NICHOLSON, Printer, Trenton, N. J.

Court of Errors and Appeals.

THE STATE, THE NEW JERSEY RAILROAD & TRANSPORTATION COMPANY,
Prosecutors,
Plaintiffs in Error,
vs.
GEORGE G. HANCOCK, COLLECTOR OF THE TOWNSHIP OF WOODBRIDGE, IN COUNTY OF MIDDLESEX,
Defendant in Error.

Writ of Error to the Supreme Court.

Writ of Error.

[Filed March 8, 1870.]

New Jersey, *ss.*—The State of New Jersey to our Justices of
[L. S.] our Supreme Court, greeting:

Because in the record and proceedings, and also in the giving of judgment, in a certain matter of taxation in the township of Woodbridge, in the county of Middlesex, and state of New Jersey, for the year 1867, against the New Jersey Railroad and Transportation Company, which was, by writ of *certiorari*, removed into our Supreme Court, before the justices thereof, at the suit of the state of New Jersey,

the New Jersey Railroad and Transportation Company, prosecutors, against George G. Hancock, collector of the township of Woodbridge, aforesaid, manifest error has intervened, as is said, to the great damage of the said prosecutors, as by their complaint we are informed.

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 aforesaid, in this behalf, do command you that, if judgment be given thereupon, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, to be held at Trenton, the second Tuesday of March next, together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness the Honorable Abraham O. Zabriskie, our president, at Trenton, the 6th day of January, A. D. 1870.

JOHN C. ELMENDORF, *Attorney.*

H. N. CONGAR, *Clerk.*

Certiorari to Remove Tax.

New Jersey, to wit—The state of New Jersey to George G. [L. S.] Hancock, collector of the township of Woodbridge, in the county of Middlesex, in the state of New Jersey.

We being willing for certain reasons to be certified of a certain tax of three hundred and fifty dollars, assessed by the assessor of the township of Woodbridge, of the county of Middlesex, in the state of New Jersey, against the New Jersey Railroad and Transportation Company, in the year eighteen hundred and sixty-seven, and now in your hands for collection—

We command you that the said tax assessed as aforesaid and now in your hands for collection with all the proceedings touching and concerning the same as the same now remain before you, by whatever name the said The New Jersey Railroad and Transportation Company may be called therein, or howsoever the said tax may have been made or assessed, to our Supreme Court, at Trenton, on the fourth Tuesday of February next, you certify and send, together with this writ, that therein may be done what of right, and according to the law and constitution ought to be done.

Witness, Mercer Beasley, esquire, Chief Justice, at Trenton, this sixteenth day of December, A. D. eighteen hundred and sixty-seven.

JNO. C. ELMENDORF, *Attorney.*

CHAS. P. SMITH, *Clerk.*

To the Honorable the Justices of our Supreme Court of Judicature of the state of New Jersey.

I, George G. Hancock, collector of taxes of the township of Woodbridge, county of Middlesex, and state ef New Jersey, in obedience to the command of the annexed writ, to me directed, do hereby certify and send to you, the said justices, the assessment of taxes recently made by Luther J. Tappen, assessor of the said township, for the year eighteen hundred and sixty-seven, for said township, against the New Jersey Railroad and Transportation Company, with all things touching and concerning the same, and the proceedings had thereon, as fully as the same remains in my hands and possession, as by the annexed writ I am commanded, as appears by the schedule hereto annexed.

In witness whereof I have hereunto set my hand and seal, this twenty-fourth day of February, eighteen hundred and sixty-eight.

GEORGE G. HANCOCK, *Collector.* [L.S.]

	Quantity of land.	Value of real estate.	Value of personal property.	Deduction.	Road district.	Poll.	Dogs.	State.	County.	Township.	Township bounty.	School.	School-house.	Road.	Total.
Superintendent of New Jersey R.R. Company's R.R. track.	110	25,000			3 00			20 00	165 00	40 00	75 00	30 00		20 00	350 00

I, George G. Hancock, collector of the township of Woodbridge, in the county of Middlesex and state of New Jersey, do herepy certify the above to be a true copy of the assessment of taxes made in the said township of Woodbridge, by Luther J. Tappen, assessor of the said township of Woodbridge, for the year of our Lord eighteen hundred and sixty-seven, against the New Jersey Railroad Company, and of the duplicate thereof in my hands.

In witness whereof I have hereunto set my hand and seal, this twenty-fourth day of February, eighteen hundred and sixty-eight.

GEORGE G. HANCOCK, *Collector*. [L. S.]

Reasons.

[Filed March 25, 1868.]

And the said prosecutors, by John C. Elmendorf, their attorney, pray that the assessment of taxes made by Luther J. Tappen, assessor for the township of Woodbridge, in the county of Middlesex, for the year 1867, may be set aside, reversed, and for nothing holden, for the following reasons, to wit:

First. Because the said railroad track upon which the said assessment is made, running from Metuchin one and three-quarter miles, to a piece of land purchased and owned by the said company, on account of the gravel on said land, which is necessary for the maintenance and repair of the main track of the said New Jersey Railroad and Transportation Company, running from Jersey City to and through the corporate limits of the city of New Brunswick, a distance of thirty-four miles, is an appurtenance of the said main track, made and used for the purpose of conveying said gravel from from said land to the main track of said road, to keep and maintain said main track in order, and for no other purpose, and is necessary therefor.

Second. Because the cost of said railroad track upon which said assessment is made, and the property to which it leads, is embraced in and constitutes a part of the true amount of the capital stock of the said company, upon which said true amount of capital stock the said company pay to the state of New Jersey a tax of one-half of one per cent., together with transit duty on passengers and transit duty on freight, as by law required, and on account of which the said company are by law exempted from the payment of any other tax.

Third. Because the said assessment is in divers other respects uncertain, erroneous, and illegal, and ought to be set aside.

JOHN C. ELMENDORF,
Attorney of Prosecutors.

Affidavits.

[Filed November 3, 1868.]

The following affidavits were taken before me, in the above matter, at my office, in New Brunswick, in the state of New Jersey, on the 9th day of October, 1868, in the presence of John C. Elmendorf, esq., attorney for plaintiffs, and G. Barry, esq., attorney for defendant, upon due notice of the taking thereof admitted before me by the defendant's attorney.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

New Jersey, *ss.*—*Israel Smith*, a witness produced on the part of the plaintiffs, being duly sworn to testify the whole truth touching such matters as should be put to him, on his oath says—

I am chief engineer of the New Jersey Railroad; been in the employ of said company for fourteen years acting as engineer; the New Jersey Railroad runs from Jersey City to and through New Brunswick, about a distance of thirty-three miles; this is called the main line or track, and built under the charter of the state of New Jersey; the company owns a farm at Bohhamptown, containing, in two parcels, about one hundred and ten acres, situate in Woodbridge township, Middlesex county, purchased in 1859; I have the two deeds in my hands.

One is a deed from Olive Deorendorf to the New Jersey Railroad and Transportation Company, dated January 5th, 1857, for ten acres.

[This is offered in evidence and marked *Exhibit No.* 1 for plaintiffs in *certiorari.*]

The other deed is from the heirs of Peter Stanfer to said company, dated November 4th, 1859, for about one hundred acres.

[This deed is offered in evidence and marked *Exhibit No.* 2 for plaintiffs in *certiorari.*]

The consideration paid for the tract of ten acres was $1900, for the second tract of one hundred acres was $5500.

These two tracts are adjoining each other, and are not valued by the company, together, at over $10,000.

In 1867 said lands were worth not over $8000 as farm lands.

The said lands were bought by the said company for a gravel pit, on account of the gravel which was on a portion of said lands, which gravel the company required for the use of ballasting their road, that is, the main road of said company from Jersey City to its western terminus; said gravel was required for the purpose of maintaining and keeping in repair said main road or track and other tracks of said company; and said gravel was and is necessary therefor; and the said railroad could not be kept up without the ballasting of the same by said gravel, or by gravel equally as good, or stone, which they could not get.

The said company have used gravel for said ballasting from said pit since 1860, transporting by rail, and prior to that they used the same gravel, carting by teams and delivering at Metuchin; from that place it was taken by rail to other parts of said main track; said gravel pit is about one mile and three-quarters from the New Jersey Railroad at Metuchin.

There was no other gravel pit as good as this one referred to anywhere along the line of the New Jersey Railroad—none as good for the purpose of supplying gravel with which to maintain and keep in order their said main track; and on that account the said company bought these lands referred to.

Prior to 1860 the company obtained the gravel for ballasting their road from various sources; some came from the aforesaid pit, some came from New Brunswick, some came from Piscataway, and some came by boat to Gravel Dock, at East Newark.

By reason of laying double tracks, and of the increased travel on the road, the company were in need of more gravel than could be obtained from other sources and by carting by teams, and they were compelled to purchase said gravel pit above referred to, and for the purpose of reaching this

pit and obtaining the gravel the company built and laid down a branch road leading from Metuchin to these lands and gravel pit aforesaid; the branch road connects with the main track of the company's road at Campbell's station and goes to the gravel pit, and is about one mile and three-quarters in length, and is built and used only for the purpose of transporting the said gravel to the main track or road of said company; and said branch track is necessary for such purpose.

Said branch has never been used for any other purpose than of carrying gravel, or ties, or piles for the main track; it has never been used for the purpose of carrying passengers, freight, or merchandise.

Being cross-examined by Mr. Berry, says—

This branch road is generally about sixty-six feet wide—it may be wider in some places where required for the construction of the road.

The company have, as a matter of accommodation, in some cases sold some gravel, but in very few instances—they did so to accommodate parties who press them for it; I don't recollect, within a year, of selling over two train loads, and that was for the purpose of benefiting roads in our vicinity —that is ordinary highways; I suppose there would not be over ten or twelve cars in the train.

We have had frequent application for small lots, say car load, but I don't recollect of our selling more than two car loads that has been sold in small loads—there has been some given away.

I am giving you my recollection; the returns for sales are made through me; no gravel could have been sold from this pit and I not know it, only to a very small extent.

Previous to July 1867, I was not road master, but as chief engineer I directed that we should refuse all applications for sale of gravel, as we could not supply any orders, and needed the gravel ourselves; I don't recollect any great quantity being sold; don't recollect any being sold, but it is possible some may have been sold.

The farm is about a mile and a quarter from railroad at Metuchin.

The pit we took gravel from prior to 1860 was in Piscataway, and this one.

The Piscataway pit was near Silver Lake; don't know the distance—but it was a bad road, and not good gravel.

There is no gravel pit near Metuchin; I know the land in the immediate vicinity of the railroad but never found good gravel.

There is a sand pit near the old toll gate near Newark, but no good clear gravel.

I know of no gravel pit near the railroad at Metuchin.

I say that the New Jersey Railroad could not be kept up or maintained without a gravel pit or some way of procuring ballasting for the road.

I do not know of any other pit of clean gravel, and as good, as near to the main road of New Jersey Railroad as the one referred to—there could not be as good a one, and I not know of it; I have examined the land both sides, and none other as convenient and having the same facilities as this one, could be obtained; I have seen test pits dug, and have noticed the excavations at other points in the vicinity of the main track, and on land which was not the company's.

The company hold deeds for their right of way for said branch track.

This track is laid through other lands than said farm to get to said farm and gravel pit.

Quest. What is the value of this gravel pit and farm to the said company?

Ans. I could not make any comparison, as there are no persons who wish to purchase for the same purpose.

The gravel pit is valuable to the company, the gravel is worth more than farm land, but how much I cannot say.

Quest. After the testimony which you have given concerning the importance of this bank to the company, and the demand outside for the gravel, are you able to say what its value is?

Ans. I could not say what its value is without knowing how ballasting could be obtained from other sources; as to what we would receive from parties who want to buy gravel,

it would not pay the company to run a train specially for such purposes.

Quest. Have you not already said that this was the only bank along the road which would supply the wants of the road?

Ans. I have said as conveniently situated within the same distance; I mean to say that this has the greatest convenience in way of access.

The road was chartered in 1832.

Quest. From 1832 to 1860, did they obtain all the gravel they needed without this bank?

Ans. No; it was partly obtained from this bank.

It was obtained by carting, but we could not in that way get it in sufficient quantities.

Being again examined in chief, says—

The company own the entire right of way on which this branch road to this pit is laid down; the company built this branch under their charter—this Mr. Jackson told me. [Objected to because hearsay.]

The company could not sell gravel as a business at a profit on the line of their road.

An individual could not take this pit and sell gravel on the line of the New Jersey Railroad, and pay tolls and transportation and make a profit.

Being again cross-examined, says—

Quest. From what you have said as to frequent calls on the company for gravel, from outside parties, and which you refused, could not a profitable business in selling gravel, be carried on by the company?

Ans. The demands have been for such small quantities that it would not be profitable as a special business.

Quest. Then are we to conclude that the company refused to sell gravel because they could not supply the demand, or because it would not pay to sell it?

Ans. We could not supply the demand, and deliver sufficient quantities for our own use; and to run a train for sale, would not pay the company.

ISRAEL SMITH.

Sworn to and subscribed, the 9th day of October, 1868, before me.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

New Jersey, *ss.*—*Martin A. Howell*, produced and examined on the part of said plaintiffs, being first duly sworn to testify the whole truth touching such matters as should be put to him, on his oath says—

I am a director of the New Jersey Railroad Company, the plaintiffs; have been director about seven years; I give its business considerable attention; I am conversant with the accounts and business of said company, and one of the executive committee, whose business it is to know; I was interested and concerned in said road from the beginning.

I am acquainted with the property in question, and with the branch road leading to it from the main track.

The length of said main road is about thirty-three miles; after the building of road, it was ascertained that we were short of the article necessary for the maintaining the road, either stone or gravel; the soil through which the track was laid was red shale and loam; it became necessary for us to obtain material from some other source, in order to keep the track in proper condition to run upon; they found it was necessary to have gravel, and gravel free from dirt—gravel that would not wash, and would keep its place where it was put; we had to take the best we could find; we took a large part from the location of the depot at New Brunswick; the company purchased from other sources; they bought from every source; I once sold them some; they had to buy it by the wagon load; they were glad to get it from any one.

They purchased a lot at Metuchin for depot purposes—more than they wanted for that purpose—because there seemed to be gravel there; that gravel, inferior as it was, was used for the purpose of maintaining the track; they also purchased a small tract of land, near Waverly, for the same purpose of maintaining road; we found it to be so inferior that we had to stop using it for such purpose; they then purchased some soil, for graveling purposes, at Silver Lake, Piscataway; they also purchased ten acres, part of this Boh-

hampton property; the gravel purchased from this last tract we carted by wagons to Metuchin, and there reloaded it on cars and distributed it on the line of the track.

From all these sources, in the way in which the company was then doing it, the supply was inadequate; that made it necessary for us to build the said spur, or branch road; since its completion, it has been used for the purpose of maintaining the main road, and for no other purpose.

Nothing has been transported on said branch except material for maintaining the main track, and to work the New Jersey Railroad.

This branch road is an appurtenance to the New Jersey Railroad, as much so as a bridge on the line of it.

It was discovered that there was so much gravel needed on the road that the ten acres was not sufficient, and they bought the other tract of one hundred acres described in *Exhibit, No. 2*, for plaintiffs, for the gravel in it, and for no other purpose.

We have already taken out from it, for the purpose of maintaining said road, about twenty-five acres.

The farm, the ten acres, and the one hundred acres, now stand on the books of the company at $8132—about its original cost—that is, adding a little to it for expenses; the balance of the account, at this time, on the purchase of that land, one hundred and ten acres, is $8132.30.

The expenses of getting the gravel is more than the gravel itself is worth.

The pit and location is a mere convenience to the company.

The cost of this branch is $19,235.22.

The branch road, in connection with the farm, stands on the books of the company at $27,367.52, cost, all of which was carried to capital account of the said company, and upon which, $27,367.52, the company have paid a tax of the one-half of one per cent., yearly, to the state of New Jersey, since their purchase of said farm, and the building of said track.

This $27,367.52 constitutes a part of the capital stock upon which the company pay to the state of New Jersey the tax of one-half of one per cent., yearly; and the amount of tax paid by the New Jersey Railroad, in 1867, to the state of New Jersey, was $28,437.50; also transit duty, for the same

period, of $33,799.29; and this $27,367.52 is part of the capital taxed which yielded the said taxes and transit duty in 1867.

Notice of assessment of taxes for 1867 on this property was served on the company; it was appealed from by the company; they went before the Pourt of Appeals at Woodbridge, in 1867.

We stated our case; I asked what we were assessed for; Mr. Tappen, the assessor, was there—he replied that $10,000 was assessed on the farm, $15,000 was assessed on the railroad track, making $25,000, upon which the company was then assessed by him.

The Court of Appeals took time to consider, and we heard they had decided not to deduct anything.

Being cross-examined by Mr. Berry, says—

The company appeared before the Court of Appeals, for the purpose of being relieved entirely, or to be relieved from the taxation on the track—claiming before that court that all this property assessed had already paid tax to the state of New Jersey according to law.

We had received a notice, but I don't recollect what it said—it was an ordinary tax bill.

The transit duty is paid on the classes of business done over the road.

Quest. Have you paid any other tax on this property than that already referred to in your testimony?

Ans. We have been assessed on this farm as farm land, and we have paid the tax—this was done prior to 1867, and not for 1867.

I know a considerable amount of gravel has been delivered in Rahway for the purpose of improving the roads and delivered free of charge; none was ever sold to my knowledge.

Speaking of the value of the gravel, I would state that in improving some streets in Newark, on the line of our road, we found it was cheaper for us to let the contractor furnish the gravel than for us to furnish it.

MARTIN A. HOWELL.

Sworn to and subscribed, the 9th day of October, 1868, at New Brunswick, in said state, before me.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

The taking of further affidavits in this cause is, by the consent of parties, adjourned to Tuesday the 13th day of October, at my office, in New Brunswick, at 7½ P. M.

October 9th, 1868.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

The parties appeared pursuant to adjournment, and said parties, by their respective counsel agree, that the following shall be considered as admitted facts of the case.

That the said New Jersey Railroad and Transportation Company were assessed by Luther J. Tappen, the assessor of Woodbridge township, in 1867, for $25,000 of real estate, and that in making such assessment, the assessor assessed said company for their said farm on which said gravel pit is referred to in the foregoing testimony, in the sum or valuation of $10,000, and for their railroad track and route or spur from Metuchin to said farm or gravel pit, in the sum or valuation of $15,000, and that these two sums or valuations made up the said sum of assessment of $25,000 for real estate against said company.

October 13th, 1868.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

The statements and matters declared by the several witnesses as contained in their foregoing affidavits were, by me, reduced to writing before being subscribed by them, and in the presence of the respective counsel.

GEORGE C. LUDLOW,
Supreme Court Commissioner.

And such proceedings were thereupon had in our said Supreme Court, that afterwards, to wit, at the term of February, A. D. eighteen hundred and sixty-nine, it was ordered by our said Supreme Court, as follows, to wit:

"George G. Hancock, collector, &c., of Woodbridge township, Middlesex county, *ads.* The State, The New Jersey Railroad and Transportation Company. On *certiorari.* In matter of tax.

"The parties to this cause having been heard by counsel, and the Court having examined and considered the matters removed by said *certiorari*, and the testimony taken and produced: It is now ordered that the assessment against said prosecutors, removed by said writ, be, and the same is, in all things, affirmed, with costs to be taxed.

"On motion of GARRET BERRY,
"*Attorney of Defendant.*"

Therefore, it is considered that the said prosecutors take nothing by their said writ, and that the assessment removed thereby be in all things affirmed as valid and lawful, and do stand in full force and effect. And it is further considered that the said George G. Hancock, collector as aforesaid, do recover against the said The New Jersey Railroad and Transportation Company the sum of twenty-two dollars and ninety cents for his costs and charges by him about his defence in this behalf laid out and expended, by the court now here adjudged to him and with his assent; and that he have execution thereof according, &c.

Judgment signed the twenty-second day of April, A. D. eighteen hundred and sixty-nine.

M. BEASLEY, *C. J.*

Opinion.

VREDENBURGH, J. The prosecutors bought a farm of about one hundred and ten acres in 1859, and built to it a branch from their main line, about one and three-quarters of a mile long. This part of the main line, and the branch, and the farm, are all in the township of Woodbridge.

The township authorities assessed the prosecutors in 1867 for twenty-five thousand dollars, to wit, ten thousand dollars on the farm and fifteen thousand dollars on the branch. This *certiorari* is brought to set aside the tax on the branch.

It appears by the evidence, that the said farm was bought for the gravel which was on it, and which was required for the ballasting of said road, and for maintaining and keeping it in repair; that said branch was built to transport the gravel more cheaply to said main line, and has never been used for anything else.

Under these circumstances, was this assessment on the branch legal?

By the seventh section of the prosecutor's charter, (*Pamph. Laws of* 1832, *p.* 99,) it is provided, that the said corporation may build bridges, raise embankments, and make any works necessary for the construction, use, and enjoyment of the said railroad, and also may enter upon said road, and take possession of and use any materials necessary therefor. Section eighteen of the same act provides, that the said corporation shall pay into the treasury yearly a tax of one-half of one per cent. upon its capital stock, and that no other tax shall be imposed on said company. This branch was not within the limits of the location of the road as established by the prosecutor's charter, but entirely without it. The seventh section of their charter gives them no power to build it. They are empowered by it to build bridges, or make any other works necessary for the construction, use, or enjoyment of the said railroad. This implies only, that they can make on the sixty-six feet (which they may take by condemnation) any works necessary for the construction, use, or enjoyment of said road. I have found no case where any railroad corporation has been released from ordinary

taxation on any structure on lands which had not or might not have been taken by condemnation under the authority of its charter.

In the case of *The Inhabitants of Worcester* v. *the Western Railroad*, 4 *Met.* 364, the court held that even passenger depots, freight houses, car, and engine houses are liable to taxation for such parts of them as are outside of the limits of the location of the road.

If this gravel pit was inside of the road as established by charter, any structures that might be made to facilitate the moving of gravel, would probably be free from taxation. But the case is different when they are obliged to go beyond that location. It is said that the road cannot be constructed or kept in repair without gravel. But iron, fuel, and sleepers are quite as essential to the construction of the road as gravel. Could the company build a spur to the iron foundry to cart rails, or to the forest to bring sleepers, and claim that such works would be exempt from taxation? Would not such a power amount to a privilege to build tracks any where, and an exemption from taxation in that regard?

This case is within the principle of *The State* v. *Mansfield*, 3 *Zab.* 510.

The assessment must be affirmed.

The Return.

The answer of the Justices of the Supreme Court of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within commanded.

M. BEASLEY, *C. J.*

[L. S.]

I, Charles P. Smith, clerk of the Supreme Court of the state of New Jersey, do certify that the foregoing is a true and full copy of all the proceedings in the above stated cause in said Supreme Court, as the same remain of record and on file in my office.

In testimony whereof, I hereto set my hand and
[L. S.] the seal of said court, at Trenton, this fourth day of March, A. D. 1870.

CHARLES P. SMITH, *Clerk.*

Assignment of Errors.

[Filed April 5, 1870.]

Afterwards, that is to say, on the second Tuesday of March, in the year one thousand eight hundred and seventy, before the Court of Errors and Appeals in the last resort in all causes, comes the said state of New Jersey by John C. Elmendorf its attorney, (the said New Jersey Railroad and Transportation Company being prosecutors,) and says, that in giving the judgment aforesaid there is manifest error in this, that the railroad which was assessed for taxes in the assessment which was removed before the said Supreme Court, belonged to the said New Jersey Railroad and Transportation Company, at the time of such assessment, as a portion of and appurtenant to their principal railroad, and was, together with said principal railroad, exempt from taxation, except in the manner specified in the act entitled "An act to incorporate the New Jersey Railroad and Transportation Company," passed March seventh, eighteen hundred and thirty-two, and the several supplements thereto, and not in the manner contained in said assessment; and yet the said assessment was sustained and confirmed by the said judgment of the Supreme Court.

And, also, there is error in this, that the said farm, which in and by the said assessment was assessed for taxes, was purchased and held by the said the New Jersey Railroad and

Transportation Company, at the time of said assessment, merely for the purpose of obtaining gravel to gravel their said principal railroad, and as an appurtenance thereof, and was, therefore, exempt from taxation in the same manner as the said railroad was exempt as aforesaid; yet the said assessment of said farm was sustained and confirmed by the said judgment of the Supreme Court.

And, also, there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said defendant in error against the said plaintiff in error; whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error against the said defendant in error; and the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for naught; and that the said prosecutors may be restored to all things which they have lost by occasion of the said judgment.

JOHN C. ELMENDORF,

Attorney and Counsel of Plaintiffs in Error.

Court of Errors and Appeals

IN THE LAST RESORT, &C.

THE STATE THE NEW JERSEY RAIL ROAD AND TRANSPORTATION COMPANY, Prosecutors, Plaintiffs in Error,

vs.

GEORGE HANCOCK, Collector of the Township of Woodbridge, in the County of Middlesex, Defendant in Error.

Writ of Error to the Supreme Court.

Points on the part of the Plaintiffs in Error.

JOHN C. ELMENDORF, *Attorney for and of Counsel with the Plaintiffs in Error.*

I. The plaintiff in error, the New Jersey Railroad and Transportation Company, claim that the Branch Railroad set forth in the return is exempt from taxation under the following clause in their charter.

"And that no other or further tax or imposition shall be levied or imposed upon said company." See appendix to laws of 1849, p. 60, Sec. 18 of Charter.

The tax or imposition imposed by the charter is heavy. It is a tax of one half of one per cent. to the state, on capital,

a transit duty of twelve cents per ton on merchandize, and eight cents on every dollar received from passengers transported over the road and which went beyond New Brunswick.

The whole of the eighteenth section of the charter reads thus:

"SEC. 18. *And be it enacted*, That from and after the completion of the said railroad, and after the expiration of five years the said corporation shall pay into the treasury of this state yearly, and every year, a tax of one quarter of one per cent. upon their capital stock paid in; and after the expiration of ten years a tax of one half of one per cent. upon the true amount of the capital stock of said company; *and that no other or further tax or imposition shall be levied or imposed upon the said company*; *provided nevertheless*, that, in addition to the above, if at any time hereafter any railroad shall intersect or be attached to the railroad hereby established, so as to make a continued line of railroads, carrying passengers across the state of New Jersey, between the states of New York and Pennsylvania, respectively, then it shall be the duty of the treasurer of this company hereby chartered, under oath or affirmation, to make quarterly returns of the number of passengers, and the number of tons of goods, wares, and merchandise transported over the whole line of the road hereby chartered, to the treasurer of this state for the time being, and thereupon to pay the said treasurer of this state at the rate of eight cents for each and every passenger, and the sum of twelve cents for each and every ton of goods, wares, and merchandise so transported thereon in manner aforesaid."

The transit duty of eight cents on passengers, was changed to eight cents on a dollar received from passengers, by the supplement to the charter of April 18, 1846, Sec. 2. See appendix to Laws of 1849, p. 66.

The seventh section of the charter of the prosecutors also provides: "That the said corporation may build bridges, fix scales, and weights, raise embankments or make any other works necessary for the construction, use or enjoyment of the said railroad," &c. See appendix to Laws of 1849, p. 55.

II. The Branch Railroad of the New Jersey Railroad and Transportation Company to the Gravel Pit, is a property reasonably incident to the enjoyment of the franchises of the said company, and was not liable to taxation.

The State vs. *Berry*, 2 *Harrison* 80.

Camden and Amboy Railroad Company vs. *Hillegas*, 3 *Harrison* 11.

Camden and Amboy Railroad Company vs. *Commissioners of Appeal*, 3 *Harrison* 76.

Gardner vs. *The State*, 1 *Zab.* 557.

The State vs. *Mansfield*, 3 *Zab.* 513.

This last case does not maintain the position of the Supreme Court, as the tax was imposed on houses built by the Camden and Amboy Railroad Company, and rented to workmen.

The State vs. *Minton*, 3 *Zab.* 529.

The State vs. *Flevell & Fredericks*, 4 *Zab.* 342.

The State vs. *Blundell*, 4 *Zab.* 405.

The State vs. *Ross*, 4 *Zab.* 503.

III. The State of New Jersey does not exempt this corporation from taxation, but prescribes as a rule that the taxes should be paid to the state, and that the property of the company should be free from assessment for taxation by the local assessors.

For this reason the decisions on the subjeet of the taxation of the property of railroad corporations in other states are not applicable to the plaintiffs in error.

The cases where the *exemption* from taxation was confined to the property the company could condemn, would not apply here, because there is no exemption from taxation. For cases of such exemption, see 2d Red. on Railways, p. 388, Sec. 10.

A class of decisions applicable to corporations in other states, where the property of such corporations has been made exempt from taxation, has been introduced in our state, and made applicable to corporations subject to taxation, without good reason therefor.

The system of taxation adopted by the state, with reference to this corporation, should have a liberal construction

by the courts in favor of the company, inasmuch as it is not an exemption from taxation.

The property of the company, both real and personal, is taxed by the tax on capital, and the business energies of the company are taxed by the transit duties.

As the capital of the company is from time to time enlarged, it embraces bridges, rails, rolling stock, depot buildings, and property worn out and lost to use. The tax continuing on the former capital, and also the capital which goes into construction for the renewal of property, real and personal, that has been worn out and lost to use.

In addition to the taxes thus paid, a large amount of property owned by the company, and not in use for railroad purposes, is subject to annual assessment, for local as well as state taxes, which taxes are paid by the company.

These taxes, in the year 1867, amounted to $7,225.38.

The public reports of the railroads to the legislature of the state in 1867 show :

Capital N. J. R. R. & T. Co.	Amount paid for Taxes and Transit Duties to State.	Percentage on Capital.
$5,000,000	$67,282.12	$1\frac{14}{100}$

The result in the united companies in 1867 was as follows :

Capital.	Amount paid for Taxes and Transit Duties.		Percentage on Capital.
$15,500,673 35	C. & A. R. R. & T. Co.....	$133,427 97	$1\frac{3}{4}$
	Del. & R. Canal...	69,478 76	
	N. J. RR. & T. Co.	67,282 12	
		$270,188 85	

The case of *The Inhabitants of Westchester* vs. *The Western Railroad Company*, *4th Metcalf*, 364.

Upon which Judge Vredenbugh puts his decision cannot control this case. In that case the railroad property of the corporation was, by the general rules of law of the State of Massachusetts, *entirely* exempt from taxation.

Chief Justice Shaw, on page 566 of *4th Metcalf* uses this language:

"Treating the railroad then as a public easement, the works erected by the corporation as public works, intended for public use, we consider it well established, that to some extent at least, the works necessarily incident to such public easement are public works, and as such exempted from taxation."

The case of the New Jersey Railroad and Transportation Company differs essentially in this, that the state has made a contract with the last named company, that they shall be taxed on their capital and on their business, and that such tax shall be paid directly to the treasurer of the state, and such tax shall be in lieu of any other tax upon the property of the company.

Until the case of *The State* vs. *Mansfield* was decided, reputed in *3d Zabriskie*, 510, the decisions in a similar clause in the Camden and Amboy Railroad Charter, had been uniform in the State of New Jersey, that all the property of the company was exempt.

This exemption was narrowed down in the case of *The State* vs. *Mansfield*, on the grounds taken by the Supreme Court of Massachusetts; in the case of *Worcester* vs. *The Western Railroad Company*, and also on similar grounds taken in the Supreme Court of Pennsylvania. The Supreme Court of New Jersey seemed to have overlooked the very important facts, that in the States of Massachusetts and Pennsylvania railroads were exempt from taxation on such part of the property as was used for the public easement.

A different principle, however, was announced in the case of *The New York and Erie Railroad Company* vs. *Sabin*, 26 *Pennsylvania St. Rep.*, 243, (2 *Casey*). In this last case there was a contract between the state and the company, and the court, Woodward, Judge, on page 246, uses this language:

"When, however, instead of surrendering the power, the legislature have exercised it by taxing all the property of a particular company in a specified manner, and have intimated no design to subject it to any further taxation, we hold the powers to be satisfied and do not add by judicial

implication burdens which the legislatue have not thought fit to impose."

Until this case, now under consideration, arose it never was considered the law of the State of New Jersey, that railroad property which was exempt from local taxation was such part of the lands of the company as they had a right to acquire by condemnation, and which was included within the filed route. Such a rule was not maintained in the case of *The State* vs. *Mansfield*, in that case the court decided, "Depots, car houses, water tanks, shops for repairing engines, houses for smiths and bridge tenders, coal and wood yards for fuel for the use of locomotives, &c. And these are within the fair consideration of the exempting clause, because they are necessary and indispensable for the operations of the company, and the accomplishment of the objects of their charter."

Such was not held to be the rule in the recent case of *The State—The Morris and Essex Railroad Company* vs. *Haight, Collector of Jersey City*—in which the opinion was delivered by Justice Depue.

The tax clause in the charter of prosecutors differs materially from those in the charters of all the companies in this particular. There is a tax on capital and also on business by way of transit duty.

It differs from most of the other charters in this, that the tax is on capital and not on the cost. The capital is always greater than the cost, inasmuch as it covers all the rolling stock, all personal and real property, and includes property worn out and property replaced.

The tax being on the business, such property as is reasonably fit to facilitate the business should be exempt.

IV. The decisions heretofore made on the subject of taxing railroad corporations in New Jersey, are not applicable to this case, for these reasons.

This branch road was not outside property awaiting for future use, at such times as the business of the company should be increased and the works of the company should be enlarged.

It is property constantly in use for railroad purposes, as it is essential constantly to renew the ballasting of a road.

It is not property from which the company either directly or indirectly derived rent like the houses of workmen.

It is not like property held and used for manufacturing locomotive engines or railroad cars.

It is a railroad used to supply the gravel for the annual *repair* of the main line, which repair was not made out of things manufactured, but from soil near at hand.

The means by which the road bed should be kept in repair, should not be the subject of taxation.

A side track, or railroad leading from a main line to a repair shop, should not and would not be subject to taxation, and yet it would be outside of the sixty-six feet of the main line authorized to be condemned.

It is a railroad and used for the repair of a railroad.

A side track or railroad to a house for storing locomotives, should not and would not be taxed.

Nicholson, Printer, Trenton, N. J.

N. J. Court of Errors and Appeals.

The State, The New Jersey Railroad and Transportation Company,
Prosecutors, plaintiffs in error,
vs.
George G. Hancock, Collector of the township of Woodbridge,
Defendant in error.

Writ of Error to the Supreme Court.

Points relied upon in the above entitled cause on the part of the defendant therein.

1st. That the tract of land and branch railroad so as aforesaid assessed by the collector of the township of Woodbridge, are and were entirely without the limits of the location of the road, established by the prosecutors' charter.

2d. That the said branch road is not authorized by the seventh section of the charter of said New Jersey Railroad, it being, together with said branch road, a mere convenience to the said New Jersey Railroad.

3d. That the said farm and branch railroad, so as aforesaid assessed, being a mere convenience to said main railroad, are, by the principles of taxation laid down in the case of *The State* v. *Mansfield*, taxable, and were rightly assessed by the collector of the said township of Woodbridge.

GARRET BARRY,
Of counsel for defendant in error.