New Jersey Court of Errors & Appeals

MORRIS & COMPANY, Prosecutor-Appellant vs. BOARD OF PUBLIC UTILITY COMMISSIONERS, CITY OF PATERSON and BOARD OF FINANCE, Defendants-Respondents.	On Appeal.
JACOB MEYER and KOMMER DE VOGEL, partners, trading and doing business as Meyer & De Vogel, Prosecutors-Appellants, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS, CITY OF PATERSON and BOARD OF FINANCE, Defendants-Respondents.	On Appeal.

BRIEF FOR MORRIS & COMPANY, AND JACOB MEYER AND KOMMER DE VOGEL, PARTNERS TRADING, ETC., AS MEYER & DE VOGEL.

Statement of the Case.

The City of Paterson, through its Board of Finance, filed a petition to eliminate certain grade

crossings of the Erie Railroad in the City of Paterson. Subsequently the City filed an amended petition (1635) and later filed an amendment to this petition (1663). Answers were put in by the defendants Erie Railroad Company, The Patersoon & Hudson River Railroad Company, The Paterson & Ramapo Railroad Company and several other public utility companies and a number of siding owners. These siding owners were not brought into the case until several hearings were had. Considerable testimony was taken, maps and drawings presented, and finally a report of the Board was filed November 4th, 1914. A petition of the Erie Railroad for further hearing was filed. The prayer of the petition was denied and on April 20th, 1915, the Board made its order in the cause. To review this order certain writs of certiorari were allowed. The Supreme Court affirmed the order of the Board of Public Utility Commissioners. The appellants are Erie Railroad Company, the Public Service Railway Company, The Passaic Water Company, D. Fullerton & Company, Morris & Company and Meyer & De Vogel. I represent the last two appellants.

The points affecting these last two appellants can be presented in one brief. The points of difference will be noted.

Grounds of Appeal.

The following reasons for reversal are stated as grounds of appeal, 2339, 2340.

4. The order under review and the statute upon which the same is based, are invalid and uncon-

stitutional, both under the Constitution of the United States and of the State of New Jersey, in that said order and statute take the private property of the prosecutors for public use without just or any compensation.

2. Said order and statute deny to the prosecutors the equal protection of the law and deprive them of their property without due process of law and abridge their privileges and immunities as citizens of the United States, contrary to and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Said order and statute take the property of the prosecutors without affording them any opportunity to protect their property and thereby deprive them of their right and guaranty of enjoying, defending, possessing and protecting their property given and guaranteed to them by Article 1, Section 1, of the Constitution of the State of New Jersey.

4. Said order and statute are contrary to and in violation of Article 1, Section 10, Paragraph 1, of the Constitution of the United States, in that they impair the obligation of contracts.

5—Said order and statute, in so far as they require changes in or the destruction or the removal of the property or constructions of the prosecutors, consisting of the buildings, equipment, sidings and other facilities now owned or used by the prosecutors, to be made at the expense of the prosecutors, and in so far as they require the prosecutors, at their own expense, to move or change the grade or location of their property or constructions in conformity with said order of

said Board, are contrary to and in violation of the Constitution of the State of New Jersey and of the United States, in the respects hereinbefore set forth.

6. Said order is invalid and beyond the jurisdiction of said Board in so far as it purports to command the prosecutors to proceed with due diligence to comply with all the requirements thereof and the duties imposed upon them thereby, and by the said act under which said order is made and the laws of the State of New Jersey, and that to that end it exercise in good faith all the powers conferred upon it by the laws of the State of New Jersey.

7. Said order and the statute upon which the same is based, in so far as they require changes in or the destruction or the removal of the property or constructions of the prosecutor (or changes in the grade or location of said property or constructions), are unconstitutional and invalid for the reason that the prosecutor is not included within the description of the term, "public utility," as defined in the act entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911 (being Chapter 195, Laws of 1911), nor is the prosecutor otherwise subject to the jurisdiction of said Board.

8. Said order is invalid and beyond the jurisdiction of said Board in so far as it imposes upon the prosecutor the duty or obligation of reconstructing or relocating its buildings, equipment,

sidings and other equipment for the following reasons:

(a) Said reconstructions and relocations are not included within the prayer of the petition upon which said order is based.

(b) No appropriate action has been taken by or on behalf of municipal or other authorities necessary or required for said changes, reconstructions and relocations, or any or either of them.

(c) Said order was not made after hearing, upon notice, as required by law.

(d) Said reconstructions and relocations are not, nor is any or either of them included within the powers conferred by law upon said Board.

(e) Said reconstructions and relocations are no part of the duties or obligations imposed by law upon the prosecutor.

(f) The prosecutor has no legal power or authority to make said reconstructions or relocations, or any or either of them.

(g) It does not appear that said reconstructions and relocations, or any or either of them, are reasonably necessary or required or appropriate for the elimination of the highway crossings named in said order, or any or either of them.

(h) Said order, and the statute upon which the same is based, require or permit the property of the prosecutor to be taken for the private use of Erie Railroad Company and The President and Board of Directors of the Paterson and Hudson

River Railroad Company and Public Service Railway Company, or one or more of them.

(i) Said reconstructions and relocations, if made by the prosecutor as required by said order, would compel the prosecutor to accept or receive unjust discriminations, preferences or advantages, in violation of the provisions of the Interstate Commerce Act.

THE ARGUMENT.

Morris & Company.

This company has its principal place of business in Chicago. Its place of business in Paterson is adjoining the right of way of the Erie Railroad and on the north side of Market street. This situation is for its purpose the very best in the city. The company has occupied the premises at this point for twenty-seven years (364). The supplies for its business are brought in refrigerator cars. They receive eight to ten cars a week The siding upon which these cars are received is near the building, which is an old brick structure. The land is occupied by virtue of a lease, which is set out on page 2026. While this lease can be terminated upon sixty days' notice, it is in effect a perpetual lease. The parties thereto are satisfied. It is mutually beneficial to them. A third party seeking advantages from this site cannot be heard as to the right of either party to the lease to terminate it. The whole interior of the building

has been reconstructed, at a cost of $8,000, so as to make it useful for the business of this appellant. The interest of this appellant in The Paterson Beef Company building upon the same premises represents $25,000. The volume of appellant's business at this place is One and a half million dollars per year (565).

Mr. Beekman, the manager, says (367) that "it is next to impossible for a beef house to run a business without tracking facilities. There are some places that cart it. You take it out in the air and keep it a few minutes and it takes the bloom off the meat. It is impossible for those people to compete with those having facilities for unloading it."

But as to this particular appellant the plan of the City adopted by the Board does not provide as in other cases for a new siding. It takes the site of Morris & Company for a new station and gives them another site elsewhere, between Green and Slater Streets, as will be seen by reference to the plan.

The distance from where they are to where they were ordered to go is about 1,800 feet. See sheet 3 of plan.

Mr. Beekman says (564):

> "According to the blue-print, that wipes us off the map entirely."
>
> "They put us down in the woods."
>
> "Q. How does this affect your business (565)? A. It is out of the world up here (indicating).
>
> "Q. What do you mean by that? A. No

trade coming up there . We might just as well back out entirely."

The cost of this new building will be, according to the estimate of Mr. Brameld (2247), $40,000, exclusive of land. This sum does not include loss of business.

The Board of Public Utility Commissioners has no power in this proceeding to order changes in the buildings of Morris & Co.

The Board of Public Utility Commissioners by its order (1787) approved the plan of the City by which the building occupied at the present time by Morris & Company is to be totally destroyed and a new building, as has been stated, erected 1,800 feet away. The order recites, (1791), after naming the public utility companies, that "all other parties to this proceeding and each and every of them proceed with due diligence to the execution of this order and comply with all of the requirements thereof and the duties imposed upon them thereby, and by the said act under which this order is made, and the laws of this state, and that to that end, they and each of them exercise in good faith all of the powers conferred upon them and each or any of them by the laws of this state."

Another section puts the meaning of the Board in this regard beyond all controversy. The order directs:

"Any telegraph, telephone, gas, electric

> lighting, water, oil, pipe line or other company or corporation, co-partnership or individual whose property or construction it may be necessary to change or remove to carry said plan and this order into effect, shall change or remove the same according to said plan'' (1790).

There can be no doubt as to what this language was intended to mean. The Board has drawn no distinction between a public utility and individuals and companies which are not public utilities.

The term ''public utility'' is defined by statute as follows:

> ''The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever that may now or hereafter may own, operate, manage or control within the state of New Jersey any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant, or equipment for public use, under privileges granted or hereafter to be granted by the state of New Jersey or by any political subdivision thereof.''

In the above act it is not every individual copartnership, association, corporation or joint stock company that is affected by the act, but only those which own, operate, manage or control the utilities therein named.

> "Where the order of said board shall require changes in or removal of the property or construction of any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, they shall at their own expense move or change the grade or location of their property or construction in conformity with the order of said board. They shall be deemed parties in interest and shall be given notice of hearing and an opportunity to be heard."

It is obvious that the intention here is not to enlarge the description beyond the 15th Section of the original act. The Board of Public Utility Commissioners in directing this order against the appellants aforesaid deemed them parties in interest, but is in error in assuming that such power conferred by the Act of 1913—which is a supplement to the Act of 1911—can be exercised by them independently of the fact whether such parties in interest are owners of a public utility. They followed the language literally but over-looked the significance of the term. Indeed, to hold that this Fourth Section of the Fielder Act means any individual or any company unassociated with a public utility is to make the act unconstitutional. By what constitutional power can the Board direct an individual who does not own, operate, manage or control a public utility "at his own expense to move or change the grade or location of his property or construction"? The Fielder Act, as has been said, is a supplement to the Act of 1911. The title of the Act of 1911 is: "An Act concerning Public Utilities; to create a board of public utility

commissioners and to prescribe its duties and powers." To give such Board authority to take the property of citizens of the State in no way engaged in business as a public utility would be in contravention of the constitutional requirements inhibiting the taking of property for public use without just compensation and requiring the object of the act to be expressed in its title.

It is clear that neither Meyer & De Vogel nor Morris & Company fall within this definition. Every party to the proceeding, whether a public utility or not, is alike in this order made subject to the direction of the Board. So far, therefore, as this order in this respect affects Meyer & De Vogel and Morris & Company it is invalid.

The City in its petition did not ask for the destruction of these buildings, nor their re-establishment elsewhere. There was, consequently, no hearing upon this subject. The Board, too, was without authority under the Fielder Act, under which the petition was filed, to make such order.

The Plans and Profile are Part of the Order.

The plan itself is the important feature of the whole scheme. It is the guide to the construction of the work. Without the plan and profile, the order itself is mere waste paper.

The petition of the city (1660) prays to "alter such crossings according to plans to be approved by your board". In the report (1757) of the board it is said "plans were submitted by the City of Paterson showing how the grades of the streets and railroad can be altered". Continued refer-

ence is made to the plans and profile in this report. The plans are numbered 1 and 2 and subdivided into sections (1758). The Erie Railroad offered its plans for consideration. The plan approved was plan No. 2 of the City of Paterson with Section D modified according to the Erie plan.

In its order, the board directed the Railroad Company "to alter such crossings, and each of them, according to the plan therefor annexed to and made a part hereof" (1789) * * * and profile of same also annexed to and made part here of". The railway and highways are to be reconstructed "by performing all other work required according to and as shown on the said plan and profile" (1790).

The order further recites that "any telegraph telephone, gas, electric, lighting, water, oil, pipe line or other company, or corporation, co-partnership or individual, whose property or construction it may be necessary to change or remove to carry said plan and this order into effect shall change or remove the same according to said plan."

Thus, the plans and profile are the very center of the whole work. Without them not a single step can be taken from the beginning to the end. They contain all the information. No specifications exist and the plan, the whole plan is the only guide. If they cannot be enlarged against these appellants neither can they be minimized or restricted.

The opinion of the Supreme Court in the cases of these appellants is found page 2311 of the stat of the case. It was decided that all the points

raised upon these questions were disposed of in the opinion of the court in the case of the Erie Railroad Company vs. Board of Public Utility Commissioners, 98 Atl. 13, which is also found on page 2256 of the state of the case.

The language of the Supreme Court in respect to the point under discussion is as follows:

> "Neither does the order require the owners of such private sidings to reconstruct them. The plan which accompanies the order simply *suggests* to such owners a method by which their property may be conformed to the new conditions so as to admit of a continuance of the siding facilities theretofore enjoyed. The order only requires others than the railroad company to make such changes in and removals of their property and construction as are necessary to carry the order and plan into effect. In this it accords with Section 4 of the statute. Since the mandate of the order to the railroad company is limited to requiring the changing of highways and the reconstruction of the railroad, the changes in, or removal of, such private sidings cannot be said to be necessary to carry the order to the railroad into effect. Of course, the plan does indicate a way in which any particular existing siding facilities may be continued after the ordered changes in the highways and the ordered reconstruction of the railroad are made. It is appropriate that it should be so, for in the adoption of a plan the effect thereof in

the industrial facilities should be taken into account and this factor should also be taken into consideration in determining whether the plan adopted is reasonable or unreasonable.

"As we have pointed out, in so far as the order directs the prosecutor to make changes in its own side tracks and the like, it was within the power conferred by the statute, if such changes were fairly incidental to the changes of grade or the main line tracks. We think that such ordered changes were of that character."

With reference to the construction of the station building at Market Street upon the present site of the building of Morris & Company, the court continues, as follows:

"Point IX is, that the order is invalid in so far as it requires changes in the construction and location of the station building at Market Street and the station building at River Street.

"We think this is not well founded in fact. The order (leaving out of account the plans and profile) does not require any change in the construction or location of these station buildings. It does not deal with them.

"The plan and profile do display reconstructed stations at new nearby locations. If these changes are fairly incidental to the changing of the highways or the reconstruction of the railroad, they are deemed to be a part of the order and must be made.

That some reconstruction of both stations is rendered necessary by the reconstruction of the railroad and will have to be made some time, either according to the judgment of the railroad managers or as may be lawfully directed by the public utility board is not questioned.

"There was no hearing and no evidence upon the question whether the existing stations at these points were safe, adequate and proper, nor was any notice given to the prosecutor that such question was to be passed upon by the board in this proceeding, other than such as might be inferred from the 'suggestion' of the city engineer that such changes might be desirable if the tracks were elevated."

The opinion further continues:

"Point X is that the order is invalid, in so far as it requires the prosecutor to construct structures upon its lands for the use of Fullers Express Company and Morris & Co. in substitution for the structures now occupied by them as lessees, and which will be rendered useless by the elimination work.

"It is true that the plan adopted by the board has indicated upon it suggested possible locations upon the lands of the rail road company of substituted structures for these private companies; but it does not require the railroad company to provide such location or to erect such structures, since neither existing structures nor the suggested structures constitute any part of the railroad."

The Supreme Court has, therefore, adopted the view that there is no direction in this order to any of these parties to destroy the siding or the present building of this appellant or reconstruct its building elsewhere.

In other words, it is said that the plans and profile are an integral part of the order only when such plans and profile relate to changes that are fairly incidental to the change of the highway or reconstruction of the railroad, but not otherwise, notwithstanding the fact that the order approves the plan without any limitation whatever. That no such view was entertained by the Board of Public Utility Commissioners is quite clear. No such view was entertained by the city. It was the city which prepared the plan adopted. It was the city which offered evidence upon the question of establishing a station on the site of the building occupied by this appellant, and the reconstruction of a new building for its business 1,800 feet away. The city counsel sought to show that this change of site of Morris & Company would not be quite so destructive to their business as the company stated (566). The city satisfied the board that the present site was needed for a station. Other siding owners were heard as to the changes affecting them. This appellant was not heard, however, as to the adjustment of its siding with the new elevation, because its entire site was taken for the station. Nor was any evidence offered by the city about such siding. The objection that the petition in the cause was filed under the Fielder Act and (1) that such act did not confer jurisdiction on the board to make such an order; (2) that the petition did not pray for such relief

and (3) that no proper hearing was had thereon does not seem to have impressed the board. If it had, surely, it is reasonable to assume that the board would have limited by appropriate language the scope of this order. No intimation was made by the city in its papers, proofs and plans, or by the board in its order, that they entertained the view adopted by the court below.

The court says that the board could not lawfully make such an order in this proceeding. This is, of course, true. The point is, however, that they broadly and unreservedly approved the plans in question without the faintest qualification in any degree limiting the language of such approval. As a foundation for the argument that the plan is part of the order, it is well to ascertain of what power the board considered itself in this regard to be possessed. We have strong evidence in this respect.

In Potter vs. Board of Public Utility Commissioners, 98 Atl. Rep. 30 (the Cranford grade crossing case) which was argued before the Supreme Court immediately following the Paterson cases, the board had ordered that

> "the Potter Building be taken for the triple purpose of making an adequate approach to the station, a new highway from the west and to open the end of Eastman Street in a proper manner * * *. The taking * * * of the Potter property on the north side of the tracks bounded by Eastman Street, North Avenue and Union Avenue is necessary for the full, proper and adequate development of the problem of providing a proper accommodation for

> traffic to and from the north and south sides of the railroad * * *. In its judgment, however, a proper and adequate development and treatment of the problem before it makes necessary the adoption of the plan as a whole and the taking of the property requisite to its execution."

When the order in the Cranford case was challenged before the court, it was sought to be defended by counsel for the board on the ground, that under the Act of 1914 (P. L. 1914, p. 490), which confers upon the railroad company power to take by condemnation any lands and property required for the purpose of complying with any order made by the board of public utility commissioners, upon ascertainment and payment or tender of compensation, as provided by law or under the Act of 1911 (P. L. 1911, p. 379, Section B), which confers upon the board of public utility commissioners power after hearing upon notice to require every public utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so. To this the court said,

> "It requires no argument to show that the order of the board cannot be sustained under both of the statutes. They cannot be made to apply to this proceeding by any accepted canons of statutory interpretation."

The board thus conceived that it had power to make such an order as was made in the Paterson case. It seems plain then that with such

knowledge and with its direct and positive adoption of the whole plan as a guide to all interested parties for the accomplishment of the work that such plan became a fundamental part of the order.

The statute says, that the board shall order the work done according to the plans, P. L. 1913, p. 91. The opinion says "leaving out of account the map and profile" the order means, etc. But what authority is there for leaving out of consideration the map and profile? The question is not what the board should have done, but what the board actually did.

A most significant circumstance is that the cost of constructing the station to be erected on the site now occupied by this appellant, as well as the station at River street is included by the board in its estimate of the cost of the whole work, p. 919, 1765, 1770, 1788.

Is it then quite within the limits of a reasonable construction of this order to say that its parts can be separated and that so much thereof as approves the plan within the right of way of the railroad is lawful and that so much thereof as approves the plan beyond the right of way has no warrant in law? As has been said, no such view was entertained by the board and it is respectfully urged that this order cannot be thus divided.

THE PLANS AND PROFILE ARE PART OF THE ORDER OF THE BOARD. SUCH ORDER MUST BE APPROVED IN FULL OR SET ASIDE.

The order in question cannot be approved in part and set aside in part. It must in this pro-

ceeding stand or fall as a whole. The plans as approved by the board annexed to and made part of the order cannot for the reasons stated be approved in full. In this proceeding the jurisdiction is appellate, not original. P. L. 1911, p. 374-388, Sec. 38. 84 N. J. L. 463.

Meyer & De Vogel.

Meyer & De Vogel are grain merchants and have their place of business abutting on the property of the Erie Railroad, 65 feet on Franklin street, 100 feet on Summer street and 100 feet on the railroad at the junction of Franklin and Summer streets. The land was purchased for this particular business, which they have carried on there for twenty-four years. They have adapted their building to their business so as to receive every reasonable facility from the railroad for their work. They unload their cars directly into the building, which is of brick and cost $13,000 (386). In addition, $2,700 worth of machinery was installed. The first floor of the building now is on a level with the floor of a car standing on the siding. The grain is taken to the top of the building by machinery and then dropped down upon the scales. From the scales it falls into the granary, which is on the second floor. It is carried to each bin as it may be needed. The elevation of the tracks at this point is to be fifteen feet. It will require $3,000 to $4,000 (387) to adapt the building to the new elevation. The whole interior of the building will have to be altered. After the plan of the city was submitted Mr. Meyer testi-

fied again, on page 571, and stated that if the tracks were raised fifteen feet, it would consequently make the opening in the middle of the first and second stories. This will be a serious damage to the building and to their business. The siding of Meyer & De Vogel, as testified to by Mr. Brameld (1976), leaves the siding of A .H. Smith about thirty feet west of Keen street, and thence crossing Keen street parallels the right of way of the railroad company to Franklin street. It is on the property of the railroad company. A letter dated February 25th, Exhibit Erie 12 (2031), shows that the appellants, Meyer & De Vogel, paid $430.19 for the installation of this siding. There was an agreement signed in reference to the matter in the usual form. Neither Mr. Bosman, the secretary of the railroad company (1945), nor Mr. Meyer has been able to find the written agreement. The right of these appellants therein was the same as that of other property owners having an agreement for the construction of siding. The terms and conditions of such agreements are shown by the other siding agreements presented in evidence. This contract between the railroad company and the appellants, Meyer & De Vogel, cannot be impaired without great loss to them. The fact that it may be terminated by notice from the other contracting party does not make it any the less valuable. These agreements are in effect perpetual contracts. As the questions of law relating to the side-tracks are common to both appellants, these questions will be discussed later in this brief.

The Closing of Franklin Street.

Another serious blow which they are called upon to bear is the attempt to close Franklin street. The land of these appellants is bounded by three sides as stated *supra;* one side is upon the railroad, one side abuts on Summer street, and the other on Franklin street. Their main building, several stories in height, is at the junction of Franklin street and Summer street and extends along Franklin street to the railroad. Franklin street is used for the entrances to the building, of which there are two, one at either end. It is also used for loading and unloading their trucks. Mr. Meyer says, "We do most of our business on Franklin street" (573). But an important fact is that it is used exclusively as a means of reaching the populous centers of the city. With this street closed, it will be necessary for their trucks and teams to haul their loads to Lafayette street and cross under the railroad at this point and return on the other side of the railroad to a point opopsite the closed street.

Photographs S. O. 4 and 5 show this plant (572).

Mr. Meyer says at page 573 that, "We have a traveling trade that would be cut off altogether." Their right to do business is thus impaired.

> *Ryerson* v. *Morris Canal and Banking Co.*, 69 *N. J. L.*, 505.

Such a result I need hardly add is a very heavy burden placed upon the shoulders of these appellants. When they were young men they purchased this site for its advantages for their trade, and

they have prospered in consequence of their foresight. To be deprived now of its benefits by this order under review is to destroy the work of a lifetime.

The order directing the construction of a new crossing at Montgomery Street as a substitute for the present crossing at Franklin Street, 500 feet distant, is an unwarranted exercise of power and invalid.

The order directs that an undergrade crossing at Montgomery street be constructed in the place of the present crossing at Franklin street. The words are: "The plan of the city provides * * * for substituting for the present crossing at Franklin street a new undergrade crossing at Montgomery street" (1757). This was ordered to be done (1765). The precise language of the order is "by substituting for the existing crossings at Cedar street a crossing under the railroad at Taylor street and for the existing crossing at Franklin street a crossing under the railroad at Montgomery street" (1790).

The authority for this extraordinary exercise of power is alleged to be found in Section 1 of the act, and which section the board set forth in their report of November 4, 1914 (1750).

This section is as follows:

> "Whenever a public highway and a railroad cross each other at the same level, and it shall appear to the board that such crossing is dangerous to public safety, or that the public travel is impeded thereby,

> the Board of Public Utility Commissioners may order the company operating such railroad, within such time as said board may fix, to alter such crossing according to plans to be approved by said board, by substituting therefor a crossing not at the grade of such public highway either by carrying such public highway under or over such railroad, or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in the place of the one ordered vacated."
>
> P. L. 1913, p. 91.

The authority given by this section to the board is to alter such crossing by substituting therefor a crossing not at the grade of *such* public highway either by carrying *such* public highway under or over such railroad or by reconstructing such railroad or changing the lines, width, direction or location of *such* highway, and the opening of a new highway in the place of the one ordered vacated.

It is obvious that what the legislature had in mind was to change the grade only of *such* highway by carrying it under or over the railroad. Power, indeed, is given to vacate and open a new highway *in the place of* the one ordered vacated. The board in the order under review has, however, directed the opening of Montgomery street as a substitute for Franklin street, which new highway is about 500 feet south of the vacated street. Even if the order directed that Montgomery street crossing be opened *in the place of*

Franklin street, the board was without power to make it, as there is another highway—Lafayette street—between these two points open for public travel for many years and in daily use. Yet by this order the Montgomery street crossing is to be substituted for the present crossing at Franklin street! There is, too, a highway, Keen street, open for travel north of Franklin street at the same distance as Lafayette street is south. There is also another crossing at Lawrence street at the same distance north of Franklin street as Montgomery street, the new substituted crossing, is south of Franklin street. Why not, instead of going 500 feet and passing an open street, go 5,000 feet and pass a dozen open streets? Where is the limit? The statute does not confer such extraordinary power.

But, again, there is an entire absence of reason for this vacation. The city employed Henry Ryon, a young man with the briefest experience, to aid the city engineer. This was his first experience of the kind. Yet this is how lightly the property rights of Meyer & De Vogel in Franklin street are set aside.

He is examined by the city counsel:

"Q. You intend to close Franklin street? A. Franklin street is shown closed.

"Q. Why do you show that? A. It was a little more convenient there, the way the tracks were laid out, and also due to the fact it gave a better distribution of streets to open Montgomery street and close Franklin street. Franklin street, according to the census given in the testimony before this commission, has the least num-

ber of people crossing of any street in the city."

This is the whole story. This young man, a complete stranger in the city, without any experience in similar cases, draws a map showing Franklin street closed and when asked to justify his action merely states that "it was a little more convenient" and then adds, as an afterthought, that it also gave a better distribution of streets. No *substantial* argument is advanced why Meyer & De Vogel should submit to this injury. He attempts a better distribution of streets by making a crossing at a street where there never existed any and where there has never been the slightest request therefor. The court is "to set aside such order when it clearly appears that there was no evidence before the board to support reasonably such order" (P. L. 1911, 374, Sec. 38). If this new crossing is to be opened, then Meyer & De Vogel say that it must not be done at the expense of Franklin street.

The railroad company is directed by this order to substitute Montgomery street crossing for Franklin street crossing. This is not left in doubt. It is the specific and direct command of the board.

> "The board * * * does hereby order the Erie Railroad Company to alter such crossings and each of them according to the plan," etc. * * * "by substituting for * * * the existing crossing at Franklin street a crossing under the railroad at Montgomery street," etc. * * * "and by performing all other work required according to and shown on the said plan and profile" (1789, 1790).

The City of Paterson is included (1791) among a long list of the parties to the proceeding who are in a general way to execute the order. How is this railroad company to vacate Franklin street and open Montgomery street? To state the question is to answer it. It has no such power. The board cannot invest it with such power. Will the city assume to execute it, although the railroad company is commanded to do so? The validity of an order cannot depend on such assumption. It will be conceded that the railroad company cannot open and close streets. If it be argued that the city was ordered to open and vacate these streets, then I ask does this order itself open the new crossing?

Is the regular method prescribed by law in opening and vacating highways thus abrogated? Is notice to be given to those interested? Are objectors to have an opportunity to be heard? Has the Board of Works, the municipal body having jurisdiction over these streets, lost *pro hac vice* such jurisdiction? (P. L. 1907, p. 114; P. L. 1911, p. 179; *Sherwood* v. *Paterson,* 94 *Atl.,* 311.) Is the act creating such board annulled? Is the vote of the members of the Board of Public Works to be dispensed with and the vote of the Board of Public Utility Commissioners substituted therefor?

Meyer & De Vogel paid for the siding and the construction thereof, and as a necessary adjunct of the contract they have an easement to the circulation of light and air.

So far as their right to light and air over the land of the railroad company, which abuts their property, is concerned, it is conceded that against

this property of the railroad company no easement of light and air can be acquired by a mere user for twenty years. *Hayden* v. *Dutcher*, 31 *N. J. Eq.*, 217. But it is claimed that against the railroad company an easement of light and air by virtue of their siding contract does exist. *Johnson* v. *Hahne*, 61 *N. J. Eq.*, 438. This is a property right under the constitution.

These appellants will also be deprived of light and air to that part of their building abutting on Franklin street near the railroad. The plans require the construction of a wall or embankment about fifteen feet high across Franklin street on the easterly line of the railroad. The effect of this will be to make the first story contiguous to this wall less valuable to these appellants. This building is entitled to the lateral light and air over the street. Any obstruction of the highway is a nuisance and subjects the party to indictment. The passage of a steam railroad longitudinally over a street is a nuisance if unauthorized, and if authorized, can only be done after compensation is made.

Van Horne v. *Newark-Pass. Ry. Co.*, 48 *N. J. Eq.*, 332.

The 34th Section of our Railroad Act, P. L. 1903, 645, declares that in any city except in a city of the first class the municipal authorities may permit the railroad company to lay its tracks along and upon any street, provided the company shall first acquire the rights of the owners abutting thereon by agreement for condemnation .

In the Elevated Railroad cases in New York, *Lahr* v. *Metropolitan Elevated R. Co.* 104 *N. Y.*,

268, it was held that abutters upon public streets in a city are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken and its legal appropriation to other and inconsistent uses. These prosecutors have an easement in the bed of the street for ingress and egress to and from their premises and also for the free and uninterrupted passage and circulation of light and air. The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term in the constitution.

Ibid.

The loss to these appellants, if this street is vacated, will be very great. It deprives them, as has been said, of its use for their business and as a means of ready communication with their customers and of their customers with them. To say that the vacation of the street will restore the land to the centre of the highway to the appellants discharged from its public easement, and that such restoration is adequate compensation for the vacation, is to state what we all know to be not in accordance with the fact. These appellants are deeply concerned, not only in the part of the street vacated in front of their own property, but also in every foot of it elsewhere, and especially in the part sought to be vacated.

Meyer & De Vogel will also be deprived of light and air where the line of their property adjoins the railroad property. The level of the railroad is at this point to be raised fifteen feet and will in consequence deprive these appellants of the

light and air for their building for their whole first story on the railroad side.

The appellants, Meyer & De Vogel, as abutting property owners on the part of Franklin street which the order now under review directs to be vacated are entitled to subject such order to ju dicial scrutiny.

Beecher v. *Newark*, 64 *N. J. L.*, 475; aff., 65 *N. J. L.*, 307.

Morris & Cummings Dredging Co. v. *Jersey City*, 64 *N. J. L.*, 142.

Lambert v. Paterson, 72 *N. J. L.*, 437.

Sherwood v. *Paterson*, 94 *Atl. R.*, 311.

The Railroad Was Constructed and in Operation Before the Street Was Opened.

Immediately upon the incorporation of the city of Paterson the municipal authorities vacated all existing streets and highways in the city and relaid them according to an ordinance and map adopted for such purpose. The ordinance was entitled, "An ordinance providing for the taking up and relaying the streets and highways of the city of Paterson" (1208, etc.). This language means all the streets and highways of the city. The ordinance includes about eighty streets. Franklin street is not among them because there was no such highway existing at the time.

Upon the map of the city for 1850 which has been offered in evidence this street appears only as a *proposed* street. There is no evidence of any kind that this street was laid out before the con-

struction of the railroad. It is not shown on the map of the streets prepared by J. W. Allen in 1852 in accordance with the ordinance. The return of this street, bearing date February 11th, 1870, was recorded in the Clerk's office of the County of Passaic, Book B f Road Records, page 438, with a map of the courses and distances from Summer Street to East 18th Street. A certified copy of this record was offered at page 468 and is set out at page 1300.

It cannot, therefore, be argued with any weight that while the railroad was built Franklin Street was a public street. There is no evidence that it became a public highway by any other method than by the return aforesaid.

Whatever view may be had as to the other crossings involved in this proceeding, there cannot be two views as to Franklin Street. The Paterson & Ramapo Railroad was constructed in from 1847 to 1849 (332), and it was not until more than twenty years afterwards in 1870 that the street was laid out. It should be remarked here that the railroad from the center of the City of Paterson to Jersey City was The Paterson & Hudson River R. R. and the railroad from the center of the City running west was The Paterson & Ramapo R. R. It is this latter line which at present intersects Franklin Street.

Several old citizens testified to the construction of these lines. William H. Levi, 327 *et seq.*, stated that he recalled the construction of the Paterson & Ramapo Railroad. He thought it was after his first trip to New York, which was in 1847 or 1848.

Peter Doremus remembered the constructon of

this road. He said that it was building from 1847 to 1849 and was running not later than 1850.

> "Q. At the time the Paterson & Ramapo Railroad started to run, what streets did it cross in the City of Paterson? A. It crossed Market Street, Broadway and River Street.
>
> "Q. Did it cross any other streets at that time? A. There were no other streets to cross, the only three outlets in the city" (332).

The charter of the Paterson & Ramapo Railroad Company was approved March 10, 1841 (P. L. 1840-41, p. 97).

It casts upon the company the duty "to construct and keep in repair good and sufficient bridges or passages over or under the said railroad where any public or other road shall cross the same, etc." (Sec. 11). This language is common to many railroad charters and is substantially save in one particular, which will be noted, the requirements of our railroad act today. It has been frequently construed by our courts.

> *Morris Canal & Banking Company v. State*, 24 *N. J. L.* (4 *Zab.*), 62.
>
> *Morris & Essex Railroad Co. v. Orange*, 63 *N. J. L.* (34 *Vr.*) 252.
>
> *Marino v. Central Railway Co.*, 69 *N. J. L.* (40 *Vr.*), 628.
>
> *West Jersey & Seashore R. R. Co. v. Woodbury*, 80 *N. J. Eq.* (10 *Buch.*), 412.
>
> *Delaware, etc., R. Co. v. East Orange*, 41 *N. J. L.*, 127.

The Erie Railroad Company is the successor in title of the Paterson & Ramapo Railroad Company. This latter railroad was leased to Union Railroad Company and by it to N. Y. & Erie Railroad Company (1025), which leases were "declared legal and valid" by the Legislature (P. L. 1853, p. 480), and by divers devolution of title the rights of such company now vest in said The Erie Railroad Company (951, 977, 1031).

It is familiar law that the obligation to construct passages over a railroad laid out across a pre-existing highway falls upon the municipality. I have many times tried indictments against railroad and canal corporations for not maintaining such crossings in the County of Passaic. The whole question upon such trials was whether the highway or railroad existed first

There is no adjudication in this State that such language in a statute means "hereafter to be laid out across the railroad.

Of course, this new burden cannot be laid upon a railroad company whose contract with the State contained no such provision. If the company is bound by its terms, the State should be equally bound. The police power of the State should not be permitted to be invoked in its own favor to escape the burden of its own contract. Under the law the municipality and not the railroad company is subject to indictment for not maintaining a proper crossing at Franklin Street. The Board of Utility Commissioners cannot by its *fiat* convert this liability into an asset. It so converts it when it seeks to impose the burden of the City upon the railroad company.

Our present statute, Section 26, of the act concerning railroads (Revision of 1903) contains the words, "Where any public or other road, street or avenue now or hereafter laid shall cross the same." The incorporation of these words in the statute gives added force to the construction aforesaid. This is further emphasized by the proviso of this very section, which declares that this section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before the second day of April, 1873.

These appellants are entitled to attack the validity of the order in question y showing its effect upon them. They may show that this order is not warranted by the statute, for instance, that there is no danger to the public safety or no impediment to public travel, etc. They may traverse the petition of the municipality. They may make the point for their own protection that the Board in this case was without power in view of the evidence to impose the obligation upon the railroad company to constrnct such crossing at Franklin Street, instead of upon the City

The order of the Board of Public Utility Commissioners impairs the obligation of contract.

These two appellants have contracts with the Erie Railroad Company (2018, 2026, 2031) of great value to them. The contract of Meyer & De Vogel is the same as that of other shippers. The siding, or what is called in these agreements

side tracks and which is also the word named in the statute (P. L. 1911, pp. 374-378), is paid for by the shipper. The usual clauses in these agreements on this subject are as follows;

> "The shipper agrees to pay the cost of the grading and of all materials and the cost of all labor used in the construction of said side track," etc. (1118).
>
> "Shippers shall repay to the railroad company the cost of all labor and the value of all material used in repairing or maintaining said side tracks, such value being based upon the cost of such materials and the labor in handling and transporting the same to said side track" (1118).

These side tracks are a valuable property right of the prosecutors. Their right depends upon the contract with the railroad company. Such company is not bound to construct side tracks. At the present time, under the Public Utility Act, the Board may direct a railroad company

> "to construct, maintain and operate upon reasonable terms a switch connection with any private side track which may be constructed by any shipper, to connect with the railroad or street railway where in the judgment of the Board such connection is reasonable and practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

It will thus be seen that the railroad company, although ordered by the Board to relocate these side tracks, is not bound to construct and maintain them. Therefore, the Board seems to view

the matter as if the side tracks must be constructed, but does not specifically point out who shall do it. If it commands the railroad company to do so, the railroad company may decline to do so as no part of its obligation. It is, therefore, seen that the order is invalid against the appellant. First, because if they desired so to do, the railroad company may not permit them; secondly, if they are commanded so to do, the Board has no authority under the circumstances to make such direction.

It may be urged that *Swift v. Delaware, Lackawanna & Western R. R. Co.*, 66 *N. J. Eq.*, 36, affirmed 452, is against this view. It is cited in the opinion of the Supreme Court. There, however, the switch in question occupied a public street. An injunction was prayed for and denied and the complainant remitted to the legal remedies. This court passing upon the contract between the defendant railroad company and private persons for the permanent maintenance of grade crossings over certain streets, concurred in the opinion of Vice-Chancellor EMERY, *so far at least as the right to specific performance was concerned.*

> "The authorities of the city and of the railroad company having *both* determined that those crossings unnecessarily endangered public travel, we think *on that ground* an injunction forbidding their removal was rightly refused.
>
> "This being our conclusion, we refrain from expressing either concurrence in, or dissent from, the other propositions set forth in that opinion."

This court in *Am. Malleable Co. v. Bloomfield*, 83 *N. J. L.* (54 *Vr.*), 728-736, cites this case and notices the contention of counsel that the switch in the *Swift* case was unlawful because crossing a public street.

No question arises in the present case concerning the occupancy of a public street by the side tracks of the appellants. They are all on private ground constructed under contract with the railroad company and both they and the railroad company desire to continue them there. These appellants are not public utilities and yet they are commanded at their own expense to remove them and reconstruct them fifteen feet above the present level, under the pains and penalty that may fall upon them for their failure to observe this mandate of the Board.

The appellants' property cannot be taken for private use and cannot be taken for public use without just compensation.

The loss of the property rights of these appellants has been pointed out above. In addition, the business of Meyer & De Vogel will be greatly damaged and that of Morris & Company will be destroyed, if this order is valid. They are entitled to the protection of the law against this invasion.

The right to choose his occupation "free from hindrance or obstruction of his fellow men, saving such as may result from the exercise of equal or superior rights on their part," is guaranteed by Article I, placitum 1, of the Constitution.

Balling v. Elizabeth, 50 *Vr.*, 197-199.
Levin v. Cosgrove, 46 *Vr.*, 344-347.
Brennan v. United Hatters, 73 *N. J. L.* (44 *Vr.*), 729.

A person's business is property entitled under the Constitution to protection from unlawful interference.

Barr v. Essex Trades Council, 52 *N. J. Eq.* (8 *Dick Ch.*), 101.

The deprivation of the right to do business; the destruction of their respective sidings for which they have paid; the reconstruction and relocation of the same at their own expense, whether for the enefit of the Erie Railroad Company or the City; the vacation of Franklin Street; the damage to the buildings of Meyer & De Vogel by the wall across Franklin Street; the elevation of the tracks by which the interior of their buildings must be rearranged; the destruction of the sidings and buildings of Morris & Company and the loss of the expensive interiors thereof adapted for their particular business commanded to be done by this order make such order for the reasons aforesaid invalid.

WILLIAM B. GOURLEY,
Of Counsel for the Prosecutors-Appellants Morris & Company and Meyer & De Vogel.