or diminish the rate of fare to be charged; and the company, at the time of the consolidation, was operating its road and charging a cash fare of five cents, as authorized in the ordinances of the city. Under the consolidation it was proposed to operate all the lines of the two constituent companies as an entire system, to operate through cars thereon, and permit passengers, for one fare of five cents, to ride from one end of said line so consolidated to the other; and, such being the purpose of the consolidation, on May 13, 1893, a communication was addressed to the common council of the city of Cleveland, as follows:

"To the Honorable Council of the City of Cleveland, Ohio: The Woodland Avenue & West Side Street-Railroad Company and the Cleveland City Cable-Railway Company have agreed to consolidate their two lines into the Cleveland City Railway Company; the consolidation to take effect June 1st, 1893. It is proposed, on June 1st, 1893, to immediately issue proper transfers, without extra charge, so that passengers on any line of the Woodland Avenue & West Side Street-Railroad Company may be transferred to and have a continuous passage upon any line of the Cleveland City Cable-Railway Company within the limits of the city of Cleveland, and also so that passengers upon any line of the Cleveland City Cable-Railway Company may be transferred to and have a continuous ride upon any line of the Woodland Avenue & West Side Street-Railroad Company within the city of Cleveland; only one fare to be charged for such ride. And, as soon as the necessary improvements can be made, additional cross-town lines will be run, and only one fare charged for a continuous ride upon any additional lines within the city of Cleveland."

On May 15, 1893, the common council of the city passed a resolution approving and consenting to the consolidation of the companies and the operation of cars upon the terms stated in said communication. It appears in evidence that since the consolidation forming the said complainant company the Cleveland City Railway Company it has continued the operation of its various lines of street railway, as proposed in said communication; has continued to charge the same cash fare of 5 cents for each passenger; has put in force the system of transfers contemplated in the council resolution; and has kept on sale tickets at the rate of 11 for 50 cents or 22 for $1. It also appears that no one of the grants under which the constituent companies which formed said complainant were authorized to operate their cars on their various lines of railway at a cash fare of 5 cents, and to sell tickets at the rate of 11 for 50 cents, has expired, but that each and all of said ordinances are in full force, and that none of said grants expire prior to the year 1908. This being the situation, can the city successfully contend that the reservation in the ordinance of 1879 relating to the Kinsman Street Railroad Company is now operative as respects the complainant the Cleveland City Railway Company? Prior to 1885, the West Side Street-Railroad Company was operating upon the west side of the Cuyahoga river. There was no interchange of traffic by transfer between it and the Woodland Avenue Railway Company, and passengers were obliged to pay a cash fare upon each road. The West Side Company was operating under a grant running for 25 years from February, 1883, entitling it to charge a cash fare of five cents. The consolidation of the Woodland Avenue and West Side Companies was made upon the condition that a

new through line of street railroad should be established, so that for a single fare passengers should be carried from any point to any point on the lines or branches of the consolidated company. Upon the taking effect of this consolidation, the relations of the two companies to the city were so far changed that, whereas the companies before had operated independent lines of railroad, and charged separate fares, a new through line was established, and a rate of fare fixed upon the entire line of five cents. The right to so charge five cents, and to carry at ticket fare at the rate specified, of course involved the right to charge such fare for the whole or any portion of the distance traveled on the line. It was competent for the companies and the city to at that time agree with respect to the terms and conditions, including the rate of fare, upon which this through line should be operated. The parties did make such contract, and one of the terms of the contract related to the rate of fare to be charged over the entire line; and part of the line with respect to which the rate of fare was so fixed in 1885 was the same line referred to in the Kinsman Street-Railroad Company ordinance of 1879; that is to say, the city and the railway companies, in 1885, contracted with respect to the same subject-matter referred to in the ordinance to the Kinsman Street-Railroad Company in 1879. This ordinance of 1879 at the time related solely to the rate of fare upon Kinsman street, operated as an independent line. The ordinance of 1885 is a contract with respect to the same subject-matter, but establishes a rate of fare which should apply to the Kinsman Street Line, not as an independent line, but as part and parcel of a direct through line from the southeasterly to the westerly part of the city. It is to be observed that no reservation is contained in this ordinance of any right to increase or diminish the rate of fare therein fixed, and the right to operate under this ordinance of 1885 was in full force in October, 1898. It must follow that no power existed in the council, in 1898, to change the rate of fare which had been so established by agreement between the parties. Again, it is apparent that the existence of any such reservation is inconsistent with the right which is expressly granted by the ordinance of 1885. The consolidated company certainly acquired the right to carry to the end of the term at five cents over the entire line or any portion thereof. This right could not co-exist with a right in the council to reduce the rate of fare during the period, as respects a portion of the line. By the contention of the city the right to reduce could now only be made applicable to the Kinsman Street Line and its extension. The city, however, contracted in 1885 that the company might carry over the Kinsman Street Line, as part of the through line, at a cash fare of five cents; from which contract it necessarily follows that the entire contract relations of the company and the city, as respects the rate of fare to be charged on the Kinsman Street Line, were merged in the contract of 1885, and the subsequent ordinances by which the Kinsman Street Line ceased to be independent, and became part and parcel of a through line, upon which a rate of fare for the full period of the grant was established. By the subsequent ordinances

of 1887 and 1892, running to the Woodland Avenue and West Side Companies, it is, as respects each of them, as before pointed out, expressly provided that their conditions, as respects fare, shall be applicable to the entire main line of the company, that the rate of fare shall continue to be five cents until the expiration of the several grants, and that the grants do not expire until the 10th day of February, 1908. Again, in determining the contract rights of the complainant company, regard must also be had to its rights under the grants to the Cleveland City Cable-Railway Company, which the present company acquired by the consolidation of 1893. The cable company had the right to operate, at a cash fare of five cents, its independent lines of railway. By virtue of the consolidation, its various lines became part of a great through system, operated by the consolidated company, whereby the public acquired the right of a continuous passage over the entire line for one fare of 5 cents, or ticket fare at the rate of 11 tickets for 50 cents or 22 for $1. The consolidated company, by virtue of such consolidation, acquired all the rights which had before pertained to the constituent companies with respect to the rates of fare which it was lawful to charge, except so far as it had voluntarily modified the same by entering into the consolidation; and it then became the duty of the company, and in the performance of such duty it acquired a corresponding right to carry over its entire line, or any portion thereof, at a cash fare of five cents. A portion of the entire system which this company is now operating under these several grants from the city was formerly the line of the Kinsman Street Railroad Company, and the reservations under which the city now claims the right to reduce rates of fare upon the portion of the line which was formerly the Kinsman Street Line was made with reference to, and can only have reference to, the operation of the Kinsman Street Line as an independent line. Now the situation has so far changed that, by operation of law, and by express contract with the city of Cleveland, this original Kinsman Street Line has become part and parcel of a through line, and, as respects the rates of fare which may be charged upon such through line, the city and the railway company have entered into various contracts expressly fixing the rates of fare to be charged over the through line, or any part thereof.

If the ordinances, as respects rates of fare, which we have been examining, passed since 1879, are to be construed as statutes, it follows that, having been passed subsequent to the ordinance of 1879 relating to the Kinsman Street Railroad Company and relating to the same subject-matter, they are so far inconsistent with the ordinance of 1879 as to operate as a repeal thereof. If we treat these subsequent ordinances simply as contracts, it is apparent that, having entered into a contract in 1879, the city has subsequently entered into various other contracts relating to the same subject, and that these later contracts are so far inconsistent with the provisions of the original ordinance as that the rights of the parties must now be measured by their latest contract, and not by the original agreement. Again, the inconvenience, if not the

absolute impracticability, of enforcing the obligations of both the original ordinance of 1879 and the subsequent ordinances, in and of itself must well-nigh force the conclusion that the rights of the parties must be gathered from these later, rather than from the original, ordinance. The complainant company confessedly has the right by contract to carry over its entire line, or any portion thereof, at a cash fare of five cents, and this it may do until its present grants expire in the year 1908; and what the city proposes, by the ordinances of 1898, is to compel the company, as respects a portion of this line, to carry at a cash fare of four cents. The right to carry at five cents over the whole line, or any portion thereof, is inconsistent with the obligation to carry for less than five cents over some portion of the through line. It is apparent that the relations between the city of Cleveland and the complainant, as the successor of the various companies out of which it has been formed, have been so far changed by subsequent ordinances and contracts and consolidation, that the reservation contained in the ordinance of 1879 relating to the Kinsman Street Railroad Company, and authorizing the council to thereafter increase or diminish the rate of fare upon such line, is not and cannot now be made operative, legally, as against the complainant company, the Cleveland City Railway Company. By reason of the various ordinances and contracts which the complainant company and its predecessors have entered into with the city of Cleveland since the ordinance of 1879, the various railroad companies assumed different and much larger obligations in the carrying of passengers than were imposed upon the Kinsman Street Railroad Company by the ordinance of 1879. In almost every instance, the company agreed to carry passengers further; and at the time of the consolidation of the Woodland Avenue and West Side Companies the service which the railway company agreed to give to the citizens desiring to ride as passengers, it may fairly be said, was doubled, and the city and its citizens received from the railway company large and valuable concessions, which concessions formed a part of the consideration for the passage of the ordinances and the making of the contracts. No other conclusion can be reached than that the relations between the city of Cleveland and the complainant, as the successor of the various companies out of which it is formed, have been so far changed by the various contracts entered into since 1879 that the city is estopped from claiming that the reservation contained in the ordinance of 1879 can now be used to either increase or diminish the rate of fare upon a small portion of the line of the Cleveland City Railway Company.

As respects the complainant the Cleveland Electric Railway Company, a very similar question is presented by the ordinances before the court. The city contends for the validity of the "Low Fare Ordinance," passed, as respects this last-named complainant, by virtue of an ordinance passed in 1879, granting a renewal of franchise to the East Cleveland Railroad Company. By this ordinance, set forth in the bill, the East Cleveland Railroad Company and its successors were authorized to reconstruct, maintain, and operate

a double-track street railroad from Superior street easterly through designated streets, including Euclid avenue, to Willson avenue; and by section 6 of said ordinance it was provided:

"Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of the line herein renewed, but said company may charge a reasonable compensation for carrying packages. The council, however, reserves the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient."

It appears by the allegations of the bill and in proof that prior to the 15th day of September, 1879, the East Cleveland Railroad Company was operating a line of railway from the intersection of Superior and Water streets to the easterly limits of the city, on Euclid avenue, under various grants, some of which emanated from the city council, others from the county commissioners, and others from the authorities of the village of East Cleveland prior to its annexation to the city. At that time there was but a single track east of Willson avenue upon Euclid avenue, and the company, under its grants, had the right to charge passengers one fare from Water street to Willson avenue, another from Willson avenue to Fairmount street, and still another from Fairmount street east; and was, in fact, charging two fares of five cents each, each way between Water street and the city limits. This was the situation when the council passed the ordinance of September 15, 1879, containing the reservation with respect to fare, under which the city claims the right to pass and enforce the ordinance of October 17, 1898. After the passage of this ordinance, the company continued the operation of its line thereunder up to April 4, 1883, and, as it was permitted to do, charged one fare between Water street and Willson avenue, and an additional fare of five cents from Willson avenue easterly to the end of its line. On April 4, 1883, the council passed an ordinance, which was accepted by the company, granting it the right to build and operate an additional track on Euclid avenue, between Willson avenue and the easterly line of Fairmount street, making a double-track line. This ordinance contained a provision and reservation, as respects fare, in similar terms to that of the ordinance of 1879. Under this ordinance of 1883 the company agreed to carry passengers over its line as far east as the city limits for five cents. It did not make any agreement to run through cars, and for the next three years it did in fact only run a portion of its cars through. It was under no obligation to give transfers at Willson avenue, and was in fact not giving such transfers. It is alleged in the bill, and in proof by affidavit, that this arrangement and operation of the cars was unsatisfactory, both to the company and to its patrons, and in March, 1886 (see Rev. Ord. p. 826), the council passed an ordinance entitled "An ordinance granting to the East Cleveland Railroad Company the right to extend and operate its double-track street railroad on Euclid avenue between the easterly line of Fairmount street and the easterly limits of the city." By section 3 of this ordinance the company was required to pave 14 feet,—an obligation which did not pertain to its then existing contract with the city; and, by section 4 of

the ordinance, the following provision is made, as respects the rate of fare to be charged by the East Cleveland Company over its entire line, which included the line referred to in the ordinances of 1879 and 1883:

"The rights as herein granted and conferred are upon the express condition, however, that said company shall charge and collect but one fare of not more than five cents for each passenger one way in either direction, between the easterly limits of the said city on Euclid avenue and the westerly terminus of said company's tracks at the intersection of Superior and Water streets; and upon the further condition that the said company shall run through cars over said line between said points last named in each direction, as the public convenience and the opinion of the common council, by resolution expressed, may require."

Section 5 of this same ordinance provides:

"The rights herein granted to lay and operate a double-track street railroad on Euclid avenue between Fairmount street and the easterly limits of the city shall cease and determine on the 20th day of September, A. D. 1904, as provided for said company's tracks on Euclid avenue west of Fairmount street."

It is apparent from an inspection of this ordinance of 1886, in connection with admitted circumstances surrounding its passage, that the council was then fixing and agreeing upon a rate of fare to be charged upon the entire line of the East Cleveland Railroad Company, and during the entire life of the franchise, which did not expire until 1904; and nowhere in this ordinance is contained any reservation in the city council to thereafter change the rate of fare therein prescribed. It also appears in the making of this contract that the city received additional consideration, namely, the obligation of the company to pave an additional space upon the street, and the requirement for the operation of through cars. In 1883 the reservation contained in the ordinance of 1879 had been repeated, in substance, in the ordinance of that date, but in 1886, the council, for the first time, legislates or contracts upon the subject of fares to be charged in connection with the operation of through cars and a double-track street railroad, and it entirely omits the reservation contained in the former ordinances. This ordinance of 1886 was a contract, still in full force and effect. It in express terms prescribed the rate of fare which the company shall charge in the operation of its line upon Euclid avenue, and in express terms provides that the conditions and obligations of such ordinance shall remain in force until the year 1904; and it makes this obligation to so operate through cars and maintain a double-track road, and to charge but five cents fare over the entire line, continue as long as, and terminate with, the ordinance of 1879; and this ordinance of 1879, so referred to, is the ordinance in which is contained the reservation upon which the city bases its contention as to the validity of the reduction of fare attempted to be made in October, 1898. It is perfectly apparent that it could not have been in the minds of the parties contracting that the reservation of the right to regulate fare in the ordinance of 1879 could be operative after the express contract in relation to fare for the entire period of the grant, as made by the ordinance of 1886.

Again, the council having, in the ordinance of 1879, reserved the right to thereafter increase or diminish the rate of fare, did, in 1886,

in the making of this contract, fix the rate of fare at five cents, to extend from the passage of the ordinance up to the expiration of the grant made in 1879; so that it may perhaps be fairly said that the ordinance of 1886 was an exercise of the reserved right of regulation contained in the ordinance of 1879. But, whether it be treated as an exercise of such right, or as the entering into of a new contract, it is plain that, after the passage and acceptance of the ordinance of 1886, there no longer remains in the city council a right to increase or diminish the rate of fare to be charged upon that line until the expiration of the grant of 1886, to wit, the year 1904. Again, in 1888, an ordinance was passed granting the East Cleveland Railroad Company the right to construct and operate its road by electricity on Euclid and Cedar avenues. In this ordinance, it is recited:

"Whereas, there is a desire on the part of the people residing in the easterly portion of the city for a more convenient and rapid mode of transit, and that an electric system be substituted for animal power for the movement of cars: therefore, the East Cleveland Railroad Company is hereby granted permission," etc.

And in section 6 of the ordinance it is provided:

"Nothing herein shall be so construed as to authorize any increase of present fare for transportation over any portion of said company's line."

It appears in evidence that the company, having accepted this ordinance, at the expense of a very large amount of money, changed its construction as contemplated, and continued, after electricity was put in, to operate without any increase of fare. It is apparent that the "present fare" referred to in the ordinance of 1888 must have had reference to the fare which the company was then charging, and as fixed in the ordinance of 1886, namely, a cash fare of five cents. In consideration of the company's so equipping its line with electricity, and so agreeing to carry at "present fare," this same ordinance granted an extension of franchise for 25 years from July 13, 1888. By virtue of this ordinance, read in connection with the ordinance of 1886, the company acquired thereby the right to operate its line for a period of 25 years from that date, at the then present rate of fare referred to in the ordinance, namely, a cash fare of five cents. In 1889, an ordinance was passed, granting the East Cleveland Railroad Company the right to construct what is known as the "Wade Park Avenue Line," and, by section 4 of this ordinance, it is provided:

"Permission is granted upon the express condition that no increase of fare shall be charged by said company on any part of its main line or said extension, and but one fare, not exceeding five cents, or one of said company's tickets, shall entitle a passenger to transportation over the main line and extension from the intersection of Lake and Water streets to the easterly limits of the city, or from the easterly limits of the city to the intersection of Lake and Water streets."

This provision as to fare covers a portion of the Euclid Avenue Line, with respect to which it is claimed by the city that a reserved right exists to regulate fares under the ordinance of 1879; but the council, as in the ordinance of 1886, specifies the fare to be five cents, and, upon this Wade Park Avenue Line, from Superior and Water streets to Case avenue, there could be no longer any right to reduce

fare, as the extension is made upon the condition that the company will thereafter carry over the entire Wade Park Avenue Line at a cash fare of five cents or a railroad company's ticket.

Prior to June 1, 1893, the Broadway & Newburgh Street Railroad Company, the Brooklyn Street Railroad Company and the South Side Street-Railroad Company were corporations operating independent lines of railway in the city of Cleveland, each of them operating under contracts or grants from the city, and charging, as authorized in the ordinances permitting their operation, a cash fare of five cents. As to no one of these companies was there any right remaining in the city council to increase or diminish the rate of fare during the period of the several grants. These companies, about June 1, 1893, consolidated with the East Cleveland Railroad Company, forming the complainant the Cleveland Electric Railway Company. The city council consented to the terms of such consolidation under the following terms and conditions:

"Only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by said constituent companies, and any line of any other of the said constituent companies within the limits of the city of Cleveland; and passengers on any of such lines paying one fare shall be entitled, without additional or extra charge, to be transferred to any other of said lines, and have a continuous ride thereon, for said single fare."

But it is evident that the one fare here mentioned must have reference to the present fare then charged by the constituent companies, namely, a fare of five cents. It thus appears that, by virtue of the ordinance of 1886 the East Cleveland Railroad Company was authorized to operate its line and cars to the end of its term at a cash fare of five cents; that each of the constituent companies which formed the present complainant the Cleveland Electric Railway Company was also authorized, for a period of time which has not yet expired, to charge a cash fare of five cents; that these different lines have been merged by consolidation; and that, under the consolidation, the system is being operated as an entirety. The portion of the Euclid Avenue Line to which the reservation of the ordinance of 1879 had reference, as an independent line, has long since ceased to be such, and the relations of the consolidated company (the complainant) and the city under these various grants are so fixed as that to admit the reserved power of regulation in the ordinance of 1879 to be now operative would be to impair the obligations of the several subsequent contracts in which the rate of fare is definitely fixed without reservation. Also, as pointed out in the discussion of the question as to the other complainant, as a matter of practical railroad operation, it is difficult to see how the conferred rights of the parties could be worked out if effect is given to the alleged reserved power in the ordinance of 1879.

It is contended by counsel for the city that certain of the provisions as to rates of fare, claimed to constitute a new contract since the passage of the ordinance of 1879, are invalid, because in violation of section 2502 of the Revised Statutes, providing that, after a grant or renewal of a grant is made, the municipal corporation shall not, during the term of such grant or renewal, release the gran-

tee from any obligation or liability imposed by the terms of such grant or renewal. It is questionable whether the right reserved to the city council to thereafter increase or diminish fare can fairly be said to be either an obligation or a liability of the railroad company within the meaning of this prohibition of the statutes; but, expressing no opinion on that subject, it is not true that the provisions of the section prohibit the city, after making an agreement or grant or renewal of a grant containing sundry provisions as to the rates of fare, from thereafter, upon sufficient consideration, modifying such contract. This has been expressly held in the case of Clement v. City of Cincinnati, 16 Wkly. Law Bul. 355, and affirmed by the supreme court of the state in 19 Wkly. Law Bul. 74. The court there held:

"The modification of a contract between the city and the owner of a street-railroad route, made in good faith for the better accommodation of the public, is not void by virtue of section 2502 of the Revised Statutes, and the release of the grantee of such route from an obligation, although in consideration of more rapid transit, involving greater expense and higher rate of fare, is permitted."

See, also, Woodson v. Murdock, 22 Wall. 351; City of Cincinnati v. Cincinnati St. Ry. Co., 31 Wkly. Law Bul. 308; Id., 2 Ohio N. P. 298; also State v. East Cleveland R. Co., 6 Ohio Cir. Ct. R. 318, affirmed by supreme court in 27 Wkly. Law Bul. 64. For nearly 20 years, as the result of municipal legislation, sometimes hostile, sometimes friendly, the rights and privileges of the public and the different street-railroad companies of this city have been gradually molded into a well-defined code of street-railway laws, every step of which has been stubbornly contended for by the respective parties to these suits. Conceding to each party all the rights and privileges won by this agitation, the court is convinced, after a thorough and painstaking investigation of all the ordinances, grants, and evidence, that the complainants are entitled to the relief for which they pray in their bills of complaint, granting them a temporary injunction. The court thinks it must be clear to every fair-minded person, from the findings of fact filed with this opinion, that to permit the ordinances of October, 1898, to be put into operation by the municipal authorities would clearly impair the present contract rights of the complainants, for which no adequate remedy exists at law.

The second contention of the complainants is that the ordinances in question prescribe a rate of fare so unreasonably low as to deprive the complainants of their property without due process of law. In support of this contention, a large volume of testimony in the shape of affidavits has been filed by the defendant and the complainants. On the part of the complainants these affidavits are offered to establish their contention that, taking into consideration the value of their railway systems, cost of construction, maintenance, and operation, they could not carry passengers at the reduced rate proposed without loss, and that this loss would be so great as that, in time, it would deprive them of their property without due process of law. The court has examined these affidavits sufficiently to see that it would involve a laborious and expert accounting to decide this contention; and, having reached a conclusion on the first contention of the complainants, that the ordinances are invalid for the