

Opinion No. 343**Cities and Towns—Street Railways—
Grades of Streets—Streets, Changing
Grades of.**

HELD: If and when the City of Butte avails itself of the right given by law and the franchise ordinance enacted by it, and changes the grades of Park and Arizona Streets and Utah Avenue or any of them, then the Butte Electric Railway Company becomes obligated to raise or lower its tracks thereon at its own expense so as to make the grades thereof conform to the newly established grades of the streets.

September 20, 1933

We have your communication of recent date in the language following:

"Herewith is a copy of a letter from the District Engineer of the Bureau of Public Roads, requesting your opinion as to whether or not it is the duty of the Street Railway Company to raise their tracks in Butte to conform to the new construction grade which is being established and to pave between the tracks and outside the rails to the ends of the ties.

"Under the provisions of the National Industrial Recovery Act, certain types of projects may be undertaken within the limits of incorporated cities and towns, using 100% Government funds. Such improvements have been recommended by the Highway Commission to the Bureau of Public Roads on Park Street in Butte and also on Arizona Street-Utah Avenue. Both streets have Street Railway tracks on them. We have been advised that the Street Railway Company is financially unable to raise the tracks and pave between them and that the State law does not require such work to be done by the Street Railway Company."

Chapter 56, Part IV, Political Code of 1921, relates to the creation of special improvement districts in cities and towns. Section 5238 thereof, so far as

material here, provided that "whenever any portion of the surface of a street is occupied or used by any person, firm, or corporation under a franchise for railway or street railway purposes, the costs and expense of making such improvements between the rails and for one foot on each side thereof shall be paid by the person, firm, or corporation owning such railway; and where double tracks of railway are laid along a street or streets, such person, firm, or corporation owning such railway shall pay the cost of making of such improvement or improvements between such tracks and between all switches, turn-outs, and spurs."

At the legislative session of 1925, the paragraph just quoted was amended so as to read as follows:

"Whenever any portion of the surface of a paved street is occupied or used for railway or street railway purposes, it shall be and continue to be the duty of the owner or operator of such railway or street railway to fully repair any injury or damage to such pavement caused by such railway or street railway either in the operation of its cars or in the laying or repair of its tracks, and in case of a failure or refusal of such owner or operator so to repair such pavement within a reasonable time after notice by the city council, the city council is authorized and empowered to cause such repairs to be made and to assess the cost thereof to such owner or operator and to enforce collection thereof as in the case of taxes." (Section 1, Chapter 163).

It would appear, therefore, that it was the intention of the legislature to relieve a street railway company thereafter of the burden imposed by Section 5238 in its original form and to compel it to do the things required by Section 5238 as amended. (*Worcester v. Worcester Consol. St. R. Co.*, 196 U. S. 539, 49 Law Ed. 591; 60 C. J. 280; 4 *McQuillin's Municipal Corporations*, Section 1774).

Section 5039, Revised Codes 1921, as amended, gives a city or town council power "to license and authorize the construction and operation of street railroads, and require them to conform to the grade of the street as the same

are or may be established" (Subd. 13), and "to grant the right of way through the streets, avenues, and other property of a city or town for the purpose of street or other railroads. (Subd. 66).

The ordinance of the City of Butte which granted the Butte Electric Railway Company, or its predecessor in interest, a franchise for the construction and operation of a street railroad on Park and Arizona Streets and Utah Avenue required it to make the grades of its tracks conform to the then surface grades of said streets and avenue, or to any surface grades or established grades thereof, or to any grades thereof that may be hereafter established, at the option and in accordance with the direction of the city council, or of its authorized committee or representative.

Section 5039, as amended, also empowers a city or town council "to establish the grade of any street, alley, or avenue, and when the grade has been established, it must not be changed except by a vote of the majority of the council, and not then until the damage to property owners, caused by the change of grade, has been assessed and determined by three disinterested appraisers who must be appointed by the mayor and confirmed by the council, who must make an appraisal, taking into consideration the benefits, if any, to the property, and file their report with the clerk within ten days after receiving notice of their appointment, and the amount of damages so assessed must be tendered to the owner or his agent before any change of grade is made." (Subd. 68).

If and when the City of Butte avails itself of the right given it by law and the franchise ordinance already referred to and changes the grades of Park and Arizona Streets and Utah Avenue, or any of them, then the Butte Electric Railway Company becomes obligated to raise or lower its tracks thereon at its own expense so as to make the grades thereof conform to the newly established grades.

In the absence of a statutory provision of charging the cost of conforming tracks to the grade of the street, the owner of the tracks is liable for such cost, (*City of Little Rock vs. Cit-*

izens St. Ry. Co., 19 S. W. 17; Hammond, W. & E. C. Ry. Co. v. State Highway Commission, 152 N. E. 806; City of Syracuse v. New York State Rys., 189 N. Y. S. 763; City of Burlington v. Burlington Traction Co., 124 Atl. 857; City of Reading v. United Traction Co., 52 Atl. 106; 60 C. J. 278).