

New Jersey Court of Errors and Appeals

PASSAIC WATER COMPANY,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS, CITY OF PATERSON
AND BOARD OF FINANCE OF
SAID CITY,
Defendants-Respondents.

In Certiorari.
On Appeal.

BRIEF FOR APPELLANT.

Statement of the Case.

This appeal brings up for review a judgment of the Supreme Court dismissing the writ of certiorari, and affirming the order of the Board of Public Utility Commissioners (hereinafter called "the Board"), dated April 20, 1915, requiring the Erie Railroad Company to alter, so as to eliminate, certain of its grade crossings in the City of Paterson, and requiring the Passaic Water Company and other public service corporations, to change and remove their pipes laid underneath said crossings, so far as may be necessary to carry into effect the adopted plan.

The opinion of the Supreme Court affirming the order of the Board (Printed Case, Vol. IV, p. 2306)

referred to its opinion in the case of the Erie Railroad Company versus the Board (Vol. IV, p. 2256) as disposing adversely to the appellant of the twelve reasons relied upon by it for setting aside said order. The opinion in the Erie case is printed in 98 *Atl. Rep.*, p. 13.

The reasons for reversal filed in the Supreme Court under the writ of certiorari (Vol. IV, p. 1858) are stated as, and in fact constitute, the grounds of appeal upon which the present appellant relies in this Court (Vol. IV, p. 2336).

A review of the judgment of the Supreme Court necessarily brings into question the constitutionality of the statute upon which the order of the Board was based.

My contention will be that even if in some respects the statute may be within the reach of the Legislature's constitutional power, there is intermingled in the statute such delegation of authority not capable of delegation, and such other violations of constitutional canons as to cause the whole statute to be void.

POINT I.

The statute upon which the order under review is based is invalid and unconstitutional for the reasons set forth in 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th and 12th Reasons filed herein (Vol. IV, p. 1858).

There are various interests which will be benefited by the proposed grade crossing elimination:

(1) The municipality of the City of Paterson and the public generally;

(2) The Paterson & Hudson River Railroad Company, owner in fee of part of the road, and the Paterson & Ramapo Railroad Company, owner in fee of another part of the road;

(3) The Erie Railroad Company, the lessee and operator of the road;

(4) The Public Service Railway Company, which uses certain of the crossings specified in said order.

Yet the statute throws the whole cost of the work upon the Erie Railroad Company (except at the crossings used by the Public Service Railway Company, in which instances the Board has, pursuant to said statute, directed the Street Railway Company to pay 10 per cent. of the cost), and upon corporations owning property that must be removed in order to permit of such improvement (such as the Passaic Water Company), who in every instance must remove such property *at their own expense*.

I respectfully submit that this division of the cost of the improvement is altogether unreasonable and unfair.

Grade crossings of railroads and streets were in the first instance as necessary as the existence of the railroads and the streets themselves. When railroads were first constructed, neither the railroads nor the communities could have afforded the cost of grade crossing elimination, and grade crossings at that time were an economic necessity. The elimination of certain grade crossings later became an economic necessity when the business of the railroads and the traffic on the streets became so heavy that neither could be carried on without serious delay, inconvenience and danger to both.

From an unbiased standpoint there can be no doubt but that grade crossings were *mutually* necessary in the first instance in order that there could be constructed the railroads that were so essential to the proper development of the country, and that could not have been constructed had the elimination of the grade crossings been required in the first instance. As the traffic that was expected would not have justified the expenditure of so large a sum of money as would have been necessary to have avoided grade crossings, neither would it have been possible for the community to have afforded the requisite revenue to the railroads to pay a return upon the large investment that would have been needed for that purpose.

In the cases of the two railroads that own the right of way in Paterson used by the Erie Railroad Company, the charters specifically provide that each road authorized thereby is declared to be free for the passage of *any* railroad carriages thereon, with passengers or property, upon payment of the tolls prescribed by the charter; and in the case of the Paterson & Hudson River Railroad Company there is the proviso that the said carriages so used shall be of the same description as those used by the company, and shall be so regulated as to time of starting, rates of traveling and rates of tonnage as not to interfere with the carriages of the company or injure the said road; and in the case of the Paterson & Ramapo Railroad Company there is a like provision except that the "carriages" are not required to be "of the same description" as those used by that company (see Sec. 14 of Paterson & Hudson River Railroad Company charter, Vol. II, p. 969; Sec. 16 of Paterson & Ramapo Railroad Company charter, Vol. II, p. 1015).

The time table in evidence in this case shows that in the year 1835 some of the "carriages" were drawn over the line of the Paterson & Hudson River Railroad "by steam" and others were drawn by "horses" (Vol. I, p. 326, ll. 10-25). Hence at the time of the original construction of this railroad it was not only to the mutual interest of the public and the company to have the crossings at grade, but it was *necessary* to have them so constructed in order that horse-drawn carriages might be used thereon.

The interests of the public and the railroads in grade crossings in the first instance were therefore mutual, and they continued to be mutual during the growth of the railroad and of the community to the point where, at the time the elimination of any crossing became necessary both the railroad and the public suffered inconvenience to such an extent that further expenditure was necessary for the elimination of the crossing. In the period of time between the first construction of a railroad and the consequent installation of grade crossings, and the time when elimination of the grade crossings became necessary, both the railroad and the community developed, each profiting by the presence of the other, so that the busy condition that later led to the necessity for grade crossing elimination was the result of the improvement of the business of the community as well as of the railroad. At this time also the interests of the community and of the railroad were mutual and it would surely seem to be the duty of each to bear its fair burden of the cost of bringing about the elimination of the grade crossings.

The justice of apportioning the cost between the railroads and the public was recognized by the

Committee on Grade Crossings and Trespassing on Railways of the National Association of Railway Commissioners, that committee having reported as follows at the twenty-fourth annual convention at Washington, D. C., in 1912:

"The elimination of a grade crossing costing as much as \$50,000 involves a perpetual annual interest charge at five per cent of \$2,500 besides annual repair.

"As this elimination does not increase revenue in the least, but only diminishes expense measured by the cost of accident or cost of protection, or both, it will be readily seen that our railways could not afford, as a purely financial matter, to invest the sum required to eliminate grade crossings in cities where the expense would be large.

"The manifest injustice of compelling the railways to bear the *total* cost of elimination caused the Legislature of Massachusetts to pass a grade crossing law so-called in 1890. By this Act the expense of elimination was divided among the railway companies, the towns and cities and the commonwealth. From 1890 to 1911 there was expended under the provision of this law, \$34,372,048.03, of which total sixty-one plus per cent was borne by the railways, twenty-six minus per cent by the commonwealth and thirteen per cent was borne by the cities and towns. In Vermont, which divided the expense of elimination among the railways, the towns and cities and the state, the state by law bears not exceeding twenty-five per cent of the cost and not exceeding \$25,000 annually.

"The elements which determined this division of expense to be the proper one are not

apparent. Different states might divide the expense according to a different ratio; and it is probable that disinterested expert judgments would differ as to the proper division of the expense. In case any state should compel the railway companies within the state to bear this expense alone it *should most certainly authorize it to collect an additional revenue to meet such expense*. But inasmuch as the state's authority would not cover interstate business it is apparent that such a method would be ill-advised. It seems, therefore, that a division of the initial cost of eliminating grade crossings ought to be made and it is probable that the Railway Commissioners of the several states would be the bodies most competent to apportion the expense. The arbitrary apportionment by legislative action would not be best because no law could be framed to fit the varying conditions involved. Manifestly there ought to be the exercise of disinterested expert judgment in each case."

It will be observed that the drastic New Jersey law now under consideration puts practically no expense on the city. I am informed that Massachusetts cities must, unless special state legislation is passed, pay not over 10 per cent. of the total; that Connecticut cities pay nothing, 25 or 50 per cent. depending upon who brings the petition, and upon priority of the existence of the railroad or the highway; that New York cities, except Buffalo, must pay 25 per cent.; that Ohio cities pay 35 per cent.; that in New York, Massachusetts and sometimes Connecticut, the state meets a portion of the expense; in the two first named states 25 per cent.; while here in New Jersey the total expense practically is cast on the operating railroad.

While I admit that the question of the *reasonableness or unreasonableness* of a law is to be determined in the first instance by the Legislature, yet it must exercise its power in that respect in the light of the restrictions imposed by the State and Federal Constitutions; and in any event, the question of whether the attempted exercise of the police power by the Legislature is reasonable or otherwise must be determined by the courts.

See *Tiedman on State and Federal Control Over Persons and Property*, Vol. 2, p. 986.

"It is a judicial question whether a particular regulation is a reasonable exercise of police power.

"The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the Legislature; but whether a given regulation is a reasonable restriction upon personal rights is a judicial question."

See also *Helena v. Dwyer*, 64 Ark., 424.

Quotation, p. 425:

"The police power of the state is very broad and comprehensive and can be exercised to promote the health, comfort, *safety*, and welfare of society. Its limits have not been definitely defined. It is not, however, without its limitations. In *re Jacobs*, 90 N. Y., 110, the Court said, 'If this were otherwise, the power of the Legislature would be practically without limitation. In the assumed exercise of the police power in the interest of health, the welfare or the safety of the public, every right of the citizen might

be invaded and every constitutional barrier swept away. Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the Courts. But they must have some relation to those ends. Under the mere guise of police regulation personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive.' ”

See also *Ritchie v. The People*, 155 Ill., 98.

In the case of *New York & New England Railroad Company v. Bristol*, 151 U. S., 556, while Chief Justice FULLER there held that the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing did no violation to the Constitution of the United States, he added this proviso, “If the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case, *and not merely arbitrary and capricious.*” The Chief Justice clearly implied that if the mode of ascertaining the method of distributing the expense was merely arbitrary or capricious, it would be depriving the party affected of property without due process of law.

Can it be for a moment doubted that if in the case at bar the statute had provided that the entire expense of the grade crossing elimination, etc., should be paid by the street railway company or the corporation whose pipe lines were laid below the crossing, this Court would have declared the

statute unconstitutional on account of its unreasonableness, and for the reason that it deprived the street railway company, the gas company or the water company, as the case might be, of property without due process of law?

I submit that the safety and welfare of the public could be just as well conserved by placing the expense of eliminating grade crossings, not arbitrarily upon the operating company, but where it properly belongs (wherever in any particular case that may be) according to equitable rules, as ascertained upon the facts in each case. It is not necessary to the proper exercise of this police power by the State to throw the expense altogether on the operating railroad without regard to the particular facts in each particular case, and the statute is unreasonable for that reason.

The unreasonableness of the statute is rendered still more conspicuous when it is applied, as it is in the case at bar, not to one or two single grade crossings in a city, but to every grade crossing in a city, involving an enormous expense to the operating company, sufficient to render it insolvent.

It was argued before the Supreme Court that compliance with the order of the Board would constitute a confiscation of the property of the prosecutor on account of the enormous cost of the proposed undertaking to the operating company. The Supreme Court met that argument by ruling that the provisions of the Fielder Act, under which the proposed improvement was made, constituted a regulation adopted by the Legislature for public safety under the police power of the State, and hence were not a taking of private property without just compensation, although conformity to such regulation

involved expense. As authority for this ruling the Court referred to somewhat similar language used by DEPUE, J., in *Morris & Essex Railroad Company et al. v. Orange*, 63 N. J. Law, 252. That was a case involving the damages which should be paid to the railroad by the City of Orange for laying out a street across the lands of the railroad company across its tracks at grade. I quote from the opinion as follows (p. 270) :

“As already observed, the decisions on this subject are not harmonious, but we think upon principle and by the clear weight of authority, these propositions may be regarded as established: *First.* That a railroad company on the laying of a highway over its tracks is entitled to compensation for the use of the *locus in quo* for a highway crossing; that such use does not deprive the company of the use of the premises for the passage of its trains, and that when the crossing is at grade, the injury to the company in that use of its property is so slight as to justify nominal damages. *Second.* That for an injury occasioned by necessary structural changes, such as the removal of buildings or changes in the tracks, compensation should be made which would be adequate under the circumstances. *Third.* That for the expenses incident to the erection and maintenance of gates, signboards, cattle-guards and the like, including the salary of a flagman, the company is not entitled to an allowance. Such expenditures, being required either for the protection of the company in running its trains or of the public using the street at such crossings, are expenses incident to a compliance with police regulations, and,

therefore, do not entitle the company to an allowance for them."

If it is proper that a railroad company, when a city lays a highway over its tracks, should be compensated for the use of the *locus in quo*, for the highway crossing and for necessary structural changes, such as the removal of buildings or changes in the tracks, it is hard to perceive the justice of depriving the railroad company of all compensation by throwing the whole burden of the expense of the change upon it, where it is not a case of a new highway being laid over its tracks, but a case of its being forced to vacate altogether its original tracks or roadbed, and by elevating its tracks to leave its original roadbed for the sole and exclusive use of the City as a street unoccupied by the railroad. To say in the one case that the laying of the street across the railroad is an exercise of eminent domain which calls for compensation, and in the other case, that the removal of the railroad from the street is an exercise of police power, especially in a case like the cases at bar, where a gigantic expenditure of nearly \$3,000,000 is at stake, is, I respectfully submit, nothing more nor less than an arbitrary invasion, under the mere guise of police regulation of property rights, and amounts to sheer confiscation within the prohibition of *In Re Jacobs*, 90 N. Y., 110, *supra*.

The Supreme Court, in the *Public Service Railway Company* case (98 Atl. Rep., 28), held that the imposition of a part of the expense of abolishing dangerous grade crossings upon the Public Service Railway Company, was neither a tax nor an assessment for a public improvement, but that it was a legitimate exercise of the police power. The Supreme Court repudiated the argument of counsel

for the Public Service Railway Company, that the police power was not legitimately exercised as applied to the Public Service Railway Company, unless its property had become a public nuisance and so lost its right to protection, remarking that that argument could only possibly apply to cases where the police power was being exercised so as to appropriate or destroy the property; that is to say (to adopt the language of the Court), where the police power was being exercised, so to speak, *in rem* and not *in personam*.

I submit that in such cases, viz., where the police power is being exercised so as to appropriate or destroy property, the reason no compensation is made is *ex necessitate rei*. There is no fund or source from which to make compensation. But, I submit, that when the police power is being exercised (again to adopt the language of the Supreme Court) to regulate "energies" and not to impair or destroy them, no possible reason exists why they should not be regulated among the owners of those energies and those who derive benefits from those energies upon equitable principles, in the manner in which a court of equity has always hitherto regulated them. To say that there is no difference in principle between a statute which authorizes a Board of Commissioners to compel a railroad, under conditions which demand it, to maintain a flagman at a railroad crossing, and a statute which authorizes a board to compel a railroad to abolish every grade crossing in a big city, costing nearly \$3,000,000, at its own expense, is, I submit, practically to hold that the police power of the State is absolutely without limitation, which the authorities, *supra*, hold not to be the case.

which has not become a public nuisance and has not lost its right to protection

It is true that in the case of *Maxwell v. Goetschius*, 40 N. J. Law, 383-387, Chief Justice BEAS-

LEY, in discussing the boundaries of legislative power prior to the Constitution of the State, adopted in the year 1844, stated that, "our earliest legislature was a copy, as near as may be, both in structure and function, of the English parliament; and there seems no reason for believing that it did not claim all the powers of its illustrious prototype. The parliament of England was not invested merely with authority to legislate; but its function was composite, partly legislative, partly administrative, and partly judicial; and it was this body that was imitated in the establishment of the legislature in this state. * * * It has been often said, and, with certain necessary reservation, said with truth, that parliament is omnipotent * * *."

But to this wide latitude conceded to our Legislature before the adoption of the Constitution of 1844, Chief Justice BEASLEY adds the following qualification, in the following language:

"There is just reason for the opinion that there were certain bounds that it could not overstep, for there are some rights so fundamental, that the existence of any power in the body politic which in its legitimate exercise would be capable of destroying them, would be fatal to the very purpose and end for which all rational government is established. Thus it has frequently, in speculation at least, been predicated of the parliament of England, that it had not the competency of making a man a judge in his own case, and in like manner of many of the governments in this country, that they could not, by an edict, take the property of one citizen, and, without compensation, or just cause, vest it in another."

It will be noted that Chief Justice BEASLEY does not make any exception with reference to police power. He does not say the governments could not, by an edict *other than one promulgated in the exercise of the police power*, take the property of one citizen and, without compensation or just cause, vest it in another—and yet, I submit, that the practical effect of the sweeping order of the Board now brought up for review, is to take the property of the prosecutors who have to pay the enormous expense of this improvement, or so much thereof as is in excess of the benefits they themselves may derive from the improvement, and vest it, without compensation, in the City of Paterson as a municipality.

POINT II.

The statute under which the order under review was made is unconstitutional in so far as it deprives the Court of Chancery of its exclusive jurisdiction over the regulation of the use of easements, as provided in Article III, Section 1, and Article VI, Section 1, of said Constitution.

I particularly submit that whatever the power of the Legislature may be to delegate to this central administrative body, the Board, the power to determine that a crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby, and to order the company operating such railroad to alter such crossing by substituting therefor a crossing not at the grade of the public highway, the provisions in the statute that the entire expense shall be paid by the company operating the railroad (except the small percentage

to be borne by any trolley road using the crossing) and casting upon the public service corporations the burden of the total cost of removing their pipes, etc., is clearly unconstitutional, not only for the reason formulated above as Point II, but for the further reasons upon which the prosecutor relies for a reversal of the proceedings under review.

The order under review is based upon Chapter 57 of the Laws of 1913 (*P. L.* 1913, p. 91). The material parts of this statute read as follows:

“1. Whenever a public highway and a railroad cross each other at the same level, and it shall appear to the board that such crossing is dangerous to public safety, or that public travel on such highway is impeded thereby, the Board of Public Utility Commissioners may order the company operating such railroad within such time as said Board may fix, to alter such crossing according to plans to be approved by said Board, by substituting therefor, a crossing not at the grade of such public highway, either by carrying such public highway under or over such railroad, or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway, and the opening of a new highway in the place of the one ordered vacated.

“2. The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property, shall be paid by such railroad unless a street railway uses such crossing, in which event the Board may order not exceeding ten per cent of such

expense directly chargeable to the crossing used by the street railway company, to be paid by the company operating such street railway, and the balance to be paid by the company operating such railroad. * * *

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

The statute thus provides that there are two prerequisites to the Board making an order for the alteration of the crossing: (1) the public highway and the railroad must cross each other at the same level; (2) it must appear to the Board (a) that such crossing is dangerous to public safety, or (b) that the public travel on such highway is impeded thereby.

KALISCH, *J.*, speaking for the Supreme Court in *Erie Railroad Co. v. Board of Public Utility Commissioners*, 95 *Atl. Rep.*, 177, held that Section 22 of the Act concerning public utilities (*P. L.* 1911, p. 383), as amended by *P. L.* 1912, page 111 (a section by no means so drastic as the one now under consideration, though somewhat of the same character), conferred upon the Board merely administrative powers in aid of public safety, and not judicial power to regulate conflicting easements; and

hence did not violate Constitution, Article VI, §1, vesting judicial power in the courts, including the Chancery Court, one of whose inherent constitutional powers was exclusive jurisdiction over the regulation of easements.

Judge KALISCH said (p. 178) :

“The argument made to support this contention is that by article 6, §1, of the Constitution of the state of New Jersey, the judicial power is vested in the courts therein mentioned, one of which is the Court of Chancery, and that one of its inherent constitutional powers is exclusive jurisdiction over the regulation of easements, and that therefore section 22 of the Act concerning Public Utilities (chapter 195, *P. L.* 1911, p. 383) as amended by chapter 80, *P. L.* 1912, p. 111, which in substance provides for three cases in which the board may make an order for the provision of safety devices: (a) When a public highway and a railroad cross one another; (b) when a public highway and a street railway cross one another; (c) when ingress or egress to any railroad station is obstructed by its tracks, trains or engines of any other railroad company—intends to confer power on the board to regulate easements in certain specified cases, and hence is an encroachment upon the constitutional powers of the Court of Chancery.

“The argument is founded upon an assumption that the regulation of the method of protecting life and limb at grade crossings of a public highway and a railroad is necessarily a regulation of an easement. The fallacy of the argument lies in the assump-

tion that section 22 confers upon the board judicial power to regulate conflicting easements. There is no such power conferred. There is no such inference to be drawn from the language used. The object sought to be attained is public safety. The Legislature has clearly defined the powers of the board in that regard. The powers conferred are administrative, and the fact that the board can put the provisions of the statute into effective operation in any case where there are facts to which the statute applies does not make the power exercised judicial. All our statutory special tribunals, such as the health boards, boards of education, etc., are clothed with administrative powers and exercise quasi judicial functions; yet no one has yet made a successful attack upon the constitutionality of the statutes conferring such powers upon the ground that the powers conferred can only be constitutionally exercised by our courts of law. *Of course, if a statute attempted to oust a constitutional court of its jurisdiction over the matter it would be void.* There is nothing in section 22 of the statute under consideration that in any way attempts to oust the Court of Chancery of its jurisdiction to deal with conflicting easements."

With the question, whether that ruling by the Supreme Court with reference to the section of the statute there under consideration was sound or otherwise, I am not now concerned. I respectfully submit, however, that a statute which gives the Board the power to force a railroad company to alter its grade crossings, either by carrying such public highway under or over such railroad, or by

reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway, and the opening of a new highway in the place of the one ordered vacated, and which, disregarding alike the relative rights of the owners in fee of the railroad and of its lessee, the operating company, and the easements of the public in the public streets, and the easements of the various public service corporations (telegraph, telephone, gas, electric, lighting, power, water, etc.), and the public rights which they possess under their respective charters to maintain their sewers, water pipes, gas pipes, electric conduits, etc., in the public streets, throws the entire cost of the improvement (except the trivial percentage to be borne in some cases by a street railway) on the *operating railroad*, the lessee of the road, *and the entire cost of removing the pipes, etc., upon the public service corporations who derive no benefit whatever from the improvement*—is certainly a statute which (whatever its design may have been) regulates easements, and which regulates such easements in a manner without regard to any basic principles of right or reason, and in a manner altogether different from that in which the same easements would be, and hitherto have been, regulated by the Court of Chancery in the exercise of its exclusive jurisdiction over that subject.

It may here be noted that in the *Erie* case the only parties in interest were the railroad company and the Board of Chosen Freeholders of the County of Hudson. The order in that case simply required flagmen to be kept on duty at each of the crossings, and there was no such interference with, or regulation of, different easements as exists in the case at bar.

That case involved only the *use* of the easement. It merely regulated the method of protecting life and limb at grade crossings of public highways and a railroad. It involved no change whatever in the *form* of the easement. The section of the statute there enforced simply authorized the Board, where conditions at the grade crossing made it necessary for the protection of the traveling public, to order and direct the railroad company, or the street railway company, to install appropriate protective devices. That section of the statute contemplated no change in the easement of the public in the public streets, or in the easements or rights of way of the street railway or the railroad companies. In short, the *Erie* case involved only the *use* of the easement, whereas the present case involves both the *use* and the *form* of easement; that is, it involves not only the right to use, but the manner of use. The present case also involves not merely the abstract right of the public to the easement in a highway crossing a railroad track at grade, but also involves all other public utility companies, such as a water company, a street railway company, a telegraph company and a telephone company.

It does not seem to be denied in the *Erie Railroad Company* case, above cited, that the Court of Chancery has exclusive jurisdiction of the regulation of conflicting easements. It may, nevertheless, be worth while to draw attention to several cases in which that jurisdiction has been exercised by the Court of Chancery and in which the exclusive nature of that jurisdiction has been maintained, and to the manner in which it has been thus exercised.

I first quote freely from the very learned opinion of GREY, V. C., in *West Jersey, &c., Railroad Company v. Atlantic City, &c., Traction Company*

(Court of Chancery of New Jersey, October Term, 1903), 65 *N. J. Eq.*, 613.

Head Notes:

1. "Jurisdiction to determine how conflicting easements of way across the same place shall be occupied and used by two or more holders of such easements, is vested in the court of chancery."

2. "That jurisdiction is one of the inherent equitable powers of the court of chancery, *which is incapable of exercise by any other forum*, and is protected by article 6, section 1 of the constitution of this state."

3. "It is unaffected by any legislative franchise granting to a corporation an easement of way, *or by a legislative charter which empowers a municipality to regulate streets and railroad crossings within its bounds.*"

4. "Where a newly-organized company is authorized to lay its railroad tracks at grade across the existing tracks of another railroad, and the construction proposed involves only such a crossing, the new company should pay the expenses incident to the safe construction of its tracks across those of the senior company."

Quotation, p. 616:

"Upon the question of jurisdiction, it being shown that two or more railroad companies, or a railroad company and a turnpike company, or a railroad company and electric road, or a railroad company and the general public using the public highway, or all of them, have easements of way over the same place, usable by each according to its

grant and its necessary implications, and that at the crossing in that spot there is danger of obstruction or impairment of the easement of one by the manner in which another uses or proposes to use its easement, or danger to the traveling public, there seems to me no doubt that the court of chancery has jurisdiction (when invoked by any person interested in any of the easements which each may have a right there to enjoy) *so to regulate the manner in which the parties shall use their several easements, that each of them and also the public may be saved from the threatened interference or danger.*

“It is of no significance to say that the defendant has a legislative grant, authorizing it to cross at grade, *or that the city of Atlantic City, under its right to regulate grade crossings, has prescribed a mode.* The grant of the franchise from the legislature, and the fixing of the mode of its enjoyment by the municipality, are essential incidents necessary to the existence of the defendant company’s right, but they do not take away from the senior company, occupying the same place, its previously granted easement of way. When it appears that the new company’s grant, as proposed to be used, threatens the impairment of the easement of the senior corporation at the same place, *there must be some forum where this question can be judicially heard and determined.* The application is a seeking to enforce the equitable maxim that every man shall so use his own as to do the least possible injury to his neighbor. The control of the manner in which conflicting easements may be enjoyed

does not take away the rights of any of the companies holding the easements. It only judicially ascertains how each shall so use its own that its use shall be the least disadvantage to the other. *In the very nature of the case the only forum in which relief can be sought must be a court of equity.* No other has the remedies of injunction and receiver, which are necessary to the enforcement of the decree fixing the rights of the several parties.

“The jurisdiction which is invoked is one which, in my judgment, is inherent in this court and protected by the constitution of this state. It existed as one of the general equitable powers of this court at the time the constitution of 1844 was adopted, and is protected by the declaration of the constitution, article 6, section 1, under the head of ‘Judiciary,’ which provides that ‘the judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore, a court for the trial of impeachments; *a court of chancery*; a prerogative court; a supreme court,’ etc.

“There is in the constitution no other ascertainment of the jurisdiction of this court than the declaration that its judicial power shall be vested ‘as heretofore.’ So that whatever jurisdiction the court of chancery had at and previous to the time of the adoption of the constitution in 1844, it has now.

“No legislation, whatever its form, can either directly or indirectly *lessen* or take away the constitutional powers of the court of chancery. *Therefore, all these enactments which have been appealed to, granting rights*

of incorporation or powers to municipalities to regulate streets and crossings, whether within or without a city, make no difference. They cannot take away the inherent constitutional jurisdiction of the court of chancery (in cases where all these functions have been exercised, resulting in the existence of conflicting easements) to hear the parties and determine how each shall enjoy his right as against the others having easements in the same place.

“That is my understanding of the declaration of the jurisdiction of this court, made by Chief Justice BEASLEY, sitting for the chancellor, in the case of *Delaware, Lackawanna & Western Railroad Co. v. Erie Railroad Co.*, 6 C. E. Gr., 304, approved by the court of appeals in *National Docks Co. v. Central Railroad Co.*, 5 Stew. Eq., 767; *National Docks Co. v. United Companies*, 24 Vr., 224; and in the case of *Palmyra v. Pennsylvania Railroad Co.*, 17 Dick. Ch. Rep., 616, 617, which was unanimously affirmed on appeal (18 Dick Ch. Rep., 799). There is in those opinions no reference to the constitutional relation of this element of chancery jurisdiction, but there can, I think, be no doubt that the power to adjust and arrange the enjoyment of conflicting easements is within the original equitable powers of a court of equity.

“The case now presented for consideration has some elements of novelty, in that it asks this court to prescribe a mode in which a traction company shall arrange and hereafter manage its crossing of a steam railroad company’s tracks. In the leading

case before Chief Justice BEASLEY, the dispute was between two railroad companies concerning the use of the same tunnel. He allowed an injunction compelling an adjustment of the dispute, intimating that, if necessary, a receiver might be appointed to carry the court's decree into effect. The judgments in the cases of *National Docks Co. v. Central Railroad Co.*, 5 *Stew. Eq.*, 767, and *National Docks Co. v. United Companies*, 24 *Vr.*, 224, presented different grounds of dispute, but each involved the basic principle of a conflict between parties having easements of way at the same place, regarding the occupation or use of their rights. There is no substantial difference as to the equitable jurisdiction, whether the contention between the parties arises for one reason or another. It is enough if there is a dispute touching the occupation or use of easements at the same place.

“The jurisdiction of this court is, I think, beyond challenge.”

The essential and controlling point, however, upon which I wish here particularly to dwell and emphasize, is that not only did Grey, V. C., in the case cited, determine that the Court of Chancery had exclusive jurisdiction over the regulation of easements, but he went on to determine, and did determine, upon equitable principles, how the expense of the “crossing” there in question should be distributed and borne.

I quote further from his opinion as follows (p. 622) :

“The expense of this plan of crossing should, in my judgment, be borne by the

traction company. That may be a good ground upon which that company may desire to appeal from the order here made, *and that right shall not be imperiled by its assent to the precise formulation of the plan in the decree.*

“The steam railroad company was given the right to put its railroad at this crossing of the highway, and has built and completed its tracks and is now in possession. The traction company has since been given a crossing at the same place. While it is true that the traction company, with respect to the owner of the fee, is enjoying one of the modes of using the public right of way over the land for which the highway was originally taken (*Hinchman v. Paterson Horse Railroad Co.*, 2 C. E. Gr., 75), yet it is equally true that the trolley company has by its franchise acquired for itself a right to exclude from the habitual use of its tracks all those who may be engaged in competitive business. *Camden Horse Railroad Co. v. Citizens' Coach Co.*, 6 Stew Eq., 267. For this special convenience thus afforded the public in the use of the highway, it is authorized to charge its passengers a fee for using its cars. The construction of its tracks and the safe passage of its cars over steam railroad tracks in its route are means whereby the traction company acquires this privilege. There seems to be no equitable ground which requires the senior company, presently in occupation, to pay anything to enable the junior company to construct its own crossing in such a manner that it shall not impair rights of the senior company already vested and in enjoyment. It is the

duty of the junior company so to build its tracks over the senior company's rails that the crossing may be safe. The junior company has no right to threaten to build them in a dangerous manner, and to require as a condition of its change to safe construction that the senior company shall pay its expenses in building on the safer plan.

"This settlement of the mode in which the defendant company shall cross the complainant's tracks does not involve a reconstruction of the whole plan of the crossing in question, whereby the steam railroad tracks and the public highway will, for the better advantage of the parties now in possession, be changed from their present condition. It accomplishes only a crossing of the steam railroad tracks as they now are by those of the newcomer, the traction company. The latter company builds solely for its own advantage. It should, I think, in such a case, pay the expenses of the safe construction of its tracks across those of the steam railroad now on the spot."

Now, then, I do not claim that there is necessarily the slightest analogy between the disposition made by the Vice-Chancellor of the cost of the crossing there involved, and his placing of that cost entirely upon the shoulders of the traction company, and the disposition which would be made by the Court of Chancery of the cost of elevating the tracks of the Erie Railroad Company in the case at bar, were that question now before it, further than to point out that for reasons already presented to the Court in this brief as to the unreasonableness of the statute in question, it is altogether unlikely that the Court of Chancery would

have adopted—in determining the question upon equitable principles—the mode of distributing the cost of this improvement directed by the statute. It is highly improbable, I submit, that the Court of Chancery, in view of all the equities involved, would have thrown all the vast expense of this improvement, without regard to the contractual relations of the parties, and without regard to their natural equitable relations, solely upon the Erie Railroad Company, the operating company; and it is equally improbable that the Court of Chancery, under these circumstances, would have compelled (as the statute compels) the prosecutor, the Passaic Water Company, who receives no benefit from the improvement, in the absence of any ordinance being passed by the city requiring the raising or lowering of the grade of the street, to remove its pipes at its own sole expense.

How, then—if this be the case—can it be fairly claimed, as was claimed in *Erie Railroad Company v. Board of Public Utility Commissioners*, *supra*, that this statute does not attempt to oust the Court of Chancery of its jurisdiction over this subject? Does that case mean that the Erie Railroad Company, notwithstanding this statute throwing the whole burden of the cost of this improvement upon its shoulders, may still go to the Court of Chancery, and if it can show that Court that but for the statute in question it should not in equity bear all this expense, obtain an injunction against the strict enforcement of that statute? If that course is open to it, and if the Court of Chancery would have the power to overrule the statute in that respect under certain conditions, does it not necessarily follow that the provision in the statute throwing the whole burden of the cost upon the Erie Railroad Company, and the cost of removing

the pipes on the Passaic Water Company, is unconstitutional in that it in terms directs the cost to be borne in a certain manner, which, under most circumstances, would differ from the manner in which that cost would be apportioned by the Court of Chancery in the exercise of its exclusive jurisdiction over that subject?

Thompson v. Egbert, 17 N. J. L., 459.

The fact that the statute in question may be a statute of police regulation, in so far as it requires an elimination of the railroad crossings, cannot enable the Legislature to deprive the Court of Chancery of its exclusive jurisdiction to see that the easements involved are regulated upon equitable principles, and that the cost of the proposed improvement is apportioned in accordance with equitable rules.

See also:

Hudson County v. Central Railroad Company of New Jersey (Court of Chancery of New Jersey, October Term, 1904), 68 N. J. Eq., 500 (affirmed by Court of Errors and Appeals, 70 N. J. Eq., 806).

Quotation, page 513:

"If my conclusions are sound, it results in my finding the existence of three easements at the point of crossing: There is the easement enjoyed by the complainants as the custodians of the Hudson county boulevard; the easement of the city of Bayonne with respect to West Second street at its intersection with the boulevard, and the easement of the Central Railroad of New Jersey along

West Second street and across the boulevard at the *locus in quo*.

“Since it is evident that the parties hereto have not agreed as to the method in which the respective easements shall be enjoyed in respect to each other, it is within the power of the court of chancery to regulate the same.

“‘The regulation of conflicting easements is *exclusively*’ a chancery power (concurring opinion in *Anthony v. West Jersey Railroad Co.*, 57 *N. J. Eq.* [12 *Dick.*], 618 [Court of Errors and Appeals, 1898]), and in a case in this court, in which all of the previous cases are noticed and commented upon, it is held by Vice-Chancellor GREY that the jurisdiction of this court, under circumstances similar to those existing in this case, is beyond challenge. *West Jersey and Seashore Railroad Co. v. Atlantic City and Suburban Traction Co.*, 65 *N. J. Eq.* (20 *Dick.*), 613 (1904).

“The court will, therefore, retain jurisdiction of this case and will make a decree defining the mode and manner of crossing.”

Another case in which the same power of the Court of Chancery is asserted is *City of Newark v. Erie Railroad Co.*, 72 *N. J. Eq.*, 447.

Quotation, page 454:

“The cause of demurrer, which asserts that this court has no equitable jurisdiction to grant the relief sought by this bill, is evidently aimed at the fourteenth paragraph of the bill, in which the complainants charge

that where the right of the public to use a public highway and the right of a railroad company to operate its railroad across such highway are in conflict, this court has the power to regulate and direct the manner of crossing so as to protect the rights of both parties and insure the safety of the public. Such a jurisdiction in this court was obviously asserted and acted upon in *Newark v. Delaware, Lackawanna and Western Railroad Co.*, 42 *N. J. Eq.* (15 *Stew.*), 196, for upon no other ground can the opinion of Vice-Chancellor VAN FLEET, on whose advice the decree in that case was made, be vindicated. What was said in the opinion of Mr. Justice REED, in *New York and Greenwood Lake Railroad Co. v. Montclair*, 47 *N. J. Eq.* (2 *Dick.*), 591, with respect to the general equitable power of the court, was unnecessary to the decision, for, as was pointed out, the jurisdiction asserted was put solely upon certain legislation which was held to be ineffective. In the subsequent case in this court of *West Jersey and Seashore Railroad Co. v. Atlantic, &c., Railroad Co.*, 65 *N. J. Eq.* (20 *Dick.*), 613, such jurisdiction was directly asserted, and the decree was made thereon. Under those decisions this contention cannot avail defendants."

The case last above cited was on a demurrer. The case on the merits was determined in 75 *N. J. Eq.*, 20, and was reversed as to certain points (immaterial to the matter under consideration) in 76 *N. J. Eq.*, 317.

I also quote from *Palmyra v. Pennsylvania Railroad Co.* (Court of Chancery of New Jersey, October Term, 1901), 62 *N. J. Eq.*, 601 (affirmed by the Court of Errors and Appeals on the opinion of the Vice-Chancellor in 63 *N. J. Eq.*, 799).

Quotation, page 611:

“Upon this question of the relation of the powers of government, there are several decisions which at first glance appear to be favorable to the contention of the defendant company. The cases of *Pennsylvania Railroad Company v. Matthews*, 7 *Vr.*, 531, and *New York Railroad Company v. Leaman*, 25 *Vr.*, 202 (Court of Errors), declare that it is the function of the legislature to prescribe the character of the safeguards which railroad companies shall provide at highway crossings, and that if additional protection is necessary, the requirement therefor ‘must proceed from the legislative, and not from the judicial, power.’ *Matthews Case*, 7 *Vr.*, 534.

“The court in these cases had under consideration the adoption by the legislature, of *general* rules applicable, as a matter of general state policy, to the crossing of all highways by railroad tracks. Neither of the cases cited discusses or refers to the duty specially imposed upon the railroad company by its own charter.

“Such general legislative regulations could not possibly provide for the special emergencies arising at particular crossings, calling for appliances to make each crossing safe which are peculiar to that spot. In some cases one method would fitly afford relief, in other cases another.

“Remedies for these exigencies must be provided. *The functions to be exercised in providing them cannot be deemed to be legislative.* The legislature has no means of investigating and determining the questions which these conditions raise, or of directing the installing of the additional safeguard which each particular crossing may require, because of its own peculiarities. If it attempted to hear and determine disputes between municipalities and railroad companies as to their respective rights and duties at each particular crossing, the parties must be noticed, a hearing must be had, evidence must be produced and its admissibility ruled upon, argument must be heard and considered, and a judgment must be pronounced.

“These incidents are inherently necessary to the accomplishment of the desired result, *i. e.*, the ascertainment whether, at a particular crossing, it is the duty of a particular railroad company to provide additional safeguards, because of the situation of affairs there existing. Such a procedure by the legislative department, in any mode of its action, would certainly go much further to intrude upon powers properly belonging to the judicial department than the exercise of the powers conferred by the statute of March 16th, 1898, upon this court, would be an intrusion upon the legislative field. * * *”

Page 616:

“There is another ground of equity jurisdiction under which the powers, conferred upon this court by the statute of 1898, may

be well exercised. This is the regulation of the enjoyment by two or more persons of several easements in common property. This was luminously expounded by the late Chief Justice BEASLEY sitting in this Court for the Chancellor, in *Delaware, Lackawanna & Western Railroad Co. v. Erie Railroad Co.*, 6 C. E. Gr., 304. He there says: 'In the case before me, the parties possess a community of interest in their property. They are tenants in common of an easement, and if this Court cannot protect the one against the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy. The general cognizance of equity in cases of this kind, where property is enjoyed in common, will not, it is presumed, be disputed by anyone.' This exposition of the jurisdiction of this court was approved by the Court of Appeals, and it was there declared that it might be invoked in cases where conflicts arise between railroad companies in the use of a crossing. *National Docks Railroad Co. v. Central Railroad Co.*, 5 Stew. Eq., 767. The same ruling was approved by the court of appeals in *National Docks Railroad Co. v. United New Jersey Railroad Co.*, 24 Vr., 224. The principle is the same where a dispute arises between a railroad company and a municipality as to their respective use of a highway crossing the railway.

"Municipal authorities being charged with the duty of keeping the highways fit for safe and convenient passage, this court has always maintained their right to its aid to restrain wrongful acts by railroad companies at crossings (*City of Newark v. Dela-*

ware, *Lackawanna and Western Railroad Co.*, 15 *Stew. Eq.*, 196), or longitudinally (*City of Burlington v. Pennsylvania Railroad Co.*, 11 *Dick. Ch. Rep.*, 260). The same principle was unanimously declared by the court of appeals in *Township of Greenwich v. Easton and Amboy Railroad Co.*, *ubi supra* (25 *N. J. Eq.*, 516).

“The jurisdiction conferred by the statute of 1898 upon this court accords with its modes of procedure and is consistent with its general equity powers.”

In *Eckert v. Perth Amboy & Woodbridge Railroad Co.* (Court of Errors and Appeals, November Term, 1903), 66 *N. J. Eq.*, 437, Mr. Justice FORT held that the Act of 1898 (*P. L.*, 1898, p. 110) conferring upon the Court of Chancery the power to determine what protection of the crossing is reasonable and necessary was constitutional, as against a claim that it conferred upon the judiciary powers that belonged to the legislative department of government. He said (p. 441):

“*The enforcement of police regulations has from time immemorial been through the courts.*”

“To us it seems that the procedure pointed out in the Act of 1898 is clearly judicial in character and strictly within judicial cognizance, and upon this branch of the case we adopt the language of Vice-Chancellor GREY in *Palmyra v. Pennsylvania Railroad Company*, *supra*,” quoted above in this brief.

Further examples of cases where the Court of Chancery has exercised its general jurisdiction in

regulating the enjoyment of conflicting easements are:

National Docks Railroad Co. v. Pennsylvania Railroad Co. (Court of Chancery, October Term, 1895), 54 *N. J. Eq.*, 142; affirmed by the Court of Errors and Appeals in 55 *N. J. Eq.*, 820.

Jersey City, &c., Railroad Co. v. New York, Susquehanna & Western Railroad Co. (Court of Chancery, October Term, 1901), 62 *N. J. Eq.*, 390.

City of Newark v. Central Railroad Co. (Court of Chancery of New Jersey, October Term, 1907), 73 *N. J. Eq.*, 469.

So far as concerns street railways not within the limits of any city or town, the Railroad Law gives to the Chancellor the power to determine the manner of crossing.

See:

P. L., 1895, page 462.

P. L., 1903, Section 32, page 662.

Comp. Stats. of N. J., 1910, page 4235, Section 32.

This statute did not confer upon the Court of Chancery any power in addition to what it already had with respect to the regulation of easements. It simply provided for a summary method of procedure and gave a definite status in court to the public authorities.

Raritan River Railroad Co. v. Traction Co. (Court of Errors and Appeals, March Term, 1904), 70 *N. J. L.*, 732, 738, 739.

The above citations clearly establish, I contend, the exclusive jurisdiction of the Court of Chancery over the regulation of the use of easements, and that, consequently, where two or more railroad companies, or a railroad company and a turnpike company, or a railroad company and an electric road, or a railroad company and the general public using the public highway, or all of them, have easements of way over the same place, usable by each according to its grant and its necessary implications, and where at the crossing in that spot there is danger of obstruction or impairment of the easement of one by the manner in which another uses or proposes to use its easement, or danger to the traveling public, the Court of Chancery has exclusive jurisdiction (when invoked by any person interested in any of the easements which each may have a right there to enjoy) so to regulate the manner in which the parties shall use their several easements that each of them and also the public may be saved from the threatened interference or danger; and that in such cases the Court of Chancery has especially exclusive jurisdiction to apportion the expense of the enforcement of such regulation among those benefited, in accordance with equitable principles.

But it was claimed in the *Erie* case, *supra*, 95 *Atl. Rep.*, 177, and in this case, too (though, as I have already pointed out, the section of the statute now under consideration is very much more drastic and confiscatory in character than the section under consideration in the *Erie* case), that these powers conferred upon the Board are purely administrative, and do not properly, or, perhaps I should say, exclusively, belong to the judicial department of government, but are rather matters which do not *properly belong*, in the constitutional

sense, to any one department exclusively, but may be brought either by statute or by circumstances within the province of any of the departments.

That matters exist not capable of precise classification, and which may, therefore, be properly brought within the province of any of the departments, I do not for a moment deny, but I submit that it is of extreme significance that so accurate a jurist as the late Mr. Justice DIXON, in the case of *Mcreau v. Freeholders of Monmouth*, 68 N. J. L., 480, in drawing attention to this very subject, placed the "determination of how conflicting easements should be enjoyed" within the category of judicial, or quasi-judicial, questions which might legally be devolved upon persons belonging to the judicial department of government, and not among the other class not capable of precise classification which might be brought within the province of any of the departments.

The matters confided to the Justice of the Supreme Court by the statute in that case under consideration were, whether, not the necessities of the Court, but the convenience of the public, made an additional court house desirable; whether a permanent or temporary court house should be acquired; in what location outside of the present county seat it should be situated, and of what style it should be, in order most to subserve the public convenience, and what expenditure, therefore, would best accord with the other demands upon the Public Treasurer. Judge DIXON said:

"These matters, in our judgment, 'properly belong' to the legislative department of government. They turn wholly on considerations of public policy with which the legislature must deal. They are of the same

character as the question whether the interests of the people of the state would be promoted by levying a tax to pay bounties to volunteers of the Civil War, of which the Court of Errors, in *State v. Demarest*, 3 Vr., 528, said the legislature was the sole judge; as the question respecting the rate of taxation that might be borne by a city without injury to its creditors (*Munday v. Rahway*, 14 *id.*, 338), the question as to what territory ought to be embraced in organizing a town (*In re Ridgefield Park*, 25 *id.*, 288), the question respecting the proper route through a municipality to be granted for a telephone line (*New York and New Jersey Telephone Co. v. Bound Brook*, 37 *id.*, 168), and the question whether a particular municipality should be divided into wards (*Gilhooly v. Elizabeth*, *id.*, 484), all of which questions this court has held to be for the legislature exclusively. We do not mean that the legislature itself must pass directly upon them, for undoubtedly it may delegate their decision to appropriate bodies, but persons belonging to or constituting the executive or judicial department of government are by the constitution precluded from such delegation.

“The cases cited by the defendants to support the opposite view are not in point.

“It clearly does not antagonize this clause of the constitution for courts to designate the times at which they will meet, though possibly a doubt may be suggested whether the legislature can imperatively fix those times.

“To determine how conflicting easements are to be enjoyed (*Delaware, Lackawanna and Western Railroad Co. v. Erie Railroad Co.*, 6 C. E. Gr., 298; *Palmyra v. Pennsylvania Railroad Company*, 17 Dick. Ch. Rep., 601; S. C. 18 *id.*, 799), to decide a dispute between contending boards of chosen freeholders as to the location of a bridge connecting their counties (*Somerset County v. Hunterdon County*, 23 Vroom, 512), to ascertain the compensation due to an officer of the court appointed to aid the court in performing its functions (*Lindabury v. Ocean County*, 18 *id.*, 417) are all judicial or quasi-judicial questions, and as such, may legally be devolved upon persons belonging to the judicial department of government. So there are many matters, not capable of precise classification, which do not *properly belong*, in the constitutional sense, to any one department exclusively, and may be brought, either by statute or by circumstances, within the province of any of the departments. *Paul v. Gloucester*, 21 *id.*, 585.

“We deem this statute unconstitutional.”

It will be observed that in this opinion DIXON, *J.*, points out matters which properly belong to the legislative department of government, also other matters which properly belong to the judicial department of government. He speaks also of other matters not capable of precise classification, which do not belong, in the constitutional sense, to any one department exclusively, and may be brought, either by statute or by circumstances, within the province of any of the departments, but, I repeat, that it is matter of the highest significance that

among the matters of this hybrid nature he does not include the determination of how conflicting easements are to be enjoyed, but expressly holds that all questions of that kind properly belong to the judicial department of government and inferentially to no other.

I also quote from *Palmyra v. Pennsylvania Railroad Company*, 62 *N. J. Eq.*, 601-611, already referred to, and which case was affirmed by the Court of Errors and Appeals in 63 *N. J. Eq.*, 799.

Quotation:

“The constitution, while requiring that the three great departments of government shall act separately, does not define, with any precision, where the limits of the functions peculiar to either begin or end. Many of those are so simple in their character as to be recognized as of course. Others are quite complex in their operation, and involve the doing of acts by one of these great departments which appear to be intrusions, to some extent at least, upon the domain of the others. It is almost impossible, in the conduct of government, to observe a precise and exact separation of these functions. This difficulty was recognized and dealt with by the court of errors and appeals in the case of *Paul v. Gloucester*, 21 *Vr.*, 611. That court there declared that the clause of the constitution under consideration operates prohibitively only when it relates to those powers which, by the constitution itself, are assigned to, or which, in their nature, pertain to, one of the three great departments exclusively. The court cites numerous in-

stances showing that, in the usual and accepted conduct of government, powers which are not expressly or inherently related to any one department *have always been exercised by that one of them to which they are, by law, referred.* The court declares that 'the conclusion is inevitable that this multitude of duties was regarded as lying outside of what were termed the powers properly belonging to the executive, legislative and judicial departments, and was left, by the constitution, to be discharged in such mode as the law should provide.'

"Upon this question of the relation of the powers of government, there are several decisions which, at first glance, appear to be favorable to the contention of the defendant company. The cases of *Pennsylvania Railroad Co. v. Matthews*, 7 Vr., 531, and *New York Railroad Co. v. Leaman*, 25 Vr., 202 (Court of Errors), declare that it is the function of the legislature to prescribe the character of the safeguards which railroad companies shall provide at highway crossings, and that if additional protection is necessary, the requirement therefor 'must proceed from the legislative, and not from the judicial, power.' *Matthews Case*, 7 Vr., 534.

"The court, in these cases, had under consideration the adoption by the legislature of general rules applicable, as a matter of general state policy, to the crossing of all highways by railroad tracks. *Neither of the cases cited discusses or refers to the duty specially imposed upon the railroad company by its own charter.*

“Such general legislative regulations could not possibly provide for the special emergencies arising at particular crossings, calling for appliances to make each crossing safe which are peculiar to that spot. In some cases one method would fitly afford relief, in other cases another.

“Remedies for these exigencies must be provided. The functions to be exercised in providing them cannot be deemed to be legislative. The legislature has no means of investigating and determining the questions which these conditions raise, or of directing the installing of the additional safeguard which each particular crossing may require, because of its own peculiarities. If it attempted to hear and determine disputes between municipalities and railroad companies as to their respective rights and duties at each particular crossing, the parties must be noticed, a hearing must be had, evidence must be produced and its admissibility ruled upon, argument must be heard and considered, and a judgment must be pronounced.

“These incidents are inherently necessary to the accomplishment of the desired result, i. e., the ascertainment whether, at a particular crossing, it is the duty of a particular railroad company to provide additional safeguards, because of the situation of affairs there existing. Such a procedure by the legislative department, in any mode of its action, would certainly go much further to intrude upon powers properly belonging to the judicial department than the exercise of the powers conferred by the statute of

March 16th, 1898, upon this Court, would be an intrusion upon the legislative field.”

See also:

Newark Plank Road & Bridges (Court of Chancery of N. J., May Term, 1902), 63 *N. J. Eq.*, 710.

Headnote 1:

“The duty imposed on the court of chancery by *P. L.* of 1902, page 566, to hear a petition for the apportionment between the counties interested of the expense of maintenance of a plank road running into two or more counties, after the charter of the plank road company had expired, is judicial and properly imposed on such court.”

In *Paul v. Gloucester* (Court of Errors and Appeals, June Term, 1888), 50 *N. J. L.*, 585-610, VAN SYCKEL, *J.*, said:

“The other particular is that for the judge to order an election and set the day on which it shall be held violates article III of the constitution, which says: ‘The powers of government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.’

“One counsel insists that ‘the naming of the day is an act of legislation’; another, that the ordering of an election is ‘a power properly belonging to the legislative and executive departments of the government.’

"The inability of counsel to agree upon the proper classification of this power indicates the weakness of the argument. They both disregard the fact that there are many powers of government, speaking generally, which do not, in a constitutional sense, properly belong to either of the departments mentioned.

"This constitutional clause relates only to those powers which, by the constitution itself, are assigned to, or which, in their nature, pertain to, one of these departments exclusively. Thus, I presume, the chancellor could not be authorized to act as governor, in case of the death of the governor, the president of the senate and the speaker of the house of assembly; and the senator of each county could not be authorized to hold the Circuit Court during the recess of the legislature.

"But there is a multitude of governmental duties which have never been and cannot possibly be performed, either by the legislature or by the governor, and which are certainly not prescribed by the constitution to the judiciary. Yet the constitution vests all the legislative power, of which it here speaks, in the senate and general assembly, all the executive power in the governor, and all the judicial power in the courts.

"The conclusion is inevitable that this multitude of duties was regarded as lying outside of what were termed the powers properly belonging to the executive, legislative and judicial departments, and was left by the constitution to be discharged in such mode as the law should provide."

I have endeavored already to demonstrate that the regulation of grade crossings involving the regulation of easements was a governmental duty which had previous to the adoption of the constitution been performed by the Court of Chancery, and that such regulation did not belong, therefore, to the multitude of duties referred to as lying outside of what were termed the powers properly belonging to the executive, legislative and judicial departments.

See also:

Eckert v. Perth Amboy & Woodbridge Railroad Co., supra.

Ross v. Board of Chosen Freeholders
(Court of Errors and Appeals, June 15,
1903), 55*Atl. Rep.*, 310.

The Supreme Court, in its opinion in the *Erie* case, controlling the case at bar, disposed of this point in this language:

“This exercise by the legislature of its police power, which in its simplest expression is illustrated in statutes requiring the erection of safety gates, the posting of flagmen, and the giving of audible signals, long antedated the adoption of the Constitution of 1844, so that the jurisdiction of the Court of Chancery that was confirmed by that instrument, was not exclusive in respect to the exercise of such powers by the legislature, even if the jurisdiction of equity at any time was or could be exclusive as to such exercises of this sovereign power, which is not for a moment admitted, even for the purposes of argument.”

By the Eighth Section of the Constitution of 1776 it was provided that "the governor, or in his absence, the vice president of the council, should have the supreme executive power, be *chancellor* of the colony," etc. At that date, therefore, and all through the times of the provincial government, the Court of Chancery had existed as an independent tribunal. Originally the power of the Court of Chancery was lodged in Lord Cornbury and his council, and subsequently, by his ordinance to that effect, Governor Franklin took the office into his own hands exclusively.

During all this period the Court of Chancery had the sole and exclusive jurisdiction over the regulation of the use of easements, and during the time I refer to railroads were not in existence.

Chief Justice BEASLEY, speaking for this Court in *Harris v. Vandervere's Exr.*, 21 *N. J. Eq.*, 424-430, intimated that in his opinion the Constitution of 1776 was possessed of the usual sanctions of such an instrument, and that it was consequently unalterable by the Legislature at its pleasure; although he held that Mr. Griffith, in his *Law Register*, was wrong in expressing the opinion that the act passed on the 13th of June, 1799, giving an appeal for the first time from the Court of Chancery to the old Court of Errors and Appeals, was a usurpation on the part of the Legislature and in violation of the old Constitution.

But be that as it may, I do not believe that any instance will be found, until perhaps quite recently, where the Legislature has attempted to exercise this so-called police power in any such wholesale manner as it has done by this act, viz., so as to cause a railroad company, a municipality, a street

railway and other public utilities so to rearrange their different easements as to involve an expenditure of millions of dollars, all practically at the sole cost of one of them. I submit that it is an innovation upon all previous courses of legislation to remove the question of who shall bear the burden of a vast undertaking of this kind from the Court of Chancery, where it properly belongs, and make it the subject of so-called police legislation on the part of the Legislature.

If the safety of the public could not be preserved except by the Legislature arbitrarily throwing the whole expense of this improvement upon the operating company, and none of it on the municipality, then there might be justification for the Legislature to enact the law as a police measure; but clearly the Legislature might have authorized the Board to direct the removal of the grade crossings and have left it to the Court of Chancery to determine how the cost should be divided, without imperiling the safety of the public in any degree. *Public policy is not involved in the distribution of the cost of the improvement. It is, therefore, not a subject of police legislation.* If it were necessary, for instance, to destroy half a city at the expense of the various owners of the properties composing that half, in order to save the other half of the city from fire, the necessity might justify the act, although even in that case equity would seem to demand compensation for the loss to the owners of the destroyed portion of the city by contribution to them in the nature of general average on the part of the owners of the property saved. But there was no necessity, in the cases at bar, to cast the whole burden of this great expense on the Erie Railroad, and none of it on the municipality, and

I submit, for reasons above stated, the Legislature in so doing was not exercising its police power, but was depriving the Court of Chancery of its exclusive jurisdiction over that subject.

The precise point I am urging is that there is a vast difference between the Legislature charging a railroad with the cost of safety gates, flagmen and minor works of protection not involving any change in the form of the easements enjoyed, on the one hand by the railroad and on the other by the municipality, although both of them are protected by such safeguards, and charging the railroad with the enormous cost of changing the entire form of the easements enjoyed by each, by causing the streets of the municipality to be left entirely free from occupation by the railroad, and causing the railroad to put its tracks up in the air at an expense of nearly \$3,000,000.

The fact (if it be a fact, which is by no means conceded) that the Erie Railroad Company may, under the charters of its lessor companies, and under its leases, be liable to pay the whole expense of the grade-crossing elimination is absolutely immaterial. We are dealing solely with a question of jurisdiction. If the Legislature has *unconstitutionally* delegated to the Board powers which exclusively belong to the Court of Chancery, the fact that the Legislature may have authorized the Board to distribute the expense of the project in precisely the same way that the Court of Chancery would have ordered it distributed, had the matter been before it for its adjudication, cannot give the Board jurisdiction where constitutionally it can have none.

I shall later on argue that if Section 2 of the Act under examination (*P. L.* 1913, p. 91) be unconstitutional for the reasons contended, it follows that Section 1 of the statute should also be held unconstitutional.

Of course, if the statute is unconstitutional as against the Erie Railroad Company, it follows that it is also unconstitutional as against the Passaic Water Company. But even though it should be held constitutional as against the Erie Railroad Company, it does not necessarily follow that the provision in the statute throwing the expense of removing its pipes upon the water company is also constitutional.

As between the water company and the City of Paterson, the water company had, by its charter, full authority to lay its pipes beneath such public roads, streets, avenues and alleys as it might deem necessary, free of all charges to be made by any person or persons or body politic whatsoever for such privilege, and also such hydrants at the crossings or intersections of the said streets or alleys, provided that the said pipes should be laid at least two feet below the surface of the same, and should not in any wise unnecessarily obstruct or interfere with the public travel, or damage public or private property. (See Charter of Passaic Water Company, approved February 13, 1849.)

That was a right of property which could not be invaded without compensation. But conceding that such right was subordinate to the public right of way (*Jersey City v. City of Hudson*, 13 *N. J. Eq.*, 420) as between the water company and the Erie Railroad Company, the Erie Railroad Company was bound to permit the pipes of the water com-

pany to be laid under its crossings without compensation. In laying its water pipes in the highway by public authority, the water company was merely exercising the public easement, to which the Erie Railroad Company, whether it owned the land or had only a right of way, must submit without any compensation being paid.

The city can, of course, change the grade of the streets at any time, and the water company must conform its pipes to the grade as changed, but the Erie Railroad, as against the water company, has no right to lower the grade of the crossing and compel the water company to move its pipes deeper at its own expense, and if the railroad company cannot do that voluntarily, I submit, the State cannot, by an act of the Legislature entitled "An act concerning public utilities; creating a board of public utility commissioners and to prescribe its duties and powers," empower it to do so without compensation to the water company. It will be observed that in the case at bar the City of Paterson has passed no ordinance requiring a change in the grade of the streets.

POINT III.

Said order is invalid and beyond the jurisdiction of said Board, in so far as it purports to command the prosecutor to proceed with due diligence to the execution thereof and to comply with all the requirements thereof and the duties imposed upon it thereby, and by the said act under which said order is made and the laws of New Jersey, and that to that end it exercise in good faith all of the powers conferred upon it by the laws of New Jersey (see 7th Reason, Vol. IV, p. 1859).

The order requires the prosecutor to change the location of its water pipes, water mains, etc., at its own expense, not in accordance with any grade established by the municipal authorities of the City of Paterson, but in accordance with grades established solely by the Board itself. This circumstance gives rise to two inquiries: (1) Has the Board any power *virtute officii* to change the grade of a street in the City of Paterson? (2) If not, what may the effect of the order, *quoad* the prosecutor, be, requiring the prosecutor to change the location of its pipes, water mains, etc., in accordance with a grade not legally established?

The title of the statute from which the Board derives its powers is "An act concerning public utilities to create a board of utility commissioners, and to prescribe its duties and powers," and a supplement to that act.

One preliminary question, therefore, is, is this statute so entitled, when interpreted as empowering the Board to change the grades of streets in

a city, in conflict with *placitum* 3 of Section 7 of Article IV of the Constitution of this State, which is in these words, viz., "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, *and that shall be expressed in the title*?"

The precise point is that the title of this statute so interpreted does not truly express the object of the legislation which it embodies.

The purpose of the provision requiring the object of the proposed law to be expressed in its title is to give notice of, and publicity to, the proposed legislation. I submit that such purpose would be frustrated if a rule should be sanctioned having a scope sufficiently wide to embrace and validate the present act. The title of this act is: "An act concerning public utilities; to create a board of public utility commissioners, and to prescribe its duties and powers." The act is not described as having any relation to streets in cities, nevertheless its immediate purpose is to create a corporation that shall possess (among other things) the power to change the grade of streets and vacate streets and open streets (under certain circumstances) in cities. The regulation of these streets, before the passage of this law, was in the hands of the officers of the municipality; the result of this act is to supersede such supervision in certain cases and to transfer it to a corporate board organized for that purpose. This was an important change most materially affecting the property and personal rights of the inhabitants of the cities embraced in the law; and yet it is certain the title of this statute would not have conveyed to such persons any intelligible intimation of one

of the projects in contemplation, viz., the alteration of the grades of streets.

See:

Rader v. Township of Union, 39 N. J. L.,
509.

While it must be conceded that the Legislature representing the State has public authority over its public ways, including the streets in cities, as well as the county roads, and can at any time resume the power of the regulation of streets previously granted to municipal sub-divisions of the State (*United Railroad & Canal Co. v. Jersey City*, 71 N. J. L., 80), I respectfully submit that the resumption by the State of the power to change the grade of streets, and vacate and open streets, in the City of Paterson, and the redelegating that power to a board other than the municipality empowering such board, to enable a railroad company itself to change the grade of streets, etc., pursuant to the order of the Board, amounts to an amendment or modification of the City's Charter, and that such modification or amendment cannot be legally accomplished under the guise of a statute entitled: "An act concerning public utilities, etc."

Moreover, the statute does not, on its face, purport to give power over the grades of public highways; the *express* power given in Section 1 is to vacate, relocate or change the lines, width, direction or location of public highways, and the opening of new highways, etc.

Furthermore, the language of the statute does not justify the implication that the Board has the power to change grades of highways. A careful

reading of Section 1 shows that there are two methods provided to alter a grade crossing, viz., *either* by carrying the highway under or over such railroad, *or* by reconstructing the railroad under or over the highway; that is, either the highway itself must be carried under or over the railroad (the railroad tracks remaining at the existing level), or the railroad itself must be reconstructed under or over the highway (the highway remaining at the existing grade). The order under review (except in the case of Madison Avenue) directs that the railroad be elevated in part, and that the grade of each highway be depressed in part. Such a reconstruction is not within the terms of the statute. Even if the Legislature could constitutionally delegate to an administrative body like the Board of Public Utility Commissioners the power to change the grades of streets, regardless of the restrictions and conditions of the City Charter, and other general laws on that subject, it has not, in fact, done so by the present statute, either expressly or impliedly, except, perhaps, in the single instance where it permits of the highway itself being carried under or over the railroad, the tracks remaining at the existing level.

The order under review is also objectionable because it requires the water company to change and remove its pipes, etc., and yet *non constat* that the municipal authorities will permit the surface of the streets to be disturbed for that purpose.

Glasby v. Morris, 18 N. J. Eq., 72.

The statute, too, in requiring the water company to remove or change the grade or location of its property or construction in conformity with the order of the Board, is objectionable, because while

it provides that the water company shall be given notice of hearing, and an opportunity to be heard, it prescribes beforehand what the duty of the water company shall be, regardless altogether of what may transpire at such hearing. The hearing would seem to be purely a matter of form. The water company is given no real *bona fide* opportunity to be heard, although its property rights are to be affected.

United Electric Co. v. Bayonne, 73 N. J. L., 410.

The order further requires the water company to change and remove its pipes according to a certain definite plan, and thereby deprives the Board of Directors of the water company of the right of themselves determining the best method of making such change or removal. The precise position of the pipes in the street, so long as they are removed without interfering with the scheme of the order generally, was a matter with which the Board had no concern, and yet the order compels the pipes to be laid in strict conformity with the plans adopted by the Board.

I submit further that the *omnibus mandamus* contained in the order directing the Erie Railroad Company, the City of Paterson, the Public Service Railway Company, the Passaic Water Company, etc., "and all other parties to this proceeding, and every of them, to comply with all of the requirements of this order and the duties imposed upon them thereby, and by the said act under which this order is made *and the laws of this State*, and that to that end *they and each of them, exercise in good faith all of the powers conferred upon them and each or any of them by the laws of this State,*" has no sanction in the statute and cannot be supported

upon any legal principle. Each of these public service corporations is, of course, bound by law to obey all the laws of this State, and such obligation cannot be increased or diminished by any order that the Board can make on that subject. The evident intent of the order is to require all these public service corporations to put in force and utilize whatever laws may be applicable or available to insure the execution of the order of the Board.

The provision in the statute that "the Board shall have power to require every public utility to comply with the laws of this State, and any municipal ordinance relating thereto, and to conform to the duties imposed upon it thereby, or by the provisions of its own charter, whether obtained under any general or special law of this State" (*P. L.*, 1911, p. 378, Sec. 17), cannot confer the power on the Board to make a sweeping order of specific performance of all laws and ordinances available or applicable to the situation, and to render the non-performance of that all-embracing, drastic command a misdemeanor (*P. L.*, 1911, p. 387, Sec. 35).

The power to make any such sweeping order as that would transcend even the power of the Supreme Court to grant a writ of mandamus. The proper province of a writ of mandamus is to enjoin the doing of particular specific acts, and not to constrain a person to regulate his whole course of conduct according to some general principle.

Rosenfeld v. Einstein, 46 *N. J. L.*, 479.

As stated in *Mocney v. Edwards*, 51 *N. J. L.*, 479-481,

"the distinction is that the writ of mandamus will issue to compel the performance in a specified manner of ministerial duties

so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of their performance, but that as to all acts or duties depending upon a jurisdiction to decide questions of law, or to ascertain matters of fact on the part of the officer or body at whose hands their performance is required, mandamus will not lie."

The order directs these public service corporations not only to comply with all the laws of this State (without naming one of them), but to exercise in good faith all of the powers conferred upon them, and each or any of them, by the laws of this State. They are in effect ordered to be "lawyers" in carrying out the order of the Court, and to know exactly what laws are available, and to exercise the power of selecting the best law and applying it to the proper exigency, at the risk of being guilty of a misdemeanor. If, for instance, permits are necessary from the Street Commissioners before the water company can open the streets, it must obtain such permits from the Street Commissioners, and probably the Street Commissioners are bound to grant the permits. But if the Street Commissioners refuse to do so, what is the position of the water company? If the act and order sweep aside all necessity for permits the water company must recognize that fact, must know it intuitively, and must act on that knowledge. The water company must also determine for itself whether the statute and order obviate the necessity of any ordinance changing the grades of the streets, and it must determine that question correctly, and determine it at its own risk. Obviously the City of Paterson has determined that no such ordinance is necessary, for none such has been passed, but if the City is

wrong in that view, how is the water company to act to protect itself?

For instance, the order vacates that part of Madison Avenue lying west of the railroad which is included between the right of way line of the railroad and the line of the relocated Madison Avenue, and changes the direction of Madison Avenue so as to run in another direction from that in which it formerly did, over and across property of the Erie and across its railroad. This leaves a water main of the water company which now crosses the Erie underneath Madison Avenue as formerly laid out, wholly outside of the relocated street, and on private property of the Erie, liable to be removed by the Erie at any time. The question is, what shall the water company do? Shall it leave its water main where it is and take chances with the Erie, or shall it remove it under the newly located Madison Avenue, not knowing yet whether in the absence of an ordinance, the new Madison Avenue as now located, is a public street or not?

These are only a few of the difficulties arising from the general sweeping character of the order in question.

POINT IV.

Said order and statute deny the prosecutor the equal protection of the law (see 2nd Reason, Vol. IV, p. 1858).

I submit that the statute denies the prosecutor the equal protection of the law, particularly in this respect, viz., that it places a street railway, using a crossing, upon an absolutely different footing in regard to the bearing of the expense, from that on

which it places other public service corporations, whose property or constructions lie underneath such crossing.

If the statute can lawfully impose upon the Passaic Water Company the obligation to bear all the expense of removing its constructions, where such removal is necessary to eliminate the crossing, what possible reason is there for putting a street railway, the removal of whose constructions is also necessary to eliminate the crossing, upon an absolutely different footing?

Both the railway company and the water company are public service corporations. Both possess the right under their respective charters to lay their constructions, the one under and the other over the crossing. Conceding that such right is subordinate to the public right of way, why should the water company pay the whole expense of changing the location of its pipes, and the railway company be treated on a totally different principle, not being required to pay the total expense of removing its tracks and relocating them, but being required to pay not exceeding 10 per cent. of the total expense?

If these two public service corporations, the street railway company and the water company, are entitled to the equal protection of the law, and should consequently be dealt with on the same basis in apportioning the cost of eliminating the grade crossing between them, and if the Legislature had the right to impose upon the water company the *entire cost* of removing its pipes, then the Legislature, to insure equality, should have cast upon the street railway the entire cost of removing its street railway apparatus, and adapting it to the new

grade. That cost could very readily be ascertained, and was, in fact, ascertained in the case at bar, the details of the cost of changing the tracks, wires and other property of the street railway company being summarized in Exhibit PSR-1 at pages 1394 to 1396, and the details being given in PSR-2, at pages 1397 *et seq.* In any given case it would be only necessary to first find the cost of eliminating the grade crossing had no street railway been there, and then find the cost of eliminating the grade crossing with the street railway there, and the difference would be the cost consequent upon the existence of the street railway. This difference might in one case amount to next to nothing; in another case to less than 10 per cent. of the total cost of eliminating the grade crossing, and in still another case to considerably more than 10 per cent. of eliminating the grade crossing. If the grade crossing was eliminated so that the railroad ran over the existing street railway, without disturbing it, there would be very little extra cost due to the existence of the street railway. On the other hand, a condition can well be imagined where at a grade crossing the expense of changing the location of the street railway tracks, etc., might amount to considerably more than 10 per cent. of the total expense of eliminating the grade crossing. So that the provision of the statute casting the whole expense of removing its pipes on the water company, and an indeterminate sum not to exceed 10 per cent. of the whole expense of eliminating the grade crossing, upon the street railway, in lieu of the actual expense of changing its tracks, etc., seems to be absolutely incongruous and to rest upon no basis of equality or fairness.

I further submit that if for any reason argued in this brief, or for any other reason, Section 2 of the

statute (*P. L.*, 1913, p. 91) is held to be unconstitutional, it necessarily follows that the entire act must fall, because Section 2 is so closely connected with the rest of the statute that it cannot be supposed that the Legislature would have passed the statute without including Section 2 therein. Moreover, if Section 2 were eliminated from the statute, the result would be to increase, or make doubly apparent, the unconstitutionality of Section 1. The result of eliminating Section 2 would be by implication to throw the whole expense of the improvement on the operating railroad, except the expense of removing municipal pipes, etc., to be borne by the municipality owning the same (under Section 3), and the expense of removing the property of other public utility corporations to be borne by them (under Section 4). The street railway company, it would seem, would thus escape all liability for any part of the expense. Its liability could not be asserted under Section 4 of the act for two reasons, (1) because Section 2 expressly provides for the proportion of the expense to be borne by a street railway company, and a street railway company is not mentioned in Section 4, thereby negating any presumption that Section 4 should also apply to street railway companies, and (2) because where a statute, after making mention of certain specific things, extends its operation by general words, the latter do not extend to objects superior in their nature to that actually mentioned, unless such a construction would render the words wholly inoperative.

Barracliff v. Griscom, 1 *N. J. L.*, 224.
Livermore v. Freeholders of County of Camden, 29 *N. J. L.*, 245; affirmed 31 *N. J. L.*, 507-512.

So that Section 4 of the act, which in terms refers to "any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines, or other company or corporation, co-partnership or individual," would not, under the rule of construction just stated, apply to a street railway company.

It would seem to be reasonable that where an essential part of an act is unconstitutional, and fails for that reason, all other parts of the act which depend upon it for force and effect, must necessarily meet the same result. And so the rule is stated,

"that all provisions of an act which are dependent, conditional or connected so as to warrant the belief that the legislature intended them as a whole, stand or fall together under the test of the constitutionality of any such provision."

Cooley on Const. Lim., 178, and cases cited.
Warren v. Mayor, &c., of Charlestown, 2
Gray, 99.

State, Van Cleef v. New Brunswick, 38
N. J. L., 320.

The rule as to the divisibility of a statute is thus stated in *Cooley's Const. Lim.*, *178:

"If a statute attempts to accomplish *two or more objects*, and is void as to *one*, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a *single object*, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion."

In *Johnson v. State*, 59 N. J. L., 535, the Court of Errors and Appeals declared the law thus:

“The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with, and dependent on, each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail.”

In applying this rule two considerations are to be kept in mind: One is that the matter rests not in proof, but in hypothesis, the question being not what the Legislature enacted, but what it would have enacted if it had been aware that all of the act that was passed could not stand; the other is, that while there is a strong presumption that the whole of a statute expresses the whole mind of the Legislature, there is only a weak presumption that less than the whole of a statute will express the whole mind of the Legislature. These considerations inculcate caution and cast a burden on him who asserts that an enactment is divisible. He is bound not indeed to prove, for that is impossible, but to show that it is at least clearly probable that, after part of the act had been cut out, the law-making power would have been satisfied with the residue.

Let this test be applied to the case in hand. The second section was passed to direct the Board by whom the expense of the improvement was to be paid. That section provides that the entire expense, etc., is to be paid by the railroad, unless a street railway uses the crossing, in which event the Board might order not exceeding 10 per centum of such expense to be paid by the company operating the street railway. The Legislature having thus carefully provided for the method of division, how is it clearly probable that it would have been content with a different distribution of the burden of the expense? It seems at least as likely that the Legislature, if aware that Section 2 must fail, would have either supplied its place, or strengthened the first section.

The above argument is a paraphrase of the language used by Judge ADAMS in the case of *Iowa Life Insurance Company v. East Mutual Life Insurance Company*, 64 N. J. L., 340-346.

In *Riccio v. Hoboken*, 69 N. J. L., 649, it was held that

“unconstitutional provisions may be eliminated from a statute only where they are interjected into an enactment otherwise valid, and are so independent and separable that their removal will leave the constitutional features and purposes of the act substantially unaffected by the process.”

I do not lose sight of the fact that Section 42 of the Act of 1911, creating the Board of Public Utility Commissioners (*P. L.*, 1911, pp. 374-389) provides that “if for any reason any section or provision of this act shall be questioned in any Court, and shall be held to be unconstitutional or invalid,

no other section or provision of the act shall be affected thereby." This provision was not inserted in the supplement to the act, with which we are concerned (*P. L.*, 1913, p. 91), and if it had been inserted it would have been incapable of being carried into effect. If, for instance, Section 1 of the Act of 1913 be held unconstitutional, the other sections must necessarily fall with it, as they owe their very *raison d'être* to Section 1, which is the sole foundation for the existence of all the other sections. And so, though in a slightly less striking sense, Section 1 is so closely connected with Section 2, that if Section 2 falls, Section 1 must fall also.

Furthermore, the provision in the Act of 1911, that an unconstitutional clause or section shall not affect any other section or sections, is, I submit, as was suggested in *Fagan v. Payen*, 59 *Atl.*, 568-590, a mere affirmation of the general legal rule of statutory construction above set forth. To give any wider significance to the provision than that would lead to absurd results, such as that above mentioned, if Section 1 of the Act of 1913 were adjudged unconstitutional, leaving the other sections in full force.

For the above reasons I submit that the order and the statute upon which it is based are invalid and that the judgment of the Supreme Court should be reversed.

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