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Hudson County Circuit Court.

THE MAYOR AND ALDERMEN OF JERSEY CITY,

Plaintiff,

v.

THE HUDSON & MANHATTAN RAILROAD COMPANY,

Defendant.

Notice of Appeal.

To John Bentley, Esq., Attorney of Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The evidence at the trial proved no breach of the alleged contract set forth in the complaint.

2. Said evidence showed no election by defendant under the fourth section of the ordinance annexed to the complaint.

3. The acceptance by plaintiff of compensation (at the rate of $100 per year) after the increase of fare by the defendant was a construction by the parties of the contract as not having been broken by such increase.

4. Under said evidence the finding of the Court should have been in favor of the defendant.

5. The Court found and determined the cause in favor of the plaintiff, and ordered judgment

against the defendant for the sum of $5,000 and interest from December 24, 1911; whereas there was no evidence to warrant such finding, determination and order for judgment.

COLLINS & CORBIN,
Attorneys for Defendant.

COMPLAINT.

Plaintiff, a municipal corporation in Hudson County, State of New Jersey, says:

FIRST COUNT.

(Omitted, action tried by consent on second count only).

SECOND COUNT.

1. On September twenty-sixth, nineteen hundred and ten, the Board of Street and Water Commissioners of Jersey City passed an ordinance granting certain conditional rights on Railroad avenue and Grove street, in Jersey City, to the defendant, a copy of which is hereto annexed.

2. Under section three of said ordinance, the right to use and occupy the tract of land described in said ordinance is to continue and remain in force so long as the rate of fare charged by the said defendant between Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, and between said Grove and Henderson Street Stations and the Hudson Tunnel in New York and intermediate stations shall not exceed for each single passenger service, one way and in either direction, the sum of five cents (5c).

3. Under the provisions of section four, if at any time after the passage and acceptance of said ordi-

nance said defendant should proceed to charge and exact a fare exceeding five cents (5c) for each single passenger service, as described in section three of said ordinance, that thereupon the said defendant is required to immediately surrender to the city of Jersey City all privileges therein and thereby granted, or in lieu thereof the said defendant is required to pay for the use and occupancy of the said tract of land the sum of five thousand dollars ($5,000) annually, commencing from the date of exaction of such excess fare by said defendant.

4. The defendant accepted all the terms and conditions of the said ordinance on the twenty-ninth day of September, nineteen hundred and ten, a copy of which is hereto annexed.

5. On the twenty-fourth day of December, nineteen hundred and eleven, the defendant began to exact, and still is exacting, an excess fare between the stations described in section three of the ordinance, to wit, the sum of seven cents (7c) instead of five cents (5c) between Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations.

6. Defendant has not surrendered the privileges granted by the terms and provisions of the ordinance, and continues to use and occupy the land described in said ordinance, nor has it paid the sum of five thousand dollars ($5,000) to the plaintiff in lieu thereof.

Plaintiff demands as damages the sum of seven thousand four hundred dollars ($7,400) with interest upon the monthly payments of two hundred dollars ($200) when such payments were due, and interest upon five thousand dollars ($5,000) from

the twenty-fourth day of December, nineteen hundred and eleven.

JAMES J. MURPHY,
Attorney for Plaintiff.

RESOLUTION PASSED SEPTEMBER 26TH, 1910.

SECTION 1. That permission be and is hereby granted to the Hudson & Manhattan Railroad Company, to use, occupy and improve, subject to proper city regulations, for the purpose of entrances to its station under Railroad avenue, between Henderson and Grove Streets, and for station facilities, the surface of all that tract of land and premises which may be more particularly described as follows:

All that part of Railroad avenue lying west of Grove street being a strip of land thirty-nine (39) feet in width, nineteen and one half (19½) feet on each side of the center line of the viaduct of the Pennsylvania Railroad as fixed by the columns thereof, and eighty-six (86) feet in length, more particularly described as follows:

Beginning at a point on Railroad avenue, Jersey City, four and one-half (4½) feet east of the west line of Grove street and thirty-three (33) feet northerly from the south line of Railroad avenue, measured at right angles thereto; thence westerly parallel with Railroad avenue a distance of eighty-six (86) feet; thence northerly at right angles to the direction of Railroad avenue a distance of thirty-nine (39) feet; thence easterly parallel with Railroad avenue a distance of eighty-six (86) feet; thence southerly at right angles to the direction of Railroad avenue a distance of thirty-nine (39) feet to the place of beginning, and having an area of 3,354 square feet.

Together with the right to connect same by proper stairways and entrances under said Railroad avenue, to the platforms of said station to erect upon said plot of land stations and waiting rooms.

SECTION 2. The stations to be erected and maintained upon said site shall be of substantial and ornamental construction and shall contain good waiting room facilities for the convenience of the traveling public.

SECTION 3. Said railroad company, its successors or assigns, shall pay to the city annually, except in the contingency hereinafter noted in section 4 hereof, for the right to use and occupy said tract of land aforedescribed in section 1 hereof, and so long as it shall so use and occupy the same, in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority, the sum of one hundred ($100) dollars for the first year of occupancy dating from the acceptance of this ordinance and thereafter like payments for the entire period of the life of this ordinance. The permission to use and occupy said tract of land aforedescribed to continue and remain in force so long as the rate of fare charged by said Hudson and Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, and between the said Grove and Henderson Street Stations and the Hudson Terminal in New York and intermediate stations and between said Henderson and Grove Street Stations and Hoboken, New Jersey, and intermediate stations shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents.

SECTION 4. If, at any time, after the passage and acceptance of this ordinance, the said Hudson and Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforedescribed, shall in lieu of the amount of annual payment indicated in section 3 of this ordinance and in substitution thereof be five thousand ($5,000) dollars to be computed from date of exaction by said company of such excess fare; such payment of five thousand ($5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City, or by any other authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder.

If by reason of the enforcement of the provisions of this section there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said company on the first payment day thereafter ensuing and as hereinafter provided.

SECTION 5. Said railroad company shall protect and repair at its own cost and expense and to the satisfaction of the proper city authorities any and all municipal properties that may be destroyed or injured by any occupancy, construction or maintenance herein authorized and the city shall at all

reasonable times and under reasonable conditions be permitted to enter upon the tract of land aforedescribed or any structure located thereon to examine, repair, relocate, restore or install any municipal property, but nothing herein contained shall be construed as lessening any obligation of said company thereunder.

SECTION 6. Proper proportions of the payments ot the city herein provided for shall be made in advance to the City Comptroller at his office in the City Hall, on the first days of October and April next succeeding the acceptance of this ordinance, failing which payment for thirty days or a failure by said company to comply with all or any of the terms, requirements or obligations of this ordinance as heretofore expressed shall constitute an annulment of any and all permissions herein or hereby accorded, and the city may thereupon remove any and all obstructions herein authorized and restore any affected street or portion thereof at the entire cost and expense of said company without prior notice and without recourse to it.

SECTION 7. This ordinance shall be of no force or effect unless said company, shall, within thirty (30) days after service on it or its legally authorized representatives of a certified copy thereof, file in the office of the clerk of this board an acceptance of all the terms and conditions thereof which acceptance shall be duly executed on the part of said company under its corporate seal and the hand of its president.

SECTION 8. That all costs and expenses incident to the introduction, passage and publication of this ordinance shall be paid by the beneficiary and such amount therefor as is estimated by the clerk of this

board to be necessary shall be deposited with that officer on demand.

ACCEPTANCE OF RESOLUTION OF SEPTEMBER 26TH, 1910.

To the Mayor and Aldermen of Jersey City and Board of Street and Water Commissioners thereof:

The Hudson and Manhattan Railroad Company, a corporation of the State of New Jersey, hereby accepts all the terms and conditions of an ordinance entitled:

"An ordinance granting certain conditional rights in Railroad avenue and Grove street, in Jersey City, to the Hudson and Manhattan Railroad Company," passed by the Board of Street and Water Commissioners, on September 6th, 1910, presented to the Mayor for his action, September 6th, 1910, and passed notwithstanding such objections, September 26th, 1910; this acceptance being filed in accordance with the provisions of Section 7 of said ordinance.

In Witness Whereof, the said Hudson and Manhattan Railroad Company has caused its corporate seal to be hereto affixed, and these presents signed by its president, this twenty-ninth day of September, nineteen hundred and ten.

[SEAL.]

HUDSON AND MANHATTAN RAILROAD COMPANY,

By W. G. McAdoo, President.

Attest:

C. W. KING, Secretary.

ANSWER.

Defendant, a corporation, organized under the laws of the States of New Jersey and New York says:

As to the first count.

(Action on first count not tried.)

As to the second count.

1. It admits paragraph 1, except that the Board of Street and Water Commissioners acted by resolution and not by ordinance, and that in the copy of said resolution annexed to the complaint the word "tunnel" should be "terminal."

2. It admits that a part of section 3, of said resolution, miscalled ordinance, is set forth in paragraph 2, except that the word "tunnel" should be "terminal;" but this defendant begs leave to refer to the whole of section 3 of the said resolution for the true intent and meaning thereof.

3. It admits that paragraph 3 partially recites the provisions of section 4, of said resolution, miscalled ordinance; but this defendant begs leave to refer to the whole of section 4, of said resolution, for the true intent and meaning thereof.

4. It admits paragraph 4, except that the resolution referred to is miscalled an ordinance.

5. It denies paragraph 5 and says that on December 24, 1911, defendant began to exact, and still is exacting, as it had the legal right to do, a seven cent fare for each single passenger service between the Grove and Henderson Street Stations of its railroad, and the Station at 33rd street and Broadway, New York, and the intermediate stations in New York City, on that line, and says it now charges, and has always charged since the passage of said

resolution, a five cent fare for each single passenger service between said Grove and Henderson Street Stations and the Hudson Terminal in New York, and the only intermediate station, and between said Grove and Henderson Street Stations, and Hoboken, New Jersey, and the only intermediate station, and this defendant submits that in its charges it fully complies with the terms of said resolution, and cannot be charged for the occupancy of the tract of land described in section 1, of said resolution, more than the sum of $100 per year, and that it has not rendered itself liable to the increased charge of $5,000 per year provided for in section 4 of said resolution.

6. Its admit paragraph 6 and says that it paid and the plaintiff accepted on or about the first days of each October and April after the passage of said resolution up to and including April 1, 1912, compensation at the rate of $100 per year, payable semi-annually on said dates, and that on or about October 1, 1912, it tendered compensation at the same rate for the ensuing 6 months, which the plaintiff refused to accept.

As to the demand of the plaintiff.

1. Plaintiff denies that there is any sum due from the defendant to the plaintiff on the first count of its complaint.

2. Defendant denies that there is any sum due from the defendant to the plaintiff on its second count, except the sum of $50, which it tendered as aforesaid.

COLLINS & CORBIN,

Attorneys of Defendant.

FINDINGS OF TRIAL JUDGE.

The cause came on to be tried at Hudson County Circuit Court in presence of John Milton, corporation counsel of Jersey City, of counsel for plaintiff, and Gilbert Collins and William D. Edwards, of counsel with defendant. It was agreed that trial should be on the second count only of the complaint, the action to be held as to first count. Jury was waived. The pleadings were amended so as to allege and admit that the alleged contract sued on was by ordinance and not by resolution. The ordinance and acceptance thereof, copies whereof are annexed to the stipulation, were offered in evidence. The stipulation of facts, of which a copy is annexed, was presented to the Court as the evidence in the cause. Counsel were heard and decision reserved.

The following requests were presented to the Court:

For the Defendant.

1. Under the evidence in the cause the finding of the Court should be in favor of the defendant.

Refused and exception taken.

2. The evidence proves no breach of the alleged contract.

Refused and exception taken.

3. The evidence shows no election by defendant under the fourth section of the ordinance.

Refused and exception taken.

4. The acceptance by plaintiff of compensation (at the rate of $100 per year) after the increase of fare by defendant was a construction by the parties

of the contract as not having been broken by such increase.

Refused and exception taken.

For the Plaintiff.

Under the evidence in the cause the finding of the Court should be in favor of the plaintiff for the sum of $5,000 with interest from December 24, 1911.

Granted: and the Court so finds and determines and orders judgment accordingly.

Defendant excepts.

WM. H. SPEER,
Judge.

Dated February 7th, 1917.

STIPULATION.

It is hereby stipulated and agreed by and between the above named parties, by their respective attorneys, that the following facts may be considered by the Court upon the trial hereof as if the same had been proved to the satisfaction of said Court by testimony or other competent evidence:

1. On the 26th day of September, in the year 1910, the Board of Street and Water Commissioners of Jersey City conferred upon the defendant company permission to erect a station at the corner formed by the intersection of Grove Street and Railroad avenue, in Jersey City, upon the surface of said Railroad Avenue, and the right to connect the same by means of stairways to the platforms of said station where passengers step upon the trains of the defendant.

2. That such permission was conferred by ordi-

nance passed and published in the manner prescribed by law.

3. That the said ordinance was to become effective when and only when the said defendant company should file an acceptance thereof in the office of the clerk of the said Board of Street and Water Commissioners.

4. That such acceptance was executed by the said defendant on the 2[illegible]th day of September, 1910, and immediately filed in the office of the Clerk of said Board of Street and Water Commissioners.

5. That the following is a true copy of sections 3 and 4 of said ordinance in their entirety.

"SECTION 3. Said railroad company, its successors or assigns, shall pay to the city, annually, except in the contingency hereinafter noted in section 4 hereof, for the right to use and occupy said tract of land aforedescribed in section 1 hereof, and so long as it shall so use and occupy the same, in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority, the sum of one hundred ($100) dollars for the first year of occupancy dating from the acceptance of this ordinance and thereafter like payments for the entire period of the life of this ordinance. The permission to use and occupy said tract of land aforedescribed to continue and remain in force so long as the rate of fare charged by said Hudson and Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson Street Stations and Thirty-third street and Broadway, New

York, and intermediate stations, and between said Grove and Henderson Street Stations and the Hudson Terminal in New York and intermediate stations, and between said Henderson and Grove Street Stations and Hoboken, New Jersey, and intermediate stations, shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents.

"SECTION 4. If, at any time, after the passage and acceptance of this ordinance the said Hudson and Manhattan Railroad Company, its successors or assigns shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforedescribed, shall in lieu of the amount of annual payment indicated in section 3 of this ordinance and in substitution therefor, be five thousand ($5,000) dollars to be computed from the date of exaction by said company of such excess fare—such payment of five thousand ($5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder. If by reason of the enforcement of the

provisions of this section there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said company on the first payment day thereafter ensuing and as hereinafter provided."

6. On the 24th day of December, in the year 1911, the said defendant commenced to charge and exact from each passenger, for each single passenger service, one way, and in either direction, the sum of seven cents between the said Grove and Henderson Street Stations and Thirty-third Street and Broadway Station, in the city of New York, and between the said Grove and Henderson Street Stations, and every intermediate station to Thirty-third street and Broadway, New York City, except and only between the said Grove and Henderson Street Stations and the Erie Station, and has continued to charge and exact the said sum of seven cents for every such passenger service, ever since the day aforesaid until the present time. There has been no increase of the charge for such passenger service between the said Grove and Henderson Street Stations upon the one hand, and the Hoboken Station and the intermediate station on the other hand, or between the said Grove and Henderson Street Stations on the one hand, and the Hudson Terminal in New York and the intermediate stations on the other hand, the fares for such last mentioned service having remained at five cents for each passenger in each direction. The intent and meaning of this paragraph is that whereas the fare for each passenger in either direction from the said Grove and Henderson Street Stations to Thirty-third street and Broadway or intermediate stations in

New York was five cents at the time of the passage of the said ordinance, the same has been increased by the said defendant company to the sum of seven cents.

JOHN BENTLEY,
Plaintiff's Attorney,

COLLINS & CORBIN,
Defendant's Attorney.

DECISION.

John Bentley and John Milton, Esqs., for plaintiff, Gilbert Collins and William D. Edwards, Esqs., for defendant.

WILLIAM H. SPEER, Circuit Judge:

The question involved in this case is raised by the second count of plaintiff's complaint and defendant's answer thereto. The second count sets out that on September 26, 1910, the Street and Water Board of Jersey City passed an ordinance granting certain conditional rights to the defendant in Rail road avenue and Grove street. That under section 3 of said ordinance the right to use and occupy the land is to continue and remain in force so long as the rate of fare charged by the defendant between Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, shall not exceed for each single passenger service, one way, in either direction, the sum of five cents. That under section 4, if defendant should charge a fare exceeding five cents for a single passenger service, as described in section 3, thereupon the defendant is required to immediately surrender all privileges conferred by the ordinance,

or in lieu thereof to pay for the use and occupancy of the said tract the sum of five thousand dollars annually, commencing from the date the fare should be raised.

That defendant accepted the ordinance September 29, 1910, that on December 24, 1911, defendant began to charge the sum of seven cents between Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations. It did not surrender the privileges granted by the ordinance, and plaintiff demands five thousand dollars with interest from the 24th day of December, 1911.

The answer practically admits all of the allegations of fact in the said complaint, but denies the legal conclusion sought to be drawn therefrom, that the construction of the ordinance is as contended by the plaintiff, but on the contrary asserts that it had the right under a legal construction of the ordinance to raise the rate of fare between Grove and Henderson Street Stations in Jersey City and Thirty-third street and Broadway, in New York, without incurring the additional rent for the use and occupancy of the said tract or surrendering the privileges granted by the ordinance.

The two sections of the ordinance which raise this interesting dispute are worded as follows:

"Section III. * * * and the permission to use and occupy said tract of land aforementioned to continue and remain in force so long as the rate of fare charged by said Hudson & Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, and between said

Grove and Henderson Street Stations and the Hudson Terminal in New York, and intermediate stations, and between said Henderson and Grove Street Stations and Hoboken, New Jersey, and intermediate stations, shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents."

"Section IV. If at any time after the passage and acceptance of this ordinance the said Hudson & Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforementioned, shall in lieu of the amount of annual payment indicated in section 3 of this ordinance and in substitution thereof, be five thousand dollars to be computed from date of exaction by said company of said excess fare—such payment of five thousand dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority, and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder.

"If by reason of the enforcement of the provisions of this section there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said com-

pany on the first payment day thereafter ensuing and as hereinafter provided."

It is suggested rather than argued in defendant's brief that this "question cannot be settled through the medium of an action at law to recover at the rate of five thousand dollars per annum on the theory that the defendant by merely continuing to use the station has elected to pay at that rate."

I do not see any reason why the question is not one appropriate to be settled in an action of this character, and I shall therefore proceed to determine it.

It was further argued by the defendant that a practical construction had been placed upon this ordinance by the action of the railroad company and the city in paying and receiving rent at the rate of one hundred dollars per annum after the 24th day of December, 1911. And it was further argued that the plaintiff, by the reception and retention of said money and by its action with respect to the matter, had estopped itself to deny that the payment of one hundred dollars was a proper and sufficient payment under the said ordinance.

I do not think it necessary to decide that a Court in construing a doubtful provision of a contract will not follow the construction placed upon it by the parties thereto, where the contract is that of a public corporation and that such rule does not apply to contracts made by municipal corporations in matters affecting the public interest, as McQuillan in his book on Municipal Corporations states in section 1268, page 2761, nor do I think it necessary to hold that the rule is invariable that a municipal corporation acting in the public interest is not subject to an estoppel, although such rule finds abundant support in the authorities. All that it is necessary for me

to decide in this case is that no sufficient evidence of a practical construction or of an estoppel to bind the city of Jersey City has been adduced in this case and I accordingly find that no practical construction has been placed upon the ordinance by the parties thereto, nor is the said city bound by an estoppel.

These points having been disposed of leads us to the consideration of the sole point which is left for decision in this case, and that is whether, under the ordinance as drawn, the Hudson & Manhattan Company had the legal right to exact a seven cent fare between Grove and Henderson Street Stations and its terminal at Thirty-third street, and the intermediate stations in New York City, on that line, without giving to the city the right to exact the additional charge for said use and occupancy, in other words might defendant, without incurring the increase of rent provided, charge more than five cents on any one or more of the three lines mentioned in said ordinance so long as it did not charge more than five cents upon all of them?

I am satisfied that the true construction of this ordinance in accordance with the intention of the city and the railroad company requires that judgment in this case should be rendered in favor of Jersey City.

Having in mind what the Street and Water Board was obviously striving to accomplish, and the best manner in which the citizens could be advantaged by the board's action, and having in mind the words employed to express their intention, it seems to me very obvious that the intention of the board was to provide against a raise in fare between any of the three

lines of stations enumerated in said ordinance, and not to enact an ordinance which would confer upon the citizens the flabby and feeble protection which this ordinance, construed as defendant desires, would afford. Were we to concede the defendant's construction of this section, an absurd condition would be brought about—the company might increase the fare upon each of the three lines mentioned and between all of the intermediate stations with the exception of the fare between Grove and Henderson streets and Exchange Place, between which points there is very little, if any, local traffic. If objection were made by Jersey City to that course of procedure, the company would answer that so long as it maintained between any of its intermediate stations a fare of five cents, it did not violate the ordinance. That of course was not the intention of the parties in making this contract.

Counsel for the defendant say in their brief, "the attempt by the city to extort five thousand dollars a year from the railroad company, not for the benefit of passengers on the railroad, but for its own use, for a privilege for which one hundred dollars a year was considered ample, is most unjust and ought not to succeed, unless the Court is driven by hard necessity to interpret the ordinance as con tended for by plaintiff's counsel."

This is a curious argument, for if we should consider the attempt of the city to compel the railroad company to pay five thousand dollars a year as extortion it does not at all follow that such extortion is not primarily for the benefit of the passengers on the railroad. The very object of putting the amount of rent to be paid at the sum of five thousand dollars was, in the interest of the passen-

gers, to prevent the railroad company from raising their fares above the rate of five cents for each single service and to compel the railroad company, by the imposition of such rent, if they should attempt to raise the fare above the rate of five cents, to reduce the same thereto, for the ordinance itself distinctly provides that said payment of five thousand dollars per annum shall continue "for each and every year during the continuance of such increased rate."

It is difficult to imagine a public board, honestly striving to protect, when it had the power to protect, its citizens by an ordinance, fixing a maximum rate of fare which would, in the ordinance proposed by it to the railroad company for its acceptance, provide such a fragile one as to leave the company in a position to exact a higher rate of fare on all the lines where the greatest amount of travel is indulged in by the citizens and protect itself against the threatening looking penalty by keeping the rate at the indicated maximum on the line which would be of least and almost negligible advantage to those whom it was the duty of the public officials to protect.

The very fact of the great disparity between one hundred dollars per annum and five thousand dollars per annum is an eloquent expression of the estimate of value which the Board of Street and Water Commissioners placed upon the right which they believed they were securing for the citizens. If it had been of as little worth to the citizens as defendant's contention would manifest it to be, the estimate placed upon its deprivation would have been utterly disproportionate to its value.

JUDGMENT.

(Entered February 13, 1917.)

This action was tried before Judge William H. Speer, without a jury at the Hudson Circuit on February 13, 1917.

The cause having been heard by the Court, the Court finds in favor of the plaintiff, and against the defendant and assesses the damages of the plaintiff and against the defendant at the sum of six thousand five hundred and twenty-five ($6,525) dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of six thousand five hundred and twenty-five ($6,525) dollars and his costs which are taxed at the sum of ninety-nine dollars and 22 cents ($99.22), making in the whole the sum of six thousand six hundred and twenty-four dollars and twenty-two cents ($6,624.22).

WILLIAM H. SPEER,

Judge.

NEW JERSEY

Court of Errors and Appeals.

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Plaintiff-Respondent,

and

THE HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from Hudson County Circuit Court.

Brief for Defendant-Appellant.

This appeal removes a money judgment entered in the Hudson County Circuit Court upon a finding of Honorable William H. Speer, Circuit Judge, in a cause tried without a jury. The recovery was by the municipality of Jersey City for $5,000 for one year's occupancy by a railroad company of certain privileges in a public street for station purposes and for interest thereon.

Statement of the Case.

The Hudson & Manhattan Railroad Company is a consolidated corporation of New York and New Jersey. It operates as a part of a through line from Newark a double track railroad from a point on the Pennsylvania Railroad, in tunnels under the property of the Pennsylvania Railroad Company through Jersey City, and thence under the Hudson River to the Hudson Terminal at Church street in the City of New York; also a double track railroad from the terminus in Hoboken through tunnels

under Hoboken and Jersey City and the Hudson River to New York at Christopher street, and thence northward to Thirty-third street in the city of New York, with double track connections through Jersey City and Hoboken, crossing the Erie Railroad underground, connecting the two sets of tunnels mentioned. Not all of the facts just recited appear in the record, but they are matters of common knowledge of which the Court will take judical notice, and are merely stated here for convenience. All pertinent facts do appear either by the admissions of the pleadings or in the stipulation on which the case was tried; among others that there is a station at Grove and Henderson streets, Jersey City, one at Exchange Place, Jersey City, one at the Hudson Terminal, Church street, New York, one at the Erie Railroad crossing, one at the Hoboken Terminal, and several stations in New York along the line to Thirty-third street. These stations were in contemplation at the time of the passage of the ordinance hereinafter mentioned, and were then in process of construction or afterwards constructed. There is now another station in Jersey City farther west than Grove street, namely, at Summit avenue in the Pennsylvania Railroad Cut, but that was not referred to in the ordinance. The railroad through Jersey City on the line between Newark and the Hudson Terminal runs altogether on the property of the Pennsylvania Railroad Company below ground, but Jersey City has the surface rights in the whole of Railroad avenue, including the Pennsylvania Railroad strip, that railroad running on an open elevated railroad. In order to give access to the surface and to afford station facilities at Grove street an ordinance was passed by the corporate authorities of Jersey City and accepted by the Railroad Company, which provided for occupation by the Railroad Company of a part

of the street surface at Grove street and Railroad avenue. By inadvertence of the pleader the complaint styles the ordinance a resolution (case, pp. 4, 8), and the answer is drawn on the hypothesis that the document was a resolution and was miscalled an ordinance in the body of the complaint. The error in the complaint having been discovered, the pleadings were amended so as to allege and admit that the supposed contract sued on was by ordinance and not by resolution (case, p. 11, l. 12). This is a matter of no importance except for the sake of accuracy and because the municipality could only act by ordinance. The ordinance (miscalled resolution) appears in full in a schedule annexed to the complaint (p. 4), was admitted by the answer as amended (case, p. 9), and was offered in evidence at the trial (case, p. 11, l. 10).

The entire ordinance is pertinent, but as sections 3, 4 and 6 will require judicial consideration they are herein reproduced for the convenience of the Court. They are as follows:

> "SECTION 3. Said railroad company, its successors or assigns, shall pay to the city annually, except in the contingency hereinafter noted in section 4 hereof, for the right to use and occupy said tract of land aforedescribed in section 1 hereof, and so long as it shall so use and occupy the same, in addition to such taxes or assessments 'which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority, the sum of one hundred ($100) dollars for the first year of occupancy dating from the acceptance of this ordinance and thereafter like payments for the entire period of the life of this ordinance/

The permission to use and occupy said tract of land aforedescribed to continue and remain in force so long as the rate of fare charged by Hudson and Manhattan Railway Company, its successors or assigns between the Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, and between the said Grove and Henderson Street Stations and the Hudson Terminal in New York and intermediate stations and between said Henderson and Grove Street stations and Hoboken, New Jersey, and intermediate stations shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents.

SECTION 4. If, at any time, after the passage and acceptance of this ordinance, the said Hudson and Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforedescribed, shall in lieu of the amount of annual payment indicated in section 3 of this ordinance and in substitution thereof be five thousand ($5,000) dollars to be computed from the date of exaction by said company of said excess fare; such payment of five thousand ($5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City, or by any other

authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder. If, by reason of the enforcement of the provisions of this section, there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said company on the first payment day thereafter ensuing and as hereinafter provided.

* * * * * * * * * *

"SECTION 6. Proper proportions of the payments to the city herein provided for shall be made in advance to the City Comptroller at his office in the City Hall, on the first days of October and April next succeeding the acceptance of this ordinance, failing which payment for thirty days or a failure by said company to comply with all or any of the terms, requirements or obligations of this ordinance as heretofore expressed shall constitute an annulment of any and all permissions herein or hereby accorded, and the city may thereupon remove any and all obstructions herein authorized and restore any affected street or portion thereof at the entire cost and expense of said company without prior notice and without recourse to it."

The railroad company from the time it began operations charged only five cents for each passenger service from the Grove and Henderson street station eastward thereof on any of its lines, until December 24, 1911, when it raised its rate of fare to seven cents between the Grove and Henderson Street Station and the stations in New York City on the Thirty-third street line. It did not increase the rate to the

Erie Station, to Hoboken, to Exchange Place in Jersey City or to the Hudson Terminal in New York, the rate to those stations from Grove and Henderson Street Station and from Summit Avenue Station for that matter, remaining five cents. In other words, passengers who go to New York from Grove street by way of the uptown line are charged two cents extra fare to New York stations and to those only (case, p. 15).

Compensation was made by the railroad company to the city at the rate of $100 per year at the time provided for in Section 6 of the ordinance until and including April 1, 1912, after which date the city refused to accept compensation when tendered at the rate of $100 per year, and demanded compensation at the rate of $5,000 per year. The fact that payment was made April 1, 1912, appears from paragraph 6 of the answer, which, under Rule 34 of the Supreme Court, not being denied, is admitted.

The railroad company has continued to occupy the premises at Grove street and Railroad avenue, described in the ordinance, and has continued to charge fare as hereinbefore stated. After December 24, 1912, the city brought the present suit for one year's compensation at the rate of $5,000, and interest thereon from December 24, 1911, and the Circuit Court gave judgment for the amount claimed—from which judgment the appeal was taken.

The questions involved are sufficiently stated in the grounds of appeal.

There is a palpable error in the amount of the judgment, but inasmuch we did not observe it at the time the finding was signed and call the attention of the Judge thereto, we do not ask a refusal

merely on this ground. The judgment can, of course, be ordered to be amended to state the true amount. The error is that no credit was given for the $50 that was paid April 1, 1912, and that interest has been reckoned as if the whole amount of compensation was due in advance, which is not the case under Section 6 of the ordinance. The true reckoning, if there be liability at the rate of $5,000 per year, would be to ascertain the proper proportion of $5,000 from December 24, 1911, to April 1, 1912, credit $50 thereon and add interest on the balance from December 24, 1911, to the date of the judgment, then add $2,500 and interest thereon from April 1, 1912, to the date of the judgment. The aggregate amount so reckoned would be $4,920.13.

If the Court should be of opinion that compensation still remains at $100 per year, then if plaintiff could recover under its complaint drawn on a different theory, it would be entitled to judgment, because, although tender was pleaded, the amount tendered was not paid into Court. In such case the amount of the judgment would be only $50 and interest thereon from October 1, 1912, to the date of judgment, namely, $63.11.

Grounds of Appeal.

1. The evidence at the trial proved no breach of the alleged contract set forth in the complaint.

2. Said evidence showed no election by defendant under the fourth section of the ordinance annexed to the complaint.

3. The acceptance by plaintiff of compensation (at the rate of $100 per year) after the increase of fare by the defendant was a construction by the parties of the contract as not having been broken by such increase.

4. Under said evidence the finding of the Trial Court should have been in favor of the defendant.

5. The Trial Court found and determined the the cause in favor of the plaintiff and ordered judgment against the defendant for the sum of $5,000 and interest from December 24, 1911, whereas there was no evidence to warrant such finding, determination and order for judgment.

BRIEF OF THE ARGUMENT.

I.

The extra two cents charged passengers to points on the uptown line in New York is not an excess fare within the purview of Sections 3 and 4 of the Jersey City ordinance.

We submit that the parties to the ordinance contemplated three lines of transportation from the Grove and Henderson Street Station, one to Thirty-third street, New York, one to the Hudson Terminal, New York, and one to Hoboken, New Jersey; the reference in the section to "intermediate" stations was surplusage, or else was inserted to guard against a possible hypothesis that a greater charge might be made to an intermediate station than to the terminus of the line. For the purpose of this argument we may ignore that reference and style the three lines as the Thirty-third street line; the Hudson Terminal line and the Hoboken line. It was argued below and apparently held by the Court that the condition of the permission to use and occupy street surface for a station at Grove street and Railroad avenue is that the company shall not charge more than a five cent fare eastward on either line; and this construction is based on the

use of the conjunction "and" in Section 3 where reference is made to the three lines of railroad. There is no force in the argument, for the use of the disjunctive "or" would have been more appropriate to support that theory. . Indeed, taken in connection with Section 4, we submit that the use of the word "and" in this connection makes Section 3 mean that the permission stands until the rate of fare is increased above five cents on all three lines. Coming to Section 4, on which alone the plaintiff can stand in the present action, we submit that its meaning is perfectly plain and does not need construction. "If at any time after the passage and acceptance of this ordinance the said Hudson and Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for *each* single passenger *service* as described in Section 3 thereof," (i. e., if it shall increase its fare on *each* line, it shall surrender its privileges or pay increased compensation. Counsel for plaintiff argued below that "each" should be read "any," but to do this would be to change, not to construe the contract.

Our interpretation is not strained or unnatural, but is one for which there is very sound reason. The long haul to Thirty-third street was experimental, and the company was undoubtedly meant to leave itself free to make a moderate increase (which it afterwards did of two cents), if it was found to be necessary. For conciseness the provision was made general, but the protection the company had in mind was undoubtedly the long haul to Thirty-third street, N. Y. It was of course unlikely that the fare would be increased on the short hauls, but the language used protected the company so long as it left one of the lines subject to a five-cent fare only.

Judge Speer in his decision, after declaring that having in mind the words employed to express the intention of the Street and Water Board in the ordinance, it seemed to him very obvious that "The intention of the Board was to provide against a raise in fare between any of the three lines of stations enumerated in said ordinance" (p. 20, l. 38, *et seq.*)—thus unwarrantably changing *each* to *any*—refrained from any reasoning to support his conclusion, except the following criticism upon the position taken by counsel for defendant—which he misapprehended. He said (p. 21, l. 8):

> "Were we to concede the defendant's construction of this section, an absurd condition would be brought about—the company might increase the fare upon each of the three lines mentioned and between all of the intermediate stations with the exception of the fare between Grove and Henderson streets and Exchange Place, between which points there is very little, if any, local traffic. If objection were made by Jersey City to that course of procedure, the company would answer that so long as it maintained between any of its intermediato stations a fare of five cents, it did not violate the ordinance. That of course was not the intention of the parties in making this contract.

We made no such argument.

One of the three lines mentioned in the ordinance, and perhaps the most important, carrying the greatest number of passengers, runs from the Grove and Henderson Street Stations to the Hudson Terminal in New York, and therefore the illustration that the condition of the ordinance would be fulfilled by charging a five-

cent fare between the Grove and Henderson Street Stations and Exchange Place Station in Jersey City (an intermediate station on the line of the Hudson Terminal) was not apposite. Our contention, whether sound or not, is not absurd, and we think that the learned Judge has not advanced any convincing reason why it is unsound

II.

The increase of two cents in the fare to the stations in New York on the Thirty-third Street Line, even if not within the permission of Section 3, of the ordinance, did not automatically make a contract for compensation to Jersey City at the rate of $5,000 per year.

On this point the learned Trial Judge contented himself with saying (p. 19):

> "It is suggested rather than argued in defendant's brief that this 'question cannot be settled through the medium of an action at law to recover at the rate of five thousand dollars per annum on the theory that the defendant by merely continuing to use the station has elected to pay at that rate.' I do not see any reason why the question is not one appropriate to be settled in an action of this character, and I shall therefore proceed to determine it."

We think this was inadequate treatment of an important question.

We submit that no contract to make compensation, at the rate of $5,000 a year, was brought automatically into existence by the increase of two cents in the fare from the Grove and Henderson

Street Station to the stations in New York on the Thirty-third Street Line.

Sections 3, 4 and 6 of the ordinance must be read together. Under Section 3, the permission to use and occupy is to continue and remain in force "so long as the rate of fare charged * * * shall not exceed for each single passenger service one way and in either direction the sum of five cents" (case, p. 5). Clearly, therefore, upon an unwarranted increase of fare, the right of the railroad company to use and occupy the premises would cease. Section 4 provides that if the railroad company "shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in Section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforedescribed, shall in lieu of the amount of annual payment indicated in Section 3 of this ordinance and in substitution thereof be five thousand ($5,000) dollars to be computed from date of exaction by said company of such excess fare; such payment of five thousand ($5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City; or by any other authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder" (case, p. 6). Section 3 did not bind the railroad company to a contract to pay at the rate of $100 per year, but merely gave it permission to use and occupy on payment of that sum semi-annually in advance. The substitution of $5,000 for $100

did not change the situation in that regard. On the increase of fare, if unwarranted, the permission to use and occupy would cease. True, Section 4 provided that the railroad company should have an election to surrender or pay the increased compensation semi-annually in advance, but suppose it did neither, what would be the city's right? Clearly eviction of the railroad company and eviction only.

Section 6 is perfectly plain. It provides that failure in payment of compensation or failure by the company to comply with all or any of the terms, requirements or obligations of the ordinance "shall *constitute an annulment* of any and all permissions herein or hereby accorded, and the city may thereupon remove any and all obstructions herein authorized and restore any affected street or portion thereof at the entire cost and expense of said company without prior notice and without recourse to it."

There is no language in the ordinance that by fair construction expresses or implies a *contract to pay*. Section 6, which is absolute not optional, affords the only remedy to the city in case of nonpayment.

III.

The railroad company has made no election under Section 4 of the ordinance, and is not compellable to make one, because the ordinance is ambiguous and the rights of both parties should be judicially determined.

The mere continued use of the Grove and Henderson street station after the increase of fare to the New York stations on the Thirty-third street

line was not an election to make compensation to the city at the rate of $5,000 per year. On the contrary, the payment at the old rate of $100, (which at first the city accepted) and the continued tender of the semi-annual instalments, provided for by section 6 at such old rate, afford conclusive evidence against such election. The position of the railroad company has been and is that its increase of fare to the stations in New York on the Thirty-third Street Line is not forbidden by Section 3, but is entirely within the permission granted by that section. We submit that that question cannot be settled through the medium of an action at law to recover at the rate of $5,000 per year, on the theory that the defendant by merely continuing to use the station has elected to pay at that rate. Sections 4 and 6, taken together, are at least ambiguous in that regard and the question ought to be settled by judicial action, and only in case of a decision adverse to it should the defendant be put to an election whether to surrender or to make compensation at the increased rate. Perhaps the question can be settled only by a suit in chancery by the city for an injunction against the continued use of the privileges granted except upon the payment of the increased compensation or by the railroad company to restrain eviction. It must be remembered that the railroad Company is a common carrier owing a duty to the public, and that its lines extend not only eastward from Grove and Henderson Street Station, but also westward therefrom to the Summit Avenue Station in Jersey City, and thence to Newark, and the public interest is involved in the maintenance of the station. We doubt very much whether it was competent for the city to impose upon the railroad company in enacting the ordinance in question a sub-

stantial imposition in the nature of rent. One hundred dollars was reasonable to cover expenses that might be incurred under Section 5, but there was no more justification for the city's charging rent than there would be in a city's imposing a license fee for revenue without statutory authority—which has often been held to be illegal.

The use by the railroad company of the small part of the street surface at Railroad avenue and Grove street embraced in the ordinance was justified as a proper street use for an underground railroad serving urban traffic. *Sears v. Crocker*, 184 Mass., 586; *Hyde v. Boston, etc., Ry. Co.*, 194 Mass., 80. The attempt to regulate fare by an extortionate exaction under color of compensation was unjustifiable. A municipality does not own its public streets, and has no right to rent them. The only reason for applying to the city at all for its permission to use the surface was because regulation of such matters is committed to every municipality, and is so committed in Jersey City (P. L. 1891, p. 249, Sec. 2). True, the city made its ordinance conditional upon the railroad company's accepting its "terms and conditions," and the company did so (case, p. 8); but the question remains, what are in legal effect such terms and conditions? This Court will not compel the railroad company to submit to an extortionate demand on pain of forfeiting privileges in which the public are more interested than the company, and which are necessary for the proper operation of the railroad—unless it has no other recourse.

We said in our brief in the Court below:

> "The attempt by the city to extort five thousand dollars a year from the railroad company, not for the benefit of passengers on

> the railroad, but for its own use, for a privilege for which one hundred dollars a year was considered ample, is most unjust and ought not to succeed, unless the Court is driven by hard necessity to interpret the ordinance as contended for by plaintiff's counsel."

The learned Trial Judge, after quoting this contention, attempts to meet it by arguing that the imposition of $5,000 a year was for the benefit of passengers, but his argument is lame and we submit palpably unsound. The passengers on the railroad, except the few who may be taxpayers in Jersey City, would get no benefit from the $5,000 per year, extorted from the railroad company. Citizens of Hoboken and New York would derive no benefit from money that would go into Jersey City's coffers. The passengers on the railroad come from all parts of the cites and states that are connected and indeed from the country at large. What right has Jersey City to attempt to regulate rates in interstate traffic, or to compel retention of unreasonably low rates with the alternative of enriching its own treasury?

IV.

Payment by the railroad company and receipt by the city of the semi-annual payment due in advance on April 1, 1912, at the rate of $100 per year was a practical construction of the ordinance-contract by the parties thereto to the effect that the increase of two cents in the fare to the stations in New York on the Thirty-third Street Line did not require either a surrender of the privileges granted by the ordinance or an increase of compensation to $5,000 per year.

We concede that the doctrine of practical construction of a contract has no applicability where the contract is unambiguous. If our interpretation of the ordinance is correct, of course the defendant will prevail without resort to this doctrine; and so if that of the plaintiff's counsel is correct the plaintiff will prevail if the present suit is a proper means of raising the question. This Court will only need to supply the doctrine in case it finds the contract ambiguous. We submit that the plaintiff's interpretation is not beyond question; either that of the defendant is right, or the contract is ambiguous.

We submit that when the regular semi-annual payment in advance fell due on April 1, 1912, several months after the increase of rate of fare, and the railroad company paid at the rate of $100 per year and the city received payment at that rate, there was thereby a practical construction by both parties to the contract that ought to be given judicial effect. There has never been any repudiation of the transaction or offer to restore the *status quo ante*.

To the argument in the Court below, of plaintiff's counsel, that the doctrine of practical construction cannot be enforced against a municipal corporation, we have only to say that the contrary seems to be the view of this Court in *Reed v. Inhabitants of Trenton*, 80 N. J. Eq., 503. In that case the Court found the contract unambiguous and did not apply the doctrine, but this Court expressed no disapproval of its application by the Chancellor (whose decree was reversed) to a contract between a traction company and the city of Trenton. True, the construction given effect was favorable to the city, but, of course, there must be mutuality and, as we understand the decision, a municipal corporation may be bound by a practical construction of a contract.

The judgment of the Circuit Court should be reversed with costs.

GILBERT COLLINS,
EDWIN F. SMITH,
Of Counsel with Appellant.

NEW JERSEY

Court of Errors and Appeals.

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Plaintiff-Respondent,

vs.

THE HUDSON AND MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from Hudson Circuit Court.

Brief for Plaintiff-Respondent.

This case comes before the Court on appeal from the Hudson County Circuit Court. It was there tried without a jury. By agreement only the issues raised by the second count and the answer thereto were tried.

The second count sets out that on September 26th, 1910, the Street and Water Board of Jersey City passed an ordinance granting certain conditional rights to the appellant in Railroad avenue and Grove street. Under Section III. of the ordinance the right to use and occupy the land is to continue and remain in force so long as the rate of fare charged by the defendant between Grove and Henderson Street Station and Thirty-third Street and Broadway, New York, and intermediate stations, should not exceed for each single passenger service, one way, and in either direction, the sum of five cents. Under Section IV. if the defendant

should charge a fare exceeding five cents for single passenger service *as described in Section III.* thereupon the defendant is required to immediately surrender all privileges conferred by the ordinance or in lieu thereof to pay for the use and occupancy of the said tract the sum of $5,000 annually commencing from the day the fare should be raised.

Appellant accepted the ordinance September 29th, 1910, and began to operate thereunder. From that date and until December 24th, 1911, appellant charged only five cents between the stations named. Upon the latter date appellant raised its fare from five to seven cents between Grove and Henderson Street Station and Thirty-third street and Broadway, New York, and intermediate stations. It did not surrender the privileges granted by the ordinance and plaintiff demanded $5,000 with interest from the twenty-fourth day of December, 1911.

The answer practically admits all of the allegations of the complaint. It contains one error in that it treats the enactment of the Street and Water Board as a resolution. In fact, it was an ordinance and was so proven at the trial. In addition to the admitted facts which appear by the pleadings a stipulation was entered into which is substantially a reiteration of the pleadings.

The question which the Court has to settle is set out in the fifth paragraph of the answer. Appellant contends that inasmuch as it charged a five-cent fare for each single passenger service between Grove and Henderson Street Station and Hudson Terminal in New York and the only intermediate station (Exchange Place) and between Grove and Henderson Street Station and Hoboken and the only intermediate Station (Erie) that it did not violate the terms of the ordinance; that under the ordinance as drawn it had the legal right to exact

a seven-cent fare between the Grove and Henderson Street Station and its terminal at Thirty-third street and the intermediate stations in New York City on that line.

The liability of the appellant depends upon the construction to be placed upon the third and fourth sections of the ordinance. The pertinent language is:

> "Section 3. * * * The permission to use and occupy said tract of land aforedescribed to continue and remain in force so long as the rate of fare charged by said Hudson and Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson Street Stations and Thirty-third street and Broadway, New York, and intermediate stations, and between said Henderson and Grove Street Station and Hoboken, New Jersey, and intermediate stations, shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents."

> "Section 4. If, at any time, after the passage and acceptance of this ordinance the said Hudson and Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described, in Section 3 hereof, then and thereupon said Railroad Company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said Railroad Company, its successors or assigns, for the use and occupancy of the tract of land aforede-

scribed, shall in lieu of the amount of annual payment indicated in Section 3 of this ordinance and in substitution therefor, be five thousand ($5,000) dollars to be computed from date of exaction by said company of such excess fare * * * * * *."

After the expiration of one year from the date of the raising of the fare, respondent brought the present suit for one year's compensation at the rate of $5,000 and interest thereon from December 24, 1911. The Court below gave judgment for the amount claimed.

ARGUMENT.

I.

The extra two cents charged to points on the uptown line constituted a breach of the ordinance.

Respondent contends that the effect of Section 3 is to require the company to charge no more than five cents upon any one of the three lines mentioned therein. The conjunctives employed indicate that all three lines are within the prohibition, and a raise of fare upon any one of the lines constitutes a violation of this section.

We do not think the defendant seriously disputes that that is the effect of this section.

Appellant contends, however, that under section 4 the limitation of the ordinance is merely to prevent it from raising the fare upon all of its lines; in other words, it has the right, under Section 4, to raise the fare above five cents upon any one of the lines mentioned, without violating the terms of the ordinance.

The answer, it seems to us, to that contention, lies in the fact that the draftsman of this ordinance must have had in mind the effect of Section 3 and intended to have that section control, because the prohibitory portion of Section 4 is referred, in terms, to Section 3.

Were we to concede the appellant's construction of this section, an absurd condition would be brought about—the company might increase the fare upon each of the three lines mentioned and between all of the intermediate stations with the exception of the fare between Grove and Henderson street and Exchange Place, between which points there is very little, if any, local traffic. If objection were made by Jersey City to that course of procedure, the company would answer that so long as it maintained between any of its intermediate stations a fare of five cents, it did not violate the ordinance. That, of course, was not the intention of the parties in making this contract. The draftsman of the ordinance very carefully, in the third section, set out to bind the company as tightly as he could. True, by a curious twist of language, he has, apparently, reversed the effect of Section 3 when he says, in Section 4, "if * * * the * * * company * * * shall * * * charge * * * a fare exceeding five cents for each single passenger service." The effect of this provision would be in harmony with the third section if the word "any" were to be substituted for the word "each" in the fourth line and it read " charge a fare exceeding five cents for any single passenger service, as described in Section 3."

However, we do not think the draftsman intended to use the word "each" in the manner for which the defendant contends. It is evident that his use of "each" is intended to be synonymous with "any."

It is also evident that, by referring to Section 3, the draftsman intended to provide for the contingency of a violation of the provisions of that section.

II.

The increase in the fare operated to put the Company to its election.

The relevant language of Section 4 is clear and admits of no dispute. The section provides that if the fare is raised the company shall (1) immediately *surrender* all the privileges granted, or (2) pay $5,000 annually. It gives to the company the right of election.

Granting for argument's sake that the extra charge of two cents constituted an increase in fare, the appellant had two courses open to it—surrender possession of the street or pay $5,000. So far as that part of the section in question is concerned, it is plain and unambiguous.

Section 6 cannot be said to have the effect attributed to it by appellant. It seems to us that it confers upon the city no more than an option to annul the contract. The language employed to define the city's rights is indicative of that—"the city *may* thereupon remove," &c.

If Section 6 is to be given the construction contended for, then it is in conflict with the clearly expressed intent of Section 4, and under the familiar rule, the one contributing the most essentially to the contract will be entitled to more consideration than that which contributes less.

Here then, we have this situation. The parties were dealing at arms length, dickering to make the best possible bargain. On the one hand the city wanted to protect its people, the prospective passen-

gers of appellant, against excessive fares. On the other hand the appellant wanted possession of the highway as a site for a station, and yet did not want to give up the right to increase its fares. The choice or election on the part of the appellant was the natural result. That contributes most essentially to the contract and protects the rights of both parties. Now, if appellant's construction of Section 6 is correct, the whole scheme may be vitiated by failure of the appellant to pay the amount of compensation within thirty days after it becomes due. Indeed, under appellant's construction of Section 6, if it had chosen to remain in possession and pay $5,000 annually, it would be in danger of losing its rights at any time should it fail to pay an installment of compensation within the time fixed.

It is respectfully insisted that Sections 3 and 4 of the ordinance sensibly and fairly construed imply a contract on the part of the appellant to pay $5,000 in the event that it elects to remain in possession of of the city's streets. Section 6 cannot be said fairly at least to afford the only remedy to the city in case of non-payment. This section must be read with the remaining portions or parts of the ordinance and made to harmonize if possible. It cannot be assumed that by the most general language the parties intended to destroy or vitiate rights which had been specifically created by previous sections of the ordinance.

III.

Appellant made its Election.

The facts and circumstances which show the making of the election by the appellant are charged in the fourth, fifth and sixth paragraphs of the complaint. See case, page 3. The answer, case, page 9, admits paragraphs 4 and 6 of the complaint

and as well the substantial facts charged in paragraph 5.

It is undisputed that the company since the raising of the fare on December 24th, 1911, has remained in the possession of the locus in quo. It seems to ask rather late for the appellant to now make the point that its liability cannot be settled through the medium of an action at law to recover at the rate of $5,000 per year on the theory by continuing to use the station it elected to pay that rate. That theory was certainly the one upon which the respondent relied at the trial and in the framing of the pleadings. It seems to us that the appellant wants to "have its cake and eat it, too." It, as well as any other suitor, must be advised as to its legal rights in the customary way. We know of no reason why this defendant should be favored with judicial determination of its liability without bearing the usual burden of the defeated litigant.

IV.

As to a practical construction of the contract.

The Court below found no sufficient evidence of a practical construction or of an estoppel to bind the city of Jersey City, had been adduced in the case, and he found as a fact that no practical construction had been placed upon the ordinance by the parties, and also that the city was not bound by estoppel.

It would seem, therefore, that the appellant is foreclosed from raising in this Court the question of a practical construction or estoppel. The record does not disclose any facts from which it could be gathered what construction was put upon this contract by the respondent except perhaps the mere receipt of one semi annual payment at the old rate after the increase in fares became effective.

Certainly it is well established that municipalities are not estopped by the acts of its agents. And the rule that a doubtful provision of a contract may receive a practical construction by the parties has never been extended so as to apply to municipal corporations.

McQuillan, Section 1268, page 2761, has this to say on the subject:

> "However, this rule that a Court, in construing a doubtful provision of a contract, will follow the construction placed upon it by the parties thereto, has been denied in construing contracts of public corporations, and it has been said that it does not apply to contracts made by a municipal corporation in matters affecting the public interest" (citing cases).

It is respectfully submitted that the construction contended for by the respondent is the reasonable one to be placed on this contract. It is evident from this ordinance (and the various sections must be read together to make a harmonious whole, if possible) that the municipality was trying to drive the best bargain it could so as to protect its inhabitants against an excessive fare. In the light of those circumstances, this contract should receive the construction placed upon it by the plaintiff. The appellant's contention, if upheld, would lead to an absurd construction and it is fundamental that the Courts will not adopt an interpretation or construction of a contract which will lead to absurd consequences.

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

JOHN BENTLEY,
Attorney of Plaintiff.

JOHN MILTON, Of Counsel.