

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

NORTH JERSEY STREET  
RAILWAY COMPANY,  
Prosecutor below,  
Defendant in Error,  
*vs.*

ON WRIT OF ERROR TO SUPREME COURT.

THE MAYOR AND ALDERMEN  
OF JERSEY CITY AND EDWARD  
FRY, CITY COLLECTOR,  
Defendants below,  
Plaintiffs in Error.

ON CERTIORARI, TAXES,  
1903.

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1904.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This case involves the validity of a tax assessment levied by Jersey City against the North Jersey Street

Railway Company. The property attempted to be taxed is described in the assessment as "the right, privilege and franchise of the North Jersey Street Railway Co. to lay and maintain tracks in the streets of Jersey City and to operate electric cars for the transportation of passengers thereon."

The City contends that this property is taxable under the general tax act of 1903. (Laws of 1903. Chap. 208) which provides in Section 2 that "All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act, or excluded from its operation, shall be subject to annual taxation at its true value under this act."

The company contends that this property is taxable under the so-called Voorhees franchise tax act (Laws of 1900. Chap. 195) and is therefore exempted from the provisions of the General tax act of 1903 by the provision exempting from its operation the following: "(8) All offices and franchises, and all property used for railroad and canal purposes, the taxation of which is provided for by any other law of this State." It is the City's contention that the Voorhees Franchise Tax act of 1900 is unconstitutional, and that this property is taxable under the General Tax Act.

The nature of the property we have attempted to tax is as follows: The Jersey City and Bergen Railroad Company was incorporated by special act of the Legislature in 1859 (Laws of 1859, page 411). This act gave the privilege to the Company to run horse cars in Jersey City, subject to the consent of the City. The City in 1860 passed an ordinance giving the company the right to lay and maintain tracks in certain streets of Jersey City for twenty-five years. In 1879 the Company filed a certificate under an act passed in 1877, extending the life of the charter of the Company, I think for one hundred years. In 1892 or 1893 the City by ordinance gave to the Company the right to change its motive power from horses to an overhead trolley system. For the purposes of this suit the North Jersey Street Railway, the successor of the Jersey City and Bergen Company, has an exclusive right,

privilege or franchise to maintain tracks in certain streets of Jersey City and to run trolley cars thereon, and to maintain the necessary poles and wires for the purpose of transmitting power to the cars.

## I.

## WHAT IS THE NATURE OF THE PROPERTY TAXED?

We hold it is an easement in land, an interest in real estate, as was decided by the Supreme Court in the case of Newark *vs.* State Board of Taxation and North Jersey Street Railway Company. (37 Vr., p. 466.)

This Court, however, held that it was not an interest in real estate, but merely a permission to do business. (Same case, 38 Vr. 246.)

While the contention in support of the validity of this tax is equally strong, whether this property is an interest in lands or a permission to do business, we submit a short argument in support of the Supreme Court's opinion in the Newark case, partly because we think the Court of Errors' opinion should be reconsidered, but mainly because such a discussion will help clear up much confusion growing out of the loose use of the word "franchise" and enable the Court to see clearly the force of our later argument.

The assessors of Newark, seeing that there was a value somewhere in the trolley business far beyond the cost of the physical structures in the street and the Company's other real and personal property, in an attempt to reach this value assessed the rails and ties in the streets as real estate, and this Court finally held that it was only a permission to do business and not an easement in lands. The fallacy in this conclusion is in the fact that the Court fails to see that the franchise is both an easement in the land and a permission to do business over that easement. The Company has several distinct pieces or kinds of property. It has (1) the right to be a corporation granted by the State. This is often called its

franchise. In fact this franchise is the property of the corporators and not of the company, as was pointed out by Matthews, J., in *Memphis R. vs. Berry*, 112 U. S. 609. It has (2) its tangible personality in the streets such as ties, poles and wires; it has (3) real and personal property such as power houses, machinery, cars, etc.; it has (4) the right, granted by city ordinance, to forever maintain those fixtures, which is clearly an interest in real estate; and it has (5) permission granted by city ordinance to run cars over these tracks and to collect toll. It is conceivable that one person or company might own part of this property, and another company own another part. For example, Jersey City might, by ordinance, grant to one company the privilege of laying and maintaining tracks for all time, upon which the said Company should never have any right to run cars, but should receive a stipulated toll or charge for every car run over those tracks. The City might by separate ordinance grant the right to run cars on the said tracks to another corporation, upon payment by such corporations to the owner of the first grant (to lay and maintain the rails) of a toll upon every car run over the rails. In that event the right to maintain the tracks in the street and to get a toll from cars that were owned by other people and run over them, would be an easement in the street and nothing else. The right to run cars upon these tracks and to carry passengers and to collect fares would be a monopoly right to do a trolley business. In that event this franchise or privilege would be separated into its constituent elements, and the privilege granted to lay and maintain tracks would be clearly an easement in the streets, and is as such an interest in real estate. Consider this illustration. In many of our communities the trolley track runs along a street until it reaches the end of the street, and then leaves the street and crosses private property, and finally comes back into another street further on. The land in the street is land exactly as is the land owned by the private owner. The whole estate in the land in the street was originally owned by the abutting property owners, who have given up a portion of it

to the city. Out of the estate so given the city carves out a portion, to wit, the right to maintain forever rails in the street, and hands it over by appropriate conveyance, to wit, by an ordinance, to the trolley company. When the trolley company reaches the land of the private owner, the private owner has in himself all of the estate in the land, and out of this he carves and hands over by appropriate conveyance to the company the right to maintain trolley tracks forever. In the latter case it is perfectly clear that it is an interest in real estate. In the former case the thing, right, title or privilege, whatever name you may attach to it, is identical with that in the latter case. The trolley company exercises, so far as the construction and maintenance of its tracks go, identically the same right in the land in the street that it does in the land of the private owner. How can you escape the conclusion that when a company's privileges and rights on two adjoining pieces of property are identical, that the legal estate which it enjoys in each piece must be the same? From this reasoning there is no escape. It is rendered even more striking, however, by continuing the illustration. Conceding that the right to run over the land of the private owner and to maintain tracks forever upon the lands of the private owner is an easement in real estate, suppose that the city determines to extend the street from the present end thereof along the right of way of the trolley track as laid over the land of the private owner; the city in that event would go through the necessary forms to acquire and open up a public street on either side of the tracks of the trolley company. The rights of the public, of course, would be subservient to the prior rights obtained by the trolley company from the private owner. After the street was opened, so far as the eye can see or the mind grasp, the street would be identically the same from one end to the other. There would be no line of demarkation at the point where the street formerly ended, but we would have, according to the decision of the Court, the astounding result that up to an imaginary line in the street the right to maintain tracks is a privilege

to do business, and not an easement in real estate, but that beyond the imaginary line the identical privilege becomes an easement in real estate.

But whatever the nature of this privilege, the important thing is that it is clearly property and taxable as such. In the Newark case this Court said:

"That there is an inherent value in the property of the North Jersey Street Railway Company, over and above the cost of reproducing its rails, stringers, poles, wires, power-house, etc., needs no demonstration. That value, however, springs, not out of any ownership by the company of an interest in the soil of the highways over which its road passes, but out of its ownership of the franchise to maintain and operate its road over those highways, and to collect tolls from all persons traveling upon it. This franchise is property and taxable as such."

Furthermore, it is, at least in this case, extremely valuable property. It is so valuable that the granting of these privileges by municipal bodies has led to State and National scandals. Witness the famous Jacob Sharp-Broadway railroad franchise scandal; the Philadelphia traction scandal, where John Wanamaker publicly offered \$2,500,000 for the franchises which the traction syndicate was trying to get, and did get, finally, from the city, for nothing. Witness the fortunes that some of our own citizens have made in a few years by capitalizing the very franchise or privilege which is the subject of this suit.

Again, the right granted by the city to maintain trolley tracks must not be confounded with the right granted by the State to be a corporation. The latter has and can only have a value equal to the license fee charged by the State to all comers for the same privilege or right. The former is either an interest in lands or a monopoly privilege to carry on a certain business, and as such has a value which grows with the growth of the community.

It has all of the characteristics of property; facility in the ascertainment of its value, exchangeability in the open market, capacity of description in a written instrument,

feasibility of pledging by temporary or long term mortgage.

It is, therefore, above all other property justly chargeable with its full share of the common burden of taxation.

It is not pretended that this property does at a matter of fact, bear its share of the tax burden. Let us proceed to inquire how it is possible to so interpret our tax laws as to allow it to escape.

## II.

### THIS PROPERTY IS TAXABLE UNDER GENERAL TAX ACT OF 1903.

The clear intention of the Legislature to include this property in the class subject to taxation is shown by the words quoted above, from the act of 1903, viz.: "All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act, or excluded from its operation, shall be subject to annual taxation at its true value under this act."

The Supreme Court (case p 16 line 30) says the only possible justification for exempting this property from the operation of the General Tax Act is that it was subjected to its full share of the tax burden under the Voorhees Franchise Tax Act. The whole point in this case is, therefore, whether it is so subjected to this tax burden under the Voorhees Act.

## III.

### VOORHEES FRANCHISE TAX IS UNCONSTITUTIONAL.

The company relies upon this act to defeat the tax levied by the city. The city contends that this act is unconstitutional because it violates Subdivision 12 of Section 7 of Article 4 of the Constitution, which provides

that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

This act violates this constitutional provision in several respects.

(a) A payment of two per cent. upon gross receipts is not a tax.

Whatever may be the nature of these franchises whether an interest in real estate or a license to do business, it is plain that their value is easily ascertainable. It is a matter of which the Court will take judicial cognizance. It is a well known fact that these street railway properties are bought and sold in the markets with great frequency, and it is therefore clear that the market has a very feasible method of ascertaining the value of the property, including the franchises. They are, therefore, property capable of assessment, and being so capable they are to be assessed by some taxing authority. Property must, under our Constitution, be taxed, not on the basis of income, but "according to its true value." A two per cent. tax upon their gross receipts is in no sense a tax. It may be a license fee and commutation of taxes, but it has no relation whatever to the value of the franchises. This is apparent from the slightest investigation. A street railway which runs through country districts over public highways may be run at a loss, or it may be run at a loss through some one town through which it passes. Certainly the receipts from its operation will differ according to the density of the population along its line. Supposing the line does not pay as a whole, as some of our seaboard trolleys have not paid. In this case the receipts, after deducting operating expenses, will not suffice to pay interest upon the bonds which represent the actual cost of the construction.

It is evident that here the privilege to lay tracks in the streets has no value whatsoever, and yet the two per cent. of the gross receipts is exacted. It is obvious, therefore, that this is not taxation, that is, an annual assessment of property according to its value.

Again, in a great city the density of population may

make the franchise or privilege of enormous value, in which event two per cent. of the gross receipts would produce to the municipality an amount of money very much less than would be the case if this great privilege was annually assessed at its true value, and taxes levied upon it at the local rate of taxation. The distinctive characteristic of taxation is an annual assessment of property at the hands of some properly constituted authority. It is obvious that the Legislature could not by this have believed that two per cent. of the gross receipts of a corporation would work out the same annual amount of revenue for the municipality as would an annual assessment of the value of the franchises; but even if the Legislature did think so they were mistaken, and the fact is as stated. Consider, also, this case. Jersey City granted a franchise years ago for an elevated structure from the Central Railroad ferry to and over the hill. Some work was done under this franchise, but the work was never completed. This franchise is in the market to-day. It has a large value, but the company, having no gross receipts, pays no tax upon it all. Yet it is a piece of property and valuable. This point clearly appears if you consider this question: Suppose the Voorhees law provided that the two per cent. tax should cover all the property, real and personal, of the company; would it then be legal? Would it not obviously be a mere arbitrary commutation of taxes? This act is, therefore, not taxation at all. It is a partial exemption from the burden of taxation as to the rich and prosperous trolley companies, a complete exemption in other cases, and it is an unfair imposition of the tax burden upon those companies which are run at a loss or whose franchises have little or no value. It is, therefore, not an assessment at all and consequently is not within the constitutional provision that property shall be annually assessed for taxation.

This contention receives added strength when you consider the words of the first section of the Voorhees Franchise Tax Act (Laws of 1900, page 502): "All the property, real, personal and franchises of all \* \* \*

corporations \* \* \* having the right to use \* \* \*  
 \* public street \* \* \* shall hereafter be valued,  
 assessed and taxed as hereinafter provided." It is,  
 therefore, evident that by this act the Legislature intended  
 to bring into the domain of regular taxation these fran-  
 chise values, and that it was not intended that these values  
 should be longer exempt from taxation in whole or in  
 part.

(b) The Voorhees Act is further unconstitutional be-  
 cause it classifies property for the purposes of taxation,  
 and then applies rules which are not uniform to different  
 kinds of property included within the class. The act,  
 broadly speaking, establishes a class including all the  
 property, real, personal and franchise, of corporations  
 which have the right to use public streets. It then pro-  
 vides that the land and buildings constituting their power-  
 houses and the rails, sleepers, poles, wires and other tangi-  
 ble property in the streets, and the trolley cars, shall  
 all be annually assessed by the local assessors and taxed  
 at the local rates. It then provides that the corporations  
 in question shall return annually to the State Board of  
 Assessors a statement of their gross receipts, and that  
 an annual franchise tax of two per cent. upon said re-  
 cepts shall be assessed by said State Board of Assessors,  
 which Board shall annually ascertain and apportion the  
 franchise tax to the various taxing districts in proportion  
 to the value of the property located in the public streets.  
 An amendment to this act (Pamphlet, Laws of 1903,  
 Chap. 142), gives the Board of Assessors discretion as to  
 this distribution. The effect of this statute, therefore, is  
 to make a class for the purposes of taxation of all the  
 property of corporations using public streets, and then  
 to apply to certain property of this class one rule of taxa-  
 tion, to wit, an annual assessment by local assessors and  
 taxation thereof at local rates, and to another portion of  
 this class no assessment at all but an arbitrary annual pay-  
 ment to the State, which is to be divided by the State  
 Board of Assessors among the municipalities affected.  
 We contend that the legislature having established a class,

the constitutional requirement that property shall be assessed by uniform rules requires that the same rule of assessment shall be applied to all property in the class, and that the same assessors shall value all of the property in the class. That this is so, clearly appears from considering some illustrations. Would it be possible to provide that the property of a single owner in the same municipality should be assessed in part by the local assessors and in part by the State Board of Assessors, the proceeds in each instance to be sent to the municipality? If the proceeds of this tax went to the state, there might be some basis for having a part of it assessed by one board and part of it by another. Would it be legal to provide that the property of corporations running silk mills should be subject to taxation by a special law which should provide that all the mills and contents should be assessed by the local assessors, but that all the houses owned by the mill corporations and rented to the operators should be assessed by the State Board of Assessors, and the proceeds in both instances to be remitted to the municipality in which all the property was situated? Would it be legal for such act to provide that the rate upon the houses should not exceed one per cent. of the valuation in any one year, but that upon the mill it should not exceed one-half of one per cent.? In other words, is it not clear that if you segregate by law any property into a class for the purposes of taxation where the proceeds of the tax are to go to the locality, the constitutional provision of uniform rules necessitates an annual valuation of all the property in the class by the same assessing body and the application to such valuation of the identical rate of taxation?

When it is considered that of all the property owned by corporations having the right to maintain structures in the public streets, the value of the franchise granted by city ordinance is a monopoly, and is the most easily ascertained, and that it has all the attributes of property, facility of ascertainment of value, exchangeability in the open market, capacity of description in a written instrument, feasibility of pledging by mortgage, the ability

to separate it from all other property; the strength of the argument that its taxation should be by the same rule as that which applies to the other property of the corporation having these essential characteristics, is unanswerable. For these reasons we submit that this act of 1900 is plainly unconstitutional in that part which requires the two per cent. tax upon gross receipts to be paid in lieu of all other taxes upon franchises. The attention of the Court is called to the fact that the last section of this act provides that if any other part of the act is held unconstitutional, it shall not affect the remainder of the act. It is therefore possible to strike out of this act every provision with reference to the two per cent. tax upon gross receipts and have left a complete working statute according to the terms of which all the property including the franchises can be assessed annually for taxation within the constitutional provision for uniformity.

#### IV.

##### POINTS IN OPINION OF SUPREME COURT.

The opinion of the Supreme Court, we submit, does not answer the foregoing reasoning. The Court says, (Case, Page 16) that "the only just reason for exempting such property (to wit, franchises) from the operation of the (Voorhees) Act is that it is subjected, in the opinion of the Legislature, to its fair share of the public burdens by other legislation."

We start then with the declaration of the Court in support of our contention that it is the plain intention of the Legislature that this class of property should bear, and by the provisions of the Voorhees Act, would, in the opinion of the Legislature, be compelled to bear, its just share of the burdens of taxation.

On page 17 of the case the Court says: "The objections to the constitutionality of the act are two: (1) That a tax upon gross receipts is not a tax according to true value as

required by the constitution, for the reason that the percentage of gross receipts must be levied though the exercise of the franchise may actually involve a loss and the franchise may be of no value; (2) that the act attempts to provide two different methods of taxation for the property of the corporation, one by local assessors according to its value, the other an arbitrary imposition by a State Board. The first objection is fatal to the validity of the act if the franchise tax thereby imposed is a property tax; if it is not a property tax, the second objection is without force."

Here is the first error in the opinion of the Supreme Court. The statement that "the first objection is fatal to the validity of the act if the franchise tax thereby imposed is a property tax; if it is not a property tax, the second objection is without force," is absolutely without any reason to support it. On the contrary, if the tax is not a property tax, that fact does not destroy our second objection, but only makes it more forcible and absolutely unanswerable. Even if the franchise tax is not a property tax, the act still provides two different burdens and methods of taxation for two different sub-divisions of the same class of the property of the corporation; it provides for full taxation of one sub-division of this property, to wit, real estate and tangible personality in the streets, by an annual assessment according to value, and as to the other sub-division of the class, to wit, franchises, that is, special privileges in the streets or a monopoly privilege to carry on a certain business, it subjects them to partial taxation in the shape of a license tax or exempts them altogether. It is admitted by the Court that this tax is not a property tax, that is, a tax upon value. If it is a mere license tax, as the Court suggests, then it either is or is not a tax which causes this class of property to bear its fair share of the public burden. The Court admits that the first objection is fatal to the validity of the act if the franchise thereby imposed is a property tax, that is a tax upon value, and in the next breath the Court says that it was the intention of the Legislature that this property should bear its share of the tax burden, that is, should be as-

sessed and taxed according to value, that is, should be subjected to a property tax. The Court confuses, we submit the point in this controversy in this utterance. The point upon which we are insisting is that it is the intention of the Legislature that these special monopoly privileges granted by the cities shall bear their just proportion of the public tax burden, and the only justification for excluding them from the general tax act of 1903 is, as the Supreme Court says, that this property is subjected to its fair share of the public burden by the Voorhees Franchise Act. The only way in which it can be subjected to its fair share of the public burden is that it should come under the system of law by which we ascertain in this State what is the fair share of the public burden, to wit, annual assessment by some competent assessment tribunal. To say that this is not a property tax is simply to beg the point. The point is that this property does not bear its fair share of the public burden by the imposition of the tax of two per cent. upon the gross receipts, and that it should be subjected to a property tax.

On Page 17 of the opinion of the Supreme Court they say: "The tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets. We ought not, unless compelled to, adopt a construction which would make the act a clear violation of the constitution requiring that property to be assessed at its true value." We submit that this is to turn this whole case bottom side up. The Court, we submit, ought not unless compelled to do so, to adopt a construction which would enable this extraordinary valuable class of property to escape its just share of the public burden, which the constitution requires it should bear. The constitution is more sacred than the Voorhees law.

The opinion of the Court goes on to say (Case pages 17, 18, 19, 20 and 21) that this Voorhees Law Tax is not a property tax, but that it is a license tax. All of the cases which it cites in support of this contention are cases of taxation upon the license or privilege to be a corporation.

So far as these cases and this reasoning of the Court are relevant they show that the Voorhees act only professes to tax the right to be a corporation, and does not pretend to tax these special privileges obtained by the Company by the exercise of the right to be a corporation. All of these cases are outside the question. The point is that the Voorhees law does not compel this property to bear its fair share of the public burden. All these cases quoted by the Court relate simply to a license fee or tax upon the right to be a corporation. The property which we have attempted to tax is an entirely different thing. *The right to exist as a corporation and the right to acquire property*, granted by the State, are an entirely different thing from *the property which the company acquires from private individuals or public bodies IN THE EXERCISE OF SAID RIGHT*. For instance, the trolley company pays a franchise or license tax for the privilege of carrying on the trolley business. What is the trolley business? It is, (1) the obtaining of permission to run through public streets. It is, (2) the obtaining permission in many cases to run over the land of private individuals. It is, (3) the purchase of equipment by which to run its cars. It is, (4) the purchase of real estate upon which to erect its power houses. It is, (5) the laying of tracks, and running of cars thereon. All this property of necessity must be subject to its proper share of taxation. The confusion in this whole case arises from the failure to see that an ordinance granted by a municipality to maintain trolley tracks in the streets and run cars thereon, is a piece of property, exactly like the piece of property represented by the consent granted by private owners to maintain tracks over private real estate; and that both of these privileges, one granted by the city which owns the surface of the street, and the other granted by a private individual who owns the surface of his own land, are identical, so far as the nature and characteristics of property go, with power houses, real estate, poles, wires, or any other personal or real property. If once the Court grasps the point that the ordinance of the city granting the monopoly privilege

in the streets is as radically different from the franchise to be a corporation as is a power house from such a franchise, then the solution of this problem becomes perfectly clear. Either it was the intention of the Legislature by the Voorhees act to provide for a license tax upon the privilege or franchise to be a corporation; (in which event these monopoly privileges in the streets are to be annually assessed and valued by local assessors exactly as the power houses and other property are to be assessed and taxed), or it was the intention of the Legislature that the word "franchise" should include not only the right to be a corporation, but should include any other piece of property to which the name franchise might be applied, irrespective of the value or nature of that special franchise or piece of property. In either event our contention must be upheld. If the first construction is right, then the right to maintain trolley tracks in the streets of Jersey City is a piece of property separate, distinct and apart from the right to be a corporation, and as such is taxable like any other real estate, if it is held to be real estate, or like any other personalty if it is held to be personalty. If, however, it was the intention of the Legislature that the tax, whether license or property, was intended to apply to special privileges like the privilege to maintain tracks in Jersey City, as well as the privilege of being a corporation, then the Legislature has made a mistake. It has attempted to do something which it has not the legal power to do. That is to say, it has attempted to apply the principle of a license tax (which can only be imposed upon the power to be a corporation) to a special privilege which is sometimes loosely called a franchise, but which when analyzed is seen to be either an easement in real estate, or a monopoly privilege to do business in our streets. The Legislature has no power to do anything of this kind. Whether the franchise to forever maintain a trolley track in the streets of Jersey City is an easement in real estate or is a privilege or permission to do business, it is a piece of property having entirely different characteristics from the right to be a corporation.

There is absolutely no reason why the tax upon the right to be a corporation should not be imposed, and in addition a property tax upon the value of any special franchise granted by any city in any particular street. In fact, on Page 20 of the Case the Supreme Court quotes the famous Metropolitan Street Railway Case in New York, by which the Ford Franchise Tax Law was tested, and approvingly says, that it was there held that the right to be a corporation could be taxed by a license tax and in addition thereto a property tax could be imposed upon the value of the franchise or privilege in the streets. The point of this whole controversy is this: Either the Voorhees franchise tax attempts to impose a property tax upon special privileges in the streets or it does not. If it does, it has attempted to impose it according to rules which are contrary to our constitution, that is to say, by classing it together with the right to be a corporation and fixing thereon an arbitrary tax, instead of separating the right to be a corporation from the special privilege to do business in the streets and causing the latter to be annually assessed. If it does not attempt to impose a property tax upon these special privileges, then these special privileges are property which is not covered by the Voorhees Franchise Tax Act, and therefore is not within the exception of the General Tax Act of 1903, and is therefore property subject to taxation like any other real or personal property in Jersey City.

The concluding sentence of the Supreme Court's opinion illustrates again the confusion into which the Court has fallen upon this subject. "It was for the Legislature to determine (Case Page 21, Line 40) whether the tax imposed by the act of 1900 was a fair apportionment of the public burden without subjecting the prosecutors to a property tax upon the value of the franchise in addition."

This sentence lays down a legal principle which we submit is unsound. It is not for the Legislature to determine whether two per cent. upon the gross receipts is a fair apportionment of the public burden upon the fran-

chises or special and monopoly privileges in our street without subjecting them to a property tax also. That statement simply begs the question once more. The opinions of the Legislature upon the question whether this method of taxation would result in the property of the company bearing its fair share of taxation, is immaterial. The point is, DOES IT AS A MATTER OF FACT BEAR ITS FAIR SHARE OF TAXATION? It would be preposterous to hold that if the Legislature should pass a law saying that any class of property, the silk mills of Paterson for instance, would bear its fair share of the public burden by having an arbitrary tax per square foot of the mill buildings levied upon it each year, that such a law could be upheld by the Court simply because it was the legislative opinion that the law would impose a just share of the public burden upon the owners of these mills. The fact would yet remain, do the mill properties bear their fair share of the public burden, and that fact would have to be ascertained not by quoting the opinion of the Legislature, but by the consideration of evidence and by the application of the constitutional rules in reference to taxation. When we come down to the question of opinion, the opinion of the Court is the determining factor, not the opinion of the Legislature. The Legislature might be of the opinion that the act of 1900 imposed a fair share of the public burden upon these corporations, but if the Court is of a different opinion and sees clearly that a special privilege in Jersey City of enormous value by this statute escapes its fair share of the public burden, then the Court must hold that the statute is void. Suppose the Voorhees law had provided that the two per cent. tax on gross receipts was to be in lieu of all taxes upon the real and personal estate of the company; would the fact that in the opinion of the Legislature such a provision would cause the company to bear its fair share of the tax burden be considered as conclusive by this Court? Would not the Court at once say that the fact, and not the opinion of the Legislature, must determine the validity of the law? This seems to us to be too plain for argument. The Court has simply fallen into an obvious error—that of assuming

that if the Legislature is of the opinion that A. B. is paying his fair share of taxes, that such an opinion prevents an examination by the Court, and by public officials into the fact as to whether or not the opinion of the Legislature was or was not correct. The only way in which the opinion of the Legislature could be relevant would be in the event that the Legislature turned itself into a taxing body and formally by resolution assessed everybody's property at a certain value every year, and even then that opinion would be subject to review by the Court upon evidence.

The Supreme Court reasons in a circle. It says these privileges here taxed are property and taxable as such; it says the only justification for exempting them from the General Tax Act is that they are subjected to their fair share of the burden of taxation by the Voorhees act. It says the Voorhees Act does not impose a property tax at all, which is equivalent to saying that it does not bear its fair share of the tax burden. When we say that the Voorhees act does not impose such a tax burden the Court simply says that the Legislature was of the opinion that it did.

The truth is that the Legislature either intended to commute the tax burden liable to be imposed upon these privileges by imposing a tax upon gross receipts, which it had no power to do, or it intended that the two per cent. tax should be a license tax upon the power to be a corporation, and that a property tax in addition upon special privileges in city streets should be annually assessed and collected exactly as the taxes upon the other real and personal property of the company. Once the Court concedes that these privileges are property and taxable as property, as this Court has held, the result must follow that being property they must be subjected to the same kind of taxation as is imposed upon other property having like characteristics, that is, having a value subject to change and, therefore, requiring annual assessments. A license tax can only apply to property which is always of the same value, to wit, the value which is charged by the State for a similar charter.

We submit, therefore, that the contention of the city should be sustained.

Respectfully submitted,

ROBERT CAREY,  
Attorney for Jersey City.

GEORGE L. RECORD,  
of Counsel.

NEW JERSEY

Court of Errors and Appeals

Nos. 55 AND 56, MARCH TERM, 1907.

NORTH JERSEY STREET RAILWAY  
COMPANY,

*Prosecutor below and  
Defendant in Error,*  
vs.

THE MAYOR AND ALDERMEN OF  
JERSEY CITY AND EDWARD FREY,  
CITY COLLECTOR,

*Defendants below and  
Plaintiffs in Error.*

On Error to Su-  
preme Court.  
(Taxes 1903.)

NORTH JERSEY STREET RAILWAY  
COMPANY,

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THE MAYOR AND ALDERMEN OF  
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On Error to Su-  
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(Taxes 1904.)

Brief for Def't in Error

### Brief for Defendant in Error.

The taxing authorities of Jersey City levied an assessment of taxes against the North Jersey Street Railway Company for the year 1903 on "cars and other personal property" and "tracks, trolley wires, poles, overhead construction, &c." The amount of the former assessment was \$346,000, upon which the tax was \$9,515. On the second item the amount of the assessment was \$492,000 and the tax \$13,530. These taxes were both paid to the City Collector (p. 12, l. 13, of Case). For the year 1904 an assessment was also levied by the taxing authorities of the city against the Railway Company on the same items. The valuations were the same, but owing to a reduction in the tax rate the amount of tax on the first amount was \$9,480.40, and on the second \$13,480.80. These taxes were also paid to the City Collector (p. 13, l. 30, of Case).

An additional assessment of taxes was also levied against the company by the taxing authorities of the city for the years 1903 and 1904. This additional assessment for the year 1903 was expressed to be on "personal property, the contract, rights, privilege, license or franchise made with or granted to the Jersey City and Bergen R. R. Co., by an ordinance adopted by the Common Council of Jersey City and approved December 20, 1859." The amount of this tax was \$275 on a valuation of \$10,000 (p. 12, l. 25, of Case). The additional assessment for the year 1904 was expressed to be upon "Personal property, the right, privilege or privileges owned or controlled by said company of laying and maintaining street railway tracks and appurtenances in the streets of Jersey City and operating their trolley cars thereon." The amount of this tax was \$274 on a valuation of \$10,000. Writs of certiorari were allowed to review these two additional assessments, and upon these writs the assessments were set aside by the Supreme Court (pp. 22, 23 of Case). It is to review these judgments that these writs of error were taken.

For the year 1903 the North Jersey Street Railway Company made return to the State Board of Assessors of its gross receipts, pursuant to the provisions of the Voorhees Act of March 23, 1900, entitled "An Act for the taxation of all the property and franchises of persons, co-partnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto." (*P. L. 1900, p. 502.*) Upon this return the State Board assessed against the company, under that act, a franchise tax of two per centum on its gross receipts. This tax amounted to \$88,746, of which \$14,415.98 was apportioned to the taxing district of Jersey City and paid to the City Collector by the company (p. 12, l. 34, of Case). A similar return was made by the company for the year 1904, upon which taxes to the amount of \$93,740.97 were assessed by the State Board. Of this amount \$16,478.24 was apportioned to Jersey City and paid to the City Collector by the company (p. 14, l. 12, of Case).

The status of the legislation upon this subject is this: In 1903 the Legislature passed a revised tax act dealing generally with the assessment and collection of taxes within this State (*P. L. 1903, p. 394*). Section 3 of this act exempts from taxation under that act *inter alia* "all offices and franchises, and all property used for railroad and canal purposes, the taxation of which is provided for by any other law of this State." (*Id., p. 396, subdivision 8.*) The Supreme Court, in construing this subdivision, held that the words "the taxation of which is provided for by any other law of this State" was a limitation applied to "all offices and franchises," as well as "all property used for railroad and canal purposes." If this construction be not sound the effect of this provision is to exempt from taxation all franchises, and therefore, the assessments under review must fail,

as made upon franchises thus exempt from the imposition of taxes. By an act of the Legislature approved March 23, 1900 (*P. L. 1900, p. 502*), commonly known as the Voorhees Act, a method is provided for the taxation *inter alia* of the franchises of corporations using or occupying public streets. The argument of the city is based upon the correctness of the construction placed by the Supreme Court upon subdivision 8 of Section 3 of the General Tax Act of 1903, and is that the provision of the Voorhees law for the taxation of such franchises is unconstitutional and void, and that, therefore, the taxation of such franchises is not provided for by any other law of this State.

The importance of this question is manifest when it is recalled that according to the annual report of the State Board of Assessors the taxes assessed under this provision for the year 1905 amounted to \$478,437.09, of which the sum of \$109,369.36 was apportioned to the county of Hudson.

The tax in question is, therefore, on its franchises to use the streets. Such tax the city has no right to levy.

This whole question was decided by this Court in the case of *Newark v. State Board of Taxation*, 38 *Vroom* 246.

The Court, speaking through the Chief Justice, said:

“That there is an inherent value in the property  
 “of the North Jersey Street Railway Company  
 “over and above the cost of reproducing its rails,  
 “stringers, poles, wires, power-house, &c., needs  
 “no demonstration. That value, however,  
 “springs not out of any ownership by the com-  
 “pany in the soil of the highway over which its  
 “road passes, but out of its ownership of the  
 “franchise to maintain and operate its road over  
 “those highways, and to collect tolls from all  
 “persons traveling upon it.

“This franchise is property, and taxable as  
 “such (*State Board of Assessors vs. Central R.*  
 “*R. Co.*, 19 *Vroom* 146), but under present legis-

"lation the right to tax it has been reserved by  
 "the State to itself, through its State Board of  
 "Assessors, and not delegated to the several  
 "municipalities through which the company's  
 "road passes."

The Court also held that such an assessment of taxes could not be sustained as upon any real estate interest which the company had in the street, approving in that respect the minority opinion in the Supreme Court of Judge Garrison in the same case.

*Newark vs. State Board of Taxation*, 37 Vr.  
 466.

This dissenting opinion, afterwards adopted by the Court, holds that the trolley company enjoys no taxable real estate in the street but only an executed license to participate in the common easement in an authorized manner.

The situation presented by this record is somewhat curious. The municipality is attacking the constitutionality of a legislative act. The power and duty of the judicial department of the government to restrain the legislative and executive departments within constitutional limitations is undoubted when the questions are properly presented for determination. There is, however, no judicial power to declare an act unconstitutional *ex mero motu*. The validity of the act must be challenged by some person affected by it and having a status to announce such challenge. Could the legislative department be heard to attack the constitutionality of an act which it had itself passed? Could the executive department be heard to attack the constitutionality of an act which had received its approval? Could any subordinate officer holding under the legislative or executive departments exercise a privilege which was denied to his superior? Can any municipality, whose existence and powers are derived solely from these departments and which is no more than an agent of the State for the administration of local government, exercise the privilege which its superior and creator could not exercise?

THE METHOD OF ASSESSING FRANCHISES UNDER THE  
VOORHEES ACT IS NOT UNCONSTITUTIONAL.

Admitting, however, for the purpose of the argument, that the plaintiff in error has a status to attack the validity of that part of the Act of 1900, which deals with the taxation of franchises, upon what ground can that attack be sustained?

The sole objection urged against this part of the Act of 1900 is that it is in violation of that clause of the constitution which provides that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

Now we insist that the tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets. The reasoning of the opinion below on this point, is clear and convincing and need not be repeated here. But assuming that it is a property tax there is no vice in the act due to the omission of anything which, as the subject of taxation, should be within its purview. Such contention, if made, could not prevail:

First, because the act, both in title and body, is sufficiently broad to cover "all the property and franchises of persons, co-partnerships, associations or corporations" of the class designated, and

Second, because the constitutional provision in question does not abridge the power of the Legislature to select the classes of property upon which the burden of public taxation shall be laid.

*State Board of Assessors vs. Central Railroad Company, 19 Vroom 1, S. C. on Error Id. 146.*

*Tippett vs. McGrath, Collector, 41 Vroom 110, affirmed on error, 42 Vroom 338.*

Nor can it be successfully contended that there is any lack of uniformity in the rule adopted for the assessment of this class of property.

In his brief in the Central Railroad case, printed in *19 Vroom*, at page 253, the learned Attorney-General gave the following definition:

“A uniform rule is a rule which puts an equal burden on all subjects that may be brought in competition with each other.”

and again on the same page:

“Equal taxation is such as is uniform on the class, and the class that possesses the inherent qualities which render it necessary that their taxes should be equal, to be just, are principally the individuals of a class who would suffer by competition in the same business if taxed more than others engaged in it.”

Chancellor Runyon, in the same case (page 79), referring to the uniformity requirements of the Constitution, said:

“The constitutional provision does not take away from the Legislature the power of selecting the subjects of taxation. But it does require that all the members of the class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole of the class.”

Mr. Justice Scudder said (page 290):

“Besides the requirement that property shall be assessed for taxes under general law it must also be assessed ‘by uniform rules.’ The word ‘uniform’ is defined as ‘not variable,’ ‘not different,’ ‘having the same form or manner.’ As it stands in this paragraph of the constitution it means that rules must not be variable in their application to the subject of taxation included in the classification of property. In the *Head Money Cases*, 112 U. S. 580, 594, in construing the clause of the Constitution of the United States, that all duties, imposts and excises shall be uniform throughout the United States,’ the court said: ‘The tax is uniform when it operates with

the same force and effect in every place where the subject is found. \* \* \* The rules for taxation must be uniform as to the property in the class on which it operates. As to railroad property, all property in that class must be assessed for taxes by the same rules.'"

Mr. Justice Parker said (page 304) :

"The uniformity of rules in taxation which the constitution requires is that uniformity which operates on the whole of a class. A tax upon property of railway corporations should be governed by uniform rules as to the property of all such companies used for railroad purposes. The act of 1884, now under examination, is within this rule. It operates uniformly upon the property of all railroad corporations used for railroad purposes, being, as has been already demonstrated, a distinctive class, by reason of inherent qualities, and therefore not antagonistic to the constitutional requirement of uniformity."

Mr. Justice Reed said (page 325) :

"Uniformity requires an equality of operation upon all property of the same class. It means that each owner of property of the class shall bear his proportion of the tax levied upon all the property comprising the class. If the value of the main stem and passenger depots of each one of all the companies in the State bear a like proportion to the value of its other property of the same class, then the practical operation of this part of the law would be uniform."

Beyond all question, the rule of uniformity as thus defined has been observed by the Legislature in passing the act in question. The same rate of assessment, the same basis upon which that rate shall be computed, is applied to all of the persons, co-partnerships, associations and corporations of the class indicated. The power of the Legislature to divide persons and property for the purposes of taxation where that division is based

upon a proper classification is too firmly established in this court to be now open to question. It has not been and cannot fairly be suggested that the classification adopted in this case is not a proper one. Surely the right of using or occupying the public highways is a mark which may properly be used as a basis for such classification.

Nor does the method of assessment provided depart from the basis of true value.

The fact that in its operation a method of taxation results in imposing an unequal burden upon different property owners is not necessarily fatal to the act under our constitutional provision. In *State Board of Assessors vs. Central Railroad Company, 19 Vroom, at page 282*, the Chancellor in the prevailing opinion in this court said:

“It may be added that no system of taxation can be devised which will be free from criticism on the ground that in some way or other it works unequally or lacks complete uniformity. Said the Court in *State Railroad Tax Cases*: ‘Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect.’ ”

It must be remembered that franchises of this sort may be difficult to value accurately. It is said that they are bought and sold in the open market, and that, therefore, their value can be ascertained in that way. How often is this true? Their securities are, of course, dealt in but the value of those securities involves many elements besides the true value of the company's franchises. The quality of the management of the company, its prospects for future development or the reverse,

the character and value of its tangible property, the relation or adaptation of that property to the use for which it is intended, the relations which a particular company may bear to other companies, the condition of the so-called money market, the rise and fall in the value of other securities, all bear upon the market value of the securities in question. None of these have any relation to the value of the franchises independently considered. Doubtless other elements in determining market values could be suggested equally remote from franchise valuations. How often does it occur that the franchises themselves are sold separately in the open market? We venture to say that no single instance of such a sale can be pointed out. In a few instances in which the assets of such a corporation have been sold, the sales have been under judicial decree, and have involved all of the corporate property, tangible as well as intangible. While, perhaps, from the elements mentioned some estimate could be made of the value of the franchise, it would be an estimate based largely upon conjecture, and not to be relied upon for accuracy. On the other hand, the receipts of the company do bear at least a close relationship to the value of the corporate franchises. Probably no better test could be made of that value than when based upon its earning powers. It may safely be assumed that the average cost of operation bears a close relation to the receipts of the road. There is, we know, a general recognized percentage of receipts which should represent the expense of operation. Peculiar conditions may make this vary slightly in different roads and in different years, but it must be remembered that the Legislature is dealing with a class of property the exact value of which is difficult, if not impossible, of ascertainment. It will hardly be argued that because of this fact the property should entirely escape taxation under the constitutional provision. Surely that provision is satisfied by the adoption of a method of assessment which is reasonably calculated to ascertain the true value. Indeed, the method adopted seems to be one

of which the companies rather than the municipalities could complain, for the receipts of the company involve the use of its tangible property, which is already assessed separately under other provisions of the Act.

Every intendment should be made to support the validity of the statutes. This doctrine, we submit, is stronger, if possible, when applied to statutes dealing with taxation, than those bearing a less important relation to the affairs of the State. Indeed, it is only contended for the plaintiff in error that the Court has a right to refuse to set aside the Legislative scheme upon evidence, and yet no evidence is produced on its part, or appears in the case, except that which can be drawn from the comparison of the results of the two methods of taxation. What does that show? It shows that under the Voorhees Act taxes were assessed upon these franchises to the amount of \$182,586.97, from which Jersey City's share was \$30,894.22. It shows that the valuation placed upon the right to use the streets by the local assessor was \$10,000, and that the tax upon that for these two years amounted to \$559. In other words, under the Voorhees Act the city received in the two years more than twice the actual value placed upon these rights by the local assessor. It cannot be said that the difference between the taxation under the Voorhees Act and the local tax, represented the value of the mere right of corporate existence for that right can be obtained at any time by any ~~seven~~ <sup>three</sup> persons under the General Traction Act upon the payment of a merely nominal sum. Yet from these facts the Court is asked to assume that the method of taxation provided by the Voorhees Act did not fairly represent the taxable value of the property in question. It is to be presumed that the local assessor took the statutory oath and discharged the duty imposed upon him by statute and by the organic law. What basis is there, therefore, for the assumption that under the Voorhees Act the property in question was not assessed according to its full value? The natural inference would be that it was over-as-

sessed and not under-assessed, but of this the plaintiff in error cannot complain.

## II.

THERE IS NO CONSTITUTIONAL RESTRICTION UPON THE POWER OF THE LEGISLATURE TO IMPOSE FRANCHISE TAXES.

If, however, the city succeeds in convincing the Court that one or all of the requirements of this constitutional provision have been violated in the act in question, it still could not succeed in its efforts to nullify so important and useful a feature of our taxing system. The taxes levied upon franchises under the Act of 1900 were properly regarded by the Supreme Court as franchise taxes. Without doubt, corporate franchises are, in many respects, property. They have many of the incidents of property, but it does not follow necessarily that a tax upon franchises is a property tax, or that franchises regarded as subjects of taxation are property within the meaning of the constitutional interdict. The Legislature plainly regarded the taxes upon franchises as franchise taxes and not property taxes. This appears by the express wording of the fifth section of the act, which speaks of the imposition in question as "an annual franchise tax," and so in the sixth, seventh and eight sections of the act it is in like manner referred to as "the franchise tax." No distinction can be taken between the franchise to be a corporation and the franchise to exercise the corporate powers. In *Standard Underground Cable Company v. Attorney-General*, 1 Dick. Ch. 270, this Court held that a franchise tax was not within the clause of the constitution above referred to, and that upon the power of the Legislature to impose such a tax there exists no restriction in our constitution.

If a license tax can be imposed upon the franchise simply to be a corporation, it certainly can be imposed

with greater force upon a franchise to use the public streets granted by the State.

### III.

THE PLAINTIFF IN ERROR IS ESTOPPED FROM LEVYING OR ATTEMPTING TO COLLECT THE TAXES IN QUESTION.

The levying of these taxes is sought to be justified upon the ground that the Act of 1900 is unconstitutional and that therefore it provides no valid method under which the so-called franchise of the Company can be assessed. This court has already held it to be proper legislation.

*Newark vs. State Board of Taxation*, 38 Vr. 246.

It is, however, a fact that for the years in question taxes were assessed against the company under this Act and in respect to this property, amounting to \$182,586.97. Of this the city has received the sum of \$30,894.22. Having accepted and still retaining this large benefit under the Act of 1900 for the years 1903 and 1904; the city should not be allowed to assess any further tax upon the Company's franchises on the theory that the Act of 1900 was unconstitutional in part. It is not a case of laches upon the part of the officers of the municipality. On the contrary the acceptance from the company of the taxes under the Act of 1900 was a deliberate, well considered act. Its wisdom cannot be doubted, for as between the two methods of taxation, that under the Act of 1900 was clearly the most beneficial to the city. It realized for the city during these two years the sum of \$30,894.22, whereas the taxes in question only amounted to \$275 for the year 1903 and \$274 for the year 1904. Upon every principle of fair dealing and business morality the city, after having accepted the benefit of the Act of 1900, should not be allowed to impose any further tax

on the theory that the benefit so accepted was illegal. These principles apply quite as fully to people *en masse* as to isolated individuals. Surely no citizen would be allowed to take the course which the city is taking and in this regard the city can have no higher rights than the individual.

## IV.

THE PLAINTIFF IN ERROR IS NOT INJURED BY THE JUDGMENT OF THE SUPREME COURT.

As already seen the city has accepted the sum of \$30,894.22 under the Act of 1900, while the taxes under review amount to \$559. The setting aside of the latter taxes establishes the validity of the former. If the judgment of the Supreme Court were reversed, while the city would be allowed to collect the lesser sum, it would be obliged in common honesty, even if not by statutory provision, to refund the former.

## V.

THE ASSESSMENTS IN QUESTION CANNOT BE SUSTAINED AS LEVIED UPON "PROPERTY" AS DISTINGUISHED FROM "FRANCHISES."

The argument for the city rests upon three fallacies. In the first place, it assumes that there is a distinction between the franchise granted by the State and the consent given by the municipality. The argument is that the corporate existence is conferred by the State, and is the franchise subjected to taxation by the Voorhees Act, while the consent given by the municipality is property subject to assessment by local taxing officers. The word "franchise" as commonly used in this State for a number of years in relation to street-using corporations has been applied not merely to the bare right of corporate existence, but to all the corporate rights, however ac-

quired, to exercise that franchise in the public streets, so that, accepting the popular definition of the term, the word "franchise" in the Voorhees Act must include both. This must be so upon principle as well. The bare right of corporate existence without the right to exercise any corporate franchises, is of no value. The mere right to hold an annual election of directors to select officers and adopt a common seal can confer no benefit upon either the corporation or its organizers, and no sane persons could be found who would waste their time, let alone their money, in acquiring a franchise of that sort. It would, therefore, have no value which could be made the subject of taxation. It is only in connection with the right to exercise the corporate franchises that the corporate existence is of value. A street railway company, to exercise its franchises, must have some right to use the public streets, for, even if constructed upon private right of way, it would be necessary for its line to cross public streets and highways. It cannot be said, therefore, that the Legislature intended to make a distinction between the franchise to exist as a corporation and the franchise to exercise the corporate powers.

In the second place, the argument assumes that the franchise to use the public streets is derived from the municipality. This clearly is not so. Both under the Traction Act of 1893 (*G. S.*, p. 3235) and the charter of the Jersey City and Bergen Railroad Company (*P. L.* 1859, p. 411), the right to maintain and operate a street railway in the public streets is directly conferred by the Legislature. *Jersey City vs. North Jersey Street Railway Company*, 63 *Atl. Rep.* 906. The Legislature has properly assumed the right and power to grant these privileges. The acts themselves expressly confer these powers and privileges upon the companies. They do not attempt to delegate to the municipality the right or power to confer those privileges. Adopting the wise and well-established policy in dealing with street-using corporations, the Legislature has required the consent

of the municipality before the companies enter upon the streets. It is difficult for the Legislature to adequately and properly deal with the local conditions in a particular municipality. It is probably impossible for it to do so adequately by a general law. It is, therefore, necessary, as well as prudent, that matters of this sort should be left to the discretion of local officers peculiarly familiar with the local situation and the needs and requirements of the body whom they represent. To permit of this the Legislature has required, as a condition precedent, the consent of the municipality, but that consent does not confer the franchise to use the streets. It is simply a condition precedent to the exercise of the franchise granted by the Legislature. As well say that because, under the General Corporation Act, a certificate of incorporation is required to be recorded in the County Clerk's Office and filed in the office of the Secretary of State, that the County Clerk and the Secretary of State or either of them, grant the corporate franchises.

In the third place, the argument fails to recognize the distinction between the rights of a municipality in the public streets and the rights of the individual in his lands. The right of ownership is a vested right, under which he has acquired and holds absolute ownership over his lands, subject only to the right of police regulation and of eminent domain upon the making of just compensation. The municipality, on the other hand, has no private or proprietary rights in the streets. It is a mere agency of the State for the purpose of administering the local government. The power of the State over municipal property is supreme. The municipality has and can have no rights which are not entirely subject to legislative control, and can be modified or taken away without being subject to the constitutional requirement that compensation should be made therefor. It is true that the municipality may hold the title to the fee in the streets. It is true that the municipality may receive a grant of the use of lands for public highways.

It is true that the Legislature has provided a machinery under which the municipality can acquire the right to use the lands for that purpose. It is true that a municipality is given plenary power to regulate and control the public highways within its limits. All of these things, however, are merely incidents to the operations of the State through its agent, and are not private or proprietary rights of the municipality.

Municipal authorities have power to regulate the public use of the streets and highways within their corporate limits, and may, as representatives of the public, maintain suits for the vindication of the public right, but such power is vested in them only as representatives of the public and for the protection and regulation of the public use. In the absence of legislative authority they cannot sell the lands so dedicated nor release or extinguish the use for which they were dedicated, nor employ them in any way variant from the purposes for which they were designed. *Trustees of M. E. Church, Hoboken, v. The Council of Hoboken, 4 Vroom, 13*; affirmed on error, *7 Vroom 540*.

*Palen vs. Ocean City (N. J. Supreme Ct. 1906), 62 Atlantic Reporter 947.*

Without legislative authority a municipality may not grant to an individual license to lay a railroad track across the public street for his own use.

*State, Montgomery, Pros., vs. Trenton, 7 Vroom 79.*

The public rights in the highways of the State can be impaired or interfered with by nothing short of the authority conferred by the sovereign power.

*Morris & Essex Railroad Company vs. City of Newark, 2 Stock. 352.*

The power of the local authorities in the matter of street improvements is a specially delegated authority and acts thereunder are legal only when in strict conformity with its terms.

*State, Terhune, Prosecutor vs. Passaic, 12 Vroom 90.*

Authority on the part of a municipality to grant the right to regulate telegraph or telephone poles in the public streets can only be derived from the Legislature.

*Domestic Telegraph Co. vs. Newark*, 20  
Vroom 344.

The analogy, therefore, sought to be drawn in this case between the city and the private land owner are not apposite.

By the municipal consent the company acquired no interest in the soil of the highways over which its road passed but the value of its right to use the public highways inheres in its franchises derived from the Legislature.

*Newark vs. State Board of Taxation*, 38  
Vroom 246.

The Act of 1900 clearly differentiates between taxes upon franchises and upon other species of property and does not contemplate at all the taxation of franchises in any other mode than that provided by the statute. The taxes in question, therefore, cannot be sustained as property taxes.

Even if, however, the taxes under review should be regarded as property taxes, the plaintiff in error cannot prevail. The rights of the street railway company in the streets, which purport to be covered by these assessments, are not real estate but personal property. The other taxes levied by the city for the years 1903 and 1904 were upon "cars and other personal property," and therefore cover this.

It is respectfully submitted that the judgments under review should be affirmed.

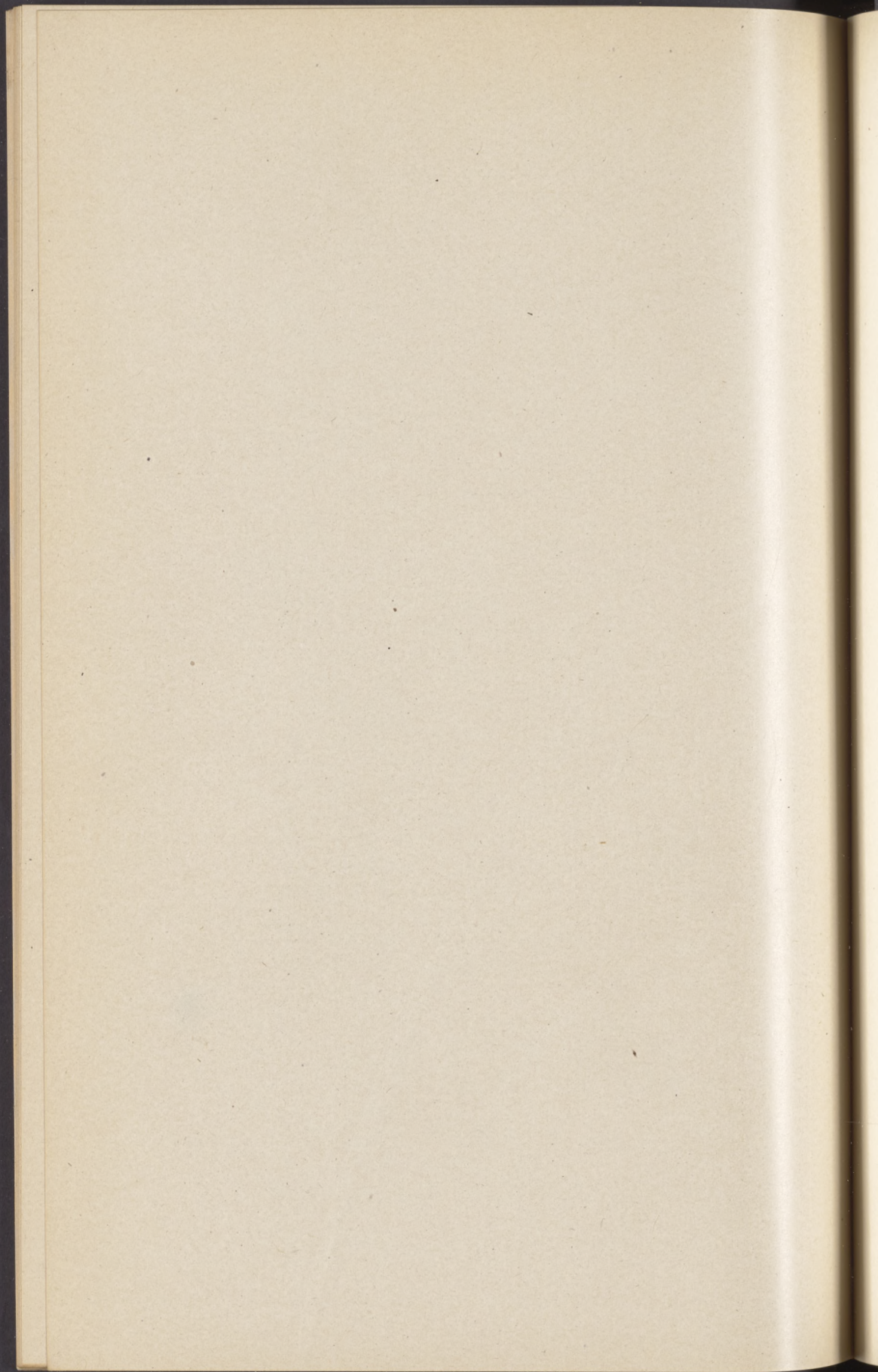
Dated March 5, 1907.

FRANK BERGEN,  
SHERRERD DEPUE,  
WILLIAM D. EDWARDS.

*Of Counsel.*

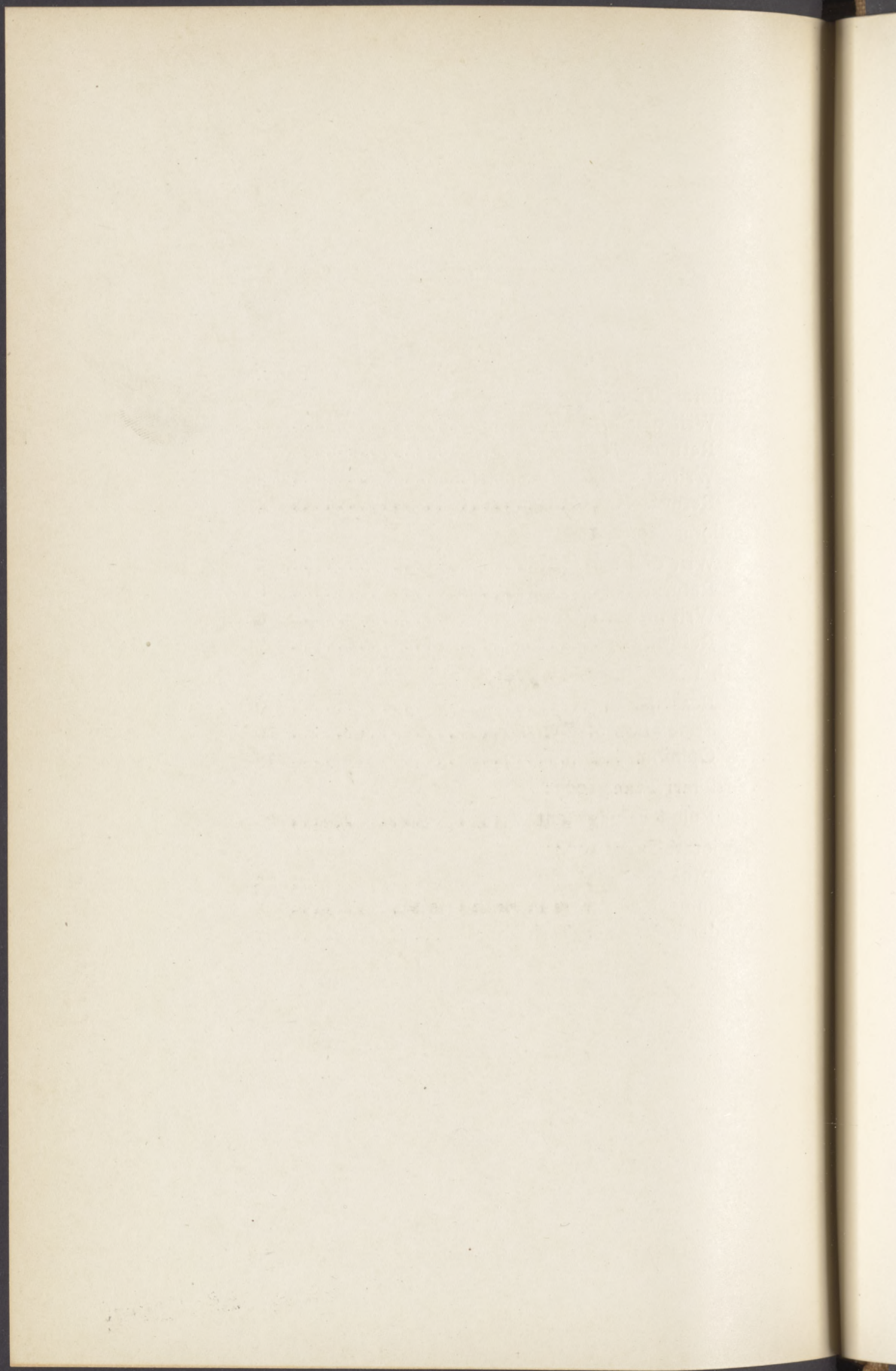
WM. D. EDWARDS,  
*Attorney.*

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NEW JERSEY COURT OF ERRORS AND  
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Prosecutor below,	)	10
Defendant in Error,	)	
	)	On Writ of Error
vs.	)	
	)	to Supreme
THE MAYOR AND ALDER-	)	
MEN OF JERSEY CITY,	)	Court.
	)	On Certiorari
and EDWARD FRY, CITY	)	Taxes 1903.
COLLECTOR.	)	
	)	20
Defendants below,	)	
Plaintiffs in Error,	)	
<hr/>		

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NORTH JERSEY STREET	)	
RAILWAY COMPANY,	)	
	)	
Prosecutor below,	)	
Defendant in Error,	)	On Writ of Error 30
	)	
vs.	)	to Supreme
	)	Court.
THE MAYOR AND ALDER-	)	On Certiorari
MEN OF JERSEY CITY,	)	Taxes 1904.
and EDWARD FRY, CITY	)	
COLLECTOR.	)	
	)	
Defendants below,	)	
Plaintiffs in Error,	)	40
<hr/>		

NEW JERSEY, SS.:

(L. S.) The State of New Jersey to  
the Chief Justice and other Jus-  
tices of our Supreme Court of  
Judicature, Greeting:

For as much as in the record and proceedings, as  
also in the giving of judgment in a certain plaint  
10 which was in our Supreme Court of Judicature, be-  
fore you, between the North Jersey Street Railway  
Company, Prosecutor, and the Mayor and Alder-  
men of Jersey City and Edward Fry, City Collector,  
Defendants, in an action on certiorari, manifest error  
has intervened, to the great damage of the said De-  
fendants, as is said; we being willing that the error,  
if any there be, should, in due manner, be corrected  
and full and speedy justice done to the parties afore-  
said in this behalf, do command you, that if judg-  
20 ment be thereupon given and affirmed, then you dis-  
tinctly and openly send, under your seal, the record  
and proceedings aforesaid, with all things touching  
the same to our Judges of our Court of Errors and  
Appeals in the last resort in all causes, at Trenton,  
on the 28th day of July, together with this writ, that  
the record and proceedings aforesaid, being inspect-  
ed, we may cause to be further done thereupon, for  
correcting that error, what of right, according to law  
and custom of the State of New Jersey, ought to be  
30 done.

Witness, our Chancellor and President Judge of  
our said Court of Errors and Appeals, at Trenton,  
aforesaid, the 9th day of July, A. D. nineteen hun-  
dred and six.

GEORGE L. RECORD,

ROBERT CAREY,

Attorneys.

SAMUEL D. DICKINSON,

40

Clerk.

## RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey, within named;

The record and proceedings whereof mention is made within, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed as within we are commanded. 10

W. S. GUMMERE. (L. S.)  
Chief Just. ce.

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## NEW JERSEY, SS.:

(L. S.) The State of New Jersey to  
The Mayor and Aldermen of  
Jersey City and Edward Fry,  
City Collector, Greeting: 20

We being willing for certain reasons to be certified of a certain assessment of two hundred and seventy-five dollars (\$275) for taxes for the year 1903, for personal property of the North Jersey Street Railway Company valued at ten thousand dollars (\$10,000), made by the Tax Commissioners of Jersey City, on "the contract, right, privilege, license or franchise made with or granted to the Jersey City & Bergen R. R. Co., by an ordinance adopted by the Common Council of Jersey City, and approved December 20, 1859, and accepted by said company," do command you that you send under your seal to our Supreme Court of the State of New Jersey, to be holden at Trenton, on the sixth day of June next, said assessment of taxes, together with all things touching and concerning the same, as fully and entirely as the same remain before you, together with this writ, that we may further cause to be done what of right and according to the laws of this State ought to be done. 40

Witness, William S. Gummere, Chief Justice of our  
said Supreme Court at Trenton, this twenty-fourth  
day of May, 1905.

BEDLE, EDWARDS & THOMPSON,  
Attorneys.

WM. RIKER, JR.,  
Clerk.

Endorsed:

10 "I allow the within writ: let it be sealed.

JONATHAN DIXON,  
Justice Supreme Court.

May 22, 1905."

To the Honorable Justices of the Supreme Court of  
Judicature of New Jersey:

I, Edward Fry, City Collector of The Mayor and  
Aldermen of Jersey City, in obedience to the com-  
20 mand of the writ hereto annexed to me directed,  
do hereby certify and send to you, the said Justices,  
the assessment of taxes made against the North Jer-  
sey Street Railway Company, for the year nineteen  
hundred and three, by the Tax Commissioners of  
said city, with all things touching and concerning the  
same as fully and entirely as the same remain in my  
hands and possession, as by the said writ I am com-  
manded, as appears by the schedule hereunto written.

30 In witness whereof I have hereunto set my hand  
and seal this 26th day of May, 1905.

EDWARD FRY,  
City Collector. (L. S.)

## PERSONAL TAXES

1903.

NORTH JERSEY STREET RAILWAY  
COMPANY

The contract, right, privilege  
license or franchise made  
with or granted to the Jersey  
City & Bergen R. R. Co., by  
an ordinance adopted by the  
Common Council of Jersey  
City, and approved Dec. 20,  
1859, and accepted by said  
company.

10

Value, \$10,000. Tax, \$275.

## NEW JERSEY, SS.:

(L. S.) The State of New Jersey to  
the Chief Justice and other Jus- 20  
tices of our Supreme Court of  
Judicature, Greeting:

For as much as in the record and proceedings, as  
also in the giving of judgment in a certain plaint  
which was in our Supreme Court of Judicature, be-  
fore you, between the North Jersey Street Railway  
Company, Prosecutor and the Mayor and Aldermen  
of Jersey City, and Edward Fry, City Collector,  
Defendants, in an action on certiorari, manifest error 30  
has intervened, to the great damage of the said De-  
fendants, as is said; we being willing that the error, if  
any there be, should, in due manner, be corrected  
and full and speedy justice done to the parties afore-  
said in this behalf, do command you, that if judgment  
be thereupon given and affirmed, then you dis-  
tinctly and openly send, under your seal, the record  
and proceedings aforesaid, with all things touching  
the same to our Judges of our Court of Errors and  
Appeals in the last resort in all causes, at Trenton,  
on the 28th day of July, together with this writ, that 40

the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon, for correcting that error, what of right, according to law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 9th day of July, A. D. nineteen hundred  
 10 and six.

GEORGE L. RECORD,  
 ROBERT CAREY,  
 Attorneys.

SAMUEL D. DICKINSON,  
 Clerk.

RETURN.

The answer of the Justices of the Supreme Court  
 20 of the State of New Jersey, within named;

The record and proceedings whereof mention is made within, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

W. S. GUMMERE, (L. S.)  
 Chief Justice.

30 NEW JERSEY, SS.:

(L. S.) The State of New Jersey to  
 the Mayor and Aldermen of  
 Jersey City and Edward Fry,  
 City Collector, Greeting:

We being willing for certain reasons to be certified of a certain assessment of two hundred and seventy-four dollars (\$274) for taxes for the year 1904, for personal property of the North Jersey  
 4 Street Railway Company, valued at ten thousand

dollars (\$10,000), made by the Tax Commissioners of Jersey City, on "the right, privilege or privileges owned or controlled by said company, of laying and maintaining street railway tracks and appurtenances in the streets of Jersey City and operating the trolley cars thereon," do command you that you send under your seal to our Supreme Court of the State of New Jersey, to be holden at Trenton on the sixth day of June next, said assessment of taxes, together with all things touching and concerning the same, as fully and entirely as the same remain before you, together with this writ, that we may further cause to be done what of right and according to the laws of this State ought to be done. 10

Witness, William S. Gummere, Chief Justice of our said Supreme Court at Trenton, this twenty-fourth day of May, 1905.

BEDLE, EDWARDS & THOMPSON, 20  
Attorneys.

WM. RIKER, JR.,  
Clerk.

Endorsed:

"I allow the within writ; let it be sealed.

JONATHAN DIXON,  
Justice Supreme Court.

May 22, 1905."

30

To the Honorable Justices of the Supreme Court of Judicature of New Jersey:

I, Edward Fry, City Collector of the Mayor and Aldermen of Jersey City, in obedience to the command of the writ hereto annexed to me directed, do hereby certify and send to you, the said Justices, the assessment of taxes made against the North Jersey Street Railway Company, for the year nineteen hundred and four, by the Tax Commissioners of said 40

City, with all things touching and concerning the same as fully and entirely as the same remain in my hands and possession, as by the said writ I am commanded, as appears by the schedule hereunto written.

In witness whereof, I have hereunto set my hand and seal this 26th day of May, 1905.

EDWARD FRY,

10

City Collector. (L. S.)

PERSONAL TAXES.

1904.

NORTH JERSEY STREET RAILWAY  
COMPANY.

The right, privilege or privileges  
owned or controlled by said  
20 company, of laying and main-  
taining street railways, tracks  
and appurtenances in the  
streets of Jersey City, and  
operating thereon their trol-  
ley cars.

Value, \$10,000. Tax, \$274.

30

40

## REASONS.

## NEW JERSEY SUPREME COURT.

-----o		
NORTH JERSEY STREET	)	
RAILWAY COMPANY,	)	
Prosecutor.	)	
vs.	)	On Certiorari. 10
THE MAYOR AND ALDER-	)	Taxes, 1903.
MEN OF JERSEY CITY	)	
AND EDWARD FRY,	)	
CITY COLLECTOR.	)	
Defendants.	)	
-----o		20

The prosecutor writes down the following reasons for setting aside the assessment for taxes brought up for review by the writ in this case:

First. Because the property described in the assessment is not subject to taxation by Jersey City under the law of the land.

Second. Because the property described in the assessment has been taxed by the State of New Jersey, under the provisions of Chapter 195, of the Laws of 1900, and is not subject to further taxation by Jersey City. 30

Third. Because said tax has been levied upon the franchises of this prosecutor and Jersey City has no authority or power to levy such taxes.

BEDLE, EDWARDS & THOMPSON,  
Attorneys of Pros.

Same REASONS were filed for taxes of 1904. 40

## STIPULATION OF FACTS.

## NEW JERSEY SUPREME COURT.

	-----	0	
		)	
	NORTH JERSEY STREET	)	
		)	
	RAILWAY COMPANY,	)	
10		)	
	Prosecutor.	)	On Certiorari.
	vs.	)	
		)	Taxes, 1903.
	THE MAYOR AND ALDER-	)	
		)	
	MEN OF JERSEY CITY,	)	
		)	
	et al.,	)	
		)	
	Respondent.	)	
		)	
20	-----	0	

It is stipulated and agreed between the parties to this action, for the purposes of this suit only, as follows:

(1) The Jersey City and Bergen Railroad Company was incorporated under "An Act to incorporate the Jersey City and Bergen Railroad Company," approved March 15, 1859; (Laws of 1859, p. 411.)

30 (2) Supplements to said act were passed as follows:

March 17th, 1860, Laws 1860, p. 393.  
 March 18th, 1863, Laws 1863, p. 53.  
 April 12th, 1867, Laws 1867, p. 1018.  
 March 31st, 1871, Laws of 1871, p. 1071.  
 March 27th, 1873, Laws 1873, p. 1302.  
 April 4th, 1875, Laws 1875, p. 1458.

Said acts and supplements may be referred to on  
 40 the agreement without printing.

(3) On December 20th, 1859, an ordinance was passed by Jersey City, giving the consent of the City to the construction by the Jersey City and Bergen Railroad Company of street railroad tracks in certain streets of Jersey City, said ordinance may be found in the Revised Ordinances of Jersey City, compiled by Howard C. Griffiths, at page 126.

(4) Subsequently other ordinances were passed by Jersey City, consenting to the construction by said last mentioned company of street railroad tracks in other streets of said City; said ordinances may be found in said compilation of the Revised Ordinances at pages 129, 132, 133, 134, 138, 139, 140, 141, 142, 143 and 144. All of said ordinances may be referred to on the argument without printing.

(5) That during the years 1860 to 1893 inclusive, said last mentioned company, in pursuance of said laws and ordinances, constructed miles of street railway tracks in the streets of Jersey City and operated the same.

(6) That in the year 1893 the Consolidated Traction Company was organized under the provisions of the Traction Act, Chapter 172, of the Laws of 1893, (Laws, 1893, p. 302).

(7) That on September 25, 1893, the Jersey City and Bergen Railroad Company leased all its property and franchises, including the tracks so laid as aforesaid to said Consolidated Traction Company for a term of years, not yet expired, and said Traction Company thereupon entered upon and operated said street railroad.

(8) That on May 25, 1898, said Consolidated Traction Company leased all its property and franchises, including the tracks so laid as aforesaid, to the North Jersey Street Railroad Company (a corporation organized under the provisions of said Trac-

tion Act)—Chapter 172, of the Laws of 1893—for a term of years not yet expired, and said North Jersey Street Railway Company entered upon and operated said street railroad and was so doing at the time of the levy of the tax in question.

(9) That for the year 1903 an assessment of taxes was levied against the North Jersey Street Railway  
10 Company by the taxing authorities of Jersey City, as follows:

North Jersey Street Railway Company:

“Cars and other personal property.” Valuation, \$346,000. Tax, \$9,515.

“Tracks, trolley wires, poles, overhead construction, &c.” Valuation, \$492,000. Tax, \$13,530.

Which taxes, amounting to \$23,045, were paid to the City Collector of Jersey City.

20 (10) That in addition thereto an additional assessment of taxes was levied against North Jersey Street Railway Company, by the taxing authorities of Jersey City, as follows:

“North Jersey Street Railway Company:

“Personal property.

“The contract, rights, privilege, license or franchise made with or granted to the Jersey City and Bergen R. R. Co., by an ordinance adopted by the Common Council of Jersey City, and approved Dec.  
30 20, 1859.” Tax, \$275.

This is the tax brought up for review; it has not been paid.

(11), That under the provisions of Chapter 195, of the Laws of 1900, (Voorhees Act Laws, 1900, p. 502) said North Jersey Street Railway Company made return in the year 1903 to the State Board of Assessors of its gross receipts, including therein its gross receipts from said street railroads in Jersey City, whereon it was assessed under said act an  
40 annual franchise tax of two per centum, which franchise

tax amounting in all to the sum of \$88,746.00; that of said franchise tax there was apportioned to the taxing district of Jersey City under said act the sum of \$14,415.98, which sum was paid to the Tax Collector of Jersey City by said North Jersey Street Railway Company.

Dated February 1st, 1906.

BEDLE, EDWARDS & THOMPSON, <sup>10</sup>  
Attorneys of Prosecutor, North Jersey  
Street Railway Company.

ROBERT CAREY,  
Attorney of Defendants, the Mayor and  
Aldermen of Jersey City, and Edward Fry,  
City Collector.

—————  
SAME STIPULATION WAS ENTERED <sup>20</sup>  
INTO on Certiorari of Taxes of 1904, except sections 9, 10 and 11, which read as follows:

(9) That for the year 1904 an assessment of taxes was levied against the North Jersey Street Railway Company by the taxing authorities of Jersey City, as follows:

North Jersey Street Railway Company: <sup>30</sup>

“Cars and other personal property.” Valuation, \$346,000. Tax, \$9,480.40.

“Tracks, trolley wires, poles, overhead construction, &c.” Valuation, \$492,000. Tax, \$13,480.80.

Which taxes, amounting to \$22,961.20 were paid to the City Collector of Jersey City.

(10) That in addition thereto an additional assessment of taxes was levied against North Jersey Street Railway Company by the taxing authorities of Jersey City as follows <sup>40</sup>

"North Jersey Street Railway Company:

"Personal property.

"The right, privilege or privileges owned or controlled by said company of laying and maintaining street railway tracks and appurtenances, in the streets of Jersey City, and operating the trolley cars thereon." Tax, \$274.

This is the tax brought up for review; it has not  
10 been paid.

(11) That under the provisions of Chapter 195 of the Laws of 1900 (Voorhees Act Laws, 1900, p. 502), said North Jersey Street Railway Company made return in the year 1904 to the State Board of Assessors of its gross receipts, including therein its gross receipts from said street railroads in Jersey City, whereon it was assessed under said act an annual franchise tax of two per centum, which franchise tax  
20 amounting in all to the sum of \$93,740.97; that of said franchise tax there was apportioned to the taxing district of Jersey City under said act the sum of \$16,478.24, which sum was paid to the Tax Collector of Jersey City by said North Jersey Street Railway Company.

Dated February 1st, 1906.

BEDLE, EDWARDS & THOMPSON,  
Attorneys of Prosecutor, North Jersey  
Street Railway Company.

30

ROBERT CAREY,  
Attorney of Defendants, the Mayor and  
Aldermen of Jersey City, and Edward  
Fry, City Collector.

## NEW JERSEY SUPREME COURT.

February Term, 1906.

_____	o	
	)	
NORTH JERSEY STREET	)	
	)	
RAILWAY COMPANY,	)	
	)	
vs.	)	10
	)	
MAYOR AND ALDERMEN	)	
	)	
OF JERSEY CITY, et al.	)	
_____	o	

ARGUED FEBRUARY 26, 1906; DECIDED  
JUNE 11, 1906.

1. The act of 1900 for the taxation of franchises of persons and corporations using or occupying public streets (P. L. 1900, 502) is constitutional. <sup>20</sup>
2. The franchise tax imposed by the act of 1900 is in the nature of a license tax, and not a tax upon property.
3. The franchises to use or occupy public streets which are subject to a franchise tax under the act of 1900 are not subject to a property tax under the general tax act of 1903 (P. L. 1903, 394.) <sup>30</sup>

## CERTIORARI.

Before Justices Garrison, Garretson and Swayze.

Frank Bergen and William D. Edwards for prosecutor.

George L. Record and Robert Carey for Jersey City. <sup>40</sup>

The opinion of the Court was delivered by  
Swayze, J.

The question involved in these cases is the right of Jersey City to levy a property tax upon the right, privilege, license or franchise of the prosecutors to lay and maintain street railway tracks and operate trolley cars thereon. The solution depends upon the construction of the tax act of 1903 (P. L. 1903, 394.) That act provides for the taxation of all property, real and personal, not expressly exempted by the act, or excluded from its operation. Included in the property exempted from taxation are "all officers and franchises, and all property used for railroad and canal purposes, the taxation of which is provided for by any other law of this State." The word "officers" is a misprint for "offices," as appears by an inspection of the original act.

We think the last clause qualifies franchises as well as property used for railroad and canal purposes, and that the exemption is only of franchises the taxation of which is provided for by another law.

It is settled in this State that franchises are property; *State Board of Assessors v. Central R. R. Co.*, 19 Vr. 146; *Newark v. State Board of Taxation*, 38 Vroom 246; and the only just reason for exempting such property from the operation of the act is that it is subjected, in the opinion of the Legislature, to its fair share of the public burdens by other legislation. This result can only be secured by the construction we adopt.

The question then is whether the taxation of franchises is provided for by other legislation.

The act relied upon by the prosecutors is the so-called Voorhees act of 1900 (P. L. 1900, 502.) That act purports to tax the franchises of persons and corporations having the right to use or occupy the

streets is not denied by the city. It is urged, however, that the act of 1900 is unconstitutional, and that if it is constitutional, the percentage of the gross receipts required to be assessed, is not a tax.

The act of 1900 has been before the courts in *Patterson and Passaic, Gas and Electric Co. v. State Board of Assessors*, 40 Vr. 116, affirmed 41 Vr. 825, and its constitutionality was essential to justify the result reached in that case, but the question now presented was not raised, and we have therefore examined it without regard to that decision.

The objections to the constitutionality of the act are two: (1) that a tax upon gross receipts is not a tax according to true value as required by the constitution, for the reason that the percentage of gross receipts must be levied though the exercise of the franchise may actually involve a loss and the franchise may be of no value; (2) that the act attempts to provide two different methods of taxation for the property of the corporation, one by local assessors according to its value, the other an arbitrary imposition by a State board. The first objection is fatal to the validity of the act if the franchise tax thereby imposed is a property tax; if it is not a property tax, the second objection is without force.

We think the tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets. We ought not, unless compelled, to adopt a construction which would make the act a clear violation of the constitutional requirement that property be assessed at its true value. That result of the city's contention is a potent argument for another construction. That the Legislature did not intend the tax on gross receipts to be a property tax is indicated by the distinction made between property and franchises throughout the act. The

title begins ("An act for the taxation of all the property and franchises," etc., Section 1 begins "All the property, real and personal, and franchises," etc; Section 2 provides for the valuation and assessment of the property; Section 4 provides for the valuation and Section 5 for the assessment of the franchise; Section 6 provides for the distribution of the franchise tax in proportion to the value of the property as assessed by local assessors. Throughout, a distinction is preserved between the property tax and the franchise tax. This distinction is emphasized by the provisions of Section 7, which enacts that money paid to a taxing district pursuant to contract, shall be considered a payment on account of the franchise tax imposed by the act; and by the provisions of Section 8, which enacts that the franchise taxes imposed by the act shall be in lieu of all other franchise taxes now assessed against persons or corporations subject to the provisions of this act. We think it clear that the franchise tax was not intended to be a property tax. That impositions of this character may be imposed by way of a license tax is well settled. Such a tax is imposed by this State upon the general franchise to be a corporation, and has been sustained by the courts.

Standard Underground Cable Co. v. Attorney-General, 1 Dick. 270.

30

Honduras Co. v. Board of Assessors, 25 Vr. 278.

Lumberville Bridge Co. v. Board of Assessors, 26 Vr. 529.

Marsden Co. v. Board of Assessors, 32 Vr. 461.

The principle upon which such taxes are sustained 40 is stated by Mr. Justice Field in Home Ins. Co. vs.

New York, 134 U. S. 594, and his language was approved by this court in *Honduras Co. v. Board of Assessors*, above cited. The grant of the privilege to be a corporation rests in the discretion of the State, and may be made upon such terms as the Legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect, the special franchise to use the streets does not differ essentially from the general franchise to be a corporation. It cannot be doubted that the Legislature or a municipal corporation vested with power to grant or refuse its consent to the special privilege to use the streets, may grant the privilege upon terms.

*Jersey City and Hoboken Horse R. R. v. Jersey City and Bergen Railroad Co.*, 6 C. E. Gr. 550.

In such a case the imposition may be regarded as in the nature of rent or purchase price for the privilege; but it may also be regarded as in the nature of a tax subject to change by the Legislature.

In the *Lumberville Bridge Co.* case the tax upon the franchise to be a corporation was imposed upon a corporation whose charter antedated the act of 1846 making charters subject to alteration by the Legislature, which is now Section 4 of the corporation act (P. L. 1896, 278.) The tax was sustained by this court.

The same reasoning which justifies the special tax upon the general corporate franchise, justifies a special tax upon the special franchise to use the streets although that special franchise may antedate the imposition of the tax.

In *Memphis Gaslight Co. v. Taxing District of Shelby Co.*, 109 U. S., 398, the gaslight company had been granted by its charter enacted in 1851 the

privilege of erecting, establishing and constructing gas-works and manufacturing and vending gas. Subsequently a license tax was imposed, which was attacked upon the ground that to permit the State to tax the company for the privilege granted by the charter was to permit it to destroy that privilege. The answer of the court through Mr. Justice Miller was that the company took its charter subject to the  
 10 same right of taxation in the State that applies to all other privileges and to all other property, and if it wished to have an exemption of any kind from taxation, it should have required a provision to that effect in its charter.

A case similar to the present is *New Orleans City and Lake Railroad Company v. City of New Orleans*, 143 U. S. 192, where a tax upon gross receipts was imposed upon a street railway which had bought its  
 20 franchise of the city for a large sum several years before the enactment of the statute imposing the tax. The tax was nevertheless sustained.

The difference between a license tax and a property tax is well illustrated by the recent litigation growing out of the New York statute of 1899 for the taxation of franchises of this character. No question was raised in that case as to the right of the State to impose such a license tax. The ques-  
 30 tion was whether it could in addition impose a property tax upon the value of the franchise; and the property tax was sustained.

*Metropolitan Street Railway v. New York*,  
 199 U. S. 1.

Whether valuable as property or not, the franchise is to be exercised upon such terms as the State may determine, and it is no objection that those terms take the form of an annual license tax. As a  
 40 license tax, it is not subject to the constitutional re-

quirement that property shall be assessed according to its true value.

It is, however, urged that if the franchise tax is the compensation exacted by the State for the exercise of the franchise, it is not taxation within the meaning of the exemption clause of the act of 1903, but rather in the nature of purchase price or rent. We think this contention also untenable. The ex-<sup>10</sup>action is called a franchise tax by the Legislature, and the word taxation in the act of 1903 must be given the same meaning as the same word in the title of the act of 1900. Whether the use of the word by the Legislature is strictly accurate is of no moment; the Legislature had the right to call its exaction "taxation."

As was said by the Court of Appeals in New York: "Both in statutes and in judicial decisions the term 'tax' is frequently used in a much more comprehen-<sup>20</sup>sive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the State or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights, which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges<sup>30</sup> which the State is at liberty to grant or to withhold at pleasure."

Heerwagen v. Cross-Town St. Ry. Co.,  
179 N. Y. 99; 71 N. E. Rep. 729.

We think the franchises sought to be taxed by Jersey City are franchises, the taxation of which is provided for by another law, and that they are therefore not taxable as property under the act of 1903. It was for the Legislature to determine whether the<sup>40</sup>

tax imposed by the act of 1900 was a fair apportionment of the public burden without subjecting the prosecutors to a property tax upon the value of the franchise in addition.

The taxes must be set aside with costs.

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10 SAME OPINION HANDED DOWN IN BOTH  
CASES.

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NEW JERSEY SUPREME COURT.

	_____o	)	
	NORTH JERSEY STREET	)	
20	RAILWAY COMPANY,	)	
		)	
	Pros.,	)	
	vs.	)	On Certiorari.
	THE MAYOR AND ALDER-	)	Taxes 1903.
	MEN OF JERSEY CITY	)	Rule for Judg-
	and EDWARD FRY, CITY	)	ment.
30	COLLECTOR,	)	
	Defts.	)	
	_____o	)	

The Court having heard the argument of counsel and inspected the assessment of taxes removed by the writ in this cause, and read the testimony and duly considered the reasons filed, it is ORDERED that said assessment of taxes for the year 1903 levied by the defendant against the prosecutors for two hundred and seventy-five dollars on the contract right,

privilege, license or franchise made with or granted to the Jersey City and Bergen Railroad Company by an ordinance adopted by the Common Council of Jersey City, and approved December 20th, 1859, and accepted by said Company, be set aside, made void and for nothing holden, with costs of suit to be taxed.

Entered June 14, 1906.

On motion of 10  
 BEDLE, EDWARDS & THOMPSON,  
 Attys. of Pros.  
 A true copy.  
 WM. RIKER, JR.,  
 Clerk.

NEW JERSEY SUPREME COURT.

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	)	
NORTH JERSEY STREET	)	
	)	
RAILWAY COMPANY,	)	
	)	
Pros.,	)	On Certiorari.
vs.	)	Taxes 1904.
THE MAYOR AND ALDER-	)	Rule for Judg- 30
MEN OF JERSEY CITY	)	
	)	ment.
and EDWARD FRY, CITY	)	
	)	
COLLECTOR.	)	
	)	
Defts.	)	
	)	
	o	

The Court having heard the argument of counsel and inspected the assessment of taxes removed by the writ in this cause and read the testimony and 40

duly considered the reasons filed, it is ORDERED that said assessment of taxes for the year 1904 levied by the defendant against the prosecutors for two hundred and seventy dollars (\$270) on the right, privilege or privileges owned or controlled by said Company of laying and maintaining street railways, tracks and appurtenances in the streets of Jersey City, and operating thereon their trolley cars, be set  
10 aside, made void and for nothing holden, with costs of suit to be taxed.

Entered June 14, 1906.

On motion of

BEDLE, EDWARDS & THOMPSON,  
Attys. of Pros.

A true copy.

WM. RIKER, JR.,  
Clerk.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

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NORTH JERSEY STREET )	)	
RAILWAY COMPANY, )	)	
Prosecutor below, )	)	10
and Defendant in Error, )	)	
vs. )	)	In Error.
THE MAYOR AND ALDER- )	)	Assignment of
MEN OF JERSEY CITY )	)	Errors.
and EDWARD FRY, CITY )	)	Taxes 1903.
COLLECTOR, )	)	20
Defendants below, )	)	
and Plaintiffs in Error. )	)	
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AFTERWARDS, that is to say, on the 25th day of August, in the year of our Lord one thousand nine hundred and six, in the Court of Errors and Appeals the last resort in all causes, comes the said The Mayor and Aldermen of Jersey City and Edward Fry, City Collector (defendants below and plaintiffs in this Court), by Robert Carey, their attorney, and say, that in the record and proceedings aforesaid, also in the finding and judgment aforesaid, there is manifest error in this, to wit:

FIRST: That the said Justices before whom, &c., found and ruled in favor of the prosecutor below, and against the defendants below; Whereas, by the

law of the land, they should have found and determined in favor of the defendants below.

SECOND: That the said Supreme Court decided that an act of the Legislature, entitled "An act for the taxation of all the property and franchises of persons, copartnerships, associations or corporations using or occupying public streets, highways, roads or  
 10 other public places, except municipal and corporations taxable under the act entitled 'An act for the taxation of railroad and canal property,' approved April 10th, one thousand eight hundred and eighty-four, or any of the supplements or amendments there-  
 to." Being known as Chapter 195 of the Laws of 1900, to be constitutional; whereas, the said Supreme Court should have decided said act to be unconstitutional and void.

20 THIRD: That the said Supreme Court decided said act, together with the supplements and amendments thereof, to be constitutional legislation; whereas, the said Supreme Court should have decided said act and supplements and amendments to be unconstitutional and void.

FOURTH: That the said Supreme Court decided that the property described in the assessment under review in the Supreme Court, is not subject to tax-  
 30 ation by Jersey City, under the law of the State; whereas, the said Supreme Court should have decided said property to be subject to taxation by Jersey City.

FIFTH: That the said Supreme Court decided that the property described in the assessment involved in the cause, has been taxed by the State of New Jersey under the provisions of Chapter 195 of the Laws of 1900, and is not subject to further tax-  
 40 ation by Jersey City; whereas, the said Supreme

Court should have given judgment that said property was not assessable for purposes of taxation under said Chapter 195 of the Laws of 1900.

SIXTH: That the said Supreme Court decided that Jersey City has no authority or power to levy a tax upon the franchises of the prosecutor below and defendant in error; whereas, the said Supreme Court should have decided that Jersey City has a right, and has authority and power to levy such taxes. 10

ROBERT CAREY,  
Attorney of Plaintiffs in Error.

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Same Assignment of Errors filed in case  
on Certiorari of Taxes of 1904.

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Joinder in Error in usual form in both cases.

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