INDEX.

POINTS.

LIST OF AUTHORITIES.

PAGE.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, *Prosecutor-Appellant,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS AND CITY OF PATERSON, *Defendants-Respondents.*	*On Certiorari.* *Appeal from Supreme Court.*

Brief for Public Service Railway Company

Statement of the Facts.

The writ of certiorari brings up for review an order, made by the board of public utility commissioners on April 20th, 1915, directing the Erie Railroad Company to abolish fifteen grade crossings in the city of Paterson. (Case, p. 1787.) The estimated cost of abolishing the grade crossings is $2,948,218.68, exclusive of damages to neighboring property. (Case, p. 1765.) The average cost of abolishing each grade crossing, therefore, probably would exceed $200,000.

Public Service Railway Company, the appellant, owns and operates street railways across the Erie railroad where three of the grade crossings included in the order are located, namely: (1) at Park avenue and Market street; (2) at Broadway; and (3) at River street. The order directs the appellant "to pay ten per centum of the expenses of the alterations, changes, relocating and opening, required by this order, including damages to adjacent property, directly chargeable to the crossings, and each of them, so used

by the said street railway operated by it." (Case, p. 1792.)

No estimate has ever been made of the expenses that must be incurred, and of the damages to adjacent property that must be paid, in order to abolish the three grade crossings, but the probable cost to the street railway company of the proposed work would largely exceed $60,000.

The statute under which the order was made is chapter 57 of the laws of 1913, page 91. The second section is as follows:

> "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 centum 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."

The Reasons for Reversal.

Public Service Railway Company objects to the order so far as it purports to impose on the company ten per centum of the cost that may be incurred in abolishing the three grade crossings referred to above.

The reasons on file and on which the street railway company relies for setting aside the order so far as it relates to the company are appended hereto at p. 37. Briefly stated, they are:

(1) The burden which the order attempts to impose on the company is neither a tax nor an assessment, nor a legitimate exercise of the

police power, and therefore, if enforced, it would be an arbitrary seizure of its property for a public purpose and without just compensation, and so violate its rights secured by paragraph 16 of article 1 of the constitution of this state.

(2) The legislature has no power and did not attempt to authorize the board of public utility commissioners to exercise the power of taxation. If the proceedings should be regarded as a tax it would violate paragraph 12 of section 7 of article IV of the constitution of this state.

(3) The legislature did not undertake to confer on the commission authority to levy an assessment on the property of a street railway company for special benefits conferred by a public improvement. Such an assessment can only be imposed on land, and must be restricted to the amount of the special benefits conferred. Nothing like that was attempted by the order.

(4) The order also violates the rights of the street railway company secured by section 1 of the 14th amendment of the constitution of the United States. **In so far as it relates to the street railway company, the order is an effort to impose arbitrarily on a single taxpayer of a political division a large and indefinite part of the cost of a general public improvement. It deprives the company of its property without due process of law, and denies to the company the equal protection of the laws; and it can not be sustained as a lawful exercise of the police power.**

Argument.

I.

The order under review in so far as it relates to the street railway company is an invalid effort to exercise the power of taxation.

The imposition on the appellant contemplated by the order cannot be justified under the taxing power. Aside from the absence of power of the board of public utility commissioners to levy a tax on the property of the street railway company, the order violates the fundamental principle that taxation must be levied uniformly on the property within a political division, and according to its true value as required by the constitution of this state.

The question in this case was involved substantially in the case of *State, New Jersey R. R. & Transportation Co., Prosecutors,* v. *Newark,* 27 N. J. L. 185. In that case it appeared that commissioners of the city of Newark had widened a part of Market street between the station of the railroad company and River street on which the tracks of the company had been laid.

In 1858, when the street was widened, it was supposed that the legislature could authorize a steam railroad company to lay its tracks longitudinally in a public street (*Morris & Essex R. R. Co.* v. *Newark,* 10 N. J. Eq., 352), and it had been held that a contract with a railroad company for payment of certain taxes in lieu of all others was binding on the state. (*State* v. *Minton,* 23 N. J. L., 529.)

The charter of the city under which the proceeding to widen River street was taken provided:

> "That whenever any street, or part of any street, in the city of Newark, occupied or

> used by the track of any railroad company, shall require to be altered or widened for the convenience of public travel, and proceedings for the altering or widening the same shall have been taken under the act to which this is a supplement and its supplements, it shall be lawful for the commissioners appointed under said act and its supplements, and whose duty it may be to make a just and equitable assessment of the whole amount of the damages and expenses of such altering or widening among the owners and occupants of all the houses and lots intended to be benefited thereby, **to assess such portion of said damages and expenses upon the corporation or company owning or using said railroad track, as shall to them seem equitable and just."** (P. L. 1854, p. 395, sec. 6.)

Under that provision of the charter the commissioners assessed $1,250 on certain houses and lots owned by the Morris & Essex company and abutting on the part of the street that had been widened. The assessment of that sum as special benefits was sustained by the court. The sum of $18,000 was also assessed on the company itself, being the amount of the damages and expenses which, in the judgment of the commissioners, it was just and equitable that the company should pay. The principal question in the case was whether the assessment of the sum of $18,000, levied on the company for part of the cost of widening the street, was a tax. It was decided that **the imposition was a tax, and, consequently, the company was not obliged to pay it.** The court, speaking by Chief Justice

Green, in deciding the case said (pp. 190 and 191):

> "The assessment is, by the terms of the act, directed to be made, and is in fact made, not upon the property of the company, but upon the corporation itself. It is not to be assessed (as in the case of houses and lots intended to be benefited) in proportion to the advantages the company shall be deemed to acquire; but the commissioners are to assess upon the company such portion of the damages and expenses as to the commissioners shall seem equitable and just. **In what respect does this differ in principle from an ordinary case of taxation?** The assessment is not required to be made with any regard to the benefit the improvement may confer upon the company. From all that appears, the assessment may have been graduated by a regard to the ability of the company to pay—to the value of its stock—or to the amount of travel that passed through the street upon the railroad. It does not appear that the improvement added any value to the road itself or to the stock of the company.
>
> "It is urged that the widening of the street gave increased facility to the operations of the railroad, by relieving the crowded state of the street, thereby diminishing the danger of accidents, allowing an increased rate of speed, and thus indirectly adding to the value of the road. But the same argument would apply with equal force to sustain an assessment against the company for paving, lighting, grading, or otherwise improving the streets and increasing the facilities of travel; indeed it is difficult to imagine any purpose for which a municipal tax could be raised that might not, in the same way, be shown to

be indirectly beneficial to the railroad company. **But in what mode is the corporation specially benefited over any and every inhabitant of the city or traveler through its streets?** If the assessment upon the railroad company may be sustained upon the ground of special benefits to the corporation from the increased facilities of travel afforded by widening the street, an assessment may be sustained upon the same ground against the owner of every express wagon or stage coach that travels the streets. **The assessment in this case is a clear exercise of the taxing power.** It is made for a public purpose, and confers no special benefits upon the property of the company."

And in the same case Justice Elmer in concurring, after sustaining the assessment of $1,250, as special benefits on the abutting real estate of the company, said (p. 192):

"But the assessment of eighteen thousand dollars on the railroad tracks is of a different character. The commissioners do not profess to have assessed it on the principle of its ratio to the benefit the company derived from the altering and widening of the street, but according to the authority intended to be conferred by the sixth section of the supplement to the charter of the city (Acts of 1854, p. 395) as they 'deemed to be equitable and just.' In my opinion, this is a contribution exacted from the prosecutors, as their equitable and just share of the expense of a public improvement, and is properly a tax from which they are exempt. It was not denied by the counsel of the city, on the argument, that the grant in the charter of the railroad company to be exempt from a tax, is a contract which cannot be

> constitutionally impaired, the only question in reference to this point being, whether this was a tax within the meaning of the charter."

Although the legal principle expounded and established in this state by the *Agens case,* 37 N. J. L., 415, is familiar law, a few passages in the opinion of this court may be quoted in order to demonstrate the palpable invalidity of the part of the order under review which attempts to impose a tax on the appellant of ten per cent. of the unknown cost of abolishing the three grade crossings that have been mentioned. In the *Agens case* it appeared that the charter of Newark provided that whenever a street should be repaved it should be lawful for the common council to cause two-thirds of the cost of repaving to be assessed on lots fronting on the line of such repavement, and that the remaining one-third should be paid by the city. It will be noticed that this was an effort to charge arbitrarily upon abutting property two-thirds of the cost of repaving a street without regard to the special benefits conferred on such property thereby. This court held that section of the charter of Newark to be unconstitutional. Referring to the provision in the city's charter, the opinion states:

> "It thus appears that the statute in question undertakes to fix, at the mere will of the legislature, the ratio of expense to be put upon the owner of the property along the line of the improvement; and, the question is, whether such an act is valid."

Again, on p. 421, Chief Justice Beasley, in writing the opinion, said:

> **"I think it impossible to assert, with the least show of reason, that the legislative right**

> **to select the subject of taxation, is not a limited right.** For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. **If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be pledged, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen."**

The court denied emphatically that such a power exists, saying:

> "If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such."

Then, referring to the case of *Tide Water Co.* v. *Coster,* 18 N. J. Eq., 519, in which the true principle was laid down, the opinion continues (page 422):

> "It was upon this principle that the case was rested. The rule thus adopted, stands upon the idea that it establishes a standard by which, with at least an approach to precision, an act of taxation may be distinguished from an act of confiscation."

The court then refers to and quotes the opinion of Chief Justice Green in the case of *State* v. *Newark, supra,* and adds (page 422):

> "It follows, then, that these local assessments are justifiable, on the ground above,

> that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a land owner to pay for a public improvement over and above the exceptive benefit received by him."

The board of public utility commissioners has no power to levy a tax on the property of the appellant. There is nothing in the act creating the board, nor in the grade crossing act, that attempts to confer on the board power to raise revenue by means of taxation; and the legislature could not have conferred such power on the board if it had attempted to do so. *Township of Bernards* v. *Allen,* 61 N. J. L., 228. That case deals with fundamental principles of taxation and holds that the taxing power cannot be delegated by the legislature except to municipalities whose taxing officers derive their authority to levy taxes from the people.

In the *Bernards case* this court considered the validity of an act passed March 20, 1884, entitled—"An act to provide for and secure the raising of revenue for the execution of the public duties of maintaining public schools, preventing the destruction of property by fire, preserving the public health, supporting the poor, maintaining police and keeping the highways and streets in a safe condition for public use within the limits of incorporated cities, towns and municipalities in cases where the local or

municipal authorities or officers fail to provide for the performance of such duties." By that act (the fifth syllabus recites) the governor was authorized to appoint a commission of three freeholders, to be known as commissioners of taxation, whose duty it should be to levy certain taxes for local purposes, in the event that local boards or officers should neglect or fail to levy the same, or there being a vacancy in the local boards or offices, or the boards or officers had not commenced the assessment or valuation of property for taxation, or the said taxes had not been levied at the time required by law. The act, in defining the duties of these commissioners and prescribing the powers conferred upon them, enacted that they should have power to levy taxes for such sums as they should deem expedient for the enumerated purposes. Commissioners had been appointed by the governor for the township of Bernards and taxes had been assessed by them pursuant to the act.

The opinion after tracing the history of the taxing power through the great charters of England and the statutes of the colony and state of New Jersey, said, referring to the act of 1884 (page 242):

> "This act does not purport in any sense to confer on local municipal bodies powers of taxation. Its legal effect is to delegate the powers mentioned in the act to three persons appointed by the governor [precisely as in the grade crossing act]. In making this delegation the legislature prescribed no rule by which the taxation should be laid. The power conferred upon the commissioners was, in express words, the 'power to levy taxes,' with no prescription or limitation, except that the taxes levied

> for any one year for all purposes should not exceed one and one-quarter per cent., **and commits to the judgment and discretion of the commissioners the right to determine whether taxes for the purposes mentioned should be laid, and at what rate and upon what property, as they might deem expedient.** Plainly the scheme of taxation devised by this act is a delegation of the power of taxation. **A decision which would sustain this legislative action would antagonize fundamental principles of constitutional law** and in effect overrule *State* v. *Sickels, State* v. *Koster,* and *Munday* v. *Rahway,* above cited. In this respect the act is unconstitutional."

The foregoing passage, with no essential change of verbiage, defines exactly the power in respect to street railway companies which the legislature attempted to confer on the board of public utility commissioners by the grade crossing act, and it also defines the power which the board attempted to exercise by the provision in its order relating to Public Service Railway Company.

The order, which is clearly an effort to levy a tax, is also illegal so far as it attempts to exact from the appellant payment of ten per centum of the cost of abolishing three grade crossings, because it conflicts with paragraph 12 of section 7 of article IV of the constitution of this state, which says that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. No such assessment was made.

This court has repeatedly held, and notably in the important and well considered case of *Van Cleve* v. *Passaic Valley Sewerage Commissioners,* 71 N. J. L., 574, that part of the prop-

erty in a political division cannot be segregated and a tax imposed upon it in disregard of the remaining property. **Such a tax would be a palpable violation of the fundamental rule of uniformity in taxation.**

In *Lydecker* v. *Englewood,* 41 N. J. L., 154, the supreme court said, at page 156:

> "It must be regarded as settled in this state that the legislature has no power to impose a tax upon any territory narrower in bounds than the political district of which it is a part."

And in *Baldwin* v. *Fuller,* 39 N. J. L., 576, the supreme court again declared, Justice Van Syckel writing the opinion (p. 583):

> "I think the true rule, deducible from sound reason, is that legitimate taxation is limited to the imposing of burdens like those in question, as far as they are for the public benefit, upon the persons or property within the political district possessing powers of local government, **so that the exactions are distributed over the entire territory upon the rule of uniformity."**

These expressions were quoted and approved by this court in the *Passaic Valley case, supra;* and decisions to the same effect, previously rendered, are collected in the opinion in that case at p. 583.

The utility board attempted by its order to impose a tax on the street railway company, but it is invalid for the reasons stated in the authorities referred to above, and also for a reason that does not appear in any of those cases—the order does not state the amount of the tax even approximately.

II.

The requirement in the order that the street railway company shall pay ten per cent. of the cost of abolishing the three grade crossings is not an assessment on property of the company for special benefits.

In *State* v. *Jersey City,* 36 N. J. L., 56, it appeared that the depot property of a railroad company had been assessed for the paving and improving of Prospect street. An attempt was made to justify the assessment on the ground that the improvement would add to the business of the company. The court said, on page 58:

> "Supposed benefits, arising from the probable increase of business in consequence of increased facilities of access to their depot, cannot be made the basis of an assessment of this character."

In *State* v. *City of Elizabeth,* 37 N. J. L., 330, it was held that an assessment based on the ground of increased facilities for the transaction of the business of the prosecutor as a steam railroad company, was not an assessment for benefits, **but a general tax,** and could not be sustained—in that case because there was an exemption from general taxation in the charter of the prosecutor—a railroad company.

In *Davis* v. *Newark,* 54 N. J. L., 144, where an assessment for grading, curbing and flagging Washington avenue in the city of Newark was objected to because part of the cost of the improvement had not been assessed on a street railway company which operated its cars thereon. The supreme court said (p. 148):

> "So far as disclosed by the evidence the benefit conferred consists only in increased facility in running the cars of the company

> by reason of diminished grades. But such a benefit, if it may be called such, is conferred upon the franchise, and not upon the strip of land on which the cars run. The land burdened with the public easement would in no respect be increased in value thereby."

In 1911 the board of street openings of Paterson widened Park avenue in that city, on which Public Service Railway Company owned and operated a railway. The total cost of widening the avenue was $3,599.20. The board made no assessment on the abutting property of any part of the cost, but divided the same equally, and assessed $1,799.60 against the railway company, and a like amount against the city of Paterson. The board sought to justify its assessment on the railway company under section 102 of the charter of the city, P. L. 1871, page 850, as follows:

> "AND BE IT ENACTED, that in making the assessment aforesaid, for the widening or altering of any street, avenue, or highway occupied or used by the track of any railroad company, it shall be lawful for the said board of street openings in their discretion to assess the whole or any fair proportion of the costs, damages and expenses of such widening or altering upon the corporation or company owning or using said railroad track, as to them shall seem equitable and just."

At the February term, 1915, of the supreme court the assessment against the company was set aside on the authority of the cases to which reference has been made, the court holding that the proposed imposition was neither a tax nor an assessment laid in the manner required by the constitution of this state.

All the arguments that have ever been advanced in the present case, either by counsel or by the supreme court in its opinion, to sustain the imposition of ten per cent. of the cost of abolishing the three grade crossings on the street railway company, might have been and perhaps were urged to sustain the assessments in Newark in the River street case, and in Paterson in the Park avenue case. Those cases are directly in point, and the judgment of the supreme court in this case cannot be sustained without overruling those judgments.

III.

The order so far as it relates to the street railway company is not a legitimate exercise of the police power.

All the authorities agree that the police power can not be defined. It is not a law because it has never been "prescribed by the supreme power in the state" and cannot be stated in the form of a rule of conduct. The power can be recognized only so far as its limits have been traced by sound decisions of the courts. It is sometimes described as a fund of almost limitless power, partly organized, and the rest the reserved and latent sovereignty of the people. It was broadly described in the *License Cases,* 5 How., at p. 583, as follows:

> "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power, that is to say,

> the power of sovereignty, the power to govern men and things within the limits of its dominion."

Written constitutions themselves are ordained and established by virtue of this sovereignty or power of the people.

Other and the most numerous authorities refer to the police power as the part of the inherent sovereignty of the people which has been conferred on a government created by the people for the exercise of the power. The description of the police power in its more restricted sense, which has been approved more than any other, was written by Chief Justice Shaw in his opinion in the case of *Commonwealth* v. *Alger,* 7 Cush., 53, 85, as follows:

> "The power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, **not repugnant to the constitution,** as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

I do not think it is possible to come nearer to a definition of the police power than in one or the other of these quotations. If the extract from the opinion in the *License Cases* is taken for a definition it will be obvious that the reserved part of the police power cannot be exercised by any organ or official of government. If the statement of Chief Justice Shaw is accepted the same consequence will follow quite as clearly. **To hold that mere power may be properly administered as law would be to approve *ex* post facto and retroactive legislation,** it would subvert the reign of law and substitute the discretion of the judge, which Gibbon tells us is the

first engine of tyranny. Constitutions are designed not only to authorize the use of power within rational limits, but also to render law as certain as possible. *Misera est servitus, ubi jus est vagum aut incertum.*

That property should rest on the security of the constitution, and its ownership should not depend upon the varying opinions or caprices of individuals or officials, is impressively stated by Judge Story in his work on the constitution, sec. 1790. In speaking of the constitutional provision that prohibits the taking of private property for public use without just compensation, he says:

> "This is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers."

There are expressions to be found in the books from which it might be hastily inferred that the entire sovereign power possessed by the people of a state may be exercised in the name of the police power as if the federal and state constitutions did not exist. Fortunately, the courts which have spoken hastily of the police power as if it were a supplemental constitution make haste to recoil from that conclusion when they perceive its danger.

In re *Jacobs,* 98 N. Y. 98, Judge Earl, speaking of the police power of a state, remarks (p. 108):

> "But the power, however broad and extensive, is not above the constitution. When it [the constitution] speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, **and so far as it imposes restraints,** the police power must be exercised in subordination thereto."

And in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Vosburg,* 238 U. S., 56, it was said at page 59:

> **"But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th amendment. Nothing to that effect was held or intimated in any of the cases referred to.** The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation."

In *Freund on Police Power,* sec. 612, it is said:

> "It is an elementary principle of equal justice, that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, **and that no individual be singled out to make a sacrifice for the community. This principle lies at the foundation of the law of taxation, and applies equally to the police power."**

One might get the impression from some of the arguments advanced in support of the application of the police power that it is only necessary for public officials to assert that a proceeding to injure or destroy private property is being taken under the police power in order to suspend *pro hac vice* all provisions in the constitution intended to protect property from spoliation.

The abuse of the police power by failure to recognize its limitations was referred to by the late Justice Brewer of the U. S. Supreme Court, as follows:

> **"It seems to me that the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation it is referred to the police power, but no exercise of the police power can disregard the constitutional guarantees in respect to the taking of private property, due process and equal protection, nor should it override the demands of natural justice."**

In the familiar discussion that has been carried on for more than a century concerning the powers of the national or federal government and the governments of the states it has often been said that the organs of the state governments may exercise all political power, *i. e.,* police power and sovereignty, except that which has been expressly withheld by their constitutions and by the constitution of the United States, and denied to the states by those few fundamental principles mentioned by Chief Justice Beasley in *Maxwell* v. *Goetschius,* 40 N. J. L., 383, 388, without which society could not exist. The national government is in a different position. It can exercise

no sovereignty or police power except that which has been expressly granted, or necessarily implied from express grants of power. **To ascertain the limits of the authority of the national government we must examine its grants of power; to ascertain the limits of the authority of the governments of the states we must examine the restrictions put upon them.**

The constitution of New Jersey consists of three parts: (1) a bill of rights; (2) provisions for creating organs or instruments of government, and in some respects to regulate their proceedings; and (3) restrictions on the exercise by the government of part of the sovereignty and police power, which is said to be "inherent in the people." (Art. I, *para.* 2.) There are a few other provisions such as the definition of the elective franchise and the distribution of powers. The people of no state in this country have ever deemed it wise to confer all their sovereign power, or all of their police power, on their instruments of government. A state constitution which should do that would create a despotism, except so far as prevented by the federal constitution which guarantees to every state a republican form of government. It is clear, therefore, that the office and purpose of a state constitution is not merely to authorize the exercise of certain sovereign powers, but **to prevent the exercise of others.** This fact has sometimes been overlooked in hasty remarks about the police power. It has been assumed that the entire police power "inherent in the people" may be exercised by the several governments of the states without regard to the prohibitions in their written constitutions.

> "By the constitution which they [the people of a state] establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the

officers of the state, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law." *Cooley's Con. Lim.*, page 28*.

"A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." *Ib.*, p. 37*.

If the constitution of New Jersey is examined it will be seen that it contains nineteen express restrictions on the power of the legislature, and **the thing which the legislature attempted to do with the property of street railway companies by the grade crossing act has been purposely, repeatedly, and distinctly forbidden** (Art. I, *para.* 16; Art. 4, *sec.* 7, *para.* 9).

Paragraph 16 states:

"Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore until the legislature shall direct compensation to be made."

The other paragraph is as follows:

"9. Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners."

Certainly there ought to be and in fact there is a line beyond which the police power can not be exercised so as to take or injure private property or interfere with its use without making compensation. That line may be found in the law defining and relating to nuisances. It is true the definition of a nuisance is extremely vague,

but it is clearly limited to this extent at least, **a thing that is lawful in itself and is lawfully used is not, nor is its use, a nuisance, and its ownership or use can not be disturbed without compensation.** *Hinchman* v. *Paterson Horse R. R. Co.,* 17 N. J. Eq., 75 (77); *Simmons* v. *Paterson,* 60 N. J. Eq., 385 (388); *State* v. *Erie R. R. Co.,* 84 N. J. L., 661.

A building harmless for a long time may become dilapidated and dangerous, and wholesome merchandise may decay, and so by becoming a nuisance lose the protection of the law, and its owner may be compelled to remove or destroy the property at his own expense, or it may be removed or destroyed by the public authorities at its owner's expense. The same thing may be said of the use of property. While the use is lawful it is protected by law. When used unlawfully its owner may be compelled to desist from such use no matter what injury may accrue to him by desisting. **In a word, property is put out of the protection of the law only when it becomes a nuisance, and the use of property is deprived of the protection of law only when the use creates a nuisance.** All this is plain enough; and it is equally plain that while property is in a lawful condition and being used according to law it can not be taken or injured or its owner compelled to expend money in changing its location, form or use at his own expense simply because it would be convenient for others living in the neighborhood or for the public that he should do so.

It is not necessary, in the present case, to pursue the discussion of the basis or the limits of the police power further than to say that natural justice and sound authority forbid the injury or destruction of private property without compensation in order to carry out a public

purpose, **unless the property has become a public nuisance, and so lost its right to protection.** It would be difficult to imagine how a street railway, legally constructed and operated according to law, could be a public nuisance and its owners compelled to forfeit their property, or forfeit a part of it for permission to retain the rest. If it be true that some other party has created a public nuisance adjoining the property of a street railway company, that is no reason why the street railway company should pay any part of the penalty for a tort committed by another. Street railways are precisely what their name implies. They are means by which the public utilize to better advantage their right of passage on public highways. *Hinchman* v. *Paterson Horse R. R. Co., supra; Halsey* v. *Rapid Transit Street Ry. Co.,* 47 N. J. Eq., 380; *Roebling* v. *Trenton Passenger Ry. Co.,* 58 N. J. L., 666. They are built under express statutory authority, and every rail, track and pole is located by the governing bodies of the municipalities in which they exist. The effect of their operation is to diminish or prevent congestion of public highways, which would result from efforts to carry on the same amount of traffc and comply with public demands for transportation by other means. There is no evidence in this case, no allegation or recital in the order under review, and there can be no presumption, that the operation of the street railway of the appellant at the three grade crossings in question is a nuisance established or maintained by the appellant; and, if not, why should the appellant be required to pay a large sum of money as a penalty for conducting a lawful business in a proper manner? In fact, the company could be compelled by mandamus to do precisely what it is now doing, if it should attempt to desist.

Bridgeton v. *Traction Co.*, 62 N. J. L., 592; *Wilbur* v. *Trenton Passenger Ry. Co.*, 57 N. J. L., 212.

The case of a steam railroad is entirely different. Such a road can only be placed on a public highway longitudinally by express legislative authority and with the consent of or compensation to the owners of abutting land, and a steam railroad company is permitted to cross a highway at grade only on the ground of necessity. *State* v. *Hoboken*, 35 N. J. L., 205; *N. J. R. R. & Transportation Co., supra, Long Branch Commissioners* v. *West End Railroad Co.*, 29 N. J. Eq., 566; *Township of Raritan* v. *Port Reading Railroad Co.*, 49 N. J. Eq., 11; *Burlington* v. *Penna. R. R. Co.*, 56 N. J. Eq., 259; affirmed 58 N. J. Eq., 547.

No matter how harmless a grade crossing by a steam railroad may be when laid, or for many years after, the company acquires no right to continue to maintain it after it becomes a public nuisance, either by increase of traffic on the highway, or on the railroad, or on both; *Newark* v. *D. L. & W. R. R. Co.*, 42 N. J. Eq., 196; **and it is only on the theory that a grade crossing has become a public nuisance by the operation of a railroad that the legislature can compel the railroad company to abate it at its own expense.** No one would think of disturbing the street railway of the appellant at the three crossings in question any more than elsewhere in the streets of Paterson except for the steam railroad. The railroad caused the nuisance, if any exists, and may be held entirely responsible for the cost of abating it.

The case of *New York and New England R. R. Co.* v. *Bristol*, 151 U. S., 556, affirms a judgment of the supreme court of Connecticut holding that

under a statute of that state, passed in 1889, railroad commissioners were authorized to require the railroad company to pay the entire cost of abolishing a grade crossing. The supreme court of Connecticut in construing the statute and sustaining the authority of the railroad commissioners to require railroad companies to pay the entire expense of abolishing grade crossings **put its decisions expressly on the ground that the grade crossings had become nuisances by means of the operation of steam railroads.** *Town of Suffield* v. *New Haven & N. R. Co.,* 53 Conn., 368, 5 Atl., 366; *Fairfield's Appeal,* 57 Conn., 167, 17 Atl., 764; *Appeal of New York & N. E. R. Co.,* 58 Conn., 552, 20 Atl., 670; *State* v. *Branford,* 59 Conn., 402, 22 Atl., 336; *New York & New England R. R. Co.* v. *Bristol,* 62 Conn., 527, 26 Atl., 122; *Cullen* v. *Railroad Co.,* 66 Conn., 211, 33 Atl., 910. The supreme court of the United States in sustaining the judgment of the supreme court of Connecticut in the *Bristol case* said, referring to the statute of 1889:

> "As to this act, the court, in 58 Connecticut, 552, on this company's appeal, held that **grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated,** and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement." (p. 567.)

This view of the matter is confirmed by the important case of *Mugler* v. *Kansas,* 123 U. S., 623. It appeared in that case that in November, 1880, an amendment of the constitution of Kansas was adopted in the following words:

> "The manufacture and sale of intoxicating liquors shall be forever prohibited in

this state except for medical, scientific and mechanical purposes."

In the following year a statute was passed to carry the amendment into effect. The statute declared that all places where intoxicating liquors were manufactured, sold, bartered or given away in violation of its provisions or where intoxicating liquors were kept for sale, barter or delivery in violation of the act **were common nuisances,** and upon the judgment of a court having jurisdiction finding such a place to be a nuisance the sheriff of the proper county or marshall of any city should proceed to shut up and abate such place by taking possession thereof and destroying the liquor, together with all screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance, and the owner or keeper thereof should be adjudged guilty of maintaining a common nuisance and punished by fine or imprisonment. Mugler, proprietor of a brewery in Kansas, was indicted in November, 1881, for violating the statute, and convicted. The judgment was affirmed by the supreme court of Kansas and taken to the supreme court of the United States by writ of error.

It further appeared that in March, 1885, the act of 1881 was amended so as to broaden its scope, by providing that an action might be brought by the attorney general, by the county attorney or any citizen to abate and perpetually enjoin the nuisance defined in the act; 123 U. S., 670.

An information was filed under the amended act against one Ziebold and his partner, who were proprietors of a brewery in Kansas, praying that the brewery might be adjudged to be a common nuisance and ordered to be shut up and

abated and the defendants enjoined from using or permitting to be used the premises as a place where intoxicating liquors were sold, bartered or given away, or kept for that purpose. The suit was removed to the circuit court of the United States, and after hearing the information was dismissed and an appeal taken to the supreme court of the United States from the decree of dismissal. The cases were argued together.

It is important to notice that the parties seeking to suppress the manufacture and sale of intoxicating liquors in Kansas omitted to depend on the legislative declaration in the statute of 1881 and its amendment in 1885 that a brewery or place where intoxicating liquors are sold is a nuisance. Such a declaration by a legislative body would have been of little value as a judicial finding of the fact (*Hutton* v. *Camden,* 39 N. J. L., 122), and probably for that reason a test of the law was made by means of an indictment against Mugler and an information against Ziebold to obtain an adjudication by the established judicial tribunals and by due process of law that such things were in fact nuisances; **and it is more important still to notice that it was upon the judgment in one case and decree in the other case establishing the fact of nuisance that the proceedings of the public authorities to destroy the breweries and terminate the liquor business were sustained.**

A similar decision was made by this court in the case of *Vreeland* v. *Forest Park Reservation Commission,* 82 N. J. Eq., 349. In that case it appeared that the Erie Railroad Company under statutory authority and under the direction of the Forest Park Reservation Commission of this state had threatened to enter upon lands adjoining its right of way to clear away trees, brush,

grass, etc., to prevent the spread of fire. The police power was invoked to sustain the proceedings of the railroad company, but this court held: **"There is nothing in the nature of the land or its use that creates a nuisance to be abated"** (page 351), and that the possibility that sparks from the engines of the company falling on land of the complainant might cause damage to other property by fire did not justify the taking of his property to the extent proposed without compensation. The statute was declared invalid.

In deciding that a resolution of a board of health declaring that a nuisance exists on a person's property and requiring its abatement, adopted in the absence of the owner and without notice to him, is void, this court said in *Hutton* v. *Camden, supra:*

> "But to rest here would be to put this matter on too narrow a ground. There is an infirmity in all proceedings of this nature, which lies deeper than the one just noticed. Assuming the power in this board derived from the legislature, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised and upon notice to the parties interested, still, I think, it is obvious, that in a case such as that before this court, the finding of the sanitary board cannot operate, in any respect, as a judgment at law would, upon the rights involved. It will require but little reflection to satisfy any mind accustomed to judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed, will conduct us to its instant rejection. The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to

apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him, *pro tanto,* of the enjoyment of such property. To find conclusively against him that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property, is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is, and the one interest can no more be taken out of the hands of the ordinary tribunals than the other can. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common law right, and is derived, in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling

exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind. It cannot be used as evidence in any legal proceeding, for the end of establishing, finally, the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass, and swells the damages. I repeat that the question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and that the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

There is no assertion in the grade crossing act under which the pending proceedings were taken that street railways are nuisances, nor is there any such assertion in the order of the commissioners that the street railway of the Public Service Railway Company in the city of Paterson is a nuisance. Such an assertion could not be sustained for a moment. If there were a statement in the statute or in the order purporting to adjudicate that street railways are nuisances, it would be of no effect whatever.

A passage in the opinion of the late Justice Bradley in *Boyd* v. *United States,* 116 U. S., at p. 635, may be of assistance in construing the

provision of the grade crossing act that attempts to impose a tax on street railway companies alone to raise revenue to pay for a public improvement:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

IV.

The Opinion of the Supreme Court.

The opinion of the supreme court in this case (Record, p. 2301) is based on the theory that one of many parties lawfully using a public highway may be compelled, by the mere *ipse dixit* of the legislature, to contribute a large sum to defray the expense of improving the highway for the common benefit of the public. The effort to

justify this *fiat* of the legislature in the grade crossing statute would, with equal force, sustain a demand that almost any other party using a public highway can be compelled in this arbitrary way to contribute to the expense of its improvement. **If the legislature had declared that the owner of a line of omnibuses, taxi-cabs, or jitneys, operating over a dangerous grade crossing must pay five or ten per cent. of the cost of abolishing the nuisance, such a demand would be fully sustained by the opinion in the present case, if that opinion is sound.** In fact, anyone having occasion to use such a crossing in his business for the purpose of delivering merchandise to purchasers might be subjected to the same injustice, and the opinion under review expressly tells us that the percentage of the cost of abolishing a grade crossing that anyone having occasion to use it may be required to pay, is entirely immaterial to the validity of the forced contribution (p. 2305). The real nature of this statutory demand was stated in the opinion of Chief Justice Green in the *N. J. Railroad & Transportation Company Case,* quoted at p. 6, *supra.*

It is impossible to distinguish the case at bar from the *N. J. Railroad, &c., case,* and from the cases of *Lydecker* v. *Englewood, Baldwin* v. *Fuller, State* v. *Jersey City, State* v. *Elizabeth, Davis* v. *Newark,* and the *Agens case, supra,* by any reasonable argument; and it is a noteworthy fact that the supreme court omitted to mention, and made no attempt to distinguish, any of those cases. They all hold that private property lawfully existing and used cannot be taken for public use by any form of proceeding without just compensation, no matter by what name the proceeding may be called.

In the case of *Williamson* v. *N. J. Southern R. R. Co.*, 29 Eq., 311, this court said, after referring to the rule that statutes should be construed if possible so as to have a prospective effect only:

> "Indeed, *a right partaking of the nature of property* * * * is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation for either public or private purposes. **This constitutional protection is thrown around property of every kind and description, and is not restricted to any particular mode of taking.** A partial destruction or diminution in value is a taking within the meaning of the constitutional provision," citing *Glover* v. *Powell,* 10 N. J. Eq., 212; *Hale* v. *Lawrence,* 21 N. J. L., 248, 714; *Trenton Water Co.* v. *Raff,* 36 N. J. L., 335.

The effect of the judgment of the supreme court, if sustained, would be to obliterate the provisions of the constitution carefully designed to protect private property, and substitute legislative assertions made from time to time, and it is not surprising to find that such a radical and injurious change in our fundamental law cannot be effected without overruling *in silentio,* as in the present case, numerous decisions of this court, and of the supreme court, which have stood unquestioned and approved for many years.

There is no authority to sustain such an imposition as the statute and order involved in this case attempt to impose. There are cases such as those cited in the brief for the respondents holding that a street railway company may be

compelled to contribute to the cost of a bridge or viaduct a sum not in excess of the amount expended by the public authorities in the construction of such bridge or viaduct for the convenience of a street railway; that is, a street railway company may be required to pay an amount expended for its own roadbed. Such a charge rests on a rational basis, and the cases so holding do not sustain the proceeding in the present case, which attempts to compel the street railway company to pay a large and indefinite sum without the slightest reference to any special benefit to be derived therefrom. **The statute and order constitute an effort to exalt the police power above the constitution, and to substitute power for law.**

Summary.

The order of the board of public utility commissioners purporting to impose a sum exceeding $60,000 on the appellant is an effort to exercise the power of taxation, and is entirely invalid, because (1) it conflicts with the taxing provision of the constitution of this state; (2) it was made by a board that was not and could not be invested with power to raise revenue by means of taxation; and (3) it entirely disregards the fundamental rule of apportionment and uniformity in matters of taxation. That the order, so far as it relates to the appellant, is a futile effort to impose taxation, and is not an assessment for special benefits, is clearly demonstrated by the case of *State* v. *Newark, supra,* page 4. That it is not a lawful exercise of the power of taxation is further demonstrated by the decisions of this court referred to on pages 10 &c., *supra.*

It is not an assessment for special benefits conferred on the property of the appellant by the abolition of the three grade crossings in question. An assessment can only be laid on land for special benefits conferred by an abutting or neighboring public improvement, and must be restricted within the amount of the special benefit conferred by the improvement. There is no authority in the act creating the board of public utility commissioners, nor in the act for the abolition of grade crossings, which confers on that board power to make an assessment for special benefits, and it did not undertake to do so.

The imposition referred to is not a valid exercise of the police power, because interference with property or destruction or appropriation of property under the police power without compensation can only be justified by a finding, judicial in its nature, that the property has become a nuisance. It is elementary that a business established and carried on strictly according to law and in itself beneficial to the public, is not a nuisance, and cannot be so regarded.

I respectfully submit that the order in so far as it attempts to impose on the appellant one-tenth of the cost of abolishing the three grade crossings in the city of Paterson, namely, (1) at Park avenue and Market street, (2) at Broadway, and (3) at River street, should be set aside.

FRANK BERGEN,
Counsel for Appellant.

Reasons.

The prosecutor presents the following reasons for setting aside the order made by the Board of Public Utility Commissioners on the twentieth day of April, A. D., nineteen hundred and fifteen, and brought up for review by the writ allowed in the above stated cause:

1. The order brought up for review was and is not within the lawful jurisdiction of the defendant, Board of Public Utility Commissioners.

2. The order brought up for review is unlawful, unjust, unreasonable and oppressive to the prosecutor.

3. There was no evidence before the defendant, Board of Public Utility Commissioners, to support reasonably the said order brought up for review.

4. The order brought up for review makes an unjust and unlawful imposition and burden upon the prosecutor.

5. The order brought up for review, if enforced, would have the effect of taking property of the prosecutor for public use without just compensation, in violation of paragraph 16 of article I of the constitution of the state of New Jersey.

6. It is beyond the power of said Board of Public Utility Commissioners, by said order or otherwise, to compel the prosecutor to contribute specially to the expense of the abolishment of the grade crossings mentioned in said order, or any of them, or to contribute otherwise to such expense except its proportion in connection with other taxpayers.

7. The order, if enforced, would have the effect of levying a special tax on the prosecutor

and its property for the cost of a general public improvement.

7a. It is beyond the power of the legislature of this state to authorize the Board of Public Utility Commissioners to impose an arbitrary tax or burden on the prosecutor or on its property, and the order of said board brought up for review selecting a single taxpayer in a large and populous political division, and attempting to impose on such taxpayer part of the cost of a general public improvement, violates the fundamental rule of apportionment in levying taxes, and is, as to the prosecutor, illegal and void.

7b. It is beyond the power of the legislature of this state to delegate to or confer on the Board of Public Utility Commissioners power to levy a tax on the prosecutor or on its property, and as the order under review is an effort by said board to impose a tax on the prosecutor, it is, as to the prosecutor, illegal and void.

8. The order, if enforced, would have the effect of taxing the property of the prosecutor otherwise than by general laws and uniform rules according to its true value.

9. The order, if enforced, would violate the rights of the prosecutor secured by paragraph 12, section 7, article IV of the constitution of the state of New Jersey.

10. The order brought up for review takes the property of the prosecutor without just compensation, in violation of section 1 of the 14th amendment of the constitution of the United States.

11. The order, if enforced, would have the effect of depriving the prosecutor of its property without due process of law, in violation of sec-

tion 1 of the 14th amendment of the constitution of the United States.

12. The order, if enforced, would deny to the prosecutor the equal protection of the laws in violation of section 1 of the 14th amendment of the constitution of the United States.

13. The order, if enforced, would be an unjust and unlawful discrimination against the prosecutor, and would impose upon it part of the cost of a public improvement which ought to be borne, if incurred at all, by the taxpayers or property owners generally of the taxing district.

14. The order brought up for review is in divers other respects contrary to the constitution of the United States and of the state of New Jersey and in violation of the laws thereof, and is illegal, unjust, unjustly discriminatory and oppressive.

The prosecutor therefore prays that the said order so brought up for review by the writ of certiorari in this cause be reversed, set aside and for nothing holden.