New Jersey Court of Errors and Appeals

SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, Prosecutor-Respondent, vs. CITY OF PATERSON and EUGENE WICKHAM, Receiver of Taxes and Assessments in the City of Paterson, Defendants-Appellants.	On Appeal from Supreme Court.

REMARKS ON CASE CITED BY APPELLANTS, *State of Indiana ex rel. Clark* v. *Haworth*, 7 *L. R. A.*, 240; 122 *Ind.*, 462.

The appellants, during the argument of this appeal, relied on the above case as authority for the proposition that that portion of the tax in question which represented the school tax was a tax *laid under the authority of the State, for the use of the State,* within the meaning of the fourth paragraph of the charter of the Society. (State of Case, p. 9, ll. 30 *et seq.*)

As that authority did not appear on appellants' brief, but was cited for the first time during the argument, and we had no opportunity to examine it until after the argument, we take the liberty of availing ourselves of the present means of submitting to this Honorable Court our views regarding that decision.

The question is not—as argued by Judge SCOTT—whether the school tax is a state tax or a local tax, but whether it is a tax *laid under the authority of the State, for the use of the State,* or a tax *laid under the authority of the State, for the use of the county or city, or some other use.*

The language of the charter is

> "that all the lands, tenements, etc. to the said Society belonging, shall be exempt from all taxes, etc. *under the authority of this state, whether for state or for county uses, or for any other use whatsoever,* * * * provided that the said exemption shall continue in force for the term of ten years only, after which term it shall be lawful to lay such taxes *for the use of the state* upon the said lands, etc., as shall be laid upon other lands, etc., of like value, nature or description."

We do not deny, and have never denied, that the State has general supervision over the schools.

The pertinent provisions of the Constitution are found in Article IV, Section 7, the sixth paragraph of which requires the Legislature "to provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years," and the eleventh paragraph of which forbids the Legislature to pass local or special laws "regulating the internal affairs of towns and counties," or "providing for the maintenance and support of free public schools."

These paragraphs became part of the Constitution in the year 1875.

We do not deny that the State could, if it saw fit, through the Legislature, take the entire management of schools out of municipal hands, but it has not as yet done so. This clearly appears in our brief submitted on the argument.

What we wish now to draw the Court's attention to is that there is nothing in the case cited by Judge SCOTT which militates against Judge DIXON'S decision in *Riccio* v. *Hoboken,* 69 *N. J. Law,* 105-107, that

> "notwithstanding the general interest of the state at large in the education of its citizens, the support and management of public schools should be treated by the legislature as an internal affair of the various municipalities denominated towns in the eleventh paragraph of the Constitution."

State of Indiana v. *Clark, supra,* simply held that (1)

> "the regulation of the public schools is a state matter exclusively within the dominion of the legislature; hence an act prescribing the text books to be used therein, and regulating the method of procuring them, does not impinge in the slightest degree upon the right of local self government";

and (2)

> "that the legislative power over schools is not exhausted by exercise, and the fact that the legislature has always entrusted the management of school affairs to local organizations will not preclude it from at any time changing the system so as to remove them from local control."

We quote from the decision, as follows:

> "As the power over schools is a legislative one, it is not exhausted by exercise. The legislature, having tried one plan, is not precluded from trying another. It has a choice of methods and may change its plans as often as it deems necessary or expedient, and for mistakes or abuses it is answerable to the people, but not to the courts. It is clear, therefore, that even if it were true that the legislature had uniformly intrusted the management of school affairs to local organizations, it would not authorize the conclusion that it might not change the system. * * * It is not true, however, that the authority over schools was originally regarded as a local one; on the contrary, the earlier cases asserted that the legislature could not delegate the power to levy taxes for school purposes to local organizations, but must itself directly exercise the power, thus denying in the strongest possible form the theory of local control. This ruling was for many years regarded as the law of this state, *but in the case of Robinson* v. *Schenck,* 102 *Ind.,* 307, *it was held that the legislature might either exercise the power itself, or delegate it to local government instrumentalities.*"

We respectfully submit that under our laws the Legislature—as it lawfully might do—has delegated the power to levy taxes for school purposes to local government instrumentalities, and that, in addition to that, for reasons stated in our original brief, taxes imposed for school purposes are laid for county and city, and not for State, uses. The only part of the school tax which, with any show of fairness, it could be argued was used for State

uses, would be the 10 per cent. of such tax which constitutes the so-called reserve fund, upon the distribution of which a school district may get more or less than it contributed to that fund, and even that so-called reserve fund is all used for municipal purposes as distinguished from State purposes. Of the total school tax 90 per cent. is used for the use of the municipality from whom it has been obtained; the remaining 10 per cent. may be used for the use of that municipality, or more than 10 per cent. may be used for that municipality, or less than 10 per cent. But the whole of that 10 per cent. is used for the benefit of the various local school districts.

If, however, this argument be unsound, the contrary argument simply shows that the Society can only lawfully be charged with 10 per cent. of the school tax, the remaining 90 per cent. at all events being exclusively used for city and county purposes.

The fact that the schools also receive, by way of subsidy, money from the fund derived from the State riparian lands and from the amount appropriated by the Legislature out of the moneys in the State treasury, we submit, is not germane to our present inquiry. Because the State chooses to contribute moneys for these local uses—assuming them to be local uses—what bearing can that fact have upon the question whether the school tax itself is for a State use, or for a city or county use? It throws no more light upon the question than if an individual had bequeathed by his will $100,000 to a trustee for the benefit of the public free schools in the City of Paterson, that bequest would determine whether the use of the money devised was a State use or a local use.

For the above reasons, we submit that the *Indiana* case above cited is irrelevant.

Copies of these notes will be served upon the City Counsel before submitting them to the Court.

JOHN B. HUMPHREYS,
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Of Counsel with the Respondent.

New Jersey Supreme Court

SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, Prosecutor-Appellee, vs. CITY OF PATERSON, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF OF COUNSEL WITH DEFENDANTS.

The question raised in these proceedings is as to validity of taxes imposed upon a hydro-power plant of the prosecutor for the year nineteen hundred and fourteen by the taxing officials of the City of Paterson. The appellee claims that it is exempt from such taxation by the provisions of its charter. The Supreme Court upheld this claim and the City appealed.

History of S. U. M.

The Society for Establishing Useful Manufactures was incorporated by the Legislature of New Jersey in 1791, with the expectation that it would establish and carry on manufactures in this State. At the time of its incorporation high hopes were entertained by the founders that the Society would be the instrument of great benefit to the people of

the United States in general and of New Jersey in particular. The history of the Society written in the reported decisions of our courts shows that the hopes of the founders have not been fulfilled. The Society, as a manufacturer, has been a failure. It is now simply a company engaged in developing power and is not engaged in manufacturing (Testimony, p. 42).

The story of its early failure and retirement from manufacturing is told in an opinion by Chancellor WILLIAMSON, reported as a note in 30 *N. J. Equity*, 145, at page 149:

> "In 1793, the society erected buildings and established a cotton factory, and in 1794 they established a printing, bleaching and dye house. They employed a number of manufacturers and other hands, and carried on the business of manufacturers for some years; but such was then the situation of the country, and so many were the difficulties which the society had to encounter, that this institution, with its large capital and extensive privileges, was unable to support itself; and the directors, after sinking a great part of their capital stock, found it necessary to discharge their numerous hands, to sell off their raw materials and other personal property and entirely to discontinue the business of manufactures, and they have not since resumed it; nor is any part of their capital employed or used in manufacturing business."

The company, did, however, some little work to develop the great natural asset placed in their hands; they leased out portions of the water power to those who were bold and skilful enough to en-

gage in the hazardous business of manufactures. That these other individuals built up a large manufacturing community at the Great Falls of the Passaic was no great credit to the Society itself, which simply took over to itself the immense water power which it developed in the most primitive and simple manner. Chancellor WILLIAMSON in his opinion gives the Society great credit for its activities. We cannot agree with him that the growth of the City of Paterson was in any great measure due to the activities of the Society. We believe the growth of the city was due rather to the fact that it was located near a great water power, than to the method of the utilization of the power. In fact, so far as the history of the Society appears from the reports, there was nothing active or progressive about its management until the control of the Society became vested in the late Vice President Hobart, Mr. Gardner and their friends (Testimony, p. 19).

Mr. Gardner, the present governor, says about the former owners of the property (Case, p. 51):

> "I believe that they were a hard-living lot of fellows, and when they wanted money they would get a fellow to buy a few feet of water, and they would capitalize it and sell it and take the money and blow it in."

And on page 57:

> "Q. Then your Society had made contracts to deliver more water than they could store? A. They sold more water than they had.
>
> Q. It was very important, then, to have these two hours extra? A. I don't think they cared a continental about that. When I came here it was hardly known by anyone

how much water they were entitled to. I have seen them shut down at 11 o'clock, everybody out of water."

It will be seen that the management of the Society before the present one was very inefficient and that its contract with the State to promote manufactures was very poorly performed. The Society was organized for that purpose alone and was given great privileges, among others exemption from certain taxes. The State got very little, if anything, in return for its gift.

The present management of the Society is far more active, but for many years it has been more interested in diverting water from the river than in developing power.

All the stock of the Society is now owned by the New Jersey General Securities Company, which last-named company also owns The Passaic Water Company, The East Jersey Water Company, and other water companies (Testimony of Mr. Gardner, pp. 52-53).

The Society claims exemption from taxation under its charter passed in 1791, the pertinent parts of which are printed on pages 8, 9 and 10 of the printed case.

About 1854 a number of questions concerning this exemption were presented to the Supreme Court and decided in the following cases:

a. *State* v. *Flavell,* 24 *New Jersey Law,* p. 370.

b. *Paterson* v. *S. U. M.,* 24 *New Jersey Law,* 385.

c. *State* v. *Powers,* 24 *New Jersey Law,* 400.

d. *State* v. *Blundell,* 24 *New Jersey Law,* 402.

e. *State* v. *Powers,* 24 *New Jersey Law,* 406.

None of the above cases were taken to the Court of Errors and Appeals.

In *State* v. *Flavell* it was decided that "the water power itself not only, but the banks, dams, canals and all lands appropriate for mill sites, or necessary for the maintenance and extension of the raceways and other works of the company are incident to the purposes of their incorporation, and are, by the charter, exempt from taxation."

In 1864 the company decided to raise its dam to obtain more power. It put flashboards on the top of its old dam and this flooded back the waters of the river on upper riparian proprietors. They strenuously objected, and since the Society had no power to condemn these lands, could have sued and recovered damages and could then have been entitled to an injunction to compel the Society to desist from flooding their lands. The Society might have been able to purchase the flooded lands and it might not have been so far as the evidence shows. The probabilities are that the owners held out for a very high price. The company finally sought help from the Legislature (Testimony printed, Case, p. 67). The Legislature passed the act requested by the company, "An act to develop and improve the water power of the Passaic River" (P. L., 1868, p. 545).

The sixth section of this act provides:

> "And that all real and personal property of said Society acquired under this act shall be subject to taxation, in the same manner as other real and personal property in the City of Paterson are subject thereto."

POINT I.

The charter of the company must be strictly construed in favor of the tax, notwithstanding the provision that it must be construed in the most favorable manner for the corporation.

> "A grant of exemption from taxation being in the nature of a renunciation of sovereignty must invariably be construed most strictly against the grantee, and *can never be permitted to extend,* either in scope or duration, beyond what the terms of the concession clearly require."
>
> *Sisters of Charity* vs. *Cory,* 73 *N. J. L.*, at 706.

> "The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interest of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the case may be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."
>
> *Board of Assessors* vs. *Paterson & Ramapo R. R.,* 50 *N. J. L.,* at 450.

"All exemptions from general taxation are to be construed strictly, the resolution in case of doubt being in favor of the rule which subjects all property to a just share of the public burdens."

In re Estate of Jane Gopsill, 77 *N. J. Eq.,* 216.

"Although a contract of exemption from taxation is valid, yet its provisions are to be construed most strongly against him who claims the benefit of it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

Morris Canal Co. vs. *Assessors,* 76 *N. J. L.,* at 630.

The above cases are but a few of the great number stating the same principle. The great wonder is that an exemption from taxes should ever have been held irrevocable. The weight of reason is against it. No government can live without the right to tax. If one property can be exempted all can be. One reckless legislature might barter away for a small consideration the right to tax half the property in the State.

"If the point were not already adjudged it would admit of grave consideration, whether the legislature of a state can surrender this power, and makes its action in this respect binding on its successors, any more than it can surrender its police power, as its right of eminent domain. But the point

> being adjudged, the surrender when claimed must be shown by clear unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power."
>
> *The Delaware Railroad Tax* (U. S. Supreme Court, 1873), 18 *Wallace,* 226.

However, tax exemption in cases somewhat similar to this have been held valid. The tendency of the Courts seems to construe the right ever more strictly. The provision of the charter of the Society that it must be construed in the most favorable manner for the corporation is not applicable in the present case. This was intended to apply to the provisions conferring power on the corporation and as to its existence, and not as to the construction of any provision to the injury of the State. This clause for favorable construction of the charter should not be held to apply to the exemption clause by implication. Every reason that is given for the strict construction of exemption clauses applies to the "favorable construction" clause when it is considered in connection with the exemption clause.

POINT II.

The exemption in the Society's charter has expired.

This is the contention made heretofore in *State* v. *Flavell,* 24 *N. J. L.,* 376.

This is a Supreme Court decision and should be overruled. We understand no rule for judgment was entered in the above case and that it is not claimed that we are bound by this case as *res judicata.*

We think that the contention of Messrs. Vroom and Zabriskie, the counsel for defendants in that case, should have prevailed upon the grounds set forth in their brief which we reprint from the report of the case p. 376-377:

> "This case depends upon the construction of the fourth section of act incorporating prosecutors, passed November 22, 1791, Rev. Laws 108.
>
> If by that section the lands of the prosecutors are liable to county and township taxes, then this assessment cannot be set aside. It may be corrected.
>
> The lands and real estate of the prosecutors were exempted from all taxes for ten years, or until November 22, 1801, since which they were liable to tax.
>
> The defendants contend that the true construction of the proviso to this section is, that after ten years, all exemption was at an end, but that after that, taxes for the use of state should only be levied in the manner therein prescribed; but that other taxes, for county, township, or city, could be levied in any lawful way.
>
> The purview or enacting part of the section ordains that the lands and goods of the society should be free from all taxes by the state for state, county, or other uses. This is the exemption plainly defined.
>
> The proviso then says that, as touching lands of society, said exemption (i. e., from state, township, and county taxes), shall continue in force for ten years only.
>
> Now, nothing can be clearer, more definite, and certain than this. The exemption first defined, and then said exemption shall cease; just as broad as grant.

If the proviso ended here, no one would doubt but that all exemption ended in 1801.

But the section (not proviso or limitation, for that ends with 'ten years only'), goes on to say, that after that it shall be lawful to lay for use of state on said lands such taxes as shall be laid on other lands, etc.; provided always, if by assessment upon the true value, according to a certain rate per centum, to be prescribed by law, and not upon chattels and profits.

This whole clause is providing for a state tax, from which they had been exempted, enacting that it shall be equal and requiring that it shall be a per cent. on true value of lands, and not on chattels or profits.

The only way in which these words can limit the absolute proviso for ending the exemption in ten years is by implication. But implication cannot affect plain words, if subsequent words, from which implication is derived can have force without it.

Now, these words are evidently intended to affect state taxes only, and the enacting part, that it shall be lawful to lay taxes for the use of the state, is necessary to give effect to the proviso. The words, for the use of the state, are not necessary to give effect to the proviso, but to limit the force of it to taxes for the use of the state, to which, only, it is intended that the proviso and restriction shall apply.

And the intention to apply these restrictions to state taxes only can never by implication extend to exclude all others from the limitation of the exemption so plainly stated. 2 *Gill*, 355, *Philadelphia Railroad Co.* v. *Bayless.*

If this should seem doubtful, there is a well established rule of construction that should settle it.

This is a grant of a privilege to a corporation—a great privilege—and against common right, and such grants must be construed most favorably for the people, and most strongly against the grantee.

This is laid down in the writs of error, in *Camden and Amboy Railroad Co.* v. *Briggs,* 2 *Zab.,* 644; 2 *Harr.,* 80, *State* v. *Berry*; 4 *Peters,* 155, *Beatty* v. *Knowles;* 3 *Zab.,* 513, *State* v. *Mansfield.*"

POINT III.

The exemption, if still in force, does not apply to the property now taxed.

A. *Because the property is not used in manufacturing or as incidental to manufacturing by the Society. In this respect we think State* v. *Flavell should be overruled.*

Section 1 of the Society's charter provides, "all those persons who have already subscribed, and who, according to the terms hereafter mentioned, shall subscribe for the purpose of establishing a company, for carrying on the business of manufactures in this State."

The Society is not carrying on the business of manufacturing. It is developing power which is useful in manufactures and so is aiding and assisting the carrying on of manufactures in this State. But a railroad or canal company which carries the raw materials to the manufacturer in abundant quantities and at a low price is likewise assisting

in manufacturing. So is the banker who furnishes capital for the undertaking. Nearly everyone in a manufacturing community contributes something to the promotion of the success of the manufacturers.

The above quotation from the first section of the Society's charter shows that the Society was incorporated with the intent that it should actually engage in manufacturing itself.

The second section of the charter (*Paterson's Laws,* p. 104) reads as follows:

> "That the original capital stock of the said society or company shall not exceed the sum of one million of dollars, to be employed in manufacturing or making *all such commodities or articles* as shall not be prohibited by law, and to that end in purchasing such lands, tenements and hereditaments, and erecting thereupon such buildings, and digging, and establishing such canals and doing such other matters and things, as shall be needful for carrying on a *manufactory or manufactories of the said commodities or articles.*"

In the case of *State* v. *Flavell,* 24 *N. J. Law,* at page 382, it was held:

> "The water power itself not only, but the banks, dams, canals, and all land appropriate for mill sites or necessary for the maintenance and extension of the raceways and other works of the company are incident to the purposes of their incorporation."

The Chief Justice, HENRY W. GREEN, quotes with approval the language of Chancellor WILLIAMSON, *State* v. *Flavell,* 24 *Law,* at 381:

> "Nor has the Society, in my opinion, by employing their funds in improving the natural advantages of the district by increasing their water power and multiplying seats for manufacturing establishments and granting leases for manufacturing purposes to individuals and private companies, either abused their corporate powers or perverted the institution from its original design,"

as an answer to the objection that the real estate of the company was not being used for purposes incident to the object of the corporation.

But this is not the ground upon which Chancellor WILLIAMSON decided against that objection when it was raised in *Society* v. *Morris Canal,* reported as a note in 30 *N. J. Equity,* page 145. He says, on page 155:

> "But if the Society has forfeited its charter by an abuse of power, or by a perversion of the design of the institution or by the breach of an implied trust or contract, or in any other way, this Court has no jurisdiction to try the question of forfeiture, or tc examine into and decide on it in this collateral way."

State v. *Flavell* rests upon itself therefore and received no support from the earlier case as a decision. Whatever support it receives from that case is from a part of the opinion which was merely *obiter dicta.* The land held to be exempt from taxation in *State* v. *Flavell* was land either used for

the manufacture of articles or commodities or incident thereto.

The clause in the second section of the Society's charter permitting it "doing such other matters and things as shall be needful for carrying on a manufactory or manufactories of said commodities or articles" refers to the manufactures in which the company's capital was to be invested and does not refer to or permit the doing of those things as incidental to the manufactures carried on by others as erroneously held in *State* v. *Flavell.*

B. *The development of electricity in itself is not manufacturing.*

The plant now taxed is used to develop electricity only one-tenth of which at present is used for power for manufacturing commodities and nine-tenths is sold to the Public Service Electric Company for lighting and the other purposes for which the company uses electricity.

Testimony, pages 40-41.

We claim that the developing of electricity is not manufacturing. To the extent of the use of the electricity for lighting it is not developed as an incident to manufacturing. It may be said that the development of electricity for power purposes is similar to the development of power by means of water wheels. But this is not so to the extent that the electricity is used for lighting.

The development of electricity is not the manufacture of an article or commodity.

The charter of the Society limits the investment of the capital of the company to one million dollars to be employed in "manufacturing or making all such commodities or articles as shall not be prohibited by law."

The Supreme Court in the present cases decided the production of electricity is manufacturing, saying (Case, page 96, lines 31, etc.):

> "That the production of electricity is a species of manufacturing, and therefore within the charter power of the prosecutor, seems to be abundantly supported by judicial decision, wherein kindred questions have presented the inquiry for determination. *People* vs. *Wemple,* 129 *N. Y.,* 543; *Frederick Co.* vs. *Frederick City,* 36 *Atl. Rep.,* 362."

People v. *Wemple* is an authority holding that the production of electricity is "manufacturing." It was the only authority cited on this point by counsel for the Society. *Frederick, etc. Co.* v. *Frederick City,* holds directly the opposite.

The following extracts are from the opinion of the Court in that case:

In *Commonwealth* v. *Northern Electric Light & Power Co.,* 22 *Atlantic,* 839, 14 *L. R. A.,* 107, the question involved in this case came up and it was held:

> "Defendant is clearly included in section 4 of the Act of 1879; it must therefore, to be relieved, show that it is unmistakably included in the exemption provided for in section 20 of the Act of 1885. In other words, it must show clearly that it is a manufacturing corporation.
>
> We have not been referred to, nor have we been able to find, any definition of the terms 'manufacture' or 'manufacturing' that do not limit them to the production of material substances. In Brande's Encyclopedia, 'manufacture' is defined: 'The term employed to designate the changes or modifica-

tions made by art or industry in the form or substance of material articles, in the view of rendering them capable of satisfying some want or desire of man; and 'manufacturing industry' consists in the application of art, science, or labor to bring about certain changes or modifications of already existing materials.' Webster defines manufacture to be 'the operation of making wares of any kind, the process of reducing raw materials to a form suitable for use, by the hands, by art, or by machinery'; and a manufactured article to be 'anything made from raw materials by the hand, by machinery, or by art'; and practically the same definition is given by Worcester, who, explaining merchandise, goods, wares, and produce as synonyms, says that 'wares are manufactured and may be goods or merchandise.'

In an extended note to *Engle* v. *Sohn,* 41 *Ohio St.,* 691, 52 *Am. Rep.,* 103, reference is made to a large number of cases in which the question arose what was a manufacture or who was a manufacturer? And in every case in which it was held that either term applied it was assumed that the articles produced must be material substances.

Whatever electricity may be, it is manifestly and admittedly not a material substance, and whatever electric light companies do, they do not, in generating or evolving electricity, 'make changes or modifications by art or industry in the form or substance of material articles.' They do not make 'wares of any kind,' nor 'reduce raw materials to a form fit for use.'

Because of the novelty of the subject, and of our desire to do justice to the defendant,

we have adopted the language of its expert witness at considerable length in the finding of facts; but when all has been heard that can be said on the subject, nothing has been said to lead to the belief that electricity is a material substance, nor is it claimed by anyone so to be; therefore, its production or generation or evolution does not come within the authoritative lexicographic, scientific, or legal definition of the terms 'manufacture' or 'manufacturing'; and hence we cannot say that defendant manufactures electricity. It is, however, strenuously contended by defendant's counsel that, even if it does not manufacture electricity, it does manufacture and sell light, and for that reason is a manufacturing company. But what is light? In 14 *Encyclop. Brit.*, 576, it is said: 'Sound may be defined as any effect on the sense of hearing; and in the same way light may be defined as any effect on the sense of sight.' And in the same authority, VIII., 569, in the article 'Ether,' it is said: 'That light is not itself a substance may be proved from the phenomenon of interference. A beam of light from a single source is divided by certain optical methods into two parts, and these, after traveling by different paths, are made to reunite and fall upon a screen. If either half of the beam is stopped, the other falls on the screen and illuminates it, but if both are allowed to pass, the screen in certain places becomes dark, and thus shows that the two portions of light have destroyed each other. Now, we cannot suppose that two bodies when put together can annihilate each other; therefore light cannot be a substance.'

So far as is at present known, it is the undulations of that which, because they do not know what it is, scientists call the 'luminiferous ether' which produce 'on the sense of sight' the effect of light. But the undulations are no more material substances than the light itself. They are to the ether what waves are to water, successive motion of different particles. Another analogy is the undulations in the air, which produces the 'effect on the sense of hearing' which we call sound. These undulations with the telephone by electricity produce the effect of sound at great distances, and if we might judge by analogy we should be inclined to say that it is the undulations of the 'luminiferous ether' which, by the use of electricity, by means of electric wires, are induced and extended to the lamps and 'produce the effect of light.' And that it might, with the same reason, be said, that in the use of the telephone sound is manufactured, as that in the use of the electric lighting apparatus there is a manufacture of light.

Without enlarging further upon a subject of which we confessedly know very little, we content ourselves with saying that defendant has not, in our opinion, so clearly shown itself to be a manufacturing corporation as to warrant us in holding that it is exempt from taxation upon its capital stock.

We do not overlook the argument of counsel, based upon the language used by the Legislature in the Incorporation Act of 1874, which in section 34, provided, among other things, that gas companies, or companies for the supply of light and heat, may erect and maintain 'the necessary buildings, machinery

and apparatus for "manufacturing" gas, heat or light from coal or other material, and distributing the same'; and in the supplement thereto, of June 2, 1887, that 'where any such company shall be incorporated for the supply of heat, light, and fuel, or any of them, by any process of "manufacture," it shall have authority,' etc.; but we understand that, in these acts, the term 'manufacture' is used in the sense of producing or furnishing, and as a convenient single term sufficient for the purpose in view, but not intended as a legal definition or extension of the terms 'manufacture' or 'manufacturing.'

The same argument is made from the language of Mr. Justice GREEN, in *Emerson* v. *Com.*, 108 *Pa.*, 111, in which he says: 'Neither light, nor heat can be produced by any human agency except by some species of manufacture. If either is the result of the mere combustion of natural substances, that very combustion is a method of manufacture.' But it is manifest that the term 'manufacture' is here used in its widest sense, as the antithesis to production by natural causes, and that it does not and was not intended to furnish any authority or criterion for the construction of section 20 of the Act of 1885.

We do not think that corporations of the kind to which defendant belongs come within the policy of the Legislature in enacting section 20, which we understand to be the proposed encouragement to manufacturing corporations to establish themselves and carry on their operations within the limits of the Commonwealth rather than beyond its borders; a policy which could apply only

> to manufactories of such a nature that they might be located in one place or another as interest and preference might dictate. But electric light companies, if they exist at all, must exist in the towns and cities to be supplied with light, and cannot choose whether they will carry on their operations within or without the Commonwealth. Therefore, exempting them from taxation would probably not bring capital into the State, and taxing them would certainly not drive it out."

In *Williams* v. *Park* (*N. H.*), 56 *Atlantic,* 463, it was held that furnishing electric light and power was not manufacturing and an electric light and power plant was not entitled to an exemption from taxation under a statute exempting manufacturing establishments.

The Court said:

> "The knowledge of electricity thus far acquired does not warrant one to speak of it as a manufacture. In common speech, an electric light and power plant is not spoken of as a manufacturing establishment. In enumerating the manufacturing industries of a town, the electric plant would not ordinarily be included. It is true that the collection of electricity is sometimes spoken of as manufacturing it; but in such cases other words are usually added, as generating, producing, supplying—showing a consciousness that 'manufacturing' does not correctly express the idea."

The following cases also hold that developing electricity is not "manufacturing":

Commonwealth v. *Edison Electric Light Co.*, 22 *Atlantic*, 845.

Commonwealth v. *Edison Electric Light & Power Co.*, 32 *Atlantic*, 419.

Electric Co. v. *Buechtel*, 146 *Kentucky*, 660.

Re Hudson River Electric Power Co., 173 *Fed.*, 942.

Williams v. *Park*, 72 *N. H.*, 314; 64 *L. R. A.*, 33.

State v. *New Orleans, &c.*, 116 *La.*, 150; 40 *So.*, 597.

In *Bates Machine Co.* v. *Trenton R. R. Co.*, 41 *Vr.*, 684, it was held that "the production and control of electric power by mechanical means for use on a trolley system is a 'manufacturing purpose' within the meaning of section 8 of the Mechanics Lien Law."

At first glance it might be said that this decision of the Court of Errors and Appeals is decisive of the point under discussion. But we think that an analysis of that decision will disclose that not to be the case.

The opinion in that case points out that the question was not so much as to the scientific meaning of the word but as to the sense in which the legislature used it; that the word is now used much differently than formerly; that in various statutes passed recently the Legislature had used the word 'manufacture' to mean the production of electricity; and for that reason should be held so far as that case was concerned to have intended the word to have included the production of electricity.

The Court points out instances wherein it might be held to have used the term with a more restricted meaning. Undoubtedly referring to the cases set out above, the Court said (page 689):

> "Obviously, manufacturing may be regarded by the legislature in a variety of aspects, and where its effect upon the community at large is chiefly or solely considered, the nature of the products of manufacture and their distribution would be a paramount consideration, and hence give color to which the word should be deemed to be employed. Hence there are decisions to be found in which the exemption from taxation have been denied to electric light companies, upon the ground that they were not included under the term 'corporations carrying on manufacturing within the state.'"

Our Supreme Court has decided that publishing a newspaper is not "manufacturing."

> *Evening Journal* v. *Board of Assessors*, 47 *N. J. L.*, page 36.

Referring to the meaning of the word "manufac-[illegible]" the Court said (p. 38):

> "Lexicographers define 'manufacture' to be 'the process of making anything by art, or reducing materials into a form fit for use, by the hand or by machinery.' Worcester's Dict., tit. 'Manufacture.' Mr. Brande defines 'manufacture' as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles in the view of rendering them capable of satisfying some want or de-

sire of man; and manufacturing industry to consist in the application of art, science or labor to bring about certain changes or modifications of already existing materials. He includes under the term 'manufacture' all branches of industry with the exceptions of fishing, hunting, mining and such industries as have for their object to obtain possession of *material* products in the state in which they are fashioned by nature. He says that the term is generally applied only to those departments of industry in which the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products. Brande's Encyclopaedia, tit. 'Manufacture.'

The etymological or scientific meaning of words is useful in the construction of statutes, and sometimes is decisive. A gas company is a manufacturing company. *Nassau Gaslight Co.* v. *City of Brooklyn,* 89 *N. Y.,* 409. An aqueduct company is not a manufacturing company. *Dudley* v. *Jamaica Pond Aqueduct Co.,* 100 *Mass.,* 183. Nor is a mining company. *Byers* v. *Franklin Coal Co.,* 106 *Mass.,* 131. The reason for this distinction is apparent. Illuminating gas is an artificial and not a natural product, produced by the modification of natural substances by art and industry. A company engaged in producing gas is a manufacturing

company in its strictest sense. A water company or a mining company manufactures nothing. Such a company applies labor and machinery simply in obtaining and making merchandise of natural products without any change of substance. Its business has none of the qualities of a manufacturing business.

But the technical or scientific meaning of words does not always control in the construction of statutes. The cardinal rule in the construction of legislative acts is that words in common use are to be taken in their ordinary signification."

The finding of the Court was as follows:

"We agree with the reasoning and with the conclusion of the Court in *In re Capital Publishing Co.,* that the publisher of a newspaper is not, in a legal sense, a manufacturer. It is true that in the production of his papers, which he sells, he employs manual labor and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter who executes his painting with his palette and his brush; so does the lawyer who prepares his brief, or the author who writes a book. But neither the sculptor nor the painter is classified as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer though they employed a printer—the former to print his brief, and the latter his book. In the ordinary and general use of the word 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term. As was said by the

Court in the case last cited, 'no definition of the word "manufacturer" has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. * * * It gives employment to printing-presses, types and editors, and yet, in the whole history of newspapers from the close of the seventeenth century, this word "manufacturer" has never been applied to them or appropriated by them in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or any authority except by way of opinion in the solitary case from Utah.'

A newspaper has intrinsically no value above that of the unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to its subscribers arises from the information it contains, and its profit to the publisher is derived, in a great measure, from the advertising patronage it obtains by the enterprise and ability with which it is conducted. Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer.

We think that the Evening Journal Association is not a manufacturing company within the meaning of the proviso in question, and that the tax in question was properly assessed upon it."

The company is now selling the greater part of its production to the Public Service Electric Company which uses electric power principally for lighting and the operation of street cars. Certainly the Legislature of New Jersey in 1791 never used

the word manufacturing in contemplation of such a use. There are no statutes of that day in which the word manufacturing was used in the sense of including the production of electricity.

The intention of the Legislature as expressed in this charter was to encourage the manufacture of "articles" or "commodities" which at that time were being made in foreign lands and imported into the United States. Certainly no such liberal charter as the Society obtained would have been granted to a lighting or local transportation company.

The Supreme Court holds that the sale of the surplus power developed by the Society on the property in question is not inconsistent with the charter obligation or limitation of the society, "because its failure to so employ the surplus product would result in wanton waste of a commercial product, a condition which we must assume was not contemplated by the Legislature in prescribing the charter limitations of the society."

But suppose the Society finds it more profitable to dispose of the power in question to the Public Service Electric Company than to sell it to the mill owners along the Passaic River and the present system is continued indefinitely.

Then, if our contention that the production of electricity for lighting purposes is not manufacturing within the sense that term is used in the Society's charter is sound, under the holding of the Supreme Court the Society is to escape all taxation on the portion of its capital devoted to uses not contemplated by its charter.

If developing electricity for the purpose of supplying power to manufacturing establishments not operated by the Society is within the scope of its charter and the manufacturing of electricity for lighting purposes is not the Society should pay taxes on the whole because it is responsible for the

mixed uses to which it devotes its property. At least it should pay taxes on the property in proportion to the extent it uses its property for purposes outside the scope of its charter.

In *Press Printing Co.* v. *Assessors,* 51 *N. J. L.,* 75, it appeared that a corporation published a newspaper and also manufactured books. It was held that it was in part a manufacturing company and to the extent of its capital employed in manufacturing was exempt from a tax on other than manufacturing companies.

The Court held (page 77):

> "The prosecutor is a manufacturing company within the exemption so far as concerns its business of printing and publishing books and general job printing, but it is not such a company, within the meaning of the statute, with respect to its business of printing and publishing a newspaper. In one sense the prosecutor is a manufacturing company; in another sense it is not; and it cannot claim exemption under the statute on business which is not within the proviso on the ground that part of its capital is employed in a business which falls within the proviso.
>
> The Act of March 23rd, 1881 (Rev. Sup., p. 602, sec. 407), which prohibits the setting aside of any tax or assessment if the person against whom, or the property upon which, the tax or assessment is laid, is in fact liable to taxation or assessment in respect of the purpose for which such tax or assessment is laid or assessed, and empowers the Court to ascertain and determine for what sum such person or property is legally liable to taxation or assessment, and to make

a proper tax and assessment thereof, provides for the contingency that has arisen in this case.

The depositions show that the two branches of the prosecutor's business are kept distinct, and that of its capital $41,102.21 is invested and used in the newspaper department, and $33,897.79 in the other department.

The tax should be reduced to one-tenth of one per cent. on $41,102.21, and a new assessment for that amount be made, without costs."

POINT IV.

The property in question is taxable under the Act of 1868 (P. L., p. 545).

It appears that the Society finding itself in need of more power about the year 1864 decided to raise the dam near the great falls. In doing so it flooded the lands of upper riparian proprietors who objected. The Society was evidently unable to settle with these proprietors and inasmuch as it had not the power to condemn their rights it could not go ahead with its project. The matter seems to have hung in abeyance for a few years and in 1868 the Society sought the aid of the Legislature which gave it the power of eminent domain but in exchange therefor inserted a provision that materially interfered with the tax exemption of the Society.

The need of the Society for the Act of 1868 is clearly shown in the testimony of Mr. Rossiter, the secretary of the company, and who has been in its employ since 1866.

Case, page 66, line 30:

"Q. When you went with the Society in 1866 was it having considerable trouble with a man named Van Houten and another man named Benson concerning the flooding back of water on their lands? A. It was negotiating for a settlement with them for raising the dam.

Q. I understand that about two years before you went with the Society, that is about 1864, the Society raised its dam temporarily about three feet? A. The dam had been raised in 1864 by putting planking on top of the old stone dam, but I do not think it was more than two feet.

Q. In about 1864 the Society raised the dam near the Great Falls about two feet by means of planking? A. Yes.

Q. That flooded the water back on the lands of Van Houten and some other upper proprietors, did it not? A. Yes.

Q. These upper proprietors started suit against the Society for damages, did they not? A. Yes, one of them did.

Q. And they obtained judgment? A. Yes, one of them did.

Q. One of them obtained judgment? A. Yes.

Q. And the others were making claims for damages, were they not? A. The others made no claims for damages, but they were negotiating for a grant.

Q. In 1868 did the Society apply to the Legislature for a new act giving it power to condemn these lands?

Mr. Humphries: If Mr. Rossiter knows that.

A. Yes.

Q. And the act was passed? A. It was.

Q. And then the Society was able to settle with these upper proprietors? A. The Society did settle.

Q. The Society did settle with them? A. Yes.

Q. After the Act of 1868 was passed—that is true, is it not? A. Yes.

Q. And then the Society raised its dam in a permanent way, that is, they made it of stone? A. Yes.

Q. That is, in 1868? A. Long after.

Q. Long after 1868, after having settled with these upper proprietors; that is true, is it not? A. Yes, they built it in stone by piecemeal in the summer time when the water was low."

The act in question is found on page 545 of the laws of 1868. It is entitled "An act to develop and improve the water power of the Passaic River."

A preamble to it reads as follows:

"Whereas the Society for Establishing Useful Manufactures, a company incorporated by the Legislature of this State, in order more effectually to carry into effect the objects of their incorporation desire to develop, increase and improve the water power of the Passaic Rover, and by that means to extend and increase manufacturing establishments in the County of Passaic, and it appearing that the public good would be promoted thereby; therefore,

1. BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, That it shall be lawful for the said company to develop, increase and improve the

> water power of said river, above the Great Falls, and to create ponds or reservoirs of water therein, and in other streams in said county to be used therewith; and to that end may erect dams in said river and streams and raise or increase the height of any dam or dams heretofore erected in said river, to such height as they may deem necessary for the purposes by this act authorized."

Sections 2, 3, 4 and 5 provide a method for condemning the lands of upper riparian proprietors.

In none of these sections is there any provision for the taking or acquiring by the company of any personal property. This is important in construing the second clause of the Sixth section of the act, which reads:

> "And that all real and personal property of said society acquired under this act shall be subject to taxation in the same manner as other real and personal property in the City of Paterson are subject thereto."

I understand this means that any property acquired by the Society for the purpose of increasing or developing the water power of the Passaic River was to be subject to taxation.

The Society claims that it was the intention of this act to subject to taxation only such property as it acquired by the power of eminent domain under the act.

In construing this language we must apply the general rule to so construe it as to uphold the tax, if possible.

It will be noted that there is in this act no provision that the act shall be construed liberally in favor of the Society, such as there is in the company's charter.

In the Seventh section the act uses the words "take by assessment."

If in the Sixth section it had intended to provide for the taxation of only such property as should have been taken under the power of eminent domain, instead of using the words, "all real and personal property acquired under this act shall be subject to taxation," it would have said, "all property taken by assessment under this act shall be subject to taxation." The intention was to subject to taxation all property acquired for the purpose of developing and increasing the water power of the Passaic River.

We may assume that the company could not as a practical matter develop and increase the water power of the river without this legislation.

It may be that the company could have purchased the lands of the upper proprietors if the upper proprietors were willing to sell. But that this was not practical can be seen from the evidence of Mr. Rossiter, and also from the fact that the Society actually sought and had the legislation enacted.

But in addition to that, there were certain public rights that the Society could not overcome without this additional legislation; for instance, the Society could not flood any public roads.

The ownership of the bed of the river by the Society is also subject to the rights of the public. The river at this point is a highway, the same as any road, and any person who can get upon the river with a boat is entitled to use the river as a highway.

> "All rivers above the flow of tidewater are, by the common law, *prima facie* private; but when they are naturally of sufficient depth for valuable floatage, the public have an easement therein for the purposes of transportation and commercial intercourse;

and in fact they are public highways by water."

Angell on Watercourses, par. 535.

"It must, therefore, be concluded that riparian owners on the Passaic River, above the point where the tide ebbs and flows, have title to the bed of the stream to the middle thereof, subject only to the right of the State to regulate navigation so far as the water may be navigable."

Simmons v. *Paterson,* 15 *Dickinson,* at 390.

It seems to have been considered necessary in the past to get permission from the Legislature to erect dams in the Passaic. In 1828 three acts were passed permitting dams to be erected across the Passaic.

P. L. 1828, p. 133.
P. L. 1828, p. 152.
P. L. 1828, p. 99.

The Society could have been indicted for maintaining a public nuisance if it had increased the height of its dam without statutory authority.

A corporation allied to the Society was indicted for maintaining such a dam a short distance below this one and about tidewater. (*State* v. *Dundee,* 42 *Vr.,* 419.)

Therefore all the work of developing and increasing the water power of the river by means of the raised dam was done under the Act of 1868.

Whatever construction was put upon land was done under the Act of 1868.

The State has asserted its right to control this river, as appears from the charter of Paterson.

P. L. 1871, p. 808, Sec. 26, par. VII, wherein power is given to the city:

> "To ascertain and establish the water lines of the Passaic River, and the boundaries of streets, highways, public lanes and alleys in said city, and to prevent and remove all encroachments beyond said water lines and upon said streets, highways, lanes and alleys."

It would therefore seem that the Society had no right to flood upper lands of the river so as to interfere with roads or with boating, and that it required legislation before it could proceed with its project of raising the dam.

The raising of the dam did materially develop and improve the water power of the Passaic River.

The Society for many years engaged in litigation with the Morris & Essex Canal Company. It brought an action against that company for diverting water from the river. The Lehigh Valley Railroad Company, lessee of the Canal Company, sought to enjoin the suit. The question as to the amount of water stored by the increased height of the dam was evidently of some importance in the suit. In the opinion in the Chancery suit, 3 *Stewart*, at page 160, the Chancellor says:

> "According to the answer, about 1864 the Society increased the height of their dam across the Passaic River, three feet, and by that means erected a large reservoir, capable of containing nearly seven million cubic feet of water, and the result was such an increase of their power at Paterson as substantially to double it."

The answer in above suit was offered in evidence, and the clause in question is printed on page 61 of

the testimony. This answer was under the seal of the company.

The present engineer and governor of the Society say that the above estimate of the increase of power is overestimated, but they still admit that the gain in power is a material one.

Mr. Cook, the engineer of the company, testifies about the storage caused by the increased height of the dam (Case, p. 39):

> "Q. As I understand, the raising of this dam to its present height gives you about two and a half more hours per day service than you would have had under the old conditions? A. No; only when you draw on that storage. Where there is water wasted the storage is of no account. So far as the storage goes it is of no account when water is wasted.
>
> Q. Have you a chart or table showing the number of days when water is wasted? A. Nobody can tell that, but the chances are that there will be water enough to operate that hydro plant in an average year, judging by past experiences, somewhere between one hundred and eighty and two hundred days.
>
> Q. And the rest of the year you must draw on storage? A. The storage can be utilized either there or in the old system of canals."

In addition to this gain by storage there is also a gain of five feet from the increased head (Case, p. 72).

The Act of 1868 providing for the taxation of the real and personal property of the company acquired under the act certainly did not mean only such property as was taken by assessment. It meant all real and personal property acquired for

the purpose of developing and improving the water power of the Passaic River.

The date of the purchase of the land devoted to this purpose is not important.

Suppose that the Society raised the dam it maintained at the time *State* v. *Flavell* was decided for the purpose of diverting water from reservoir to supply certain silk dyeing establishments with water. It could hardly be said that the dam in such case would be free of taxation.

Or if the Society found that some of its vacant and unused land referred to in *State* v. *Flavell,* and which that case decided should be taxed, could be used by it to increase and develop the water power of the Passaic River under the Act of 1868 and applied it to that purpose should it not be taxed.

The words "real and personal property acquired under this act" are used in the 1868 statute in a very broad sense. It means more than such land or personal property as might be purchased under the act.

It includes property created by the company, such as the additional structures and buildings erected to increase and develop the water power of the Passaic River. It was intended to include such structures as this hydro-electric plant (considered apart from the land on which it stands). It must include the additional water power developed under the act.

It was admitted that the hydro-electric plant was built to develop and increase the water power of the Passaic River at the Great Falls.

Mr. Gardner, the present governor of the Society, so admits. (*Testimony,* page 55, line 13, etc.)

The company obtained title to the lands taxed in 1792, and have since retained them in a vacant condition. It did not devote them to the purposes

of the Society under its charter. Therefore they were taxable. When they are put to use, even though it be an incident of manufacturing, they do not cease to be taxable if it be in connection with the raised dam and under the provisions of the Act of 1868.

POINT V.

The property of the Society is not exempt from the State School Tax.

The property is described on the tax bills as follows:

Fronts.	Land Val.	Bldg. Val.	Tax.
42-64 McBride Ave. ..	$3,600		$68.76
Rears.			
42-64 McBride Ave. ..	900		17.19
66-72 McBride Ave. ..	1,000		19.10
74-76 McBride Ave. ..	800		15.28
78-90 McBride Ave. ..	700	$167,985	3,208.51
Total	$7,000	$167,985	$3,328.84

This total tax of $3,328.84, although assessed in five separate parcels, must be considered now as one tract. The building is not actually upon the plot where it appears in the assessment, but all objection on that score has been waived by the Society.

The tax rate is $1.91 for each $100. The return shows this to include a county tax rate of $0.36956 per $100 and a State school tax of $0.25695.

The amount of the State school tax therefore is $174,985, the total valuation, multiplied by $0.25695 or $449.62.

In *State* v. *Flavell,* 24 *N. J. Law,* it was decided, as appears from the opinion (p. 380):

> "They (the prosecutor in the present case) are liable to taxes under the authority of this State for the use of the State only. It is conceded that the entire assessment sought to be relieved against in this cause was made for township and county uses."

In making the claim, therefore, that part of the present tax is levied for the use of the State we are raising a new point.

In commencing on this section of the Society's charter, the Court, in *State* v. *Flavell, says* (p. 379):

> "The language of the enactment leaves no room for the application of the principle adopted in the case of the *Railroad* v. *Hillegas,* 3 *Harr.,* 11, 71, that all taxes are State taxes, because they are imposed by the authority of the State. This section, in the most explicit terms, distinguished between the authority by which taxes are assessed and these uses to which they are applied. The exemption 'is from all taxes, charges and impositions whatsoever under the authority of this State, whether for State or for county uses, or for any other use whatsoever.' The proviso is, that, as to the lands, the exemption 'shall continue in force for the term of ten years only, after which it shall be lawful to lay such taxes for the use of the State upon the said lands, &c., as shall be laid upon other lands, &c., of like value, nature or description.' The first clause of the proviso, standing alone, would

limit the operation of the exemption clause, so far as regards the real estate, to the term of ten years. The second clause of the proviso qualifies the limitation, by confining it to a particular class of taxes. The effect of the whole proviso, taken together, is not to determine the entire operation of the exemption clause at the end of ten years, but to narrow its operation at that time to a part of the subject matter to which it originally applied.

It was argued with much ingenuity that, by the proviso, the exemption of the real estate from taxation totally ceases at the expiration of ten years; that the last clause of the proviso was designed merely to provide for the mode in which the State taxes should be assessed, and cannot by mere implication revive the exemption from township and county taxes. However plausible the suggestion may be, it is obvious that it is not the natural and plain meaning of the section. That construction can only be reached by detaching the various members of the sentence from the relation in which they stand to each other. The proviso, as it stands in relation to the exemption clause, declares that the exemption of the lands of the society from all taxes, for State, county, or other uses, shall continue in force for the term of ten years only, after which the exemption shall not include taxes for State uses.

By the terms of the charter, the lands of the society were exempted from all taxes whatever under the authority of this State for the term of ten years. From the expiration of that term the lands are exempt from

> all taxes for county, township or city purposes. They are liable to taxes under the authority of this State for the use of the State only. It is conceded that the entire assessment sought to be relieved against in this cause was made for township and county uses."

The question as to when a tax is levied for the "use of the State" or "for local use" has not been decided in this State.

The very fact that it is practically impossible to determine this question with any approach to accuracy is a good reason for overruling *State* v. *Flavell.* In one sense all taxes are levied for the use of the State. It only has the authority to tax, and it alone owes certain duties to its citizens. It is the duty of the State to dispense justice and to protect its citizens and to preserve order within its borders. In carrying out this duty it sets up courts of justice and defrays the expense thereof, partly out of the State Treasury and partly by compelling the various communities of the State to tax themselves for the purpose. The salaries of the Supreme and Circuit Court Justices are paid by the State. The jurymen are paid by the county. A stranger may come into the State and institute a suit in the Supreme Court and have the same tried by a jury of Passaic County at the expense of the County. Money raised for the purpose of maintaining the courts is raised for a State purpose. The amount required to operate the courts in Passaic County, as appears from the County Ordinance, is $82,000, quite a large item.

It is the duty of the State to properly police its territory. Some States have a State Constabulary. New Jersey fulfills this duty to its inhabitants by compelling the local communities to organize and

pay a local police force. Yet they are upholding the peace of the State of New Jersey. They are performing a duty which it is incumbent upon the State to perform and which it has simply shifted upon the municipalities. The amount raised for this purpose in the City of Paterson is something over $208,000. Yet if the city police at any time did not adequately preserve the peace the militia would be called in and the expense borne by the State.

So we might go through the various city and county expenditures and find that many of them are for State purposes. There are many expenditures made from the State Treasury that would naturally be considered for local purposes.

The State, for instance, maintains a system of inspection of tenement houses. This under most views would be considered a local purpose. It likewise maintains a civil service commission, a large part of whose function is maintaining a supervision over the appointment and dismissal of municipal employees. There are many other departments of the State Government whose functions seem to extend to local affairs.

It seems almost impossible to draw a line between what may be considered a local purpose under this charter and what a State purpose.

This difficulty argues strongly against the strength of *State* v. *Flavell.*

Officers paid by counties have been held to be "State Officers."

In *Burgan* v. *Civil Service Commission,* 84 *N. J. L.,* page 219, the secretary of a county tax board, who under *P. L.* 1906, page 210, was to be paid out of the county treasury, was held to be "an officer in the paid service of the State."

The same thing was held in the case of *Paddock* v. *Hudson Tax Board*, 53 *Vroom*, at page 361, where the Court said:

> "There is no merit in the claim that the relator was not in the paid service of the State. The mere fact that the county paid him his salary does not, according to the reasoning in *Pierson* v. *O'Connor*, 25 *Vroom*, 36, make him less a person in the paid service of the State."

In *Freeholders, &c.*, v. *Stevenson*, 46 *N. J. L.*, 173, the question came up whether a statute fixing the salary of the Prosecutor of the Pleas of Passaic County was a special law regulating the internal affairs of the county. It was so held. The prevailing opinion was written by Justice VAN SYCKEL, who said (page 187):

> "This law attempts to fix the salary of the Prosecutor of the Pleas of Passaic County. It is true that the prosecutor represents the State in the administration of the criminal law, and while the administration of justice within a county may not properly be termed an internal affair of the county, the amount of compensation which public officers who administer the laws shall receive from the county treasury is an affair which concerns the county alone, and not the State. This statute does not affect the administration of justice in anywise; it relates wholly to the salary which the county shall pay. Those who control the county finances are charged with the duty of raising the necessary funds to pay such salaries, and upon such laws depend the extent to which the county shall be burdened by taxa-

tion. In no respect can the internal affairs of a county be more materially regulated."

Justice DIXON wrote a dissenting opinion on the point, saying (page 189):

> "Does this law purport to regulate the internal affairs of the counties where it is to operate? It attempts to fix the salary payable by the County of Passaic to the prosecutor of the pleas of that county. Is the payment of that salary an internal affair of the county? I think not. The compensation of the prosecutor is a necessary incident of the prosecution of crimes within the body of the county, and such prosecution cannot properly be regarded as an internal affair of the county. The offences to be prosecuted are violations of State laws, committed against the peace of the State, prosecuted in the name of the State by an attorney of the State before judges appointed by the State, the penalties to be imposed are inflicted by direct authority of the State and mainly under State supervision, and whether in any case they shall be remitted is determined in a Court of the State. These things have been so ever since the commonwealth existed; and they show, in my judgment, that, according to the general consent of our people, the repression of crime in each county concerns the State at large and is not an internal affair of the county. The incidents partake of the character of the principal."

WHILE A TAX MAY BE LEVIED FOR A LOCAL PURPOSE IT MAY STILL BE FOR THE "USE" OF THE STATE.

The words of the charter limiting the exemption are "after which time it shall be lawful to lay such taxes for the *use* of the State, &c."

The word "use" is not synonymous with "purpose." The case of *State* v. *Flavell* did not hold that taxes might be laid for State purposes and not for local purposes, but that taxes might be laid for the use of the State.

While the exemption granted in the beginning of the fourth section of the charter was as to all taxes, &c., "under the authority of this State for State and county uses, or for any other use whatever," yet the limitation of the exemption following later reverses the order and makes it "for the use of the State," not for State uses.

The purpose for which the tax is laid does not determine whether it is lawful or not. That is determined under this charter by whether the tax is to be applied to that purpose by the State or by a subordinate governmental agency.

By means of the State School Tax the money of one municipality or taxing district is taken and expended in another municipality or taxing district.

Such being the case, the State School Tax, if a tax for local purposes, is invalid.

The State cannot tax one community for the benefit of another. This was pointed out by Justice VAN SYCKEL in *Baldwin* v. *Fuller*, 39 *N. J. Law*, at page 586 (*affirmed* 40 *N. J. Law*, page 615), in the following language:

> "The power of the Legislature over the subject is certainly not absolute, for it will

be conceded that the assessment of one school district for the benefit of another would be a palpable trespass upon the rights of private property."

And further on page 578 of the same case the same Justice points out:

"That the Legislature may designate certain occupations, trades, or employments as special subjects of taxation, or discriminate between different kinds of property in the rate of taxation, or apportion the tax among classes of persons or property made liable to taxation, in such manner as may seem fit, provided it is apportioned upon the rule of uniformity, may be conceded. From the operation of such laws, no injustice necessarily flows. The class of tradesmen upon which they act, must add the burden to the selling price of their wares, and thus, ultimately, it is distributed over the community with an approximation to equality. Where real estate is selected to bear the heavier load, uniformity is still preserved—it acts on each and all in their turns, as they become owners of lands, and ceases to be exacted of them, when they no longer hold the estate in respect of which the duty is required.

But it seems equally clear that a tax for State purposes must fall upon the State at large, for county purposes, upon the county, and for the public uses of any lesser political district, upon such district. The county of Hudson could not be required to defray the entire expense of the State government, nor could one township, in that county, be compelled to yield the whole revenue necessary for county purposes; nor could the

> Legislature impose upon a single citizen the whole burden of taxation in the township in which he may reside. Any such fiscal scheme would be pronounced, by the common judgment of mankind, so contrary to the principles of natural justice, that we would be driven to conclude that there was some radical error in the premises upon which its justification was grounded."

THE STATE SCHOOL TAX IS LEVIED IN PROPORTION TO THE ASSESSED VALUATION OF THE PROPERTY IN THE VARIOUS TAXING DISTRICTS BUT IS DISTRIBUTED IN AN ENTIRELY DIFFERENT MANNER. Ten per cent. may be withheld and not returned to the county where the money was raised, and further in the distribution of the money sent into each county the distribution of the money produces many inequalities so that some districts receive much less than they paid.

A State school tax was first imposed by *P. L.* 1871, p. 94.

The State constitution (Article IV, Section 7, par. 6) as amended in 1875 provides:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in this State between the ages of five and eighteen years."

The present School Law provides for the levying of a State school tax (Compiled Statutes, p. 4780). Article XVII is headed "State School Tax."

Section 177 provides, among other things:

> "A State school tax shall be annually assessed, levied and collected upon the taxable real and personal property in the State."

This tax is apportioned by the State Comptroller amongst the several counties and the County Collector of each county apportions it amongst the several municipalities of the respective counties. Each municipality pays its share of the tax to the County Collector, who in turn pays it to the State Treasurer.

The State tax, together with other State school moneys, is then distributed to various municipalities by a complicated system laid down by Section 182 of the School Law.

This distribution is based principally upon the number of teachers employed and upon the attendance of pupils.

Money for the erection of buildings and other such items is raised by direct local taxation. School Law, Section 76. Money for current expense, in addition to the share of the State school money, is obtained by local taxation. School Law, Section 75.

The State School Law is a comprehensive statute controlling the operation of the local school boards. In certain contingencies there may be withheld from a municipality its share of the State school tax distribution.

The State School Superintendent is given supervision of every school in the State. School Law, Section 9.

In the argument before the Supreme Court we cited the opinion of Justice DIXON in the case of *Riccio* v. *Hoboken,* 40 *Vroom,* 104, as supporting our contention, but that Court interpreted that case as an authority against us. It is true that Mr. Justice DIXON, in his opinion in that case, after pointing out a number of statutes in which the Legislature treated the public school as in some respects a matter of local concern, said:

> "Indeed it may be truthfully said, at no time prior to the adoption of the amendments of 1875, can anything be discovered in our legislative history on the subject of public education which does not point to the support and management of common schools in cities and in other municipalities as a matter, *more or less,* of local concern."

This we have conceded and the decision of that case shows that even after the adoption of the constitutional amendment of 1875 the public school system is still *"more or less"* a matter of local concern.

Our contention is that in some respects it is and has for many years been a matter of State concern and was so stated to be by Mr. Justice DIXON in the opinion in question in the following language (40 *Vr.,* page 108) :

> "The education of children is a matter which concerns the State at large, as well as the local community in which they dwell, and may therefore reasonably be regarded in either aspect. As a concern of the local community, it falls within the regulation of internal affairs, while as a concern of the whole State, it falls within the other clause. The Legislature has dealt with it from both points of view. The State appropriations treat it as involving the good of the State, while the local provisions treat it as of narrower moment."

Our contention is that the Legislature has treated the public school system as a State matter to the extent of the appropriations made to it from the

We contend that under this provision the State could impose lawful taxes and could use them in any lawful way even if such use was in connection with some matter of local concern.

POINT VI.

The case of *State* v. *Society, etc., 43 N. J. Equity, 410*, does not control the questions now under consideration.

The City of Paterson was no party to the case, and is not bound by it as *res judicata*.

The Society resisted the franchise tax imposed by the State in that case:

1. Because it was exempt by its charter.
2. Because it was a manufacturing corporation doing business in this State, and exempt under the statute imposing the tax.

The decision must have been upon the second ground, because the statute imposing the tax expressly exempted manufacturing corporations doing business in this State. Under this statute no tax could have been levied upon the Society, if it was actually engaged in other business than manufacturing. The tax was on the franchise of the Society which limited the company to manufacturing within the State. If the company went outside of its charter it could not have been taxed, the only remedy being by information by the Attorney-General to compel it to cease its illegal acts.

We respectfully submit that the Supreme Court should be reversed and the tax upheld for the reasons herein set forth.

EDWARD F. MERREY,
FRANCIS SCOTT,
Of Counsel with City of Paterson.

State, whether the money so appropriated is raised by a State school tax or in any other way.

As early as 1817 the Legislature has denominated money raised by the State for the purpose of support of the school system as money raised for a "State use."

By *P. L.* 1817, page 26 (*Harrison,* page 612), it was enacted:

> "That the six per cent. stock of the United States, belonging to this State, purchased and hereafter to be purchased in pursuance of an act entitled 'An act directing the investment of certain moneys belonging to this State,' passed the ninth day of February, 1816, all dividends which may hereafter be received on the shares of this State in the capital stock of the Cumberland Bank, and on the shares of the State in the Newark Turnpike Company, all moneys to be received on the sale of the house and lot belonging to the State in the City of Jersey, AND ONE-TENTH PART OF ALL MONEYS HEREAFTER TO BE RAISED BY TAX FOR THE USE OF THE STATE, shall be, and the same are hereby set apart and appropriated for the purpose of creating a fund for the support of free schools in this State."

Could it be said that this Society was exempt from the one-tenth part of the taxes levied for the use of the State as referred to in the above statute simply because the money was paid into the school fund?

The charter provides that after ten years from the date of incorporation it should be lawful "to lay such taxes for the use of the State"; that is in such way as the State might want to use them.

New Jersey Court of Errors and Appeals

SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, Prosecutor-Respondent, vs. CITY OF PATERSON and EUGENE WICKHAM, Receiver of Taxes and Assessments in the City of Paterson, Defendants-Appellants.	On Appeal from Supreme Court.

BRIEF FOR RESPONDENT.

Statement of the Case.

This appeal brings up for review a judgment of the Supreme Court on writ of certiorari, setting aside certain tax assessments for the year 1914 on the Society's property, consisting of land and a hydro-electric power plant and auxiliary steam power plant, erected thereon, located on McBride Avenue in the Sixth Ward of the City of Paterson, and known as Lots 42 to 106 McBride Avenue, being the property colored pink on Exhibit P-4, facing page 87. Spruce Street, McBride Avenue and Ellison Street (also shown on said map) are

all now known as McBride Avenue (p. 13, lines 30-35).

The assessments vacated were under six separate tax bills as follows:

McBride Avenue Lots.			Assessment.	Rate.	Tax.
42 - 64	Fronts Real Estate		$3,600	1.91	$68.76
42 - 64	Rears "	"	900	1.91	17.19
66 - 72	"	"	1,000	1.91	19.10
74 - 76	"	"	800	1.91	15.28
78 - 90	Real Estate	$700			
	Buildings	167,285	167,985	1.91	3,208.51
92-106	Real Estate		4,700	1.91	89.77
			$178,985		$3,418.61

(Exhibit P-2, pp. 77-82; p. 12, ll. 22 to 30).

The location of these lots will be readily understood by referring to the map (Exhibit P-4, facing p. 86).

The taxes for the year 1914 on Lots 22 to 40 McBride Avenue, which lots are not at present utilized in connection with any buildings, were paid December 22, 1914 (p. 12, l. 35, to p. 13, l. 3; see tax list facing p. 5).

The Society had recently built a modern hydro-electric power plant upon part of this land and an auxiliary steam power plant on another part of the land, as shown on said map. The hydro-power plant was commenced to be erected in 1913 and was completed in 1914, and the first assessment upon

the building, the one now in question, was for the latter year (p. 17).

It was not a complete assessment (p. 17, ll. 31 to 33). The assessment treats the hydro-power plant as located on Lots 78-90 McBride Avenue, which is not correct, but the respondent made no point out of that irregularity (p. 18). There was no assessment for the year 1914 on the steam power plant which stands on Lots 48-60 McBride Avenue, as *that building was not completed until the following year* (p. 18).

The land upon which these buildings stand had been owned by the Society for many years. The land upon which the steam power plant stands it acquired title to under two deeds, one from Anthony Van Blarcom on July 3rd, 1792, conveying a tract of 28.08 acres, and the other from John I. Post on June 27th, 1792, conveying a tract of 122.22 acres (pp. 14-15; see map Exhibit P-7 facing p. 86).

The land upon which the hydro-electric power plant stands the Society acquired title to under a deed from John Colt dated December 8th, 1834, conveying a tract of 10 acres, including the bed of the Passaic River (p. 16 and map Exhibit P-7 facing p. 86).

Title to these lands has been held by the Society ever since these deeds were given (p. 17). The assessment of $167,285 as the value of the buildings on Lots 78-90 (*sic*) is the assessment on the hydro-electric plant (p. 18). The respondent objected, however, to the total assessments $178,985 on all the lands and buildings, the same being then all used as one entire property.

The hydro-electric plant is located on the edge of the cliff just across the tongue of land that goes out from Spruce Street to the chasm bridge, which is just about opposite the end of the Society's dam. It is built upon the bed of the Passaic River. It is used and to be used to effect a more economical operation and use of the water power of the Society by bringing the use of all the water into one station, thus effecting economies of operation and construction. It is the present custom to use all the power developed in one station for the sake of economy and more efficient operation. The form of power created from this hydro-power plant is electric power. It is created by means of water wheels and direct connected electric generators and from the station is distributed to the mills along the raceways and to other parties. The steam power plant is located east of the hydro-power plant, across the pool and about 200 feet distant, and the steam-power plant and the hydro-power plant are correctly designated on the two maps, Exhibits P-4 and P-7, facing p. 86 (see pp. 34 and 35).

While it was the intention of the Society to sell the electricity to various manufacturers along the raceway, and only the surplus power, if any, to the Public Service Corporation, at the time the testimony was taken the Society had not completed its arrangements with the mill owners along the raceway and the Public Service Electric Company was therefore getting the greater part of the current (p. 35, ll. 15 to 23; p. 40, l. 9 *et seq.*).

The customers of the Society, including the Public Service Corporation, use the electricity furnished by the Society for manufacturing purposes, although the Public Service Corporation can, of course, use it also for other purposes.

The respondent claimed that the property in question consisting of the said land and building was exclusively devoted to and used for manufacturing purposes for uses incident to the operation of the Society's incorporation, and that under the charter of the Society, said property was exempt from taxation by the City of Paterson.

The Society for Establishing Useful Manufactures was incorporated November 22, 1791, by special act of the Legislature, entitled "An act to incorporate the contributors to the Society for Establishing Useful Manufactures, and for the further encouragement of the said Society." (See Folio Edition of the Laws of New Jersey, revised and published under the authority of the Legislature by William Patterson in the year 1800, at p. 104.)

The preamble to the act of incorporation reads as follows:

> "Whereas it is represented to this legislature, that a subscription has been made, for the purpose of introducing and establishing useful manufactures to an amount which already exceeds two hundred thousand dollars; and whereas the State of New Jersey, having been deemed by the contributors the most suitable for carrying the same into effect, the aid of the legislature has been requested, in promotion of the views of the said contributors; *and whereas it appears to this legislature that the granting such aid will be conducive to the public interest;* therefore Be it enacted, etc."

By the fourth paragraph of the act which is the charter of the Society, it is provided as follows:

> "IV. *And the more effectually to encourage so useful and beneficial an establishment,* be it further enacted by the authority aforesaid, That all the lands, tenements, hereditaments, goods and chattels, to the said society belonging, shall be and they are hereby declared to be free and exempt, from all taxes, charges and impositions whatsoever, under the authority of this state, whether for state or for county uses, or for any other use whatsoever, provided always, that the said exemption shall not be construed to extend to the private or separate property of any member of the said corporation, in his or her individual capacity; and as touching the lands, tenements, and hereditaments, of the said society, shall continue in force for the term of ten years only, after which term it shall be lawful to lay such taxes, for the use of the state upon the said lands, tenements, and hereditaments, as shall be laid upon other lands, tenements, and hereditaments of like value, nature or description; provided nevertheless, That in case the said taxes shall be laid by way of assessment, it shall be according to a certain rate percentum, to be prescribed in the law, laying such taxes, of the true and absolute value of the lands, tenements, or hereditaments, whereupon the same shall be laid or assessed, and shall not extend directly or indirectly to the moneys, goods, or chattels, whether in possession or action, or to the profits, real or supposed, of the said society."

POINT I.

Under the above paragraph of its charter the Society is exempt from taxation upon the lands in question in this proceeding (see Reasons, pp. 90-92).

The following authorities have sustained the legality of the exemption:

State v. *Flavel* (New Jersey Supreme Court, February Term, 1854), 24 *N. J. Law,* 370.

City of Paterson v. *Society for Establishing Useful Manufactures* (New Jersey Supreme Court, February Term, 1854), 24 *N. J. Law,* 385.

State v. *Powers, Collector* (New Jersey Supreme Court, February Term, 1854), 24 *N. J. Law,* 400.

State v. *Blundell* (New Jersey Supreme Court, February Term, 1854), 24 *N. J. Law,* 402.

State v. *Powers* (New Jersey Supreme Court, February Term, 1854), 24 *N. J. Law,* 406.

State of New Jersey v. *Society for Establishing Useful Manufactures* (Court of Chancery of New Jersey, October Term, 1887), 43 *N. J. Eq.,* 410.

In re Application of S. U. M. for vacation of tax assessment for the year 1913 on property in the Seventh Ward of the City of Paterson, before the Board of Equalization of Taxes. (Note: A printed copy of the opinion in this last case will be handed up to the Court with this brief.)

A close reading of all these cases is respectfully bespoken before proceeding further with the reading of this brief.

Under these authorities I respectfully insist that this particular property of the Society is exempt from taxation for two reasons:

(1) Because it is being utilized by the Society for the express purpose of manufacturing electricity. The business of generating electricity is a manufacturing business and the Society was expressly incorporated for the purpose of manufacturing.

(2) Because the buildings will be used for the purpose of disseminating power among manufacturers in the City of Paterson in the same manner as the water of the Society was utilized for the same purpose, and it was held, in the case of *State* v. *Flavel, supra,* that the utilization of its water-power, not for the purpose of itself manufacturing, but by confining its operations to creating power and leasing out water privileges for manufacturing establishments, was neither an abuse of power nor a perversion of the end of its institution, and the property so used was not subject to taxation. *The sale of its surplus power to the Public Service Corporation could not be deemed a departure from its charter, as that surplus power if not thus disposed of would simply be wasted.*

Under the doctrine of *stare decisis,* this Court ought not, I respectfully submit, to do otherwise than vacate the tax in question. Moreover, these decisions, or at all events, some of them, have been more than once referred to by the Court of Errors and Appeals without any expression of disap-

proval on its part, and having now stood unreversed for more than sixty years, have the additional sanction of age to entitle them to respect.

State v. *Flavel, supra,* and *State* v. *Blundell, supra,* were cited and relied on by BEASLEY, *C. J.,* sitting in the Court of Errors and Appeals, in the case of *State, New Jersey Railroad Transportation Co.* v. *Hancock* (New Jersey Court of Errors and Appeals, March Term, 1871), 35 *N. J. Law,* 537-543.

State v. *Powers,* 24 *N. J. Law,* 400, *supra,* was cited and relied upon by Mr. Justice VAN SYCKEL, sitting in the Court of Errors and Appeals, in *Singer Mfg. Company* v. *Heppenheimer* (New Jersey Court of Errors and Appeals, March Term, 1896), 58 *N. J. Law,* 633-637, and it was again cited and relied on by the same Justice in the same Court in *Hancock, Comptroller,* v. *Singer Mfg. Company* (New Jersey Court of Errors and Appeals, June Term, 1898), 62 *N. J. Law,* 289-339.

Unfortunately I was unable to find any rule for judgment entered in the Supreme Court in the case of *State* v. *Flavel,* 24 *N. J. Law,* 370, that I might offer the judgment in evidence as establishing the Society's non-liability for this tax as *res judicata* between the City of Paterson and the Society.

Hancock, Comptroller, v. *Singer Mfg. Company,* 62 *N. J. Law,* 289.

POINT II.

Even if this were a case of first impression, if there had been no previous decisions of the Supreme Court establishing the Society's immunity from taxation, the fact is that by its charter it is exempt from all taxation except for State uses, and this tax was therefore properly vacated.

It may be noted, in the first place, that there has been no attempt on the part of the Legislature to repeal the fourth paragraph of the charter of the Society or to render the Society liable for any taxes other than those for the use of the State, but as counsel for the appellants will claim that an act passed March 30, 1868, entitled "An act to develop and improve the water power of the Passaic River" (P. L. 1868, p. 545, to which reference will be made later on), operated to repeal that paragraph so far as it would otherwise apply to the lands in question, we shall later on demonstrate that the Act of 1868 referred to by counsel, has no effect whatever upon the questions involved in this matter, and that the contract between the City of Paterson and the Society created by the fourth paragraph of the Society's charter is an irrepealable contract and one entered into because the Legislature expected the State to benefit by the incorporation.

The fourth section of the Society's charter, after exempting its property from taxation, provides that as touching the lands, tenements and hereditaments of the said Society, this shall continue for only ten years, after which it shall be lawful to tax its lands *for the use of the State.* The words creating the exemption were "that all the lands, etc.,

shall be, and they are hereby, declared to be free and exempt from all taxes, charges and impositions whatsoever under the authority of this state, *whether for state or for county uses or for any other use whatsoever.*" The words in italics in the sentence of the proviso "after which term it shall be lawful to lay such taxes *for the use of the state* upon the said lands, etc.," are in apposition to the words in the enacting clause, "whether for state or for county uses or for any other use whatsoever." The proviso by plain implication limits the termination of the exemption to State taxes only.

It is an established rule of construction that *expressio unius est exclusio alterius.*

Brooms' Legal Maxims, p. 298.
Dwarris on Statutes, 707.

The construction of the words of a statute must be reasonable and according to the general intent of the Legislature on the subject.

22 *Pick.,* 571.

Here the object of the Legislature was to encourage the establishment of manufactures by a relief from taxes.

Again, a statute must be so construed that no clause or word is without effect. *Dwarris on Stat.,* 706; 1 *Harr.,* 285. And here, if the effect contended for is to be given to the first clause of the proviso, then the second clause is useless and unmeaning—there was no occasion to enact that "after that it shall be lawful to lay taxes for the use of the state."

This interpretation is also supported by the provisions of the thirty-seventh section of the charter,

which provides that the act shall be construed most beneficially for the company.

The thirty-seventh section of the charter reads as follows:

> "And be it further enacted by the authority aforesaid, *That this act shall in all things be construed in the most favorable manner for the said respective corporations,* nor shall any non-user of the privileges hereby to the said corporations respectively granted, create any forfeiture of the same; and notwithstanding the members of the said respective corporations should fail to meet and hold their elections as is hereby specified, the said elections may be afterwards holden and made in such manner, as shall have been prescribed by the laws and ordinances of the said respective corporations and the officers for the time being shall continue to hold and exercise their office, until others shall be duly elected to succeed them at some subsequent meeting."

Reference is made by counsel to the act entitled "An act to develop and improve the water power of the Passaic River" (P. L. 1868, p. 545), as in some way affecting the question now under discussion. All we can do at the present time in anticipation of counsel's argument will be to analyze the two acts, the charter and the Act of 1868, and see exactly what was enacted by each statute.

First, by the charter:

The Society was incorporated and rendered able and capable to acquire, purchase, receive, have, hold and enjoy any lands, tenements, herditaments,

goods and chattels of what kind or quality soever, to an amount in value not exceeding $4,000,000, and the same, or any part thereof, to sell, grant, demise, alien and dispose of.

This gave it the right when it acquired riparian lands on both sides of the river, to erect dams across the river of any height or dimensions it chose, so long as it returned the water into the bed of the stream. It had, however, no power to condemn lands for the purposes aforesaid. It would, of course, be bound to compensate the owners of any lands it flooded by means of its dams, and also any riparian owners below from whom it unduly or unreasonably withheld the natural flow of the stream by the erection of such dams.

By the seventeenth clause of the charter it was given the right to condemn lands and land covered with water *for creating navigable canals* for the purpose of transporting goods, wares and merchandise, and also for the purpose of opening and clearing rivers for navigation—*but it in fact never exercised any of such rights and never created a navigable canal or made any river navigable* (p. 19, ll. 12-20).

By the thirty-seventh section of its charter it was not obliged to use privileges it did not desire to use.

A very interesting history of the work of the Society and of the progress it made in that work will be found in Chancellor WILLIAMSON'S opinion in *Society* v. *Morris & Essex Canal Co.*, 30 *N. J. Eq.*, 145, a careful perusal of which is respectfully bespoken.

Mr. Rossiter testified that about the year 1864 the dam at the Great Falls had been temporarily raised about two or three feet by planking, and lands of one Van Houten and some other upper proprietors had been flooded. There had been litigations between Van Houten and the Society on this subject and the Act of 1868 was procured to be passed in order to enable the Society to condemn Van Houten's lands under that act (p. 26, ll. 30 to 38; p. 27, ll. 1-35).

There was no other object for the passage of that act except to enable the Society to condemn lands. There could have been no other object because every power conferred by that act on the Society it already possessed, except the single power to condemn. The first paragraph of the Act of 1868 provides:

> "that it shall be lawful for the said company to develop, increase and improve the water power of said river above the great falls, and to create ponds or reservoirs of water therein, and in other streams in said county to be used therewith; and to that end may erect dams in said river and streams, and raise and increase the height of any dam or dams heretofore erected in said river, to such height as they may deem necessary for the purpose by this act authorized."

The residue of the statute simply provides for condemning lands that might be flooded by raising the dam, or that might be taken for the erection of the dam, and the sixth clause provides that no action shall be sustained in any court for the recovery of any damages for the erecting, raising, maintaining and using any such dam or reservoir except as

herein provided for (viz., under the scheme of condemnation established by the act), and that all real and personal property of said Society, *acquired under this act,* shall be subject to taxation in the same manner as other real and personal property in the City of Paterson are subject thereto.

Manifestly, the real and personal property of said Society acquired under said act, which was thus to be rendered subject to taxation, was any land that was condemned by the Society under that act. The Society had full power under its charter to buy any lands it wanted to buy, and such lands were to be free from taxes. The Act of 1868 gave it the additional right to acquire lands by condemnation, but such lands were to be subject to taxation.

The first section of the Act of 1868, giving the Society the right to increase the height of its dam, was merely introductory to giving it the right to condemn flooded lands.

Mr. Rossiter testified that no lands were in fact ever condemned under the Act of 1868 (p. 19, ll. 21-30); that as soon as the act was passed, Van Houten and the other upper proprietors submitted to a voluntary settlement and granted the Society an easement to flood their lands, retaining title to the lands in their own names (p. 27, l. 35, to p. 28, l. 5). He further testified that when the Society settled with these upper proprietors it obtained from them grants of the privilege to raise the Society's dam to a height not exceeding thirty-two inches above the level of the top of the old stone dam, and by means thereof to raise the water in the said Passaic River and its tributaries and to back and flow the same on the lands of the said upper proprietors (pp. 30-32).

None of these grants conveyed any title to any land to the Society and both Van Houten and one Benson continued to pay the taxes on their lands, as presumably did all the other upper proprietors (p. 33).

If the proposition should be urged that this language in the sixth section of the Act of 1868, "and that all real and personal property of said society *acquired under this act,* shall be subject to taxation," means that all real and personal property acquired *subsequent* to said act, shall be subject to taxation, the answer is that the language is absolutely incapable of any such meaning. The Legislature could not have intended to say, "We will give you the right to condemn lands for the purpose of raising your dam, etc., upon condition that all lands acquired by you after the passage of this act shall be subject to taxation." If that had been the intention of the Legislature it would certainly have been so stated in the statute.

In *State* v. *Commissioners of Railroad Taxation,* 38 *N. J. Law,* 472, Mr. Justice VAN SYCKEL said (p. 475):

> "The well settled law in this state is that the provisions of a special charter shall not be altered or repealed except by express words."

See also:

Catholic Protectory, 56 *N. J. Law,* 385.

The mere fact that the Act of 1868 imposed a tax *on lands acquired under that act,* viz., by condemnation, did not impair the exemption upon all its other lands from general taxation contained in its charter.

State v. *United Railroad & Canal Company* (N. J. Supreme Court, November Term, 1874), 37 *N. J. Law,* 240, headnote 2:

> "A corporation having an irrepealable charter which provides for a special mode of taxation, and that 'no other or further tax or imposition shall be levied or imposed upon the said Company' may consent to other taxation, or a different mode of assessment from that specified in its charter, by the acceptance of subsequent legislative acts, without impairing the exemption from general taxation contained in its charter. In such event, the new taxation becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force."

Furthermore, that the Act of 1868 had no such effect as that claimed by counsel, has already been settled in the case of *State of New Jersey* v. *Society,* 43 *N. J. Eq.,* 410, *supra.*

It was claimed by counsel in a former brief that the property taxed was acquired in whole or in part under the Act of 1868, and was, therefore, taxable and not exempt.

I quote from counsel's former brief, to which I have referred, as follows:

> "The claim of the Society seems to be that this means that only such property as may be acquired by condemnation under the act shall be taxed. This position is untenable. The Society was flooding the lands of the upper proprietors. These men would not sell or demanded too high a price. The State

> granted its right of eminent domain. With this weapon in its hands, the Company again approached the upper proprietors. They surrendered without much ado. Because the Company did not discharge its weapon should it not pay for it? The act accomplished the purpose for which it was secured and the Society should pay the price agreed upon."

I have already tried to explain that had the Act of 1868 not been passed at all, the upper proprietors might lawfully have given the easements they did give, to flood their lands, and the Society might have lawfully accepted the same, and there is no human way of telling whether these upper proprietors would or would not have come to an agreement with the Society had the Act of 1868 never been passed.

But assuming—just for the purposes of the present argument—that these easements were given by these upper proprietors to the Society in fear of *"the discharge of the weapon," and that in that sense these easements* may be said to have been acquired under the Act of 1868—what possible relevancy that fact would have as tending to show that the property in question was acquired under the Act of 1868 is something which I simply do not understand.

I am dealing in this brief with the right to tax this particular property of the Society and no other property. I shall deal with other attempts of the City to tax the lands of the Society as they arise. But assuming just for the argument—(though, of course, not conceding)—that the easements to flood these lands were acquired under the Act of 1868, and were taxable for that reason, what bearing at

all has that upon the taxability or non-taxability of these properties of the Society that were purchased more than thirty years before the Act of 1868 was passed?

I could understand some sort of sense in counsel's argument if the tax which we are now concerned with were a tax upon the property, or upon the easement, which had been obtained from the upper proprietors, the argument being that it had been so obtained as a result of the passage of the Act of 1868, but how it can be intelligently claimed that the property now in question, most of which had been owned by the Society from as far back as the year 1792, and the part of it most recently acquired having been acquired by it as far back as the year 1834, was acquired by the Society under the Act of 1868 I cannot understand.

Counsel will say that the raising of the dam was of material advantage to that property. Conceding that, how does that indicate that the property was acquired under that act? Take any property that the Society owns—for instance, its raceway, which it has owned from the commencement of its incorporation up to the present time, and which it uses for conducting water-power to different mills. The raising of the dam was probably of some advantage to the use of this raceway. Does counsel claim that the raceway is now taxable? If there is any sense in his argument it seems to me that his claim must be that all the property of the Society is now taxable; in other words, that because it obtained from the Legislature the right to condemn lands for the purpose of raising its dam and the Legislature imposed the condition that any lands acquired under that act should be taxable, and inasmuch as the raising of the dam was of advantage to its prop-

erty as a whole, therefore the acceptance of that charter, or that particular franchise, destroyed its immunity from taxation altogether.

Of course, I altogether deny that the provision in the Act of 1868 that "all real and personal property of said Society acquired under this act shall be subject to taxation in the same manner as other real and personal property in the city of Paterson are subject thereto" can possibly mean that all real and personal property of the Society whose value is increased by the passage of this act shall be subject to taxation. Such a proposition would be simply preposterous. *What counsel really wants to tax is the "franchise" which he claims was granted by the Act of 1868, but the act itself contains no provision for taxing the franchise.* There is a vast difference between the franchise itself and property acquired under the act.

I quote from *Tuckahoe Canal Co.* v. *Tuckahoe R. R. Co.,* 11 *Leigh.* (Va.), 78:

> "Now, I take a franchise to be (1) an incorporeal hereditament, and (2) a privilege or authority vested in certain persons by grant of the sovereign (with us, by special statute) to exercise powers or to do and perform acts *which without such grant they could not do or perform.* Thus it is a franchise to be a corporation with power to sue and be sued and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge or keep a ferry over a public stream with a right to demand tolls or ferriage; or to build a mill upon a public river and receive tolls for grinding, etc. But the franchise consists in the *incorporeal right; the property acquired is not*

> *the franchise.* A bank has a right to purchase a banking house; when purchased is the bank building a franchise? Surely not, for it is *corporeal,* whereas a franchise is *incorporeal.*"

Assuming, then, that the Society acquired a valuable franchise by the passage of the Act of 1868, there is no law anywhere to be found for the taxation of that franchise.

The value of the franchise was greatly impaired by the passage of an act entitled, "A supplement to an act entitled 'An act to develop and improve the water power of the Passaic River,' " approved April 16, 1868, a few days after the act to which it was a supplement was passed (see P. L. 1868, p. 1091), and which rendered it unlawful for the Society to increase the height of the Beatty Dam on the Passaic River at Little Falls, or to erect any dam in said river above Beatty's dam.

The Society was thereby practically denied the right to build any new dam at all and the only right that remained under the Act of 1868 was the right to raise the old dam, and to acquire lands for that purpose by condemnation proceedings.

In counsel's former brief, to which I have referred, he said:

> "Since the Society has accepted this act, it cannot now be heard to say that it already had the power to do the very thing conferred on it by Section 1."

I do not say, and never did say, that the Society had the power to do the things it was authorized to do by Section 1 of the Act of 1868 *without the*

consent of all parties affected. The Act of 1868 gave the Society the right to raise the dam *without such consent* and provided a method for ascertaining the compensation to be paid to the parties affected by the raising of the dam.

I do say that, without the Act of 1868, the Society had the right, under its charter, and still possesses that right, to do the same things which it is authorized to do by Section 1 of the Act of 1868 *provided, however, that all parties affected first consent.*

As tending to show that property can be acquired under the Act of 1868 by other means than by condemnation, counsel point out that that act provides that the *real and personal property* acquired under it should be subject to taxation, and that there is nothing in the act giving the right to condemn any *personal* property, the argument being that if *personal* property can be acquired otherwise than by condemnation, and be taxed, why cannot real estate be also acquired in a similar manner and be taxed? I think in this argument there lies a *non sequitur.*

I confess I do not understand how any *personal property* could be acquired under the Act of 1868 unless perhaps such personal property as happened to be located on lands which were condemned under that act, and which personal property was destroyed by the flooding of said lands. The commissioners could undoubtedly take into consideration the value of such personal property in awarding compensation.

The Society was *perpetually* exempted under its charter from paying any taxes at any time on its personal property, and it had also the right under

its charter to purchase "any lands, tenements, hereditaments, goods and chattels of any kind or quality soever, to an amount in value not exceeding four millions of dollars."

I do not, therefore, perceive how the Society could ever acquire personal property under the Act of 1868 and be taxed upon it (unless in the manner above suggested), because it could always purchase all the personal property it needed under its charter and not be taxed upon it. But, I submit, that the fact that it does not clearly appear from the Act of 1868 how personal property could be acquired under that act, cannot negative the fact that it does clearly appear how real estate can be acquired under that act, *and the only way in which it can be so acquired.*

I regard all this discussion, however, as wide of the mark because, as I have repeatedly said, even if the easements obtained from the upper proprietors were obtained *under threat of the weapon* (to use counsel's metaphor) of the Act of 1868, and as such may in that sense be said to have been acquired under that act, there was no weapon used in the Society's acquiring the lands in question, and because these lands may have been benefited by the passage of that act, that cannot render them taxable, neither is there any provision for taxing the franchise conferred by the Act of 1868.

POINT III.

The fourth clause of the charter of the Society for Establishing Useful Manufactures constitutes an irrepealable contract with the State.

(*a*) *It constitutes a contract.*

The act itself recites that the granting by the Legislature to the Society of its charter, which necessarily embraced all its terms, would be conducive to the public interests.

> "Whereas it is represented to this legislature that a subscription has been made for the purpose of introducing and establishing useful manufactures to an amount which already exceeds $200,000; and whereas the State of New Jersey having been deemed by the contributors the most suitable for carrying the same into effect, the aid of the legislature has been requested in promotion of the views of the said contributors; *and whereas it appears to this legislature that the granting such aid will be conducive to* the public interest, etc."

In order to ascertain what an advantage the Society has in fact proved to the City of Paterson, it is only necessary to read the opinion of Chancellor WILLIAMSON in *Society* v. *Morris & Essex Canal Company,* 30 *N. J. Eq.,* 145, *supra.* Such charters when accepted have been held to constitute contracts in a multitude of cases.

> *State* v. *Berry* (N. J. Supreme Court, May Term, 1839), 17 *N. J. Law,* 80.
>
> *Gardner, Assessor of Jersey City,* v. *The State* (N. J. Court of Errors & Appeals, July Term, 1845), 21 *N. J. Law,* 557.

State v. *Mansfield* (N. J. Supreme Court, November Term, 1852), 23 *N. J. Law,* 510.

State v. *Commissioner of Railroad Taxation* (N. J. Supreme Court, November Term, 1874), 37 *N. J. Law,* 228.

The State Board of Assessors v. *The Morris & Essex R. R. Co.* (N. J. Court of Errors & Appeals, November Term, 1886), 49 *N. J. Law,* 193.

Singer Manufacturing Co. v. *Heppenheimer* (N. J. Court of Errors & Appeals, March Term, 1896), 58 *N. J. Law,* 633.

Sisters of St. Elizabeth v. *Chatham* (N. J. Court of Errors & Appeals, November Term, 1888), 51 *N. J. Law,* 89.

Mount Pleasant Cemetery Company v. *Newark* (N. J. Court of Errors & Appeals, June Term, 1890), 52 *N. J. Law,* 539.

Hancock, Comptroller, v. *Singer Manufacturing Company* (N. J. Court of Errors & Appeals, June Term, 1898), 62 *N. J. Law,* 289.

(*b*) *The contract is irrepealable.*

It must be borne in mind that the charter was granted prior to the passage of the Corporation Act of February 4, 1846.

I quote from the opinion of Mr. Justice VAN SYCKEL in *Hancock, Comptroller,* v. *Singer Manufacturing Company* (N. J. Court of Errors & Appeals, June Term, 1898), 62 *N. J. Law,* 289-328, as follows:

> "If the sixth section of the charter of the company contains the entire contract, it is

unassailable by state legislation. Both the federal and state constitutions inhibit the passage of any law by the state impairing the obligation of a contract.

The state attempts to justify this tax by reading into the charter of the Singer company the sixth section of the act of 1846 (Pamph. L., p. 16), which is as follows:

'The charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature.'

For many years after the passage of this act it was uniformly held by the courts of this state that the sixth section of the act of 1846 was to be literally read into every charter thereafter granted by the legislature, thereby rendering every such charter subject to repeal or alteration at legislative discretion. Such was the judgment of this court in *Morris and Essex Railroad Co.* v. *Commissioners of Railroad Taxation,* 9 *Vroom,* 472, decided in 1875. That case was removed to the Supreme Court of the United States and the decision of this court was reversed. *New Jersey* v. *Yard,* 95 *U. S.,* 104. The federal court, in reversing, declared that a legislature could not bind its successors; that, notwithstanding the act of 1846, it was still competent for any legislature to make an irrepealable contract if it elected to do so, and that it was therefore a question in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect and without the power of the legislature to impair its obligation.

The federal court held the contract under consideration in that case to be irrrepealable because it could not be believed that it was the intent of either party to it that one should be held forever and the other merely at will, and it refused to read the act of 1846 into the contract because the contract was inconsistent with it.

The rule thus so explicitly laid down by the federal court has since been accepted as the law of this court. *State Board* v. *Morris and Essex Railroad Co.*, 20 *Vroom*, 193. Unless, therefore, an intention can fairly be drawn from the terms of this contract, as agreed upon by the parties, to reserve to the state the right to repeal the contract at will without the consent of the company, there can be no departure from it.

There is nothing in the language of this contract which gives the slightest foundation for the suggestion that the state reserved the right to deprive the company at will of the benefit it was to receive under the agreement after it had fully performed on its part.

* * *

It cannot be conceived that either the state or the company deliberately entered into a contract by which it was understood and intended that the state should be at liberty to deprive the company of the benefit to be derived from it as soon as the company had performed on its part. Such a proposition could not have been seriously made by the state nor for a moment entertained by the company.

The terms of the contract and the circumstances attending it repel the assumption that the entire engagement is not expressed in the sixth section of the charter.

> When a contract is made, the good faith of the state must be preserved and the contract performed according to a reasonable and just interpretation of it. * * *
>
> It may be well to observe here that it could not have been supposed by those who voted for the constitutional amendments of 1875, that it was intended to bestow upon the legislative branch of the state government the power to disregard and violate the contracts into which the state had previously entered. It would be a reflection upon the integrity of those who framed the amendments to infer such a power from any language contained in them. That no such power resides in the lawmaking power by force of the constitutional amendments of 1875 was manifestly the opinion of this court in *Mount Pleasant Cemetery Co.* v. *Newark,* 23 *Vroom,* 539. So free from doubt was this question regarded that the distinguished Chief Justice who delivered the opinion of the court in that case did not even suggest that it was a question worthy to be considered.
>
> The contract must be regarded as irrepealable."

I am fully aware of the rule that where the provision in the charter granting an exemption from taxation can be regarded as a mere gratuity, that in such cases it does not constitute an irrepealable contract, and is subject to legislative repeal. This rule is laid down in *Hanover* v. *Camp Meeting Association* (New Jersey Supreme Court, February Term, 1908), 76 *N. J. Law,* 65, affirmed on appeal, 76 *N. J. Law,* 827, as follows (quotation p. 66) :

> "It is settled that the legislature may enter into an irrepealable contract as to tax-

ation with a private corporation, which is not subject to alteration by a subsequent legislature by virtue of the right reserved in the Act of 1846 (Pamph. L., p. 16), which is now section 4 of the Corporation act, Pamph. L., 1896, p. 277; *New Jersey* v. *Yard,* 95 *U. S.,* 104; *State Board of Assessors* v. *Paterson and Ramapo Railroad Co.,* 21 *Vroom,* 446.

The question which arises is whether in any particular case the exemption, total or partial, is a mere gratuity or whether the elements of a binding contract are present. If the exemption is a mere gratuity, it is subject to repeal.

In the case of *Mount Pleasant Cemetery Co.* v. *Newark,* 23 *Vroom,* 539, the court held that there was a contract arising out of the acceptance of the charter by the corporators, the incurring by them of the expenditures incident to the enterprise, *and the expectation by the legislature of benefit resulting therefrom.* The charter in that case antedated the Act of 1846.

In other cases it has been held that there was no contract. *Little* v. *Bowers,* 17 *Vroom,* 300; affirmed, 19 *id.,* 370. The case was subsequently taken to the United States Supreme Court, but the writ of error was dismissed on another ground. 134 *U. S.,* 547; *State Board of Assessors* v. *Paterson and Ramapo Railroad Co., supra; Newark and South Orange Horse Car Railroad Co.* v. *Clark,* 24 *Vroom,* 332; affirmed 25 *id.,* 213; *Flower Hill Cemetery Co.* v. *North Bergen,* 39 *id.,* 488; affirmed 41 *id.,* 338.

In *Cooper Hospital* v. *Camden,* 39 *Vroom,* 691, the Court of Errors and Appeals said that in order to sustain the claim that a con-

tract had arisen, it would require something more than the mere assumption and exercise of the corporate powers. In *New Jersey* v. *Yard* the consideration was a compromise of a vexed question between the state and the railroad company. In both the *Singer Manufacturing Company* cases (29 *id.*, 633; 33 *id.*, 289), the consideration was the removal of a part of the plant to New Jersey and the investment of a large sum of money here. Each case depends on its own facts. In every case there is present the element of an agreement evinced by the acceptance of the charter, and the question necessarily is, whether there is such a consideration as will make the agreement a binding contract. We fail to find a consideration in the present charter. The whole language speaks of privileges conferred upon the incorporators. No obligation is imposed upon them, *nor is there anything to indicate that the legislature expected the state to benefit by the incorporation.* To use the language of the Court of Errors and Appeals, in the *Paterson and Ramapo Railroad Co.* case, there was no service, duty, expenditure or other remunerative condition imposed upon the corporation, either directly or as a consequence of the exercise of privileges and franchises conferred by the same legislature. The case does not differ in this respect from the *Flower Hill Cemetery Company* case."

It will be observed that in the case just quoted the Court failed to find a consideration in the charter then under examination. The Court pointed out that no obligation was imposed upon the incorporators, *nor was there anything to indicate that*

the Legislature expected the State to benefit by the incorporation. In our case, however, the case at bar, as I have already stated, the charter itself recited that it appeared to the Legislature that the granting of the charter would be conducive to the public interest, and the opinion of Chancellor WILLIAMSON in *Society* v. *Morris Canal Co.* demonstrates how vastly the City in fact benefited by the incorporation of the Society.

The case at bar, I respectfully submit, does not differ from the case of *Mount Pleasant Cemetery Company* v. *Newark* (New Jersey Court of Errors and Appeals, June Term, 1890), 52 *N. J. Law,* 539. I quote from the opinion of Chief Justice BEASLEY, as follows (quotation p. 540):

> "The inquiry is, whether or not an assessment upon the burying ground of the plaintiff in error, by virtue of proceedings to widen one of the streets in Newark, is legal.
>
> This tax the cemetery company resists, on the ground that it is entitled to exemptions from such burthens by force of the sixth section of its charter, which enacts 'that the premises, burial lots, vaults, monuments and other erections and fixtures of said cemetery, shall not be subject to any assessments, taxes or fines, unless otherwise ordered by the board of chosen freeholders of the county of Essex.' This charter was created by an act approved 24th January, 1844, and consequently, so far as affects its conventional qualities, is irrepealable by legislation.
>
> On the 4th April, 1873 (Pamph. L., p. 629), a statute was passed authorizing the 'assessment for street openings and all other local improvements in the City of Newark,' of this cemetery company, and other corpo-

rate property. It is not denied that this act empowers the city to lay the assessment now in question, if such thing can be effected, in any mode, by legislative action.

That a charter of this kind constitutes a contract between the state and the corporation has not been, and could not be, denied. Since the decision of the *Dartmouth College* case, there has been no doubt upon that subject; nor has it been, nor can it be, any more in doubt, that by force of the pertinent provision of the constitution of the United States such contract cannot be impaired by the act of the legislature without the consent of the corporators.

What will constitute such an impairment of the charter is thus stated by Judge COOLEY in his summary of the doctrine as adjudicated: 'Any law,' says this accurate writer, 'which enlarges, abridges or in any manner changes the intention of the parties discoverable in it, necessarily impairs the contract itself, which is but the evidence of that intention. The manner or degree in which this change is effected can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases.' Cooley Tax., 80. * * *"

Quotation page 542:

"It is true that it is insisted that this exempting clause was a mere legislative gratuity, and does not constitute a part of any contract between the public and the corpo-

ration. But the fallacy of this position is obvious, and the cases cited are irrelevant. The decisions relied on are either instances where the language used, the direct opposite of the language before us, did not purport an intention to impose any obligation on the state—such is the case *State* v. *Parker, Receiver,* 3 *Vroom,* 426—or where there was a merely *gratuitous* promise from the public to the corporators, as is exemplified in the cited case of the *Rector of Christ Church* v. *County of Philadelphia,* 24 *How.* (U. S.), 300. It must certainly be conceded that if an exemption from any public burthen be made as a mere privilege, it may at any time be revoked; such a concession would be purely *nudum pactum,* and as such would not be legally binding.

But how is such a doctrine as this applicable to the case in hand? *Here we have this legislative promise of exemption set forth in the original charter of this company; it was made while the matter was in fieri, and it was obviously an inducement to the corporators to accept the charter and incur the expenditures incident to the enterprise, and on the other side, the legislature had for its consideration the expectation of the benefits* that might result from such expenditures. Such a situation has always, so far as has been observed, been held to place the public and the members of the corporation in the attitude of contracting parties; it does not seem to be possible to treat the question as an open one."

Under the above authorities, I respectfully submit that the Legislature would have no power to

repeal the contract created by the fourth clause of the charter of the Society, rendering it free from taxation. I further submit that the Legislature has never attempted to repeal said contract.

POINT IV.

While the general proposition is not controverted, that a charter granting an exemption from taxation must ordinarily be strictly construed against the grant and in favor of the tax, nevertheless the charter of the Society having expressly provided that it should in all things be construed in the most favorable manner for the Society, and that any non-user of the privileges thereby granted to the Society should not create any forfeiture of the same, this rule of construction is not applicable to this case.

In *Brown University* v. *Granger* (Supreme Court of Rhode Island, February 11, 1897), 36 *Atl. Rep.*, 720, it was held that the general rule that laws exempting property from taxation, being an abrogation of a part of the sovereignty of the state, are to be strictly construed against the exemption, does not govern where the enactment itself declares the rule of interpretation which shall be applied to it.

Quotation page 721:

> "But it is argued by the city solicitor that the phrase, 'the college estate,' in the charter, ought to be given its most limited meaning, and held to include only the college estate proper, *i. e.*, the college buildings and

grounds—and not the endowment of the college, which might comprise both real and personal property; and in this connection he argues that there is a wide difference between the meaning of the phrases, 'the college estate' and 'the estate of the college.' Perhaps there might be some force in this argument if this phrase stood alone, but, taken, as it must be, in connection with the entire exemption clause in question, there can be no doubt whatsoever that it was intended to include property held by the plaintiff by way of endowment, as well as the college estate proper; and to place any different construction thereon would be to do violence to the manifest intention of the legislature. It is doubtless true that, in the construction of statutes whereby the state has abrogated a part of its sovereignty, the strict rule of interpretation contended for obtains, on the ground that the presumption is against such abrogation of power. And as in England, the crown is not reached by statute except by express words or by necessary implication in any case, where it would be ousted of an existing prerogative or interest, so here the state is not reached in any such case except by the use of express words or by necessary implication; that is to say, it is to be presumed that the legislature does not intend to deprive the state of any part of its sovereign power, unless the intent to do so is clearly expressed, or arises by necessary implication from the language employed. * * * This doctrine was clearly enunciated in *Bank* v. *Billings* 4 *Pet.*, 561, by Chief Justice MARSHALL, who, in speaking of the taxing power of the state, said: 'It would seem

that the relinquishment of such a power is never to be assumed. We will not say that the state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' When, however, as in the case before us, the statute does contain language which is not only easily capable of the meaning contended for by the plaintiff corporation, but was evidently intended to have that meaning, *and, furthermore, when there is coupled with said language a positive direction as to the rule of construction which shall be applied thereto, the plain and obvious duty of the court is to declare the intention of the law accordingly; and to do otherwise, as the defendant urges us to do in this case, would be to disregard our highest obligation.*"

The case of *The People* v. *Theological Seminary*, 174 *Ill.*, 177, is not in point. The section of the act there referred to as preventing the application of the usual rules of strict construction of laws exempting property from taxation provided that the act "should be liberally construed in all the courts *for the purposes therein expressed.*" In that case the very first question to be determined was, what was the purpose expressed in the section under consideration?

I also refer to the opinion of Chancellor WILLIAMSON in *Society* v. *Morris & Essex Canal Co.*,

30 *N. J. Eq.*, 145, in which the Chancellor recognized the authority of the Legislature to legislate as to the rules of construction which should be applied to the charter generally.

POINT V.

Counsel may claim that because the Society has sold to the East Jersey Water Company, Newark and Jersey City certain rights to divert water, that that amounts to a departure from the objects for which it was incorporated, but clearly the municipalities whom the East Jersey Water Company serves with water supplies, and Newark and Jersey City, had authority to condemn the right to divert such water, and if the Society could have been compelled to dispose of these water rights by condemnation proceedings, why should it not do the same thing by contract—especially in view of the fact that according to Mr. Gardner, the Society got a very much larger *quid pro quo* from the water companies by private contract than it would have been at all likely to have obtained under condemnation proceedings (p. 52, ll. 10-27).

See:

McCarter, Attorney-General, v. *Hudson County Water Company,* 70 *N. J. Eq.,* 695.

McCarter, Attorney-General, v. *Hudson County Water Company,* 209 *U. S.,* 349.

Wilson, Attorney-General, v. *East Jersey Water Company,* 83 *N. J. Eq.,* 42.

POINT VI.

I submit that the fact that the stock of the Society is owned by the New Jersey General Security Company, which also owns all the stock of the Passaic Water Company and the East Jersey Water Company, is entirely immaterial to the present subject of discussion. There is no evidence in the case that the interests of the Society have ever been sacrificed or subordinated to the interests of the other corporations, but rather the reverse (p. 52, l. 10, to p. 54, l. 29).

POINT VII.

The City Counsel contends that the making of electricity is not within the scope of the Society's charter, his precise point being that "generating electricity" is not "manufacturing."

This would seem unimportant in view of the fact that the Society furnishes this electric power to manufacturers for manufacturing purposes, and it was held, in *State* v. *Flavel,* 24 *N. J. Law,* 370, and in *Society* v. *Morris & Essex Canal Co.,* 30 *N. J. Eq.,* 145, that cessation of actual manufacturing on the part of the Society, but increasing its water power and its uses for others to use in manufacturing, was not an abuse or perversion of its charter, and I have already pointed out that the sale of surplus power which would otherwise be wasted to the Public Service Corporation could not amount to a perversion of the charter.

Nevertheless, I submit, that clearly the generating of electricity is "manufacturing" within the meaning of the Society's charter. It is absurd to think that the Society could legally under its charter improve its water powers and not make use of

any modern improvements in the use of those water powers. If the use of electricity for power and lighting purposes had been a known art in 1792 when the Society was incorporated, is it not absolutely certain that the Society would have been expressly given the right to convert its water power into electricity?

Frederick Electric Light & Power Co. v. *Frederick City,* 36 *Atl. Rep.,* 362, holding that an electric company was not a manufacturing industry, is altogether against the weight of authority.

For an admirable exposition on this subject I refer to the case of *People* v. *Wemple,* 129 *N. Y.,* 543 (headnote):

The generating of electricity is manufacturing.

Quotation:

> "If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places or for power, is a manufacturing company, were made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a power or as an agent in nature, it would doubtless be difficult and perhaps impossible, to show that the process which the relator calls manufacturing produces anything that in a certain sense and in some form did not exist before. That, however, is true of most, if not all, manufacturing operations. The application of labor and skill to materials that exist in a natural state gives to them a new quality or characteristic and adapts them to new uses, and the process by which this result is

brought about is called manufacturing, whether the change is accomplished by manual labor or by means of machinery. * * *

But we think that these considerations are by no means conclusive in determining the true scope and meaning of the term 'manufacturing corporations' as they are used in the statute. The true inquiry would seem to be whether a corporation organized as this is, and carrying on the business that this does, and in the manner shown, would not be considered in common language as engaged in some manufacturing process or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. To say that electricity exists in a state of nature and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which the corporation is engaged renders it necessary in the first place to invest a large amount of capital in a plant, which may appropriately enough be called a factory. Then it must purchase and consume a vast amount of coal to produce steam and to furnish power for the operation of machinery. Then it supplies and operates a complicated system of machinery such as boilers, engines, dynamos, shafting, belting and such other things as are commonly used in manufacturing establishments, and then by means of wire cables and lamps it lights streets and private houses by electricity for a compensation. But the elec-

tricity or electric currents that produce this really cannot properly be said to be the free gift of nature gathered from the air or the clouds. It is the product of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding the electricity or thing which produces the results from which the corporation derives its income, is generated or produced by the application of power to machinery and thus by means of a process wholly artificial the relator is entitled to sell the product of its operations to its customers. Passing by the refinements of scientific discoveries as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. * * *

The Attorney General has attached to his brief in this case a very elaborate and able opinion by the Court of Common Pleas in Pennsylvania in the case of *Commonwealth of Pa.* v. *U. S. Light Co.,* in which the learned judge arrives at the conclusion that companies of this kind are not manufacturing corporations. It is proper to say, however, that the highest court of that State, while affirming the judgment rendered by the learned judge on other grounds, did not assent to his views that electric lighting companies are not manufacturing corporations."

A number of authorities may be found holding that electric companies are not manufacturing corporations within the meaning of the general statutes exempting manufacturing corporations from

taxation, but those authorities are based upon the fact that electric companies are not incorporated under the general act incorporating manufacturing corporations, but under special acts, and such authorities are therefore inapplicable to the present case.

See also:

The People ex rel. v. *Wemple,* 129 *N. Y.,* 664.

See also:

Bates Machine Co. v. *Trenton, &c., R. R. Co.,* 70 *N. J. Law,* 688, in which all the cases on the subject are reviewed.

Here again the provision in the charter that the act shall in all things be construed in the most favorable manner, for the Society steps in so that the broadest possible construction should be placed on the word "manufacture."

POINT VIII.

In his brief before the Supreme Court the City Counsel argued that City and County taxes were not used for City and County purposes, but for State purposes. Of course, all taxes are in one sense used for State purposes, and I know of no other way of distinguishing between State purposes and purposes other than State purposes, than by classifying taxes for State uses as taxes levied directly by the State upon the taxpayers and disbursed by the State, and classifying taxes for other than State purposes as taxes levied by municipalities for their own purposes under authority of the

State, the taxes so levied to be distributed by the municipalities themselves. The principle is that for local purposes, the local authorities are the representatives of the people.

> "Except as the legislature of the State may confer upon political divisions powers to legislate and to provide revenue *for defraying the expenses of the local governments,* it has no power to delegate the power of taxation to ministerial officers or to another department of the government."
>
> *Township of Bernards* v. *Allen,* 61 *N. J. Law,* 228-236, 237 and 238.

That has been the construction which the City of Paterson and the County of Passaic have placed upon the exemption clause in the Society's charter ever since the decision in *State* v. *Flavel*, referred to at the commencement of this brief. No City, County or school tax has ever since (until the present time) been imposed upon any of the Society's property actually used for the purposes of its incorporation.

POINT IX.

The whole of the tax sought to be vacated is one levied for the use of the county and city or for uses other than, and in contra-distinction to, State uses.

It is claimed by the City that that part of the tax in question which represented the school tax was a tax raised for State purposes.

The so-called State school tax is a local tax and not a State tax, in the sense that it is levied for local purposes and *not for the use of the State.*

The exemption in the charter is from all taxes except such as are *for the use of the State.*

The criterion by which it should be determined whether or not the corporation is exempt from the tax in question, is not whether the so-called State school tax is imposed by State or local authorities; for in theory all taxes are imposed by State authority.

The criterion is the use to which the tax is devoted, whether to State or local purposes.

State v. *Flavel,* 24 *N. J. Law,* 370.

The question is, therefore, whether the school tax is imposed for the use of the State or for the use of the locality where it is raised; and that depends upon the determination of the question whether the public schools, towards whose support the tax is raised (and for that purpose solely) are local or State institutions.

The Public Schools Are Local Institutions.

This is so, although the schools of the various localities throughout the State may form part of a State-wide system organized under State legislation, and subject to a certain amount of State supervision and control.

The legislation dealing with the public school system undoubtedly discloses (Comp. Stats. of New Jersey, Vol. 4, p. 4718 *et seq.*) a State policy to require the public schools throughout the State to conform to a certain general scheme of education, both regarding the facilities and methods of educa-

tion, and for the purpose of insuring compliance with the legislation, the local schools are subject to the rules and regulations of the State Board of Education, and to the Superintendent of Public Instruction at Trenton and to the County Superintendents appointed by the State educational authorities (Sections 1, 2, 3, 6, 9, 22 and 23 of the School Act).

The whole purpose of the legislation is to require every locality to furnish to the children of school age, within its limits, school facilities which shall meet a certain standard set by the State, and in order to insure that these required facilities shall in fact be furnished the inhabitants of every locality, borough, township or city, comprising the school districts into which the State is divided (Section 32, p. 4733) are required by means of this mandatory school tax, to tax themselves at least the amount of this tax, for the purpose of maintaining their local schools; that is to say, they may tax themselves as much over the amount of this school tax as they find necessary in order to meet the expenses of the schools, but they are required to raise at least the amount of this school tax for that purpose.

But, nevertheless, the public schools are local institutions, and are managed by the local school authorities, the boards of education of the school districts, subject only to the State supervision heretofore mentioned.

To begin with, the school buildings and other facilities are built and furnished solely at the expense of the local taxpayers, the State not contributing anything whatever towards this expense.

In townships, incorporated towns and borough school districts, the expense for the purchase of land and the erection of school buildings is provided by a special tax raised by vote of the legal voters of the school district at an annual or special meeting of the voters, which tax is assessed and collected by the local tax assessors and collectors in the ordinary manner (§ 95, p. 4755).

In cities the cost of purchasing land and erecting school buildings is raised by an appropriation by the Common Council or Board of Finance, being raised, assessed, levied and collected in the same manner as moneys appropriated for other purposes in such cities are assessed, levied and collected, or by an issue of bonds of said city (§ 76, p. 4746).

The title to the school buildings in the various localities is vested in the local boards of education (§ 48, p. 4740; § 84, p. 4750).

The expense of maintaining the schools is also borne by the tax payers of the respective school districts, although not entirely so. The local tax payers bear all the expense of such maintenance with the exception of the amount apportioned to the school district out of the State School Fund, together with the amount, if any, received out of what is called the reserve fund, in excess of the amount which the tax payers of the district have themselves contributed by taxation, to this last mentioned fund.

In regard to the so-called reserve fund, it consists of ten per centum of the total school tax raised throughout the State by the various school districts, so that every school district in the State contributes towards this fund, but upon the distribution of the fund by the State a school district may get more

or less than it contributed to the fund, so that unless the district gets back more than it has actually contributed towards the fund, it has gained nothing from the State so far as that fund is concerned, and if it gets back less than it contributed to the fund, it has then contributed to that extent to the support of schools outside its own district.

In the townships and boroughs the cost of maintaining the schools is raised by tax, the amount of which is determined by the legal voters of the district in the same manner as the cost of erecting the buildings is first obtained (§ 95, p. 4755).

In the cities a Board of School Estimate is created, consisting of two members of the Board of Education and two members of the Common Council (§ 73, p. 4745), and that Board determines the amount of money necessary to be appropriated for the use of public schools for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent out of the moneys received from the State treasury from the State school tax. The amount so determined is certified to the Council or Board of Finance, upon which it becomes mandatory to appropriate the amount so certified, which is assessed, levied and collected in the same manner as money for all other city purposes (§ 73, p. 4745; § 75, p. 4746).

In addition to the money raised by the local tax payers for the maintenance of the schools in the manner above stated, the schools also receive money from the State treasury, which is apportioned to them by the State Superintendent (§ 16, p. 4729) and is distributed through the County Collectors to the custodians of the school moneys of their

counties under the orders of the County Superintendents of Schools (§§ 180, 181, p. 4782).

There are three distinct sources from which the money received from the State treasury is derived: (1) There is the income from the State School Fund, which fund is derived from the State riparian lands (§§ 166, 170, pp. 4778-4779). This income is apportioned by the State Superintendent in proportion to the school attendance (§ 16, p. 4729 and § 180, p. 4782); (2) There is such sum, not less than $100,000, as shall be appropriated by the Legislature out of the money in the State treasury not otherwise appropriated (§ 177, p. 4780), and (3) There is the so-called State School Tax, which is the tax involved in the present appeal (§ 177, *supra*).

The amount of this last mentioned tax is such amount as will make, when added to the amount of the appropriation mentioned above (viz., not less than $100,000), a sum equal to two and three-quarters mills on each dollar of valuation of the taxable real and personal property in the State (§ 177, *supra*).

The tax is apportioned by the State Comptroller among the counties in proportion to the amount of their taxables and a statement of the amount apportioned to each county is certified to the County Collector, who in turn lays the amount so certified to him before the local assessors within his county, and they in turn apportion the amount for which the county is liable among the various taxing districts in the county (the limits of the taxing district being the same as those of a school district) as other taxes are apportioned, and the same is assessed, levied and collected in the same manner as other local taxes (§ 177, *supra*).

The amount of the tax is paid by the local collector over to the County Collector, who in turn pays the same into the State treasury (§ 178).

Out of this total tax collected throughout the State ten per cent. is set aside as a reserve fund, which latter fund must be apportioned among the counties by the State Board of Education equitably and justly according to the discretion of the Board (§ 179); and the balance consisting of ninety per cent. of the total tax collected, is distributed among the counties, each county getting back ninety per cent. of the amount it originally paid into the State treasury; so that each county (and in turn each local school district) gets back from the State treasury ninety per cent. of the amount of the tax collected in its limits, and paid into the State treasury, together with such portion of the remaining ten per cent. so collected as may be apportioned to it by the Board of Education in its discretion (§ 179); so that as a result of this cumbersome method the State requires each taxing district, which is the same as to limits as the school district, to levy and collect a tax upon the local tax payers, and pay the amount so collected into the State treasury, and then pays back the amount of the tax so collected to the district, less ten per cent., together with such amount of the remaining ten per cent. as shall be determined by the State Board of Education.

So far as ninety per cent. of the school tax is concerned, it is paid by the local tax payers and used for the local schools in the districts where the tax is raised. They also get back the whole or a part, or possibly something in excess of the remaining ten per cent.

So that the first cost of erecting the schools is entirely borne by the local school districts, and the cost of maintaining them is also paid by the local tax payers with the exception of the share of the income from the State School Fund, derived from the State riparian lands, and of the appropriation of not less than $100,000 made by the legislature out of the State moneys, and the amount, if any, received from the reserve fund in excess of the ten per cent. contributed to said fund by the local tax payers.

From the foregoing, from which it appears that the original expense of building the school buildings and acquiring school facilities, is entirely borne by the local school districts, and the title and ownership to the buildings is held by the local authorities, and the expense of maintaining the schools is almost entirely borne by the various localities, it would seem to be incontrovertible that the schools are local and not State institutions.

From an examination of the annual appropriation act it will clearly appear what are the purposes or uses to which the State, through the legislature, appropriates its own funds, which funds, as pointed out by Mr. Justice BLACK, in his work on taxation, are obtained by a method of taxation altogether different and distinct from that by which the local taxes are raised.

See Chapter 4 of Black on Taxation, 2nd Ed., p. 73 *et seq.*, which chapter treats of the sources of State and local taxation in New Jersey, and from which I quote the following extract, page 74:

> "The school tax, that is, the tax for maintaining free public schools, is frequently spoken of as a state tax, it is levied,

upon the taxable real and personal property of the taxing districts, by the local assessors, collected by the local collectors, the same as the other local taxes, paid to the treasurer of the state and by him, on orders of the state superintendent of public instruction, on the state comptroller, returned to the county collectors, on or before the 15th day of January, except ten per centum, known as a 'reserve fund,' which is apportioned by the state board of education, to the various counties, 'equitably and justly according to its discretion,' on or before the 15th day of February. While this school tax is spoken of as a state tax, it is in fact a local tax used for the support of the local public schools, over which the state exercises some control, in the amount to be collected which, with the amount appropriated by the state, shall not be less than one hundred thousand dollars each year, it shall be a sum equal to two and three-fourths mills, on each dollar of valuation of the taxable real and personal property in the State. The State, also, controls the apportionment of ten per centum, by the State officers, in the manner and to the extent pointed out."

See also *Youngblood* v. *Sexton*, 32 *Mich.*, 406, 413:

"In one sense undoubtedly any tax levied by a general law is a state tax; but if the moneys are to be put to local uses the only substantial difference between that and one levied by local action consists in this; that in one case the state levies the tax, and in the other it authorizes the levy. * * *

> The school mill tax may be taken as an illustration. Collected under a general law it was nevertheless put to the use of the community which paid it; *and it was in no proper sense anything more than a local tax.*"

In the case of *State* v. *Flavel,* 24 *N. J. Law,* 370, it was not admitted, as counsel claims, that the taxes were not laid for the use of the State. The stipulation stated that no money was directed to be assessed, collected or paid into the treasury of the said State for the year A. D. 1849 by Act of the Legislature of said State, and that the Board of Chosen Freeholders of said County in said year voted and granted the sum of $5,000 to be raised, etc., in said County for the purposes of said County, and that the sum of $2,600 was adjusted and ascertained by the Board of Assessors of the individual townships of said County as the proportion of the said sum of $5,000 to be levied upon the inhabitants of the said Township of Paterson. Undoubtedly the tax included the school tax, although no direct reference is made thereto.

Mr. Merrey in his brief before the Supreme Court relied on the late Mr. Justice DIXON'S opinion in the case of *Riccio* v. *Hoboken* (N. J. Supreme Court, February Term, 1903), 69 *N. J. Law,* 104, as upholding his contention that the school tax is a tax *for the use of the State,* within the meaning of the Society's charter. With equal confidence I rely on the same authority as upholding the opposite conclusion, viz., that the school tax is a tax essentially for local purposes. I submit that that case directly holds that the support of public schools is part of the internal affairs of the various municipalities of the State. *Quotation,* p. 106:

"* * * it seems reasonably clear that the support and management of public schools were, previous to the year 1875, committed to the various municipalities of the state as part of their internal affairs.

As early as September, 1682, an island in the Delaware river, was given by the Assembly of West Jersey to the town of Burlington for the maintenance of a public school (Grants and Commissions of New Jersey, p. 455), and in 1693 and 1695 the inhabitants of each town within the province of East Jersey were empowered to maintain a school within the town by public tax. *Id.*, 328, 358. In 1820 the inhabitants of each township in the state were authorized to raise by tax such sum of money as the town meeting should vote, to be expended under the direction of the town committee for the education of poor children residing in the township. Elm. Dig. 577. In 1829 'An act to establish common schools' provided for the division of the state appropriation among the townships of the state, and the control of common schools by the township or by school districts created by the township authorities. Pamph. L., 1829, p. 105. In 1831 this act was repealed and a new statute substituted, but, although the school district was given a more independent character, the state funds were still apportioned among, and the local funds were raised by, the several townships. Pamph. L., 1831, p. 145. Similar conditions were preserved in the Act of 1838 (Pamph. L., p. 246), and continued until 1867. See Nix. Dig., 733. Concurrently with these general statutes, various local charters were enacted conferring upon particular cities

special powers for the maintenance of public schools. In the Act of 1867 (Pamph. L., p. 360) a system of state control was established, which, however, still recognized townships and cities as possessing special powers and duties in reference to the common schools within their borders, and in the numerous municipal charters passed between 1867 and the adoption of the constitutional amendments in 1875, will be found special provisions for particular municipalities on that subject. Indeed, it may be truthfully said that, at no time prior to the adoption of the amendments of 1875, can anything be discovered in our legislative history on the subject of public education, which does not point to the support and management of common schools in cities and in other municipalities as a matter, more or less, of local concern. While the state made some provision for their support it was confessedly inadequate, and the determination of the additional means to be furnished was treated as an internal affair of each locality, which was likewise charged with the responsibility of the proper expenditure of all the funds appropriated. Consequently, notwithstanding the general interest of the state at large in the education of its citizens, I think that the support and management of public schools may be treated by the legislature as an internal affair of the various municipalities denominated towns in this paragraph of the constitution. Certainly the education of youth concerns the local community as much as does the prosecution of those who violate the laws of the state, and an important incident of such prosecution was made by legis-

lation an internal affair of the counties. *Passaic* v. *Stevenson*, 17 *Vroom*, 173. A like power must exist in the legislature respecting schools."

An examination of the charter of the City of Paterson, Title VI, p. 51, will further demonstrate the complete control of the City over the school tax.

For the above reasons I respectfully submit that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

JOHN B. HUMPHREYS,
Of Counsel with the Prosecutor.

State of New Jersey

BOARD OF EQUALIZATION OF TAXES.

In the matter of the application of The Society for Establishing Useful Manufactures for the Vacation of the Tax Assessment for the year 1913, on property situate in the Seventh Ward of the City of Paterson, in the County of Passaic and State of New Jersey.

MEMORANDUM. BY MR. JESS.

For the petitioner, Humphreys and Sumner.

For the respondent, Edward F. Merrey.

This appeal is from an assessment for the year 1913 on a lot of land and the building thereon erected, situated in the City of Paterson and owned by the Society for Establishing Useful Manufactures. The land is assessed at $3,000 and the building at $15,000. The payment of the tax is resisted on the ground that the property is exempted from taxation by force of a special act of the Legislature under which the appellant was incorporated on November 22, 1791. Section 4 of the incorporating act reads as follows :

"IV. And the more effectually to encourage so useful and beneficial an establishment; be it further enacted by the authority aforesaid, that all the lands, tenements, hereditaments, goods and chattels, to the said society belonging, shall be, and they are hereby declared to be free and exempt from all taxes, charges and impositions whatsoever, under the authority of this state, whether for state or county uses, or for

any other use whatsoever. Provided always, that the said exemption shall not be construed to extend to the private or separate property of any member of the said corporation, in his or her individual capacity; and as touching the lands, tenements and hereditaments of the said society, shall continue in force for the term of ten years only, after which term it shall be lawful to lay such taxes, for the use of the state, upon the said lands, tenements, and hereditaments, as shall be laid upon other lands, tenements, and hereditaments, of like value, nature or description. Provided nevertheless, that in case the said taxes shall be laid by way of assessment, it shall be according to a certain rate percentum, to be prescribed in the law, laying such taxes, of the true and absolute value of the lands, tenements, or hereditaments, whereupon the same shall be laid or assessed, and shall not extend directly or indirectly to the moneys, goods, or chattels, whether in possession or action, or to the profits, real or supposed, of the said society."

The validity of the exemption granted to the Society by the Legislature has been sustained and its limitations defined in numerous decisions of the Supreme Court of New Jersey.

(a) State vs. Flavell,
24 New Jersey Law 370.

(b) Paterson vs. The S. U. M.
24 New Jersey Law 385.

(c) State vs. Powers,
24 New Jersey Law 400.

(d) State vs. Blundell,
24 New Jersey Law 402.

(e) State vs. Powers,
24 New Jersey Law 406.

(f) New Jersey vs. S. U. M.
43 New Jersey Equity 410.

Counsel for the City of Paterson concedes that any question decided in the first five of the cases cited are now res adjudicata, but denies that the City is bound by the decision in the last named case since it was not a party or privy to that suit. It is contended on behalf of the City that the questions to be passed upon in this proceeding have not heretofore been adjudicated in the following particulars :

1. The property in question is a property purchased by the Society in 1898 and is used in a different manner than any of the properties referred to in those cases.

2. The Society, by the payment of taxes for a great number of years on this property, has waived its exemption if it had any.

3. By a Law of 1868, page 545, the Society is now liable to taxation.

4. Because the property in question was acquired in whole or in part under the Act of 1868 and not under the Act of 1791.

5. Because the tax in question is made partly for the use of the state.

The first contention of the City is that the property now assessed was purchased by the Society in 1898 and is not so used as to bring it within the exempting provisions of the Society's charter. The property in question was part of a tract of about 122 acres purchased by the Society in 1792. It was leased with water power in 1850 for a term of twenty-one years with a covenant for renewal at the end of every period of twenty-one years. The lessee built a mill upon the land which was used for a considera-

ble period in the manufacture of paper. This mill was destroyed by fire sometime between 1890 and 1897. While the evidence is not explicit upon this point, it is fairly inferable therefrom that the lessees of the property mortgaged their interest therein to the Paterson Savings Institution; that after foreclosure proceedings the Society conveyed the fee to the mortgagee with other land, and that the Paterson Savings Institution simultaneously conveyed the land in question back to the Society. This conveyance took place on August 22, 1898. The Society has been the owner in fee of the property from the time it acquired the original tract in 1792 down to the date of the assessment under review, with the momentary transfer of the title in 1898 incident to the legal exigencies of the adjustment with the Paterson Savings Institution. That instantaneous disseizin did not, in our judgment, divest the land of its privilege of freedom from taxation.

The further objection that the use of the taxed property was not of a character contemplated by the grant of immunity from taxation we find also to be without merit. In our opinion, which we believe to be supported by the decided weight of authority, the generating and distributing of electrical power largely for manufacturing purposes is within the purview of the conditions of the legislative grant of exemption in this case.

The second ground of objection to exemption urged in behalf of the City is that the Society by the payment of taxes for ten years has waived any immunity from taxation which it might have enjoyed. It may be that a privilege of this sort might be lost by a long-continued failure to assert it. In Given vs. Wright, 117 U. S. 648, Mr. Justice Bradley said that "If an exemption from taxation can be lost in any case, by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty

years, and, indeed, a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. * * * Non-user for sixty, or even thirty years, may well be regarded as presumptive proof of its abandonment or surrender." In another case payment of taxes for 20 years did not destroy a right of exemption or preclude the beneficiary from insisting on it. Landon vs. Litchfield, 11 Ct. 250. It would seem to be clear, from these authorities, that the payment of taxes for a period of ten years raises no presumption of a surrender of the exempting privilege. If such a presumption arises in the present case it is completely rebutted by the facts.

This brings us to the third and fourth propositions advanced by the City, namely, that by an act of the Legislature of 1868, page 545, the property in question is liable to taxation, and that such property was acquired in whole or in part under that Act.

The act referred to confers upon the Society the right to take by condemnation proceedings lands for the purpose of developing, increasing, and improving the water power of the Passaic River, creating ponds or reservoirs, and erecting dams and raising the height of dams already erected. The act further provids that " all real and personal property of said Society acquired under this act shall be subject to taxation, in the same manner as other real and personal property in the City of Paterson are subject thereto."

The purpose of this statute was manifestly to invest the Society with the right of eminent domain and it seems equally clear that the property made taxable by that act is such property as might be acquired by condemnation. In any event there can be no doubt that the act did not repeal the privilege of tax exemption as to property previously acquired by the Society and used for the purposes specified in the original charter. The property now in question was

so acquired. The fact that its value may have been enhanced by the raising of the Society's dam after the act of 1868, did not affect its status with respect to its enjoyment of freedom from taxation. In no aspect of the case can we find any support for the insistment of the City that this property was acquired under the act of 1868 and therefore is subject to the tax provision of that act.

It is further urged by the City in support of the assessment under review, that the tax attempted to be levied is partly for the use of the State. The portion of the tax thus referred to is the State School tax. This is not a tax for State uses. On this subject we quote the following from Black on Taxation, 2d Ed. p. 74 :

"The school tax, that is, the tax for maintaining free public schools, is frequently spoken of as a state tax, it is levied, upon the taxable real and personal property of the taxing districts, by the local assessors, collected by the local collectors, the same as the other local taxes, paid to the treasurer of the state, and by him, on orders of the state superintendent of public instruction, on the state comptroller, returned to the county collectors, on or before the 15th day of January, except ten per centum, known as a 'reserve fund,' which is apportioned by the state board of education to the various counties, 'equitably and justly according to its discretion,' on or before the 15th day of February. While this school tax is spoken of as a state tax, it is in fact, a local tax used for the support of the local public schools."

In State vs. Flavell, supra, Chief Justice Green, speaking for the Supreme Court, said :

"The language of the enactment leaves no room for the application of the principle adopted in the case of The Railroad Co. vs. Hillegas (3 Harr. 11, 71) that all taxes are state taxes, because they are imposed by the authority of the state. This section, in

the most explicit terms, distinguished between the authority by which the taxes are assessed and the uses to which they are to be applied. The exemption is 'from all taxes, charges, and impositions whatsoever under the authority of this state, whether for *state* or for *county* uses, or for any other use whatsoever.' "

It appears to be perfectly clear that in the case under consideration, it is the use to which the taxes are to be put rather than the authority by which they are levied, that is to determine whether the property of the society is to be subject thereto. We do not believe that the School Tax is a State tax in the sense contemplated by Section 4 of the Society's charter.

Finally it is insisted by the City that the property in question is not exempt because it does not appear that the four million dollar limitation has not been exceeded. Section 1 of the act incorporating the Society empowers it "to acquire, purchase, receive, have, hold and enjoy, any lands, tenements, hereditaments, goods and chattels, of what kind or quality soever, to an amount in value not exceeding four millions of dollars, and the same, or any part thereof, to sell, grant, demise, alien and dispose of."

Counsel for the City contends that as soon as the Society had purchased or acquired property up to the value of $4,000,000, its powers ceased. It is not in evidence whether the total value of the property held by the Society during the entire course of its existence has exceeded this limitation or not. There is certainly no evidence in the case from which we can find that the Society now "holds and enjoys" property in excess of the limit fixed by its charter. The absence of proof upon these points makes it unnecessary for us to discuss the effect upon the Society's freedom from taxation of the acquisition or holding by it of property exceeding in value the amount limited in the statute.

The conclusions we have reached must result in a cancellation of the assessment under review.