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THE ORDER EXCEEDS THE JURISDICTION CONFERRED UPON THE BOARD BY THE STATUTE UNDER THE AUTHORITY OF WHICH IT PURPORTS TO HAVE BEEN MADE, BECAUSE MORE THAN ONE HIGHWAY GRADE CROSSING WAS DIRECTED TO BE ELIMINATED IN ONE AND THE SAME ORDER.

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THE ORDER IS INVALID IN SO FAR AS IT REQUIRES CHANGES IN THE CONSTRUCTION AND LOCATION OF THE STATION BUILDINGS AND FACILITIES OF THE PROSECUTOR AT OR NEAR MARKET STREET, KNOWN AS THE MARKET STREET STATION, AND AT OR NEAR RIVER STREET, KNOWN AS THE RIVER STREET STATION, FOR THE FOLLOWING REASONS:

(a) *The petition of the Board of Finance of the City of Paterson did not include any prayer for said changes; and even if it did the evidence does not show that the existing station buildings and facilities are not safe, adequate or proper; and even it if did no hearing has been given to the prosecutor on the question as to whether or not the same are safe, adequate or proper, or on the question whether in order to have the same safe, adequate and proper, it is necessary or reasonable to make the changes in said station bulidings and facilities as specified in said order.* 86

(b) *The evidence does not show that said changes in said station buildings and facilities are reasonably necessary or required for the elimination of the several highway grade crossings.* 89

(c) *Said order is also invalid in so far as it relates to the Market Street Station for the further reason that it requires the prosecutor to take, occupy and use part of the property of an-*

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THE ORDER IS INVALID IN SO FAR AS IT REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES AS SPECIFIED ON THE PLAN ATTACHED TO SAID ORDER, IN THE BUILDINGS AND FACILITIES OF FULLERS EXPRESS COMPANY AND MORRIS & CO., FOR THE FOLLOWING REASONS:

(a) *The Board of Public Utility Commissioners has no authority to require the prosecutor to make said changes; and even if it had, the prosecutor has no power and is under no legal obligation so to do.* 104

(b) *The evidence does not show that said changes are reasonably necessary or required for the elimination of the several highway grade crossings.* 111

(Reason 51).

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IV. 114

THE ORDER IS INVALID IN SO FAR AS IT PERMITS OR REQUIRES THE PROSECUTOR TO MAKE VARIOUS CHANGES IN CERTAIN STREETS, AS FOLLOWS:

(*a*) *To substitute for the existing crossing at Cedar Street, a crossing under the railroad at Taylor Street, and for the existing crossing at Franklin Street, a crossing under the railroad at Montgomery Street.* 114

(*b*) *To widen and alter existing undergrade crossings at Essex Street, Governor Street and Fulton Street, and to adjust, relocate and reconstruct the existing abutments and other structures at said streets.* 122

(*c*) *To change the lines, width and direction of the several highways ordered to be altered and to carry so much thereof as so changed under the said railroad (except in the case of Madison Avenue), and to carry Madison Avenue over said railroad, and to vacate the remaining parts of said highways within the lines of the right of way of the prosecutor and to vacate a certain specified part of Madison Avenue.* 126

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(*a*) *The petition of the Board of Finance of the City of Paterson did not include therein any prayer for the relocation, reconstruction or rebuilding of said properties or any of them; and even if it did, the Board of Public Utility Commissioners has no power (either under said petition or otherwise) to command the prosecutor to make such relocations, reconstructions, or rebuildings; and even if said Board of Public Utility Commissioners has any such power, the order with respect thereto has not been made after hearing and upon notice.* 140

(*b*) *Said changes in said properties are no part of the legal duties or obligations of the prosecutor or of said companies, copartnerships or individuals.* 143

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(c) *Said changes in said properties are not, nor is any or either of them, reasonable, necessary or required for the elimination of the several grade crossings.* 152

(d) *The commands of said Board of Public Utility Commissioners to the prosecutor to make said changes in said properties interfere unlawfully with the judgment and discretion of the board of directors of the prosecutor.* 158

(Reasons 45 and 46).

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(Reasons 57 and 58).

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THE ORDER IS ILLEGAL IN SO FAR AS IT REQUIRES THE PROSECUTOR TO RELOCATE AND RECONSTRUCT THE SEVERAL HIGHWAYS IN THE MANNER SPECIFIED IN THE PLAN ATTACHED TO SAID ORDER AND TO CHANGE THE GRADE OF SAID HIGHWAYS OUTSIDE OF THE RIGHT OF WAY OF THE PROSECUTOR AT SAID CROSSINGS.

(Reason 62).

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THE ORDER IS INVALID BECAUSE THERE IS NO EVIDENCE TO REASONABLY SUPPORT THE CONCLUSIONS OR FINDINGS OF THE BOARD AND THE DECISION OF THE SUPREME COURT AFFIRMING SAME THAT THE SEVERAL CROSSINGS AND EACH OF THEM ARE DANGEROUS TO PUBLIC SAFETY.

(Reasons 1-10 and 12).

IX. 238

THE ORDER IS INVALID BECAUSE THERE IS NO EVIDENCE TO REASONABLY SUPPORT THE CONCLUSIONS OR FINDINGS OF THE BOARD AND THE DECISION OF THE SUPREME COURT AFFIRMING SAME THAT THE PUBLIC TRAVEL ON SAID CROSSINGS AND EACH OF THEM IS IMPEDED.

(Reasons 1-10; and 12).

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THE ORDER IS UNREASONABLE, FOR THE REASON THAT THE PROSECUTOR IS NOT GIVEN THE ALTERNATIVE OF DECREASING OR ELIMINATING THE ALLEGED DANGER TO PUBLIC SAFETY AND THE ALLEGED IMPEDIMENT TO PUBLIC TRAVEL BY DECREASING THE NUMBER OF TRAIN MOVEMENTS OR BY ABANDONING THE RAILROAD.

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THE ORDER UNDER REVIEW IS ILLEGAL IN SO FAR AS IT REQUIRES THE PROSECUTOR TO CONSTRUCT BRIDGES OR PASSAGES OVER OR UNDER THE RAILROAD TRACKS AT THE HIGHWAY CROSSINGS IN QUESTION, OR SOME ONE OR MORE OF THEM, FOR THE REASON THAT THE EVIDENCE DOES NOT SHOW THAT THE SAID HIGHWAYS, OR ANY OR EITHER OF THEM, WERE LAID OUT AND OPEN BEFORE THE RAILROAD TRACKS WERE CONSTRUCTED.

(Reasons 59, 60 and 61; also last paragraph of Reason 33).

XII. 301

THE EVIDENCE DOES NOT SHOW, NOR DOES THE BOARD FIND, THAT THE WIDTH AND CHARACTER OF THE BRIDGES AND PASSAGES ORDERED TO BE CONSTRUCTED AT THE SEVERAL HIGHWAYS ARE SUCH AS ARE SUITABLE TO THE LOCALITY IN WHICH THE SAME ARE SITUATED.

(Reasons 53, 54 and 55 including Amendments).

XIII. 307

THERE WAS NO EVIDENCE BEFORE THE BOARD OF PUBLIC UTILITY COMMISSIONERS TO JUSTIFY OR SUPPORT THE CONCLUSION THAT THE RAILROAD WHICH CROSSES AT THE SAME LEVEL THE SEVERAL HIGHWAYS ORDERED TO BE ALTERED IS THE RAILROAD OF THE PROSECUTOR; OR TO JUSTIFY OR SUPPORT THE CONCLUSION THAT THE PROSECUTOR IS THE COMPANY OPERATING SUCH RAILROAD. ON THE CONTRARY, THE UNDISPUTED EVIDENCE SHOWS THAT THE SAID RAILROAD IS IN PART OWNED BY THE PATERSON & HUDSON RIVER RAILROAD COMPANY; AND IN PART BY PATERSON & RAMAPO RAILROAD COMPANY; AND FURTHER SHOWS

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THAT THE SAID RAILROAD IS IN LAW OPERATED BY SAID PATERSON & HUDSON RIVER RAILROAD COMPANY AT AND ACROSS SOME OF SAID HIGHWAYS AND BY PATERSON & RAMAPO RAILROAD COMPANY AT AND ACROSS THE OTHER OF SAID HIGHWAYS. AS TO THE PUBLIC SAID COMPANIES ARE CHARGED WITH THE DUTY OF CONSTRUCTING AND MAINTAINING GOOD AND SUFFICIENT BRIDGES OR PASSAGES AT HIGHWAY CROSSINGS. THE ORDER OF THE BOARD, IF MADE AT ALL, SHOULD, THEREFORE, HAVE DIRECTED THAT THE EXPENSE OF ALTERING SAID CROSSINGS BE PAID BY SAID PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY, RESPECTIVELY; AND IF THERE WAS DOUBT AS TO THE LEGAL RIGHTS AND DUTIES OF THE PROSECUTOR AND THE SAID PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY AS TO EACH OTHER, THEN THE ORDER SHOULD HAVE DIRECTED THAT THE EXPENSE OF ALTERING SAID CROSSINGS BE PAID JOINTLY BY THE PROSECUTOR AND SAID TWO OTHER COMPANIES, SO THAT THE COST THEREOF MIGHT BE APPORTIONED BETWEEN AND AMONG THE THREE RAILROAD COMPANIES BY APPROPRIATE PROCEEDINGS IN ACCORDANCE WITH THEIR SEVERAL INTERESTS.

(Reasons 13 to 30, 38, 76, 77 (a), 77 (b).)

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XIV. 331

THE EVIDENCE SHOWS THAT THE BOARD IN MAKING THE ORDER UNDER REVIEW HAS GROSSLY ABUSED WHATEVER DISCRETIONARY POWER IT MAY HAVE UNDER THE STATUTE, BECAUSE IT APPEARS THAT THE PROSECUTOR DID NOT HAVE AND IN ALL REASONABLE PROBABILITY WILL NOT HAVE SUFFICIENT FUNDS OR ANY MEANS OF PROCURING SAME FOR THE PURPOSE OF MEETING THE ENORMOUS COST OF COMPLYING WITH SAID ORDER.

(Reasons 39, 70, 77 (c).)

XV. 367

SAID ORDER IS UNREASONABLE IN THAT IT REQUIRES THE PROSECUTOR TO ALTER THE SEVERAL HIGHWAY GRADE CROSSINGS ACCORDING TO A PLAN WHICH IS MORE EXPENSIVE TO THE PROSECUTOR THAN IS NECESSARY FOR THE PURPOSE OF REMOVING THE DANGER TO PUBLIC SAFETY OR THE IMPEDIMENT TO PUBLIC TRAVEL AT SAID CROSSINGS, IN THE FOLLOWING PARTICULARS:

(*a*) *Said order failed to adopt the suggested proposal of the prosecutor for the elimination of the grade crossings at Keen, Warren and River Streets.* 367

(*b*) *Said order failed to adopt the suggestion of the prosecutor for the consolidation of the crossings at Straight and Clay Streets.* 370

(Reasons 65, 66 and 67).

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XVI. 373

SAID ORDER IS UNREASONABLE IN THE FOLLOWING RESPECTS:

(a) *It arbitrarily limits the dates of the beginning and of the completion of the work of construction required in the execution thereof.* 373

(b) *It arbitrarily requires the work of construction in the execution thereof to be done according to certain designated divisions and in the sequence of said divisions.* 375

(c) *It arbitrarily requires the alteration of the several crossings according to a certain specified plan without any provision for such changes or modifications of the details of said plan as may become necessary during the work of construction.* 379

(Reasons 68, 69, 74).

CHAPTER THIRD 383

Reasons attacking said order on the ground that the order violates certain provisions of the State and of the Federal Constitutions.

XVII. 383

THE ORDER UNDER REVIEW IS UNCONSTITUTIONAL BECAUSE IT TAKES THE PROPERTY OF THE PROSECUTOR AS THE LESSEE OF THE RAILROADS OF THE PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY FOR THE PRIVATE USE AND BENEFIT OF SAID TWO COMPANIES, THE RESPECTIVE OWNERS OF SAID RAILROADS.

(Reasons 38, 35, 36, 37).

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XVIII. 393

THE ORDER UNDER REVIEW VIOLATES THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION IN THAT IT CONFISCATES THE PROPERTY OF THE PROSECUTOR BECAUSE THE COST OF COMPLYING THEREWITH WILL GREATLY EXCEED THE VALUE OF THE PROSECUTOR'S INTEREST IN THE PROPERTY OF THE PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY WITHOUT ANY COMPENSATING ADVANTAGE TO THE PROSECUTOR, AND WILL MAKE THE INVESTMENT OF THE PROSECUTOR IN SAID PROPERTIES INCAPABLE OF EARNING A FAIR AND REASONABLE RETURN UPON THE AMOUNT OF ITS INVESTMENT THEREIN.

(Reasons 38, 35, 36, 37).

XIX. 398

THE ORDER UNDER REVIEW VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION BECAUSE IT IS AN UNREASONABLE EXERCISE OF THE POLICE POWER.

(Reasons 39, 40, 63).

XX. 399

THE ORDER UNDER REVIEW IN SO FAR AS IT REQUIRES CHANGES IN OR THE REMOVAL OF THE PROPERTY OR CONSTRUCTIONS, OR CHANGES IN THE GRADE OR LOCATION THEREOF, OF PERSONS OR CORPORATIONS OTHER THAN THOSE WHO ARE INCLUDED WITHIN THE DESCRIPTION OF THE TERM "PUBLIC UTILITY," AS DEFINED IN CHAPTER 195 OF THE LAWS OF 1911, TO BE MADE AT THE EXPENSE OF SAID PERSONS OR CORPORATIONS; AND IN SO FAR AS IT REQUIRES THAT THE EXPENSE OF CHANGING MUNICIPAL UTILITIES, AND THAT THE EXPENSE OF

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PAVING, CURBING AND FLAGGING HIGHWAYS CONSTRUCTED AS THE RESULT OF CHANGES OF GRADE, TO BE BORNE BY THE MUNICIPALITIES, IS UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT SAID PERSONS, CORPORATIONS AND MUNICIPALITIES ARE NOT INCLUDED WITHIN THE DEFINITION OF "PUBLIC UTILITY" IN SAID CHAPTER 195 OF THE LAWS OF 1911.

(Reasons 41, 44, 42, 31 (e).)

XXI. 403

THE ORDER UNDER REVIEW IN SO FAR AS IT REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES IN THE PROPERTIES OF PUBLIC SERVICE RAILWAY COMPANY, AND IN SO FAR AS IT LIMITS THE PROPORTION OF THE EXPENSE OF THE ALTERATIONS IN CERTAIN OF THE GRADE CROSSINGS, TO BE PAID BY THE STREET RAILWAY USING THE SAME, IS UNCONSTITUTIONAL AND INVALID FOR THE FOLLOWING REASONS:

(*a*) *The Board of Public Utility Commissioners has no authority to require the prosecutor to make said changes; and even if it had, the prosecutor has no power and is under no legal obligation so to do.* 404

(*b*) *The proportion of expense to be paid by the street railway is not a fair or reasonable amount of the expense of such alterations in comparison with the danger to public safety and the impediment to public travel created by and chargeable to said street railway.* 410

(Reasons 52, except (h); 64 (a), 64 (b), 77 (e).)

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XXII. 414

SAID ORDER IS IN VIOLATION OF THE CONSTITUTIONS OF THE STATE OF NEW JERSEY AND OF THE UNITED STATES, IN SO FAR AS IT DEPRIVES THE PROSECUTOR OF THE RIGHTS, BENEFITS, ADVANTAGES, PRIVILEGES AND CONTRACTS NOW POSSESSED BY IT WITH REFERENCE TO THE SEVERAL LEADS, SWITCHES AND SIDE TRACKS WHICH UNDER SAID ORDER ARE REQUIRED TO BE DESTROYED OR RELOCATED AND RECONSTRUCTED, FOR THE FOLLOWING REASONS:

(*a*) *The destruction of or changes in said sidings deprive the prosecutor of its property without just compensation and without due process of law; and deprive the prosecutor of its right and guaranty of enjoying, defending, acquiring, possessing and protecting its said property; and deny to the prosecutor the equal protection of the laws and impair the obligation of the prosecutor's contracts with the owners of said sidings.* 416

(Reasons 63 (d); 72; 73 (a) (b), 75).

(*b*) *Said changes take the private property of the prosecutor for a private use; and if said changes be construed to be the taking of property for public use the property of the prosecutor is taken for such public use without just compensation.* 434

(Reason 72).

(*c*) *The prosecutor has no legal right to make said changes.* 435

(Reason 73 (a), (b), (e).)

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(*d*) *There is no power in said Board of Public Utility Commissioners in this proceeding to order the prosecutor to make said changes; and even if there were any such power in said Board, no hearing has been given to the prosecutor as to whether these said changes should be made.* 436

(Reason 73 (c), (f).)

(*e*) *Said changes would constitute a violation of the Interstate Commerce Act.* 437

(Reason 73 (h).)

XXIII. 439

SAID ORDER IMPOSES A BURDEN UPON THE INTERSTATE TRAFFIC OF THE PROSECUTOR AND INTERFERES WITH AND IMPAIRS ITS OPERATION TO PERFORM ITS DUTY AS AN INTERSTATE CARRIER OF FREIGHT AND PASSENGERS BECAUSE:

(*a*) *It requires changes in the location or grade of switches, sidetracks, leads, bridges, yards, structures and other facilities and properties of the prosecutor which are used by the prosecutor in the furtherance of its interstate business.* 439

(*b*) *It compels the prosecutor to raise and expend moneys for the purpose of complying with said order, which said moneys would otherwise be available for and would be used by the prosecutor in the making of changes and improvements which are essential for the purpose of enabling the prosecutor to carry on its interstate business.* 443

(Reasons 46 (g); 71, 72, 73 (g); 77 (d).)

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CHAPTER FOURTH. 454

Reasons attacking the statute by authority of which said order purports to have been made, on the ground that it violates certain provisions of the State and of the Federal Constitutions.

XXIV. 454

IF THE PROSECUTOR IS THE OPERATING COMPANY UNDER THE STATUTE OF 1913, THEN THE SAID STATUTE IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE PROSECUTOR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, FOR THE REASON THAT THE SAID STATUTE REQUIRES THAT THE ENTIRE EXPENSE OF ALTERING THE SEVERAL GRADE CROSSINGS, INCLUDING DAMAGES TO ADJACENT PROPERTY (LESS SUCH AMOUNT AS IS ORDERED TO BE PAID BY THE STREET RAILWAY COMPANY USING SOME OF SAID CROSSINGS) BE PAID BY THE PROSECUTOR; AND IN THIS AND OTHER RESPECTS THE SAID STATUTE IS AN UNREASONABLE EXERCISE OF THE POLICE POWER.

(Reasons 39, 40, 63.)

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THE STATUTE UPON WHICH THE ORDER UNDER REVIEW IS BASED, IF CONSTRUED TO PERMIT OR REQUIRE THE BOARD OF PUBLIC UTILITY COMMISSIONERS TO ORDER THE PROSECUTOR AS THE COMPANY OPERATING THE RAILROAD AT THE SEVERAL CROSSINGS ORDERED TO BE ALTERED, AT THE SOLE EXPENSE OF THE PROSECUTOR (LESS SUCH AMOUNT AS MAY BE ORDERED TO BE PAID BY THE STREET RAILWAY COMPANY USING SOME OF THE CROSSINGS,) IS UNCONSTITUTIONAL BECAUSE:

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(*b*) *It takes the property of the prosecutor for public use without just compensation.* 499

(*c*) *It confiscates the property of the prosecutor in violation of the Fourteenth Amendment to the Federal Constitution.* 499

(Reasons 38, 35, 36, 37).

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THE STATUTE OF 1913 IN SO FAR AS IT REQUIRES CHANGES IN OR THE REMOVAL OF THE PROPERTY OR CONSTRUCTIONS OR CHANGES IN THE GRADE OR LOCATION THEREOF, OF PERSONS OR CORPORATIONS OTHER THAN THOSE WHO ARE INCLUDED WITHIN THE DESCRIPTION OF THE TERM "PUBLIC UTILITY," AS DEFINED IN CHAPTER 195 OF THE LAWS OF 1911, TO BE MADE AT THE EXPENSE OF SAID PERSONS OR CORPORATIONS; AND IN SO FAR AS IT REQUIRES THAT THE EXPENSE OF CHANGING MUNICIPAL UTILITIES, AND THAT THE EXPENSE OF PAVING, CURBING AND FLAGGING HIGHWAYS CONSTRUCTED AS THE RESULT OF CHANGES OF GRADE, TO BE BORNE BY THE MUNICIPALITIES, ARE UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT SAID PERSONS, CORPORATIONS AND MUNICIPALITIES ARE NOT INCLUDED WITHIN THE DEFINITION OF "PUBLIC UTILITY" IN SAID CHAPTER 195 OF THE LAWS OF 1911.

(Reasons 41, 42, 44.)

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XXVII. 501

THE STATUTE OF 1913 IS INVALID BECAUSE THE OBJECT THEREOF IS NOT EXPRESSED IN ITS TITLE AND THE SAID STATUTE EMBRACES MORE THAN ONE OBJECT.

(Reasons 31 (e) and 43.)

XXVIII. 506

THE STATUTE IN SO FAR AS IT PERMITS OR REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES IN THE PROPERTIES OF PUBLIC SERVICE RAILWAY COMPANY, AND IN SO FAR AS IT LIMITS THE PROPORTION OF THE EXPENSE OF THE ALTERATIONS IN CERTAIN OF THE GRADE CROSSINGS, TO BE PAID BY THE STREET RAILWAY USING THE SAME, IS UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT IT DELEGATES ARBITRARY POWER TO THE BOARD TO FIX A MAXIMUM PROPORTION TO BE PAID BY THE STREET RAILWAY WITHOUT FIXING ANY STANDARD WHEREBY THE AMOUNT TO BE THUS PAID MAY BE DETERMINED.

(Reasons 33, 52, except h; 64 (a), 64 (b), 77 (e).)

XXIX. 513

THE STATUTE IS INVALID BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE BOARD OF PUBLIC UTILITY COMMISSIONERS AND CONFERS UPON SAID BOARD ARBITRARY POWER TO MAKE OR TO REFUSE TO MAKE AN ORDER FOR THE ALTERATION OF GRADE CROSSINGS WITHOUT PRESCRIBING ANY STANDARD WHEREBY THE ACTION OF SAID BOARD IS TO BE GOVERNED.

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(c) *Contracts between the prosecutor or its predecessors and the Public Service Railway Company or its predecessors.* 526

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(Reasons 31 (c) and (d).)

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IF, FOR ANY OF THE FOREGOING REASONS, ANY PART OF THE ORDER UNDER REVIEW IS INVALID, THEN THE ENTIRE ORDER MUST BE SET ASIDE.

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IF, FOR ANY OF THE FOREGOING REASONS, ANY PART OF THE STATUTE UPON WHICH THE ORDER UNDER REVIEW IS BASED IS INVALID, THEN THE ENTIRE STATUTE MUST FALL.

XXXIV. 547

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New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY, *Prosecutor-Appellant,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS, CITY OF PATERSON and BOARD OF FINANCE OF SAID CITY, *Defendants-Respondents.*	*On Appeal from Supreme Court.*

Brief in Favor of Prosecutor-Appellant.

1.

STATEMENT OF THE CASE.

There are two appeals of the above title; the first appeal is from a judgment of the Supreme Court affirming an order of the Board of Public Utility Commissioners dated April 20, 1915, directing the appellant (hereinafter called "prosecutor") to eliminate certain grade crossings in the City of Paterson. This order was brought before the Supreme Court for review by writ of certiorari allowed June 16, 1915.

The second appeal is from a judgment of the Supreme Court affirming an order of said Board dated July 9, 1915, whereby the Board denied the prosecutor's petition for a rehearing of said order of April 20, 1915. The denial of said application for a re-hearing was brought before the Supreme Court for review by writ of certiorari allowed July 22, 1915.

For report of decision of Supreme Court on both writs, see 98 Atl. 13. (Copy is attached to this brief as Appendix XI.) The records under both

writs have, for convenience, been printed together. There are also included in the printed book the writs of certiorari (and the reasons and other proceedings thereunder) sued out by Public Service Railway Company, Passaic Water Co., Western Union Telegraph Co., D. Fullerton & Co., Meyer & DeVogel, Fuller's Express Co. and Morris & Co. Each of these companies obtained separate writs of certiorari to review said order of the Board of April 20, 1915, so far as said order affected their respective rights. The Board's order was affirmed as to each of said companies, and each of them (except Fuller's Express Co., which subsequently went into bankruptcy and has no further interest) has taken an appeal to this court. Each of the appellant companies will present separate briefs. The present brief is limited to the appeal of the Erie Railroad Co. from said orders of April 20, 1915 and July 9, 1915.

The question involved in the appeals of the railroad company is whether the Supreme Court should have reversed said orders, or either of them, for one or more of the reasons urged before said court.

2.

GROUNDS OF APPEAL.

(a)

(Re Order of April 20, 1915—Certiorari allowed June 16, 1915.)

The Supreme Court affirmed the order of the Board of Public Utility Commissioners brought up for review, whereas for one or more of the reasons for reversal urged therein, the said court should have reversed said order. (Vol. IV., p. 2333.)

The reasons for reversal (as amended) filed in the Supreme Court are as follows:

(1) The conclusions or findings of the Board of Public Utility Commissioners that the crossings, and each of them, at the same level of the following highways, and each of them, known respectively as (A) Madison avenue, (B) Clay and Straight streets (two crossings), (C) Cedar street, (D) Market street and Park avenue (one crossing), (E) Ellison street, (F) Van Houten street, (G) Broadway, (H) Fair street, (I) Hamilton avenue, (J) Lafayette street, (K) Franklin street, (L) Keen street, (M) Warren street, (N) River and Putnam streets (one crossing), and the railroad stated in the order under review to be the railroad of the Erie Railroad Company in the City of Paterson are dangerous to public safety and that the public travel on said highways and each of them is impeded thereby, were not, nor was either of them, justified nor reasonably supported as to any or all of said crossings, by the evidence taken before said Board.

(2) There was no evidence before said Board to support reasonably the order under review with respect to said crossings named in Reason (1), or any or either of them.

(3) According to the whole of the evidence taken before said Board, the said order under review, so far as the same relates to the crossings of the said highways, and each of them, named in Reason (1), and the railroad stated in said order to be the railroad of Erie Railroad Company is unreasonable as to each and all of said crossings.

(4) The evidence taken before said Board shows that at the crossings at the same level of the highways, and each of them, named in Reason (1) and the railroad stated in said order to be

the railroad of Erie Railroad Company, the prosecutor has provided and maintains safeguards that measure up to the danger to be encountered by the public at said crossings and each of them; and further shows that the said highway crossings are not, nor is any or either of them, dangerous to public safety; and that the public travel at the crossings of the said highways, and each of them, is not impeded by said crossings, or any or either of them, within the meaning of Chapter 57, Laws of 1913.

(5) The evidence shows that the action of said Board in ordering that the crossings at the same level of the highways, and each of them, named in Reason (1) and the railroad stated in said order to be the railroad of Erie Railroad Company be altered in the manner and according to the plan described in the said order, is, as to each and all of said crossings—

(a) purely arbitrary, or

(b) without reasonable basis upon which to rest, or

(c) unsupported by the facts laid before said Board; and should therefore be declared null and void and ordered to be set aside.

(6) If the conclusions or findings of said Board that all of the said crossings, and each of them named in Reason (1) are dangerous to public safety and that the public travel on all of said highways, and each of them, is impeded thereby, are justified, or reasonably supported, by the evidence taken before said Board so far as it relates to some one or more of said crossings, nevertheless, the said conclusions or findings are not justified, or reasonably supported, so far as relates to the other crossings, or any or either of them; and said conclusions or findings cannot, under the evidence be applied to the other cross-

ings, or any or either of them, so as to support or justify like conclusions or findings as to said other crossings, and each and all of them.

(7) If there was some evidence before said Board to support reasonably the order under review, with respect to some one or more of the said crossings named in Reason (1), nevertheless, there was no evidence to support reasonably the order under review with respect to the other crossings, or any or either of them; and the conclusions or findings as to some one or more of said crossings cannot, under the evidence, be applied to the other crossings, or any or either of them, so as to permit like conclusions or findings or a similar order as to said other crossings, and each and all of them respecting which there was no evidence to support reasonably the conclusions or findings, and the order based thereon.

(8) According to the whole of the evidence taken before said Board, the said order under review is unreasonable so far as relates to at least some one or more of the said crossings named in Reason (1); and even if, according to the whole of the evidence, the said order is reasonable as to some one or more of said crossings, that fact does not permit the Board to enlarge and extend its order so as to include the other crossings, or any or either of them, as to which said order is unreasonable.

(9) The evidence taken before said Board shows that at at least some one or more of the said crossings named in Reason (1), the prosecutor has provided and maintains safeguards that measure up to the danger to be encountered by the public at said crossings, or some one or more of them; and further shows that at least some one or more of said crossings named in Reason (1) are not dangerous to public safety, and that public

travel is not impeded thereby, within the meaning of Chapter 57, Laws of 1913; and, even if the evidence shows that, at some one or more of said crossings the prosecutor has not provided and does not maintain such safeguards, and even if the evidence shows that some one or more of said crossings are dangerous to public safety, and that public travel is impeded thereby, within the meaning of said statute, those facts do not permit the Board to enlarge and extend its order so as to include the other crossings, or any or either of them, at which the prosecutor has provided and maintains such safeguards, and which are not dangerous to public safety, and by which public travel is not impeded within the meaning of said statute.

(10) The evidence shows that the action of said Board in ordering that the crossings at the same level at the highways and each of them named in Reason (1) and the railroad stated in said order to be the railroad of Erie Railroad Company be altered in the manner and according to the plan described in the said order is, as to at least some one or more of said crossings—

(a) purely arbitrary, or

(b) without any reasonable basis upon which to rest, or

(c) unsupported by the facts laid before said Board; and even if the order is not purely arbitrary, nor without any reasonable basis upon which to rest, nor unsupported by the facts laid before said Board as to some one or more of said crossings, that fact does not permit the Board to enlarge and extend its order so as to include the other crossings, or any or either of them.

(11) The petition of the Board of Finance of the City of Paterson was not made or presented

as required by Chapter 57 of the Laws of 1913, or by the rules of the Board of Public Utility Commissioners, and said Board therefore did not acquire any jurisdiction to take any proceedings under said statute or to make any order by virtue thereof, because more than one highway grade crossing was involved and embraced in said petition, proceedings and order.

(12) Said order under review is unreasonable and invalid because the fact, if it be a fact, that some one or more of the public highway crossings named in Reason (1) are dangerous to public safety or that public travel on such highways is impeded thereby (within the meaning of Chapter 57 of the Laws of 1913) does not confer upon said Board of Public Utility Commissioners power or jurisdiction under said statute to order, at the expense of the prosecutor, the alteration or the elimination of other highway grade crossings that may be affected by, or involved in, the alteration or elimination of such crossing, or crossings, as are dangerous to public safety or impede public travel, within the meaning of said statute.

(13) The conclusions or findings of said Board that the railroad which crosses at the same level the highways named in Reason (1) was the railroad of Erie Railroad Company were not justified, or reasonably supported by the evidence taken before said Board.

(14) There was no evidence before said Board to support reasonably the order under review with respect to the ownership of said railroad by Erie Railroad Company at said highway crossings named in Reason (1).

(15) According to the whole of the evidence taken before said Board the said order under review is unreasonable so far as it is based upon the conclusions or findings of said Board that

the railroad which crosses at the same level the highways named in Reason (1) is the railroad of Erie Railroad Company.

(16) The evidence taken before said Board shows that the railroad which crosses the said highways named in Reason (1) is not the railroad of Erie Railroad Company.

(17) The evidence shows that the action of said Board in finding that the railroad which crosses the said highways named in Reason (1) is the railroad of Erie Railroad Company is—

(a) purely arbitrary, or

(b) without reasonable basis upon which to rest, or

(c) unsupported by the facts laid before said Board.

(18) The conclusions or findings of said Board that Erie Railroad Company was, within the meaning of Chapter 57, Laws of 1913, operating the railroad which crosses at the same level the highways named in Reason (1), were not justified nor reasonably supported by the evidence taken before said Board.

(19) There was no evidence before said Board to support reasonably the order under review, with respect to the operation of said railroad, within the meaning of Chapter 57, Laws of 1913, by Erie Railroad Company at said highway crossings named in Reason (1).

(20) According to the whole of the evidence taken before said Board, the said order under review is unreasonable so far as it relates to the operation of said railroad, within the meaning of Chapter 57, Laws of 1913, by Erie Railroad Company, at the said highways named in Reason (1).

(21) The evidence taken before said Board shows that Erie Railroad Company was not, within the meaning of Chapter 57, Laws of 1913, operating the railroad which crosses the said highways named in Reason (1).

(22) The evidence shows that the action of said Board in finding that the said Erie Railroad Company was operating said railroad within the meaning of Chapter 57, Laws of 1913, at the said highways named in Reason (1) is—

(a) purely arbitrary, or

(b) without reasonable basis upon which to rest, or

(c) unsupported by the facts laid before said Board.

(23) The evidence taken before said Board shows that the railroad which crosses at the same level the highways known as (A) Madison avenue, (B) Clay and Straight streets, (C) Cedar street and (D) Market street and Park avenue, is the railroad of a corporation known as "The President and Board of Directors of the Paterson and Hudson River Railroad Company."

(24) The evidence taken before said Board shows that the railroad which crosses at the same level the highways known as (E) Ellison street, (F) Van Houten street, (G) Broadway, (H) Fair street, (I) Hamilton avenue, (J) Lafayette street, (K) Franklin street, (L) Keen street, (M) Warren street, and (N) River and Putnam streets, is the railroad of a corporation known as "Paterson and Ramapo Railroad Company".

(25) The evidence taken before said Board shows that a corporation known as "The President and Board of Directors of the Paterson and Hudson River Railroad Company" is the company operating the railroad which crosses at the same level the highways known as (A) Madison avenue,

(B) Clay and Straight streets, (C) Cedar street, and (D) Market street and Park avenue, within the meaning of Chapter 57, Laws of 1913.

(26) The evidence taken before said Board shows that a corporation known as "Paterson and Ramapo Railroad Company" is the company operating the railroad which crosses at the same level the highways known as (E) Ellison street, (F) Van Houten street, (G) Broadway, (H) Fair street, (I) Hamilton avenue, (J) Lafayette street, (K) Franklin street, (L) Keen street, (M) Warren street, and (N) River and Putnam streets, within the meaning of Chapter 57, Laws of 1913.

(27) Said order under review is unreasonable and invalid in so far as it orders Erie Railroad Company to alter the crossings and each of them at the highways known as (A) Madison avenue, (B) Clay street and Straight street, (C) Cedar street, (D) Market street and Park avenue, for the reason that said order requires that the entire expense of the alterations, changes, relocation and opening, as directed in said order, be paid by Erie Railroad Company (less the amount to be paid by Public Service Railway Company at (1) Park avenue and Market street, (2) Broadway, and (3) River street), whereas said order, if, under the evidence, any order is justified, should have directed that the expense of such alterations, changes, re-locations and opening (less the amount to be paid by Public Service Railway Company), should be paid by The President and Board of Directors of the Paterson and Hudson River Railroad Company.

(28) Said order under review is unreasonable and invalid in so far as it orders Erie Railroad Company to alter the crossings and each of them at the highways known as (E) Ellison street, (F) Van Houten street, (G) Broadway, (H) Fair

street, (I) Hamilton avenue, (J) Lafayette street, (K) Franklin street, (L) Keen street, (M) Warren street, (N) River and Putnam streets, for the reason that said order requires that the entire expense of the alterations, changes, re-location and opening, as directed in said order, be paid by Erie Railroad Company (less the amount to be paid by Public Service Railway Company at (1) Park avenue and Market street, (2) Broadway, and (3) River street), whereas said order—if, under the evidence, any order is justified—should have directed that the expense of such alterations, changes, relocation and opening (less the amount to be paid by Public Service Railway Company), should be paid by Paterson and Ramapo Railroad Company.

(29) Said order under review is unreasonable and invalid in so far as it orders Erie Railroad Company to alter the crossings and each of them at the highways named in Reason (1) for the reason that said order requires that the entire expense of the alterations, changes, re-location and opening, as directed in said order, be paid by Erie Railroad Company (less the amount to be paid by Public Service Railway Company at (1) Park avenue and Market street, (2) Broadway, and (3) River street,) whereas said order—if, under the evidence, any order is justified—should have directed that the expense of such alterations, changes, re-location and opening (less the amount to be paid by Public Service Railway Company) should be paid by The President and Board of Directors of the Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company, as their respective interests may appear, or be determined by appropriate proceedings.

(30) Said order under review is unreasonable and invalid in so far as it orders Erie Railroad

Company to alter the crossings and each of them at the highways named in Reason (1), for the reason that said order requires that the entire expense of the alterations, changes, re-location and opening, as directed in said order, be paid by Erie Railroad Company (less the amount to be paid by Public Service Railway Company at (1) Park avenue and Market street, (2) Broadway, and (3) River street), whereas said order—if, under the evidence any order is justified—should have directed that the expense of such alterations, changes, re-location and opening (less the amount to be paid by Public Service Railway Company) should be paid jointly by said Erie Railroad Company, The President and Board of Directors of Paterson and Hudson River Railroad Company, and Paterson and Ramapo Railroad Company so that the cost thereof might be apportioned between and among said Erie Railroad Company, The President and Board of Directors of Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company, by appropriate proceedings, as provided by law, in accordance with the respective interests of said companies.

(31) Said order and the statute upon which the same is based, to wit, Chapter 57, Laws of 1913, are void, for the reason that the same are in violation of, and contrary to, the Constitution of the State of New Jersey in the following particulars:—

(a) Said order and statute take the private property of the prosecutor for a private use and also take the property of the prosecutor for public use without just compensation, contrary to Article I, Section 16, reading as follows:

"Private property shall not be taken for "public use without just compensation."

(b) Said order and statute take the property of the prosecutor without affording to it any opportunity to protect its said property, thereby depriving the prosecutor of its right and guaranty of enjoying and defending, acquiring, possessing and protecting said property, contrary to Article I, Section 1, reading as follows:

> "All men are by nature free and independ-
> "ent and have certain natural and unalienable
> "rights, among which are those of enjoying
> "and defending life and liberty, acquiring, pos-
> "sessing and protecting property, and of pur-
> "suing and obtaining safety and happiness."

(c) Said order and statute deprive the Court of Chancery of the State of New Jersey of its exclusive jurisdiction over the regulation of the use of easements, contrary to Article III, Section I, reading as follows:

> "The powers of the government shall be
> "divided into three distinct departments—the
> "legislative, executive and judicial; and no
> "person or persons belonging to, or consti-
> "tuting one of these departments shall exer-
> "cise any of the powers properly belonging to
> "either of the others, except as herein express-
> "ly provided."

and contrary to Article VI, Section 1, reading as follows:

> "The judicial power shall be vested in a
> "court of errors and appeals in the last re-
> "sort in all causes as heretofore; a court for
> "the trial of impeachment; a court of chan-
> "cery; a prerogative court; a supreme court;
> "circuit courts, and such inferior courts as
> "now exist, and as may be hereafter ordained
> "and established by law, which inferior courts
> "the legislature may alter or abolish, as the
> "public good shall require."

(d) Said order and statute deprive the Supreme Court of the State of New Jersey of its jurisdic-

tion to compel the prosecutor or its lessors, The President and Board of Directors of the Hudson River Railroad Company, and the Paterson and Ramapo Railroad Company, by mandamus or other appropriate proceedings to perform the duties imposed by law upon the prosecutor or upon its said lessors, or either or both of them, with respect to the construction and maintenance of such crossings particularly named in said order, or some one or more of them, contrary to the provisions of said Article III, Section 1, and Article VI, Section 1.

(e) The object of the said statute is not expressed in the title thereof and the said statute embraces more than one object, contrary to Article IV, Section VII, paragraph 4, reading as follows:

> "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."

(32) Said order and the statute upon which the same is based, to wit, Chapter 57 of the New Jersey Laws of 1913, are void for the reason that the same are in violation of and contrary to the Constitution of the United States in the following particulars:

(a) Said order and statute deprive the prosecutor of its liberty and property without due process of law, contrary to the Fifth and Fourteenth Amendments of said Constitution, reading as follows:

> "ARTICLE V."
>
> "No person shall be * * * deprived of life, liberty or property, without due process of law."

"ARTICLE XIV."

"Nor shall any state deprive any person of life, liberty or property without due process of law."

(b) Said order and statute deny to prosecutor the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution, reading as follows:

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

(c) Said order and statute abridge the privileges or immunities of the prosecutor, contrary to the Fourteenth Amendment of the Constitution, reading as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

(d) Said order and statute take the private property of the prosecutor for public use without just compensation, contrary to the Fifth Amendment of the said Constitution, reading as follows:

"Nor shall private property be taken for public use without just compensation."

(e) Said order and statute create a burden upon and operate as a regulation of, and an interference with, interstate commerce, contrary to Article I, Section VIII, paragraph 3, reading as follows:

"The Congress shall have power * * * 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

(f) Said order and statute impair the obligation of contracts between the State of New Jersey and the prosecutor, contrary to Article I, Section X, paragraph 1, reading as follows:

"No state shall pass any * * * law impairing the obligation of contracts."

(33) The statute upon which the order under review is based (being Chapter 57, Laws of 1913), is unreasonable, unconstitutional and invalid for the reason that it establishes no reasonable, or any, standard whereby the Board of Public Utility Commissioners may determine when or under what circumstances a highway grade crossing is dangerous to public safety, or that the public travel on said highway is impeded thereby, within the meaning of said statute, and delegates legislative power to said Board with respect to such crossings and the orders that may be made concerning the same.

(34) The statute upon which the order under review is based (being Chapter 57, Laws of 1913), is unreasonable, unconstitutional and invalid for the reason that, when and if the Board finds that a highway grade crossing is dangerous to public safety, or that the public travel on the highway is impeded by such crossing, the said statute confers upon said Board arbitrary power to order or to refuse to order that such crossing be altered.

(35) Said order is unreasonable and unconstitutional for the reason that it appears that the cost to Erie Railroad Company of complying with said order will greatly exceed the value of the leasehold interest of said company in the property of the President and Board of Directors of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, or both of them combined, without any compensating advantage to said Erie Railroad Company, and therefore is, in effect, a confiscation of the property of said Erie Railroad Company, and takes the property of said Erie Railroad Company for the benefit of said The President and Board of Directors of Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad

Company, contrary to the provisions of the Constitutions of the State of New Jersey and of the United States as hereinbefore set forth.

(36) Said order is unreasonable and unconstitutional for the reason that the cost of complying therewith will exceed the total combined value of all the property, real and personal, of the corporations known as The President and Board of Directors of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company and the value of the prosecutor's interest therein, and will make the interest and investment of the prosecutor in said properties, or either of them incapable of earning, when used for railroad purposes, a fair and reasonable return upon the amount invested therein, and will confiscate prosecutor's property and interest therein.

(37) Said order, with the plan thereto annexed, in so far as they require changes in the location or grades or other property of the corporations known respectively as, "The President and Board of Directors of Paterson and Hudson River Railroad Company," and "Paterson and Ramapo Railroad Company," and the construction, relocation or rebuilding thereof in whole or in part, as indicated on said plan, is invalid and beyond the jurisdiction of said Board, for the reason that the said changes, relocations, constructions, reconstructions and rebuildings confiscate the property of the prosecutor for the benefit of the said The President and Board of Directors of the Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company, and take the property of the prosecutor for public use without just compensation, contrary to the provisions of the Constitutions of the State of New Jersey and of the United States, as hereinbefore set forth.

(38) The statute upon which said order is based (being Chapter 57, Laws of 1913), if construed to permit or require the Board of Public Utility Commissioners to order the company operating the railroad at the highway crossings named in Reason (1) to alter said crossings, or any or either of them, at the expense of said company so operating such railroad (less such amount as may be ordered to be paid by the street railway company using such crossing or crossings), is unconstitutional and void because it takes the property of the prosecutor for private use, and also takes its property for public use without just compensation and otherwise violates the provisions of the constitutions of the State of New Jersey and of the United States, as hereinbefore set forth.

(39) Said order is unreasonable and invalid and impossible of performance, for the reason that the cost to the prosecutor of complying therewith will be approximately the sum of three milion dollars (exclusive of property damage), whereas the testimony taken before said Board shows that prosecutor did not have, and in all, reasonable probability will not have, sufficient funds available for such purpose; and has not and in all reasonable probability will not have, any means of securing funds whereby it might be enabled to comply with said order within the time limited therein.

(40) Said order is unreasonable, and the statute upon which the same is based is unconstitutional and invalid, for the reason that each of them fails to give to the railroad the alternative of decreasing or eliminating the danger to public safety and the impediment to public travel by decreasing the number of train movements over said crossings, or some of them, or by abandon-

ing the railroad at said crossings, or some of them.

(41) Said order and the statute upon which the same is based, in so far as they require changes in, or the removal of, the property or constructions (or changes in the grade or location thereof), of persons or corporations other than telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other companies (as specified in Section 4 of Chapter 57, Laws of 1913), or other persons or companies owning or controlling or operating or managing within the State of New Jersey any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant or equipment for public use under privileges granted by the State of New Jersey, or by any political sub-division thereof, are unconstitutional and invalid for the reason that none of said persons or corporations is included within the description of the term "public utility" as defined in the act entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911 (being Chapter 195, Laws of 1911), nor are any of them otherwise subject to the jurisdiction of said Board.

(42) Said order and statute in so far as they require that the expense of removing, relaying or relocating municipal water or sewer pipes or other municipal pipes, conduits or subways to be borne by the municipality owning the same, and in so far as they require the expense of paving, curbing and flagging the highway, or highways, constructed as the result of changes of grade, to be borne by the municipality, are unconstitutional and invalid, for the reason that a municipality is not included

within the description of the terms "public utility," as defined in the act entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners, and to prescribe its duties and powers," approved April 21, 1911 (being Chapter 195, Laws of 1911), nor is it otherwise subject to the jurisdiction of said Board.

(43) Said statute (being Chapter 57, Laws of 1913), is in violation of and contrary to Article III, Section VII, paragraph 4, of the Constitution of the State of New Jersey, in that the object of the said statute is not expressed in the title thereof and the said statute embraces more than one object, in that said statute purports to empower the Board of Public Utility Commissioners to exercise jurisdiction over municipalities, companies, or corporations, copartnerships or individuals which are not included within the description of the term, "public utility," as defined in the act entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911 (being Chapter 195, Laws of 1911), to which said statute is a supplement.

(44) Said order is impossible of performance, in that it has no effective provision requiring changes in the property or construction of the various companies, copartnerships and individuals mentioned in the testimony taken before said Board, whose lands, buildings, facilities or other property will, as shown on the plan annexed to said order, be affected, or destroyed, or rendered useless thereby.

(45) Said order is invalid and beyond the jurisdiction of said Board in so far as it purports to command the prosecutor to acquire certain property for the purpose of complying therewith, to reconstruct the said railroad and highways, to

perform all other work required according to and as shown on the plan and profile attached to said order, and to proceed with due diligence to the execution of said order, and to comply with all of the requirements thereof, and the duties imposed on it thereby, and by the said act under which said order was made and the laws of this State, and that to that end it exercise in good faith all of the powers conferred upon it by the laws of this State, for the following reasons:—

(a) The prosecutor is not now required, or empowered, by law, to carry out the said commands of said order, or any or either of them.

(b) Said Board has no power to issue such commands or any or either of them, to the prosecutor.

(c) Said commands, and each of them, interfere unlawfully with the judgment and discretion of the board of directors of the prosecutor and deprive said directors of the right given them by law to exercise their judgment and discretion in the management of the prosecutor's business.

(4c) Said order with the plan thereto annexed, so far as they require changes in the location or grade of various switches, sidetracks, leads, bridges, yards, structures and other facilities and property of the prosecutor and other companies, corporations, copartnerships, or individuals, and the construction, relocation or rebuilding thereof, in whole or in part, as indicated on said plan, is invalid and beyond the jurisdiction of said Board for the following reasons:

(a) The petition of the Board of Finance of the City of Paterson, upon which said order is based, was limited to a prayer for the elimination of certain highway crossings, and did not include therein any prayer for the relocation or reconstruction or rebuilding of said property of prosecutor, and said other

companies, corporations, copartnerships or individuals.

(b) Said Board has no power to order said changes, relocations, constructions, reconstructions and rebuildings, or any or either of them, upon the petition filed by said Board of Finance of the City of Paterson.

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

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

(e) Said changes, relocations, constructions, reconstructions and rebuildings are not, nor is any or either of them, any part of the duties or obligations imposed by law upon the prosecutor, or upon said other companies, corporations, copartnerships or individuals.

(f) Said changes, relocations, constructions, reconstructions and rebuildings are not, nor is any or either of them, reasonably necessary, required, or appropriate for the elimination of said crossings named in Reason (1), or any or either of them.

(g) Said changes, relocations, constructions, reconstructions and rebuildings impose a burden upon the interstate traffic of the prosecutor and interfere with and impair its ability to perform its duty as an interstate carrier of freight and passengers.

(47) Said order is invalid in so far as it requires the construction or reconstruction and the relocation of the station buildings and facilities at or near Market street and the station buildings and facilities at or near River street, or either of them, in the City of Paterson, other than the station buildings and facilities respectively now occupied and maintained by the prosecutor, for the following reasons:

(a) The petition of the Board of Finance of the City of Paterson, upon which said

order was based, was limited to a prayer for the elimination of certain highway crossings, and did not include therein any prayer for the construction or reconstruction or relocation of said station buildings and facilities, or either of them.

(b) There is no evidence to show that said existing station buildings and facilities, or either of them, are not safe, adequate or proper.

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

(d) It does not appear that said constructions, or reconstructions, or relocations, or any or either of them, are reasonably necessary, required or appropriate for the elimination of the highway crossings named in Reason (1), or any or either of them.

(e) It deprives the prosecutor of its property without due process of law, as no hearing has been given to the prosecutor on the question as to whether said present station buildings and facilities, or either of them, are safe, adequate and proper, or on the question whether, in order to have the same safe, adequate and proper, it is necessary or reasonable to construct or reconstruct or relocate said station buildings and facilities or either of them, in the manner required by said order.

(48) Said order is invalid in so far as it requires the prosecutor as a part of the construction, reconstruction and relocation of its station buildings and facilities at or near Market street in the City of Paterson, to take, occupy and use certain property on the approach of the Paterson City station of the New York, Susquehanna and Western Railroad Company indicated on said plan under the name of "Crosby Place," and owned by said New York, Susquehanna and Western Railroad Company.

(49) Said order is invalid in so far as it requires the prosecutor as a part of the construction, reconstruction and relocation of its station buildings and facilities at or near River street in the City of Paterson, to build and maintain a sidewalk in the public street and to take, occupy and use part of a public street for the purpose of said construction, reconstruction and relocation.

(50) Said order is invalid in so far as it requires the prosecutor as a part of the construction, reconstruction and relocation of its station buildings and facilities at or near River street in the City of Paterson, to devote part of its right of way to the use of the public in the form of a sidewalk on said right of way, and to construct and maintain the same as shown on said plan.

(51) Said order is invalid in so far as it requires the prosecutor to remove from the present location the buildings and facilities, and each of them, now used respectively by Fuller's Express Company and Morris & Company, and to relocate, rebuild, reconstruct and maintain the same upon the respective sites indicated on the plan and profile attached to said order, for the following reasons:—

(a) Said Board is without authority or jurisdiction to make an order requiring the prosecutor to take any action whatever involving or affecting said buildings and facilities, or either of them.

(b) Said Board is without authority or jurisdiction to require the prosecutor to remove, rebuild, relocate and maintain said buildings and facilities or either of them at the respective sites indicated on the said plan and profile.

(c) Said Board is without authority or jurisdiction to require the prosecutor to devote said sites, or either of them, to private purposes for the benefit of said Fuller's Express Company and Morris & Company, or either of them.

(d) Said Board is without authority or jurisdiction to require the prosecutor to devote said sites, or either of them, to public or any purposes other than the public purposes to which the same, or either of them, are now devoted.

(e) The evidence does not show that the removal of said buildings and facilities, or the relocation, rebuilding, reconstruction and maintenance of the same or either of them, are reasonably necessary, or required, or appropriate for the elimination of the highway crossings named in Reason (1), or any or either of them.

(52) Said order is invalid in so far as it requires the prosecutor to relay, relocate, rebuild, reconstruct and maintain the tracks, poles and wires of Public Service Railway Company on the several sites indicated on the plan and profile attached to said order, for the following reasons:—

(a) Said Board is without authority or jurisdiction to make an order requiring the prosecutor to take any action whatever involving or affecting said tracks, poles, wires, or any or either of them.

(b) Said Board is without authority or jurisdiction to require the prosecutor to relay, relocate, rebuild, reconstruct, or maintain said tracks, poles and wires at the respective sites indicated on said plan and profile.

(c) Said Board is without authority or jurisdiction to require the prosecutor to devote said sites, or any or either of them, so far as the same or some of them are on the right of way or other property of the prose-

cutor, to private purposes for the benefit of said Public Service Railway Company.

(d) Said Board is without authority or jurisdiction to require the prosecutor to devote said sites, or any or either of them, so far as the same or some of them are on the right of way or other property of the prosecutor, to public or any purposes other than the public purposes to which the same or some of them are now devoted.

(e) The evidence does not show that the relaying, relocation, rebuilding, reconstruction, or maintenance of said tracks, poles and wires, or any or either of them, are reasonably necsary or appropriate for the elimination of the highway crossings named in Reason (1), or any or either of them.

(f) The prosecutor has no legal duty or right to relay, relocate, rebuild, reconstruct, or maintain said tracks, poles and wires, or any or either of them.

(g) The legal duty and right to relay, relocate, rebuild, reconstruct and maintain said tracks, poles and wires rests on persons or corporations other than the prosecutor.

(h) The existing contracts between the prosecutor or its predecessors, and other persons or corporations, or their predecessors, respectively, with respect to the relaying, relocating, rebuilding, reconstruction and maintenance of said tracks, poles and wires, and each of them, are impaired and destroyed.

(i) There is no right in the prosecutor to relay, relocate, rebuild, reconstruct, or maintain said tracks, poles and wires in, along, or through public streets, except under the limitations imposed by law.

(53) Said order of said Board is invalid in so far as it requires the prosecutor to substitute for the existing crossings at Cedar street a crossing under the railroad at Taylor street and for the existing crossing at Franklin street a crossing

under the railroad at Montgomery street, for the reason that:—

(a) Such substitution amounts to the opening of new streets across the railroad at Taylor street and Montgomery street and the closing of existing streets at Cedar street and Franklin street, and the power to open and close said streets respectively is not within the authority or jurisdiction conferred upon said Board by law.

(b) The opening or closing of said streets respectively does not constitute the altering of such crossings by substituting therefor a crossing not at the grade of such public highway, either by carrying such public highway over or under said 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 place of the one ordered vacated, within the meaning of Chapter 57, of the Laws of New Jersey for 1913.

AMENDMENT.

Add to Reason (53) the following:

53 (c). The evidence taken before said Board does not show, nor does the said Board find, that the width and character of the bridges and passages ordered to be constructed at Taylor street and Montgomery street respectively are such as are suitable to the locality in which the same are situated.

(54) Said order is invalid in so far as it requires the prosecutor to widen and alter the undergrade crossings at Essex street, Governor street and Fulton street, and each of them, and to adjust, relocate and reconstruct the existing abutments and other structures at said streets and each of them, for the following reasons:—

(a) The petition of the Board of Finance of the City of Paterson, upon which said

order was based, did not pray for any change in said undergrade crossings, or any or either of them, nor for the widening, nor alteration thereof, nor for the adjustment, reconstruction or relocation of the said abutments, and other structures, or any or either of them.

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

(c) Said order deprives the prosecutor of its property without due process of law, because the prosecutor has had no hearing in regard thereto or concerning the propriety thereof.

(d) Said Board is without authority or jurisdiction to make any order requiring any action whatever to be taken for the widening or alteration of said undergrade crossings, or any or either of them, or the adjustment, reconstruction or relocation of the existing abutments, or other structures, at said undergrade crossings, or any or either of them.

(e) It does not appear that the widening and alteration of said undergrade crossings, or any or either of them, and the adjustment, reconstruction and relocation of said abutments and other structures are reasonably necessary, required or appropriate for the elimination of the highway crossings named in Reason (1), or any or either of them.

(f) None of said highways cross the railroad of the prosecutor at the same level.

AMENDMENT.

Add to Reason (54) the following:

54 (g). The evidence taken before said Board does not show, nor does the said Board find, that the width and character of the bridges and passages ordered to be constructed at Essex street, Governor street and Fulton street respectively, are such as are suitable to the locality in which the same are situated.

(55) Said order is invalid in so far as it requires the prosecutor to change the lines, width and direction of the highways named in Reason (1), or any or either of them, and to carry so much thereof as so changed under said railroad (except in the case of Madison avenue), and to carry Madison avenue over said railroad, according to and as shown on said plan and profile for said purpose, and to vacate the remaining parts of said highways within the lines of the right of way of the prosecutor, and to vacate 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, for the following reasons:—

(a) The prosecutor is under no legal duty or obligation to change the lines, width or direction of the said highways, or any or either of them, nor to carry any part thereof as so changed under the said railroad, nor to vacate the remaining parts of said highways, or any or either of them, within the lines of said right of way, nor to vacate said part of said Madison avenue.

(b) The prosecutor has no power, or authority to change the lines, width or direction of the said highways, or any or either of them, nor to carry any part thereof as so changed under the said railroad, nor to vacate the remaining parts of said highway, or any or either of them, within the lines of the said right of way, nor to vacate said part of said Madison avenue.

(c) Said order imposes upon the prosecutor the entire expense of such changes, relocations and vacations, including damages to adjacent property (except such expenses as by statute are expressly imposed upon municipalities, or other persons or corporations) without affording to the prosecutor any hearing as to the propriety or necessity of such changes,

relocations and vacations, and without affording to the prosecutor any hearing as to the cause of such changes, relocations or vacations and the method or the amount of the assessment, or assessments, therefor.

(d) The power or authority to order the prosecutor to change the lines, width or direction of said highways, or any or either of them, and to carry any part thereof as so changed under the said railroad and to vacate the remaining parts of said highways, or any or either of them, within the lines of the said right of way, and to vacate said part of said Madison avenue has not been conferred by law upon said Board of Public Utility Commissioners, and can only be exercised by the proper municipal, or other authorities, in the manner provided by law.

(e) No appropriate proceedings have been taken and the necessary consents have not been given by or in behalf of the prosecutor, or other interested property owners, for the said changes, relocations and vacations of said highways, or any or either of them, as required by the charter of the City of Paterson and by the laws of the State of New Jersey.

AMENDMENT.

Add to Reason (55) the following:

55 (f). The evidence taken before said Board does not show, nor does the said Board find, that the width and character of the bridges and passages ordered to be constructed at the highways named in Reason (1), or any oreither of them, are such as are suitable to the locality in which the same are situated.

(56) The statue upon which said order is based is unreasonable, invalid and unconstitutional, in so far as it permits or requires said Board of Public Utility Commissioners to order the prosecutor to vacate, relocate or change the lines, width, direc-

tion or location of the highways named in Reason (1), or any or either of them; and in so far as it permits or requires the opening of new highways in the place of those ordered vacated, for the following reasons:—

(a) The prosecutor is under no legal duty or obligation to vacate, relocate or change the lines, width, direction or location of said highways, or any or either of them, or to open new highways in the place of those ordered vacated.

(b) The prosecutor has no power or authority to vacate, relocate or change the lines, width, direction or location of said highways, or any or either of them, or to open new highways in the place of those ordered vacated.

(c) Said statute attempts to impose upon the prosecutor the entire expense of such changes, relocations, or openings, including damages to adjacent property (except such expenses as by statute are expressly imposed upon municipalities or other persons or corporations) without affording to the prosecutor any hearing as to the propriety or necessity of such changes, relocations, or openings; and without affording to the prosecutor any hearing as to the cost of such changes, relocations or openings and the method or the amount of the assessment or assessments therefor.

(d) The power or authority to vacate, relocate or change the lines, width, direction or location of such highways and to open new highways in the place of those ordered vacated, has not been conferred by law upon said Board of Public Utility Commissioners and can only be exercised by the proper municipal or other authorities in the manner provided by law.

(e) No appropriate proceedings have been taken, and the necessary consents have not

been given, by or in behalf of the prosecutor or other interested property owners for the vacation, relocation or change of the lines, width, direction or location of such highways, or any or either of them, or for the opening of new highways in the place of those ordered vacated, as required by the charter of the City of Paterson and by the laws of the State of New Jersey.

(57) Said order is invalid in so far as it requires the prosecutor to reconstruct the railroad over the public highways named in Reason (1) (except Madison avenue), by elevating the railroad at such public highways, and each of them, and by depressing the grade of said highways, and each of them, in order to pass under the railroad when thus elevated.

(58) The statute upon which the order under review is based is unreasonable and invalid and deprives the prosecutor of its property without due process of law, because it requires grade crossings to be altered and eliminated by substituting therefor a crossing not at the grade of the public highway, either by carrying the public highway over or under such railroad, or by reconstructing such railroad over or under such public highway, without permitting the Board of Public Utility Commissioners in its discretion to alter and eliminate such crossings by depressing or elevating the public highway in part and depressing or elevating the railroad in part.

(59) Said order and the statute upon which the same is based are illegal, unconstitutional and void in so far as they permit or require the prosecutor to construct or maintain bridges or passages over or under the railroad at the said crossings, or some one or more of them, named in Reason (1), for the reason that the highways at said crossings, or some one or more of them, were opened and laid out

subsequent to the construction of the railroad at such crossings.

(60) The statute upon which the order under review is based (being Chapter 57, Laws of 1913) is unreasonable, unconstitutional and invalid because it deprives the prosecutor of its property without due process of law, and impairs the obligation of prosecutor's contracts by permitting the Board of Public Utility Commissioners to alter and amend the charters of the several predecessors in interest of the prosecutor, to whose rights the prosecutor has succeeded.

(61) The statute upon which the order under review is based (being Chapter 57, Laws of 1913) is unreasonable, unconstitutional and invalid because it purports, or attempts to delegate, to the Board of Public Utility Commissioners, the power in its discretion to alter and amend the charters of the predecessors in interest of the prosecutor, to whose rights the prosecutor has succeeded.

(62) Said order and the statute upon which the same is based are illegal, unconstitutional and void in so far as they permit or require the prosecutor to relocate and reconstruct the highways mentioned in Reason (1), and to change the grade thereof, or parts thereof, outside of the right of way of the prosecutor at said crossings.

(63) The statute upon which said order is based is unreasonable and in violation of the Constitution of the United States, because it takes the property of the prosecutor without just compensation and wihout due process of law, and denies to it the equal protection of the laws and impairs the obligation of the prosecutor's contracts as follows:—

(a) The contracts made by the prosecutor with the holders of its stocks, bonds, notes and other obligations.

(b) The contracts made between the State of New Jersey and the prosecutor or its pre-

decessors in interest, to whose rights prosecutor has succeeded.

(c) The contracts made between the prosecutor or its predecessors in interest, to whose rights the prosecutor has succeeded, and the Public Service Railway Company, or its predecessors in interest.

(d) The contracts made between the prosecutor, or its predecessors in interest, to whose rights prosecutor has succeeded, and the various corporations, copartnerships and individuals in possession or enjoyment of various sidings, switches and other facilities, as described in the evidence and in the plan attached to said order.

(e) The contracts made between the corporations known respectively as "The President and Board of Directors of Paterson and Hudson River Railroad Company," and "Paterson and Ramapo Railroad Company"; and the prosecutor, or its predecessors in interest, to whose rights the prosecutor has succeeded.

in that the said statute imposes upon the prosecutor the entire expense of the alterations, changes, relocations or openings, including damages to adjacent property, caused by the alteration of crossings in the manner described in said statute—except such part of such expense not exceeding ten per cent., which may be imposed upon the street railway using such crossings, and except such part of such expense as the statute requires to be borne by the municipality, and except such part of such expense as the statute requires to be borne by any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other companies, or corporations, co-partnerships or individuals.

(64) Said order and the statute upon which the same as based are unconstitutional, unreasonable and invalid in so far as they limit the proportion of expense of the alterations, changes, relocations, or

openings (as specified in said statute) to be paid by the street railway using such crossing, or crossings, for the following reasons:

(a) Said proportion is not commensurate with, or in proportion to, the danger to public safety or the impediment to public travel created by and chargeable to said street railway at such crossings, and each of them; nor is it commensurate with, or in proportion to, the protection made necessary by such danger or impediment.

(b) Said proportion is not a fair or reasonable amount of the expense of such alterations, changes, relocations or openings.

(c) Said proportion is less than that imposed upon, and assumed by, the street railway under the terms and conditions of existing agreements between said street railway company, or its predecessors, and the prosecutor or its predecessors, respecting the use, maintenance and protection of said crossings, and each of them.

(65) Said order is unreasonable and invalid in so far as it requires the prosecutor to alter said highway crossings named in Reason (1), and each of them, according to a plan which is more expensive to the prosecutor than is necessary for the purpose of removing danger to the public safety, or impediment to, public travel at said crossings and each of them.

(66) Said order is unreasonable and invalid in so far as the Board of Public Utility Commissioners does not adopt the proposal of the prosecutor for the elimination of the highway grade crossings at Keen, Warren and River streets.

(67) Said order is unreasonable and invalid in so far as the Board of Public Utility Commissioners does not adopt the proposal of the prosecutor for the consolidation of the highway grade crossings at Straight and Clay streets.

(68) Said order is unreasonable and invalid in so far as it specifies the date on or before which the prosecutor is required to begin the actual work of construction in the performance and execution of said order, and the dates on or before which the prosecutor is required to begin and complete the divisions of said work, respectively marked and designated on the profile attached to said order as "A," "B," "C" and "D."

(69) Said order is unreasonable and invalid in so far as it arbitrarily requires the actual work of construction in the performance and execution of said order to be done according to certain divisions marked and designated in the profile attached to said order as "A," "B," "C" and "D"; and in so far as it requires said work to be prosecuted in the sequence of divisions named in said order.

(70) Said order is unreasonable and invalid, and the statute upon which same is based is unconstitutional and invalid, for the reason that the testimony shows that it is impossible for the prosecutor to obey said order; but on failure to obey, the prosecutor becomes subject to a penalty of one hundred dollars per day for every day during which default continues; and the prosecutor and its officers, agents and employees, on such neglect or default, become liable to indictment for misdemeanor.

(71) Said order is unreasonable and invalid and in violation of the Constitution of the United States in that the cost to the prosecutor of compliance therewith is so great that it imposes a burden upon the interstate traffic of the prosecutor and interferes with and impairs its ability to perform its duty as an interstate carrier of freight and passengers, for the reason that said order compels the prosecutor to raise and expend moneys which (if available for any purpose), would otherwise be

available for, and in the ordinary course of events, would be used by, the prosecutor in the making of changes and improvements which are essential for the purpose of enabling the prosecutor to carry on its interstate traffic.

(72) Said order is in violation of the Constitution of the State of New Jersey in that it takes the private property of the prosecutor for a private use, and takes the property of the prosecutor for public use without just compensation; and takes the property of the prosecutor without offering to it any opportunity to protect said property, thereby depriving the prosecutor of its right and guaranty of enjoying and defending, acquiring, possessing and protecting its said property. Said order is likewise in violation of the Constitution of the United States, in that it deprives the prosecutor of its liberty and property without due process of law, denies to the prosecutor the equal protection of the laws, abridges the privileges and immunities of the prosecutor, takes the private property of the prosecutor for public use without just compensation, creates a burden upon and operates as a regulation of and an interference with, interstate commerce, and impairs the obligation of contracts, for the reason that the effect of said order will be to deprive the prosecutor of the rights, benefits, advantages, privileges and contracts now possessed by it with reference to certain sidings in the following respects (numbers correspond to numbers of sidings on maps marked "Exhibit 23" and "Exhibit 23-A"):—

(a)	Passaic Steel Co.	No. 3
	R. H. McDonald	No. 4
	Paterson Vehicle Co.	No. 19
	Paterson Beef Co.	No. 20
	David C. Rodgers Co.	No. 24

Said order requires the destruction of each of said sidings.

(b)	G. A. Zabriskie	No. 5
	Commercial Lumber and Mill Work Co.	No. 6
	Christopher Kelly	No. 7
	M. Gobel	No. 8
	National Wood Co.	No. 9
	Standard Oil Co.	No. 10

Said order requires the destruction of the existing sidings and the construction of three other sidings in lieu thereof at different locations; and said new sidings, if constructed as required by said plan, will be unavailable for use.

Said order further requires the construction of a bridge across Taylor street for the purpose of carrying two of said new sidings to G. A. Zabriskie, Commercial Lumber and Mill Work Co., Christopher Kelly, M. Gobel and National Wood Co.; and requires the construction of another bridge across Taylor street for the purpose of carrying said third new siding to Standard Oil Company.

(c)	John Agnew Co.	No. 11

Said order requires the destruction of the two sidings located between Hamilton avenue and Governor street; and the construction of two new sidings, each at an elevation of about sixteen feet above the present grade upon the land of John Agnew Co., and also requires the construction of a bridge over Hamilton avenue for the purpose of carrying one of said new sidings.

(d)	McNabb & Harlin	No. 15
	Graham Brewing Co.	No. 16
	National Biscuit Co.	No. 17
	Hygeia Ice Co.	No. 47
	Paterson Consolidated Ice Co.	No. 50
	Bon Arbor Chemical Co.	No. 55

Said order requires the destruction of the lead by which each of said sidings is reached, and requires the construction of a new and longer lead

through a public street in order to reach said sidings and each of them, which said new lead is partially on and partially off the right of way and property of the prosecutor.

Said order further requires the maintenance of each of said sidings along, in and through a public street.

(e) Morris & Co. No. 18
Fullers Express Co. No. 50

Said order requires the destruction of each of said sidings and the construction of two other sidings at the locations indicated on said plan.

(f) Herman Co. No. 22
Sulsberger & Sons Co. No. 23

Said order requires the destruction of the siding and the construction of a new siding at an elevation of fifteen feet above the grade of the present siding and the construction of a bridge over Ellison street for the purpose of carrying said new siding—said new siding being partially on and partially off the right of way and property of the prosecutor.

(g) Armour & Co. No. 25

Said order requires the destruction of the lead by which said siding is connected with the main line, and the construction of a new lead and of bridges at Lafayette, Montgomery, Fulton and Governor streets on which to carry said new lead.

(h) Hinchliffe Brewery No. 26

Said order requires the destruction of said siding and the construction of a new siding at an elevation of sixteen and one-half feet above the present grade.

(i) Katz Brewery No. 27

Said order requires the destruction of said siding and the construction of a new siding at a different place and grade.

Said order also requires the construction of a new lead, and of new bridges at Lafayette, Mont-

gomery, Fulton and Governor streets, on which to carry said new lead.

(j)	P. S. Van Kirk Co.	No. 28
	Diamond Coal Co.	No. 53
	Olive Oil Soap Co.	No. 61

Said order requires the destruction of each of said sidings and the construction of new sidings at a different grade and off of the right of way and property of prosecutor.

(k)	A. H. Smith	No. 29

Said order requires the destruction of said siding and the construction of a new siding on a different elevation and place, partly on and partly off the right of way and property of the prosecutor.

(l)	Meyer and De Vogel	No. 30

Said order requires the destruction of said siding and the construction of a new siding at an elevation of about fifteen feet above the present grade.

(m)	Armstrong Sons Co.	No. 31

Said order requires the destruction of said siding and the construction of a new siding at an elevation about seventeen feet above the present grade.

Said order further requires the construction of a bridge across Montgomery street on which to carry said new siding.

(n)	A. H. Smith	No. 32
	D. Fullerton & Co.	No. 33

Said order requires the destruction of said sidings and the construction of other sidings at an elevation of about sixteen feet above the present grade.

(o)	Atherton Grain Co.	No. 34
	J. A. Lydecker	No. 35

Said order requires the destruction of the siding and the construction of a new siding at an elevation of about sixteen feet above the present grade.

Said order further requires the construction of a bridge over Keen street on which to carry said new siding.

(p) Public Service Gas Co. No. 36

Said order requires the partial destruction of the two existing sidings and the construction of a new siding in a different location through a public street and off the right of way and property of the prosecutor.

(q)	J. Van Den Hendell	No. 37
	Swift & Co.	No. 38
	H. M. Post	No. 39
	Ashley & Bailey	No. 40
	National Silk Dyeing Co.	No. 41
	Grasselli Chemical Co.	No. 42
	Auger & Simon Co.	No. 49
	Center Paper Box Co.	No. 56
	Waldo Silk Ribbon Co.	No. 57

Said order requires the destruction of the leads and connections by which each of said sidings is now reached, and requires the construction of new leads and connections.

(73) Said order is illegal and unconstitutional in so far as it requires the construction and maintenance of sidings—

(A) on the right of way and other property of the prosecutor;

(B) off the right of way and other property of the prosecutor on the property of other persons or corporations;

(C) in, along and through public highways, for the reason that—

(a) The prosecutor has no legal duty or right to construct and maintain said sidings or any or either of them.

(b) The legal duty and right to construct and maintain the same rests on persons or corporations other than the prosecutor.

(c) No hearing has been given to the prosecutor as to whether said sidings, or any of them, should be constructed or maintained by it, nor as to the terms under which said sidings or any of them should be constructed or maintained.

(d) Existing contracts between the prosecutor and other persons or corporations with respect to the construction and maintenance of said sidings and each of them are impaired or destroyed.

(e) There is no right in the prosecutor to construct or maintain sidings in, along or through public streets, except under the limitations imposed by law.

(f) There is no power or jurisdiction in said Board of Public Utility Commissioners in this proceeding to order the prosecutor to construct or maintain the said sidings or any or either of them in the manner required by said order and plan.

(g) The order imposes a burden upon the insterstate traffic of the prosecutor and interferes with and impairs its ability to perform its duty as an interstate carrier of freight and passengers.

(h) The construction and maintenance of said sidings, and each of them, by the prosecutor as required by said order would constitute an unjust discrimination, preference or advantage between interstate shippers, in violation of the provisions of the Interstate Commerce Act.

(74) Said order is invalid and unreasonable because it arbritrarily requires the alteration of said crossings named in Reason (1) according to and as shown on said plan and profile, without making any provision for such changes or modifications of the details of said plan and profile as may become necessary during the progress of the work for engineering, or other reasons.

(75) Said order is invalid and beyond the jurisdiction of the said Board of Public Utility Commissioners, because it prevents or impairs the right of the prosecutor to change the construction or use of switches, sidetracks, leads, bridges, yards, structures, facilities and other property of the prosecutor, comprehended in said plan, in such manner and to such extent as the necessities of its business may from time to time demand; and requires the prosecutor arbitrarily to devote and surrender its said structures, facilities and other property to the uses and purposes limited in and prescribed by said order and plan, and to maintain the same accordingly, and divests the prosecutor of the powers, duties and obligations imposed upon and delegated to it by law, with respect to the construction, use and maintenance of said structures, facilities and other property.

(76) The action of the Board in denying the prayer of the prosecutor for a further hearing was arbitrary, unjustified and unreasonable.

(77) Said Board should have granted the prayer of the prosecutor for a further hearing for the purpose of considering some one or more of the following matters, as specified in the prosecutor's petition for such further hearing, to wit:—

(a) Whether any order made in this proceeding should not be made against the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company as the railroad companies operating the railroad over the crossings in question within the meaning of Chapter 57, Laws of 1913.

(b) Whether any order made in this proceeding should not be made against the Paterson and Hudson River Railroad Company, the Paterson

and Ramapo Railroad Company and this respondent jointly, so that the cost thereof may be apportioned between and among said companies by appropriate proceedings.

(c) Whether this respondent is financially able to carry out the terms of any order made in this proceeding if the heaviest burden of the cost thereof falls upon it.

(d) Whether such order would impose a burden upon the interstate traffic of this respondent and interfere with and impair its ability to perform its duty as an interstate carrier of freight and passengers.

(e) Whether in any order made in this proceeding the Public Service Railway Company should not be chargeable with ten per cent. of the total cost of eliminating all of the crossings involved in said plan or scheme adopted by the Board, in addition to all costs and expenses legally chargeable to said Public Service Railway Company under Section 4 of said statute.

(f) If the Board reaches the conclusion that under existing circumstances an order must be made requiring this respondent to eliminate the grade crossings in question, whether the danger to public safety and the impediment to public travel could not be removed by reducing the number of train movements over said crossings, or some of them, in accordance with plans which this respondent will submit.

(78) The conclusion of said Board whereby it denied the prayer of prosecutor's petition for a further hearing with respect to the matters described in Reason (77), sub-division f, was arbitrary, unreasonable and unjustified, and was made without hearing and without any evidence in support thereof.

(See Vol. IV, pp. 1815-1856).

GROUNDS OF APPEAL.

(b.)

(Re-Order of July 9, 1915—Certiorari allowed July 22, 1915).

The Supreme Court affirmed the order of the Board of Public Utility Commissioners brought up for review, whereas, for one or more of the reasons for reversal urged thereon, the said court should have reversed said order.

(Vol. IV., p. 2334).

The reasons for reversal filed in the Supreme Court are as follows:

1. The action of the Board of Public Utility Commissioners in denying the application of the prosecutor for a rehearing of the order of said Board, dated April 20, 1915, was arbitrary and unjustified, and was not supported by the evidence taken before said Board.

2. Said application for a rehearing of said order of April 20, 1915, should have been granted for the purpose of considering the plan proposed by the prosecutor in said application for a rehearing, in lieu of the plan described in said order, and for the purpose of taking testimony thereon so far as might be necessary.

3. The application of the prosecutor that the effective date of said order of April 20, 1915, be extended for such reasonable time as would permit a full consideration of said petition for a rehearing, should have been granted.

4. The evidence shows that the action of said Board in denying said application for a rehearing, was:

(a) Purely arbitrary.

(b) Without any reasonable basis upon which to rest.

(c) Unsupported by the facts laid before said Board.

5. The action of said Board in denying said application for a rehearing was contrary to the undisputed testimony taken before said Board upon said application.

6. Said application of the prosecutor for a rehearing should have been granted for the reason that the undisputed testimony before said Board taken on such application showed that it was feasible and practicable to remove the danger to public safety and the impediment to public travel at the highway crossings, and each of them, involved in this proceeding, by adopting the plan proposed by the prosecutor in said application, in lieu of the plan described in said order, dated April 20, 1915.

(See Vol. IV. pp. 1924-5.)

The foregoing Reasons, so far as they affect the legality of the order of April 20, 1915, will be considered in this brief under the following general headings:

FIRST.

Reasons attacking said order of April 20, 1915, on the ground that it exceeds the jurisdiction conferred upon the Board by the statute under the authority of which the order purports to have been made, i. e., Chapter 57, Laws of 1913.

SECOND.

Reasons attacking said order on the ground that it is not reasonable nor justified by the evidence taken before said Board.

THIRD.

Reasons attacking said order on the ground that the order violates certain provisions of the State and of the Federal Constitution.

FOURTH.

Reasons attacking the statute by authority of which said order purports to have been made, on the ground that it violates certain provisions of the State and of the Federal Constitutions.

The proceedings of the Board, leading to the denial on July 9, 1915, of the prosecutor's petition for the rehearing of said order of April 20, 1915, may be conveniently considered under the second heading.

(3.)

Brief of the Argument.

PRELIMINARY STATEMENT.

Before taking up a consideration of the legal questions a brief statement of the facts and of the terms of the order of April 20, 1915, and of the effect thereof will be helpful.

Pursuant to the terms of certain leases the prosecutor runs some of its trains over the railroad tracks of the Paterson & Hudson River R. R. Co. and the Paterson & Ramapo R. R. Co.; part of the railroad of each company is located in the City of Paterson, the total length of the main line through that City being nearly four miles. The railroad tracks of the Paterson & Hudson River R. R. Co. enter the City from the south; the first street reached by such tracks is known as Crooks avenue, which is the boundary line between the City of Paterson and the Township of Acquackanonck. This street crosses the railroad tracks at grade; although the city in its argument before the Supreme Court asserted that this was a "much travelled road", no application for the elimination of such crossing has

been made, and it is not considered in the present case. After passing Crooks Avenue the railroad continues in a general northerly direction for a distance of about 4500 feet to Madison Avenue, which is the first street involved in this proceeding. Between Crooks Avenue and Madison Avenue a street known as Gould Avenue is open across the tracks. This is located about 2500 feet north of Crooks Avenue. It is not included in the present proceeding. There are several other streets between Crooks Avenue and Madison Avenue, to wit, Knickerbocker Ave., Genesee Ave., Vesper St., Buffalo Ave., Delaware Ave., Michigan Ave., Grove St., Goshen St., George St. and Thomas St. on the westerly side of the tracks; and Dundee Ave., Buffalo Ave., Pennsylvania Ave., Michigan Ave., Illinois Ave., Florida Ave., Maryland Ave., Alabama Ave., Kentucky Ave., Iowa Ave., on the easterly side of the tracks; all of these streets are open up to the railroad right of way but none of them crosses the tracks (see Key Map of city, Ex. P. 1, Map of Lot Numbers, Ex. P. 40; and plan attached to order of Board under review).

After crossing Madison Avenue the tracks continue in a general northerly direction for a distance of over half a mile before reaching the next crossing—the one known as Straight Street—which is the second street involved in this proceeding. Between Madison Avenue and Straight Street there are six streets, to wit, Elizabeth, Hemlock, Mallard, Lynn, Ivy and Leroy, on the westerly side of the tracks; and four streets, to wit, East Nineteenth, Lewis, Martin and Gray, on the easterly side of the tracks, all of which extend either to the right of way or to a street running parallel with the right of way, but none of which crosses the railroad

tracks (see Key Map of city, Ex. P. 1, and Map of Lot Numbers, Ex. P. 40).

The next crossing to the north of Straight Street is Clay Street, about 100 feet distant; the next street, one block or about 400 feet to the north, is Taylor Street, where no crossing exists at the present time (although by the order under review the prosecutor is directed to construct at that point an undergrade crossing); the next street included in the petition is Cedar Street, which is about 500 feet north of Taylor Street. There is a grade crossing at this street at the present time but under the Board's order this crossing is to be closed.

The next street to the north is Oak Street, which is shut off from access to the railroad tracks by a large factory, and is not involved in this proceeding.

The next street is Essex Street, which is distant about 800 feet from Cedar Street. At this point an *undergrade* crossing already exists. No reference was made to this street in the City's petition, although the Board's order directs that the present undergrade crossing be widened and altered in certain respects.

The next street to the north which approaches or crosses the tracks is Market Street, which is nearly 1000 feet north of Essex Street and nearly 1800 feet from Cedar Street—the nearest street to the south which was included in the city's petition. A street known as Park Avenue begins on the easterly side of the tracks near the point where Market Street crosses the tracks, and the city's maps showing this crossing are accordingly designated as "Market Street and Park Avenue", although the crossing in question is commonly called the Market Street crossing.

Proceeding to the north from the Market Street crossing there are five grade crossings, to wit, Ellison, Van Houten, Broadway, Fair and Hamilton Avenue—each crossing being separated from the other by a city block. All of these streets are included in the city's petition.

Proceeding to the north after passing Hamilton Avenue the next street included in the the petition is the one called Lafayette Street, which is over 2000 feet to the north of Hamilton Avenue.

Between Hamilton Avenue and Lafayette Street are four streets, to wit, Godwin, Tyler, Lawrence and Montgomery, which extend to, but do not cross, the railroad tracks, none of which is referred to in the city's petition; there are also two existing *undergrade* crossings, to wit, Governor Street, a distance of about 750 feet to the north of Hamilton Avenue, and Fulton Street, a distance of about 500 feet to the north of Governor Street. Neither of these last two sreets was included in the City's petition, although by the Board's order they are required to be widened and altered in certain respects.

Proceeding to the north beyond Lafayette Street there are four crossings, to wit, Franklin, Keen, Warren and River (the last named including also Putnam), each crossing being a distance of one block, or about 250 feet, from the crossing next south thereof. All of these streets are included in the present proceeding. But the Board's order requires the existing crossing at Franklin Street to be closed and a new *undergrade* crossing to be constructed at Montgomery Street—which latter street does not at the present time cross the tracks.

The last crossing included in the city's petition is the one known as the River and Putnam

Street crossing. Proceeding to the north beyond this crossing, for a distance of about 2500 feet, we come to the next and last grade crossing within the city limits, that known as Fifth Avenue. After passing Fifth Avenue the railroad tracks continue in a northerly direction for a distance of about 500 feet to the Passaic River (which marks the northern boundary of the city at that point) and cross the river on a bridge and thence proceed to the north to Suffern, N. Y., a distance of about sixteen miles above Paterson.

That part of the railroad which extends from Jersey City to a point at or near the Market Street station in Paterson was constructed and is owned by the Paterson & Hudson River R. R. Co., and that part which extends north from the Market Street station to Suffern, N. Y., was constructed and is owned by the Paterson & Ramapo R. R. Co. Beyond Suffern, and extending thence to Buffalo, Chicago and other points, the tracks were constructed and are owned by other companies which are either operated or controlled by the prosecutor.

The Board's order of April 20, 1915, was based upon proceedings initiated by the Board of Finance of the City of Paterson by a petition filed under Chapter 57, New Jersey Laws of 1913, wherein the several crossings, the grades of which the City prayed to have eliminated, are designated as follows:

A. Madison Avenue.

B. Clay and Straight Streets (two crossings).

C. Cedar Street.

D. Market Street and Park Avenue (one crossing).

E. Ellison Street.

F. Van Houten Street.

G. Broadway.
H. Fair Street.
I. Hamilton Avenue.
J. Lafayette street.
K. Franklin Street.
L. Keen Street.
M. Warren Street.
N. River and Putnam Streets (one crossing).
(Vol. IV., p. 1637).

The city claimed in its petition that it was not practicable to change the grade of said highways or any of them so as to carry the same under or over the railroad; asserting "the said highways are all in the center of a thickly populated city and all contain large numbers of buildings which would be ruined or destroyed by any such change of grade."

The city further claimed that the crossings should be altered by depressing the tracks of the railroad so that the same would pass under the highways, or in case such a plan should be impracticable that the railroad should be elevated to pass over said highways. (Pars. 18 and 19; Vol. IV., p. 1660).

The Board's order directed the prosecutor to alter the crossings, according to a certain plan therefor, annexed to and made part of said order.

> "by substituting therefor crossings not at the grade of the public highways known as Madison Avenue, Straight Street, Clay Street, Market Street, and Park Avenue, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Keen Street, Warren Street, Putnam and River Streets; by changing the lines, width and direction thereof and carrying so much thereof as so changed under the said railroad, except in the case of Madison Avenue, which

is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further by vacating 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; by substituting for the existing crossings at Cedar Street a crossing under the railroad at Taylor Street and for the existing crossing at Franklin Street a crossing under the railroad at Montgomery Street and also by widening and altering the existing highways known as Essex Street, Governor Street and Fulton Street, adjusting the structures spanning them to the proposed grade or grades; (which said new highways shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated); by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile." (page 1790.) (For complete copy of this ordeer, see Appendix X, annexed hereto.)

By reference to said plan and profile it will be seen that the order directs that the grade of the highways be changed by carrying all of them *under* the railroad, except in the case of Madison avenue, which is to be carried over the railroad.

The order further directed that the prosecutor and the City of Paterson and certain other public utility companies, "and all other parties to this proceeding, and each and every of them proceed with due diligence to the execution of this order, and comply with all of the requirements thereof and the duties imposed upon them thereby, and by the said act under which this order is made,

and the laws of this State, and that to that end, they and each of them exercise in good faith, all of the powers conferred upon them and each or any of them by the laws of this State."

The order further directed that the prosecutor begin the actual work of construction required in the performance and execution of the order on or before August 1, 1916, and continuously carry on the same thereafter and perform and fully comply with the directions and requirements of the order and complete all of the work required to be done within eight years from the date of the order, and that in the continuous prosecution of the work it take up in the order named certain subdivisions thereof—four in number—beginning and completing each subdivision within certain fixed periods, specified in the order.

The order further directed the Public Service Railway Company to pay ten per centum of the expenses of the alterations, etc., required by the order, including damages to adjacent property, "directly chargeable" to the three crossings used by the street railway operated by it, to wit, (1) Park Avenue and Market Street (2) Broadway, and (3) River Street; and required the prosecutor and said street railway company to keep records of the expenses directly chargeable to these crossings and gave leave to make application to the Board for further order in the event that they could not agree upon the amount of such expenses chargeable to said crossings. (Vol. IV., pp. 1787-1792).

A separate writ of certiorari was sued out by Public Service Railway Company. The order of the Board, so far as it affected that company, was sustained. (Vol. IV., p. 2300.) For report of opinion see 98 Atl. 28; for convenient reference copy of the opinion is attached hereto as Appendix XII.

The estimated cost of the work as ordered is the sum of $2,948,218.68. See report of Board (Vol. IV., p. 1765). This does not include damages to adjacent property, which under said Chapter 57, Laws of 1913, must be paid by the prosecutor. The amount of such damages, due to changing the grades of streets, was estimated at $168,500; and the amount due to the revision of buildings and sidings, outside the railroad right of way, at $131,922. (pp. 1323-4).

The prosecutor's share of this total cost of over $3,000,000 is as follows:

Section A—Market street to Lafayette street	$1,442,719.30
Section B—Keen, Warren and River streets	418,260.78
Section C—Straight street to Market street	572,319.51
Section D—Madison avenue	104,278.02
	$2,537,577.61

(See Ex. R-103, Vol. II., p. 1324, and summary thereof at p. 1326; Ex. R-104, at p. 1327.)

But the foregoing figures do not represent the total amount to be paid by the railroad. These estimates do not include certain other items which must be paid by the railroad, namely, the cost of street work, chargeable to the railroad, amounting to the sum of $54,160.79, These figures are taken from the engineer's estimate and are for the *grading* of streets and for changes and approaches to houses and other buildings resulting from the changes of street grades—none of which comes within the items chargeable upon the city under section 3 of the statute. There is included in the railroad estimate the increased cost for duplication of portions of the construction, which necessarily

results from doing the work in sections in the manner ordered by the Board. This amounts to the sum of $123,672.44. This figure is obtained by comparing the cost of the work estimated without regard to doing it in sections with the cost estimated by doing it in sections. There must also be added the cost of reconstruction of sidings, leads, etc., amounting to the sum of $131,922. See Exhibit R-102, at page 1324. But as the work is to be done in sections, the actual cost of reconstruction of the sidings, etc., will be slightly in excess of that amount, namely, $136,922. This figure is obtained by adding the items in Exhibit R-103, at page 1325, entitled "Industries off R. of Way." The total cost, therefore, to the *railroad* is as follows:

General Construction Work	$2,537,577.61
Street Work Chargeable to Railroad	54,160.79
Reconstruction of Sidetracks	136,922.00
Total	$2,728,660.40

(NOTE—The above items for street work and for reconstruction of sidings are not included in the city's estimate. Some of the differences between the railroad estimate and the city's estimate is accounted for by the failure of the city engineers to include any allowance for increased cost of work resulting from doing it in sections.)

The above estimate includes a guess as to the amount of property damage under the item of street damages. (See Exhibit R-103, pp. 1324, 5.) But it is impossible to tell how much more the property damage may be. In view of the fact that under the Board's order the street grades are changed in some cases for a distance of nearly 500 feet outside the right of way, it is practically certain that the property damage will be much in excess of this preliminary estimate.

Moreover, in a work of this magnitude there are bound to be many unforeseen emergencies and difficulties; and, extending as it does over a period of several years, there will probably be a very considerable variation in the cost of labor and material—which is constantly on the upward trend. Under such circumstances, the statement that the work will cost the prosecutor approximately $3,000,000 is very conservative.

Counsel for defendants may say that there should be deducted from the estimates an allowance of 10 per cent., which is chargeable against the street railway company. What that amount may be is problematical. The statute says; "The Board may order not exceeding 10 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." It is impossible to determine how this language will finally be construed, or what proportion of the expense may be said to be "directly chargeable" to each of the three crossings used by the street railway, and it is equally impossible to determine at this time whether the allowance is to be based upon the cost of the entire work or upon the cost of such part of the work as may be at and immediately adjacent to each crossing, or whether this amount will be determined upon some other basis.

Counsel may also say that the company will save about $14,000 a year, which is now pays for protection of the crossings in question. It is true that if the crossings are eliminated it will not be necessary to maintain crossing gates and watchmen, but it is a very violent assumption that by reason thereof the company will save the amount which it now pays for such purposes. This suggestion overlooks the fact that the company will be under heavy charges for maintenance and renewal of

bridges and other parts of the proposed elevated structure, together with whatever expenses that may be legally chargeable to it for the maintenance of streets and sidewalks on its right of way underneath the bridges. Any such saving will in all probability be largely exceeded by these charges.

The private properties that may be affected by the proposed changes in the grades of the streets and the railroad tracks, covering an area of about 400 feet on each side of the railroad, are valued at nearly $10,000,000, as shown by the testimony of the Chief Clerk of the Tax Receiver (Vol. I., p. 120; Exhibit P. 42, Vol. II., pp. 864-904). A compilation of these valuations taken from the eighty-five separate sheets giving the details thereof, and included in said Exhibit P. 42, shows the total of these valuations to be as follows (in round figures):

Land	$3,800,000
Buildings	6,000,000
Total	$9,800,000

None of the numerous property owners whose names appear in this exhibit received any notice of the proceedings except in the case of a comparatively few persons or corporations who happened to be the owners of, or otherwise interested in, certain side tracks, and who, as such side track owners, were brought in as parties after the proceedings had been started. When the proceedings were instituted, Ch. 238, Laws of 1914, providing for notice by publication for such time as the Board deems "reasonable," had not been passed. (For copy of this statute see Appendix II.)

Under said Chapter 57, as construed by the Board in the order under review, the entire expense of the change of grade of the above mentioned fifteen crossings, including damages to adja-

cent property, must be paid by the prosecutor, except that at three crossings, to wit, (1) Park avenue and Market street, (2) Broadway, and (3) River street, the Board ordered the Public Service Railway Company, in accordance with said Chapter 57, to pay ten per cent. of said expenses and damages "directly chargeable" to the said three crossings.

After the filing of the report of the Board and before the making of the order under review, the prosecutor filed a petition for *further* hearing, wherein it requested the Board to take further testimony upon certain matters set forth in said petition (Vol. IV., p. 1772). On the same date upon which the order under review was made the Board filed a report refusing to take any further testimony and denying the petition (Vol. IV., p. 1793).

After the order under review was made, the prosecutor, under date of June 15, 1915, filed a petition for *re*-hearing in which it submitted an alternative and much less expensive plan for the elimination of the alleged danger to public safety and the alleged impediment to public travel at the more important of the several highways included in the proceedings.

In support of this petition for re-hearing the prosecutor was permitted to present testimony to the Board (Vol. IV., p. 1885).

Pending the Board's decision on said petition for re-hearing the prosecutor obtained the present writ of certiorari, with stay, as the time limit within which such writ might be allowed, as provided by section 38 of the act concerning public utilities (Chapter 195, Laws of 1911), was about to expire. Thereafter, on July 9, 1915, the Board denied the petition for re-hearing (Vol. IV., p. 1919). The

proceedings thereunder are the subject of the second writ of certiorari allowed on July 22, 1915.

The reasons upon which the prosecutor relies for a reversal of the judgment of the Supreme Court, and of the proceedings of the Board under review will now be considered under the four general headings above stated.

CHAPTER FIRST.

Reasons attacking said order of April 20, 1915, on the ground that it exceeds the jurisdiction conferred upon the Board by the statute under the authority of which the order purports to have been made, i. e., Chapter 57, Laws of 1913.

I.

THE ORDER EXCEEDS THE JURISDICTION CONFERRED UPON THE BOARD BY THE STATUTE UNDER THE AUTHORITY OF WHICH IT PURPORTS TO HAVE BEEN MADE, BECAUSE MORE THAN ONE HIGHWAY GRADE CROSSING WAS DIRECTED TO BE ELIMINATED IN ONE AND THE SAME ORDER.

(Reasons 11, 12,)

For convenience we have printed as part of an Appendix to this brief a copy of Chapter 57 of the Laws of 1913, pursuant to which the order under review purports to have been made. (See Appendix I.) Section I thereof reads 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 the 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."

It will be observed that this section refers to "such crossing" and provides for the substitution therefor of *a* crossing. Other sections of the statute use similar expressions, thus, in Section 2 we find the words "such crossing;" also "the crossing;" Section 5 uses the expression "such crossing."

We submit that the use of such language indicates that it was the intention of the Legislature to have only one crossing considered in any one proceeding. The petition of the City prays for the alteration of 15 entirely separate crossings. True, these various crossings all happen to be located in the city of Paterson (though they are not all of the grade crossings within the city limits on the line of the railroads involved in this proceeding); the streets on which these crossings are located, in some cases but not in all, adjoin one another; in several cases, one crossing is a considerable distance from the next crossing ordered to be altered. Thus, the first crossing beginning in the southerly section of the City included in the petition is Madison Avenue; proceeding in a northerly direction, and passing over six streets (none of which is open across the railroad tracks), for a distance of over half a mile, we come to the next

crossing, known as Straight Street; the next crossing is known as Clay Street, which is about 100 feet from Straight Street; the next street—one block to the north—is Taylor Street, where there is no existing crossing; in the second block we find the next street included in the petition, known as Cedar Street; the next street is Essex Street, where an *undergrade* crossing already exists; one block further to the north we come to the crossing known as Market Street and Park Avenue—the next street in the proceeding—a distance of 1,800 feet from Cedar Street; passing north from Market Street there are several grade crossings in the next successive streets, each distant one block from the other, namely, Ellison Street, Van Houten Street, Broadway, Fair Street and Hamilton Avenue—each crossing being separated from the other by one city block, the width of which varies from about 600 feet between Market Street and Ellison Street, and about 475 feet between Ellison Street and Van Houten Street, to 300 feet between each of the other last named streets.

Leaving Hamilton Avenue and going further to the north we pass seven city blocks, a distance of over 2,000 feet, before coming to the next street involved in this proceeding—the street called Lafayette Street—on the way passing two existing *undergrade* crossings at Governor Street and Fulton Street, respectively.

Beyond Lafayette Street, we come to four other streets, at each of which there is a crossing, and each of which is included in the present proceeding, known respectively as Franklin Street, Keen Street, Warren Street and River Street (the last including also Putnam Street), each crossing being located one block from the crossing immediately to the south thereof.

We submit that by the language used in this statute the Legislature did not intend that proceedings might be taken under which all, or a large proportion, of the grade crossings in a large city could be eliminated in one proceeding.

The Board, in its report of January 11th, 1915, said:

> "It is true that the phrase 'a public highway' is used in the first section of the act, but certainly the legislature never intended thereby to limit the filing of a petition to a single crossing, in cases where the elimination of one crossing would be impracticable and inadvisable.
>
> "In a case like the present, to take such view would be to practically deny all relief, for the reason that the suppression of the grades of many of the crossings involved in this proceeding cannot be satisfactorily accomplished without affecting the other crossings.
>
> "It may be that each crossing must be dealt with and found to require change or alteration, but the whole legislative scheme, as found in the act, negatives the idea that each crossing must be dealt with independent of, and not in connection with, other crossings in the same locality and upon the same line of railroad. The board is of opinion that a separate proceeding is not required by the act for each crossing, and that more than one crossing may be embraced in a petition" (p. 1752, lines 5 to 25).

It is pertinent to inquire what the Board meant by the expression "crossing in the same locality." As shown by the above description of the location of the crossing included in the present order, one of them is over half a mile from the nearest crossing included in the order, and the distance between the most southerly and the most north-

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erly crossing so included is over two miles. If the Board's view is correct, there is no limit to the number of crossings that may be included in one proceeding, unless perhaps it be the limits of any particular municipality, by whose financial body the petition is presented, as required in Section 5—but even this limit would not apply to the elimination of crossings in which the proceedings are instituted by the Board *of its own motion,* as provided in that section. Under the construction of the statute adopted by the Board, a municipality could file a petition as to all crossings within its limits, and the Board could, of its own motion, institute a single proceeding covering every crossing in the State of any one railroad company.

We submit it was not the intention of the Legislature, in passing this statute, to permit the elimination of several or all of the grade crossings of any one railroad to be considered in the same proceeding. If more than one can be thus considered, then, logically, all of them can be included in the one proceeding—in the case of a municipality, all the crossings within the limit of the municipality; in the case of proceedings instituted by the Board under Section 5, then all of the crossings in the State on the line of the particular railroad.

According to the Board's report for 1913 (p. 9,) there are not less than 2,500 grade crossings in the State of New Jersey. According to the testimony of Mr. Brameld, an engineer of long experience in the work of supervising the elimination of grade crossings, the average cost for the elimination of each crossing runs from $30,000 to $50,000—in some cases, as in a city like Buffalo, to a much larger amount, probably $125,000 (p. 287, lines 1 to 5; p. 288, line 20); the average cost is about $55,000 (p. 289, line 30). On this average basis the

total cost of eliminating all the grade crossings in the State of New Jersey would be $137,500,000.

The number of grade crossings on the Erie System alone within the State of New Jersey is 256 (p. 282, lines 10 to 40). On the same average basis the cost to the Erie Railroad of eliminating grade crossings in New Jersey would be $15,180,000. Probably these estimates are under, rather than over the mark as they do not include any allowance for damages to adjacent property. If the Board's decision is correct, that more than one crossing can be included in the same proceeding, why limit the number to 15 as in the present case? There is no logical stopping place between a single crossing and all of the 256 on the Erie lines within the State; but it will hardly be claimed that it was the intention of the Legislature to give the Board power to consider all the crossings in one proceeding. If, under the statute, the Board has no right to consider all the crossings at once, on what theory can it be consistently claimed that it has the right to consider any part of all that is more than one?

It may be said that there is no probability that the prosecutor will be called on to pay the great expense of changing all of its grade crossings within the State of New Jersey, at any time within the near future, if ever. It so happens, however, that there is at the present time another proceeding pending before this same Board involving a grade crossing at Rutherford in which the proceeding was instituted by the Board on its own motion under Section 5 of the statute. The estimated cost of this one crossing is about $300,000. Reports have also been made to the prosecutor that other municipalities have prepared or are preparing petitions for the elimination of grade crossings.

The Board itself in a recent decision declared its policy on this subject, as follows:

> "The board is doing its utmost to extend grade crossing protection, and to bring about the elimination of grade crossings as speedily as possible. It has proceedings pending which tax the energies of its engineers to the utmost, and in the comprehensive scheme for steady and gradual elimination which it has adopted, has other proceedings in view." (Re-N. Y. S. & W. R. R. Co., 38 N. J. L. Journal, issue of Oct., 1915, p. 312 at p. 315).

The fact that in the present case it was not necessary, even in the opinion of the Board, to include *all* of the crossings in one proceeding, is shown by the very order under review, which directs the prosecutor to take up the work of eliminating crossings in four certain sections or divisions—the work on one section beginning immediately after the completion of the work of the preceding section. The testimony also shows, *without dispute,* that it was entirely practicable to eliminate at least some of the 15 crossings involved, without reference to the rest of the crossings. The city's own engineers subdivided the work into sections and asserted that it was practicable to do the work of eliminating the crossings included in any one section without affecting the crossings included in any of the other sections. As an engineering proposition there was no practical necessity whatever to include *all* of the crossings in one petition, proceeding or order, and hence the argument *ab inconvenienti* made by the Board cannot be justified under the particular facts in this case. But whether or not such an argument is sound, that does not affect the question of the construction of the statute.

It may be claimed that under the provisions of Section 9 of An Act Relative to Statutes (4 Comp.

St., p. 4972), the word " highway" as used in the Act of 1913, although importing the singular number, must be understood to include several crossings. That statute has the following proviso:

> "Unless it be otherwise provided, or there shall be something in the statute or context repugnant to such construction."

That there is such a repugnancy in the present statute is obvious. Ordinarily there would not be the slightest relation between the elimination of one grade crossing and the elimination of another, or several others—even though in the same municipality. In the present case, for example, all the engineers agreed that Madison Avenue might be and should be considered by itself; and, in fact, the order, although directing that all of the other crossings be altered by raising the tracks and constructing the highways underneath the tracks, directs that in case of Madison Avenue the tracks remain at practically the same level and the street be carried *over* the tracks on a viaduct. Under the Board's construction of this statute, the Board has not only ordered the elimination of crossings, some of which at least have not the slightest relation to the other crossings, but has actually ordered two streets to be closed, and has ordered two other undergrade crossings *at other streets* to be substituted for the streets thus closed. Of course this last is attempted to be justified under the provision of the statute relating to the vacating and opening of new highways (as to which see Point IV), but in this connection we call attention to the far-reaching result which in the present case has followed a construction of the statute that more than one crossing may be included in the same proceeding—a result which, if sustainable under the statute, gives to the Board of Public Utility Commissioners un-

limited power over streets that happen to intersect railroad tracks; and that, too, of any restrictions imposed by municipal charters of other laws relating to the control and regulation of public streets.

The power of an administrative body such as this must be found in the statute by which it is created and under which it attempts to exercise its authority. As was said by the Supreme Court of the State of Maine, in the case of *City of Augusta* v. *Lewiston, etc., Ry. Co.*, 95 Atl. Rep. 267, such a board "has just the kind and extent of jurisdiction which the statute gives, and no more."

We quote from the opinion of the Attorney-General to the Board of Railroad Commissioners, dated September 10, 1907, rendered to that Board in response to an inquiry as to the extent of its power to require the abolition of grade crossings under the then statute, as follows:

> "Of course your powers must be found altogether in Chapter 197 of the Laws of 1907 creating your board. It is elementary that a commission of this character has no inherent power beyond or outside of the statute creating it and defining its duties, so that a determination of this question involves purely a construction of the statute. One is not permitted, in reaching a conclusion upon a question of this character, to read into the act matters which one might think could properly have been inserted therein, but which the legislature in its wisdom saw fit to omit. It is not a question as to what the law ought to be but what it is." (See Annual Report of Board of Railroad Commissioners for the year 1907, p. 371.)

In the Annual Report of the Board of Public Utility Commissioners for 1914 the Board says;

"The Board can exercise such powers only as the Legislature delegates to it" (p. 21 of Report.)

In *Public Service Electric Company* v. *Board of Public Utility Commissioners and the City of Plainfield,* 87 N. J. L. 128 (affirmed 88 N. J. L. 603,) this court set aside an order of the Board which directed the electric company to conform to the duties imposed upon it relative to furnishing free light to certain municipal buildings, by virtue of a contract with the city. This conclusion was reached on the ground, among others, that the Board by the statute creating it had power to enforce certain legal obligations of the electric company but "the language is not broad enough to confer upon the Board the power to enforce specific performance of contracts."

The inference from this opinion is that the Board has only those powers which are conferred upon it either expressly or by necessary implication.

We quote from another case as follows:

> "The public service company is entitled to the benefit of the ordinary rules that require penal and criminal statutes to be construed strictly."
>
> *Public Service Gas Co.* v. *Board,* 84 N. J. L. 463, at page 468.

The power of the Board we submit is limited by the statute and such statute must be strictly construed. We quote as follows from Volume 2, Elliott on Railroads, Section 684 (Second Edition):

> "The general rule is that the jurisdiction of a statutory tribunal will not be extended by implication except in cases where the implication necessarily arises from a consideration of the objects or language of the statute. The rule that, where new rights are created and new remedies prescribed, the construction of the statute creating such rights

and prescribing such remedies shall be strict, is an influential one."

The author cites the following authorities in support of this proposition:

Beekman Street, Matter of, 20 Johns. (N. Y.), 269;
Thatcher v. *Powell,* 6 Wheat. (U. S.), 119;
Kansas City etc., R. Co. v. *Campbell,* 62 Mo. 585;
Shivers v. *Wilson,* 5 Harr. & John. (Md.) 130; 9 Am. Dec. 497;
Ryan v. *Commonwealth,* 80 Va. 385;
Beebe v. *Schneidt,* 13 Ohio St. 406;
Keitler v. *State,* 4 Greene (Iowa) 291;
School Inspectors v. *People,* 20 Ill. 525;
Pringle v. *Carter,* 1 Hill L. (S. Car.) 53;
Thompson v. *Cox,* 8 Jones L. (N. Car.) 311;
Traders etc., Un. v. *Philadelphia etc., R.,* 1 Int. Com. Rep. 371;
Sprigg v. *Baltimore etc., R. Co.,* 8 Int. Com. Rep. 443;
Transportation of Fruit, Re, 10 Int. Com. Rep. 360;
Keller v. *Corpus Christi,* 50 Texas 614; 32 Am. R. 613;
Willard v. *Fralick,* 31 Mich. 431;
Dent v. *Ross,* 52 Miss. 188;
Bloom v. *Burdick,* 1 Hill (N. Y.) 130; 37 Am. Dec. 299;
Staples v. *Fox,* 45 Miss. 667;
Anness v. *Providence,* 13 R. I. 17;
Walker v. *Burt,* 57 Ga. 20;
Monk v. *Jenkins,* 2 Hill Ch. (S. Car.) 9.

The author then calls special attention to the case of *Board* v. *Oregon, etc., R. Co.,* 17 Ore. 65; 19 Pac. 702; 2 L. R. A. 195. We quote therefrom as follows:

"The first question arising would be: Of what contentions between the railroad company and such persons, firms, etc., has it jurisdiction? The answer to that question can-

not be left to speculation. The jurisdiction of such commissions is not given by implication. Commissions of that character are mere creatures of the statute, and possess no power except what the statute expressly confers upon them. Again, if the board had jurisdiction to investigate complaints for overcharges on freight, its order to refund the excess could not be enforced in the manner provided in section 15 of the act. The recovery of money unjustly exacted in such cases is a common-law remedy; and the party against whom the claim is made, whether a natural person or a corporation, has the right to a trial by jury before its repayment can be enforced. A summary remedy, of the character of the one provided for, cannot be used to enforce a claim for damages arising *ex contractu* or *ex delicto,* though it might be employed to compel the performance of a specific duty necessary to the administration of public affairs."

* * * * * * *

"It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which and the scope within which it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the legislative branch of the government to exact that when it creates a commission and clothes it with

important functions, it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent."

In *Bessette* v. *Goddard,* 88 Atl. 1 the Supreme Court of Vermont said:

"Such being the character of our Commission, it must be classed with other bodies exercising special and limited statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of their jurisdiction, but the facts necessary to confer it must affirmatively appear, and the exercise of jurisdiction does not imply a previous ascertainment of those facts. Kent v. Village of Enosburg Falls, 71 Vt. 255, 44 Atl. 343; Blanchard v. City of Barre, 77 Vt. 420, 60 Atl. 970; Barber v. Vinton, 82 Vt. 327, 73 Atl. 881. And although the commission is given an extensive jurisdiction in respect of eliminating highway grade crossings, yet it can do in that behalf only what is reasonably necessary to be done in order to accomplish the elimination, or what may fairly be regarded as incident thereto. Bacon v. Boston & Maine R. R. Co., 83 Vt. 421, 441, 76 Atl. 128. So in Davis v. County Commissioners, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750, under a statute much like ours the court said that, though it was not easy to determine within what limits a change of this kind must be confined, yet that it might be said in general terms that, under the guise of doing away with a grade crossing, the authority of the commissioners would not extend further than to do what was reasonably necessary to accomplish the purpose, in view of the situation of the ground and other circumstances."

The foregoing case was followed by the Supreme Court of Vermont in *Sayres* v. *Montpelier R. R. Co.*, 97 Atl. 660, where the court said:

> "* * * the authority of the commission to change the location of highways goes no further than to order such changes as are necessary and fairly incidental to the purpose of adapting railroads and public highways to each other in such a manner as best to promote the safety and convenience of the traveling public."

In the Supreme Court counsel for defendants argued that with the exception of Madison Avenue it was impossible to plan for any one crossing without considering the others. If by this, it was meant that it would be convenient to consider all of the crossings in one general plan, we have no criticism to make of such argument. But if this is to be understood as meaning that it was "impossible" to plan for one crossing without considering the others, then we cannot concede it to be correct. We have already explained the location of the several streets with respect to one another. A change of grade in the railroad at River Street does not 'necessarily' involve Broadway. A change at Broadway would involve Van Houten and Ellison Streets and probably also Market Street (although whether the Board under this statute has the right to consider more than one crossing in the same proceeding is an entirely different question); but the distance from River Street to Broadway is over 3,700 feet. Counsel also argued that changes at Market Street involved changes at Cedar Street and Clay Street; but Market Street is about 1,800 feet from Cedar Street. It is no doubt very convenient to consider all of the crossings together; for that matter, it would be equally convenient, and perhaps more so, to include several other crossings in Paterson, such as Fifth Avenue, the first street to the north of River Street that

crosses the railroad tracks, and Gould Avenue, the first street to the south of Madison Avenue, that crosses the tracks. The argument that it is "impossible" to consider River Street without reference to Broadway; or Market Street, without reference to Cedar Street, is not justified by the engineering or other testimony. The fact that the construction as ordered by the Board can be done in sections, and that the work on each section may proceed without reference to any of the other sections, is shown by the order itself, now under review, which directs that the work be done according to sections (section A covering Market Street to Lafayette Street; section B covering Keen, Warren and River Streets; section C covering Straight Street to Market Street, and section D covering Madison Avenue), and does not require the work on more than any one section to proceed at the same time. The order fixes a certain limit within which section A is to be begun and finished, and a certain further limit within which section B is to be begun and finished, and so also as to sections C and D.

In the Supreme Court counsel also argued that a proceeding under the Grade Crossing statute is not limited to a single crossing because, they said such a construction "would create a situation wholly impossible from a practical point of view, since the elimination of the several crossings must, as is conceded by all, proceed under a general plan." It is not "conceded" by anybody, except defendants, that the elimination of all the crossings involved in this case must proceed under a general plan. Even the Board itself in its order has permitted the work to be done in sections. This is the best possible proof that some, at least, of the several crossings may be considered independently, each from the other. If the Legislature intended

that the Board should have the right to consider more than one crossing in any one proceeding it might easily have said so. It has not said so.

It may have been wise for the Legislature to have said so, but that does not alter the fact that it has not said so. As was said by this Court in the case of *Island Heights, etc. Company* v. *Brooks & Brooks,* 88 N. J. L. 613:

> "It is not a question of what would have been wise for the legislature to have enacted with which the courts are concerned, but what is expressed in the statute; and when the terms used therein clearly express the legislative intent, nothing remains to the courts except the enforcement of that intent as expressed in the enactment."

In discussing this point the Supreme Court said (italics ours):

> "If a separate plan of alteration of each crossing and a separate proceeding is requisite, it would make it wholly impossible to alter *any* of the crossings from a practical point of view, since the alteration of the several crossings *must,* as is *conceded,* proceed under a general plan." (p. 2269, l. 18).

The Supreme Court further said:

> "Several crossings may be considered in one proceeding, when so related to one another; that the consideration of the one *necessarily* involves the consideration of the other, as a practical engineering problem." (p. 2270, l. 30).

Even if this statement were correct in fact, it would not be conclusive or even helpful on the question of the construction of the statute; such argument might be persuasive to the Legislature in considering what provisions might reasonably be included in a grade crossing statute, but it has no bearing upon the meaning of the statute that

was actually passed. But the Supreme Court was mistaken in assuming that it would be "impossible" to alter any of the crossings since their alteration must proceed under a general plan. It never has been and is not now "conceded" that such alteration "must" proceed under a general plan. On the contrary, the evidence shows that while it might be convenient to consider the several crossings under one general plan, it is equally clear from the evidence that some one or more of the several crossings ordered to be altered not only can be, but as a matter of fact were considered separately from the other crossings. This is best illustrated by the crossing at Madison Avenue, which is over a half mile from the next crossing (Straight Street) which is included in the order. It is true that changes in some of the crossings "necessarily" involve changes in others; for example, a change at Broadway would involve Van Houten and Ellison Streets, but it is impossible to see how a change at Broadway "necessarily" involves any change whatever at River Street, which is over 3,700 feet distant. It is equally impossible to see how a change at Market Street "necessarily" involves a change at Cedar Street, a distance of 1,800 feet. If the rule of convenience is to control, it would be even more convenient to include *all* of the crossings in the City of Paterson, such as Crooks Avenue, Gould Avenue, Fifth Avenue, as well as a number of other streets that extend to the railroad right of way, but are not physically open over the same at the present time.

The evidence shows that there is no "practical engineering" difficulty whatever about considering Madison Avenue, for example, entirely separate from any of the other crossings; and indeed, the very order under review makes a sharp distinction between that crossing and all of the other crossings,

in that at Madison Avenue the highway is required to be carried over the railroad tracks, while at all of the other crossings the highways are carried *under* the tracks. The very fact that the Board directed the work to be done in the sequence of certain sections, without requiring the work on the several sections to proceed at the same time, also shows that there is no "practical engineering problem" which could not be readily solved by a consideration of some one or more or the several crossings separately from the others.

But we submit that the construction of the statute should not be controlled by "engineering problems" nor by matters that might be thought to be possible or convenient. If the statute is defective in this respect then the obvious remedy is for the Legislature to amend the statute rather than for the court to legislate upon the subject-matter.

It was said by the Supreme Court that the prosecutor did not point out in what way fifteen separate petitions with fifteen separate hearings would be more "advantageous" to it. This assumes that if there were fifteen separate petitions it would be necessary to have fifteen separate hearings. But such assumption is erroneous; if the statute does require fifteen separate petitions, it would be a simple matter for the Board to order the petitions consolidated into one hearing—or at least to order a consoldiation of such of the several petitions as "necessarily" related to one another. But here again the question is; not whether separate petitions and separate hearings are more or less "advantageous," but, what did the Legislature mean by the language used in the statute? If the question is to depend upon what is "advantageous" or otherwise, the prosecutor would prefer to have the Board consider all of its grade crossings within the State of New Jersey—or for that matter, on its

entire system between New York and Chicago. There are many grade crossings on this system both within and without the State of New Jersey which are quite as dangerous as the most dangeruse of the several crossings in the city of Paterson—indeed, it may fairly be said that there are many crossings both within and without the State of New Jersey which are far more dangerous than many, if not most, of the crossings in the city of Paterson; and if the prosecutor was to have the matter considered solely from the standpoint of what was "advantageous," the result would be that many of the crossings outside the city of Paterson would be altered before those within the city.

The Supreme Court said that the Grade Crossing Act of 1913 is "remedial" and should therefore "receive a liberal, rather than a narrow, construction," citing several cases. The first case cited is *Alton etc. R. R. Co.* v. *Vandalia etc. R. R. Co.*, 268 Ill. 75, 108 N. E. 800. This was a controversy between two railroad companies, wherein the Alton Company was seeking to obtain the right to cross the tracks of the Vandalia Company at grade. The right was granted by the Commission, and on the appeal of the Vandalia Company the Commission's order was affirmed. The case has no bearing upon the question of the proper construction of a statute permitting a Board or Commission to order the elimination of a highway grade crossing.

The next case cited in the Supreme Court opinion is *Warner* v. *King*, 267 Ill. 87, 107 N. E. 837. This involved a construction of the meaning of a statute providing for the adoption of children and has nothing to do with a statute like the one now under consideration.

The opinion of the Supreme Court then cites the cases of *Read* v. *City of Camden*, 54 N. J. L.

373, and *Morris Dredging Co.* v. *Jersey City,* 64 N. J. L. 590. The statute in question in those cases authorized the making of contracts between cities and railroad companies for the separation of grades. The quoted remarks of Judge Dixon in the *Read* case had reference to the construction of the power given by that statute to the municipal authorities "to vacate any street." It was held that this power included any *part* of a street "when the vacation of such part aids in attaining the desired result." It by no means follows that a statute like the Grade Crossing Act of 1913 should receive a similar construction.

In the *Morris Dredging* case the question under consideration was what was the meaning of the word "enter" as used in the statute of March 19, 1874, as amended March 9, 1893 (Gen. Stat. 2689, § 221). It was held that the statute was applicable to a railroad which was wholly within the limits of a single municipality.

But when we are dealing with a statute which by *vis major* requires a railroad, at its sole expense (subject to certain small deductions), to eliminate crossings without regard to cost and without regard to the provisions of municipal charters, whenever and however a statutory tribunal specially created, may order, an entirely different question is presented.

The only ground upon which the Grade Crossing statute of 1913 can be sustained (if it can be sustained in any particular at all) is that it is an exercise of the police power. But the exercise of that power depends upon the necessities of the case. Unless stern necessity is shown, the power does not exist—neither can it operate beyond the requirements of such necessity.

The statute of 1874 which was in question in the *Read* case was also considered in *Clark* v. *Eliza-*

beth, 71 N. J. L. 568, wherein it was held that the statute did not supersede the provisions of the city charter providing for the manner in which the city authorities should legislate with respect to the change of grade of streets. The *Read* case was approved in so far as it held that proceedings under the Act of 1874 should be sustained if it appears that in the course of such proceedings compensation was made to land owners for the injury done to them by the change of grade. The *Clark* case indicates that the Act of 1874 must be construed to be limited expressly to the authority thereby conferred—and that, too, notwithstanding the fact that the Act of 1874 gave general authority to do all such acts as might be necessary and proper to effectually carry out the contracts made between cities and railroads pursuant thereto. The Grade Crossing Act of 1913 has no such general provision.

In addition to the cases hereinbefore cited, the following cases hold that the power of a Board or Commission to act under a grade crossing statute is limited by the express language of the statute:

In the case of *Appeal of Connecticut Company,* 94 Atl. 972, the Court said, in referring to the limitations upon the power of the Public Utility Commission of the State of Connecticut:

> "It may not act illegally, or in excess of its powers, or arbitrarily, else the court will set aside its order."

In the case of *Re New York Central & H. R. R. Co.* 200 N. Y. 121, 93 N. E. 155, held that the words "street, avenue, or highway," as used in a statue providing for the elimination of grade crossings, import ways of a public character only, and had no application to private ways.

In *Guenther* v. *Patch,* 135 N. Y. S. 629, 76 Misc. Rep. 649, held that the enumeration of certain street

crossings in the statute relating to the City of Buffalo limited the authority of the Commissioners to the crossings mentioned and to such other crossings as should necessarily be affected by the plan; and that the mention of a crossing at Niagara street did not authorize the elimination of a crossing at Dearborn street where there was no necessary, and not merely convenient, connection between the elimination of the two crossings.

In *State* v. *Chicago etc. R. Co.,* 140 N. W. 147, 1136, held that the municipality could not compel the railroad to construct a viaduct over its property, occupied by the station and switch tracks, at a point where there was no public way or street.

In the case of *Re City of Detroit,* 156 Mich. 9, 120 N. W. 25, a petition was filed by the city for the separation of the grades of *three* streets and the tracks of certain railroads. On objection made by a property owner the petition was dismissed by the trial court. The city appealed and the action of the trial court was affirmed. This ruling is so much in point on the present question that we quote the opinion in full (italics ours):

> "The petition is filed by the city of Detroit under the provisions of Comp. Laws, c 102, which is entitled 'An Act to provide separate grades for railroads and public highways and streets where railroads intersect such highways and streets.' In the opening section of the statute, and in succeeding sections, *the words used import a separate proceeding for each street and highway.* The city seeks to have one jury, in one proceeding, determine the necessity for a change of the grades of three streets and to ascertain the resulting damage to all property abutting upon those streets and affected by the change. An agreement, to which the city and various railroad companies and a street car company are parties, has been made for a change of grade on streets

crossed by the tracks of such railroad companies, according to a general plan, for the payment of the expenses of the improvements, and for an apportionment or division of the cost, including the damages paid to abutting owners, among the parties to the agreement. The statute provides that the question for the jury shall be the necessity of the change of grade in accordance with this plan. *The three streets mentioned in the petition appear to be so situated with reference to each other that, if a change of grade is made in one of them, in accordance with the plans adopted, a similar change must be made in the others.* Therefore, if a jury determines that the change in one of the streets is necessary, it would, upon the same facts, find a similar change in the others to be necessary. The required ordinances were passed by the common council at the same time. Indeed, it is said in the brief for the city that the necessary work is in progress on the three streets. Under the motion of a property owner, who was affected only by the separation of grades on one of the streets, the recorder dismissed the petition, and discharged the jury which had been summoned.

"It is possible, that, under the circumstances disclosed, convenience and the despatch of public business will be served by pursuing the course proposed by the petitioner. If three streets may be joined in one proceeding, there would be no legal objection to joining a larger number, and unless such a course may be pursued, at the suggestion of a petitioner, in every case the question of whether it may be pursued in a particular case must be a question of judgment—of fact. The statute is general, applicable to the separation of grades in other cities and in the country. A construction of the statute such as petitioner asks for is *clearly not the necessary, and we think is not the reasonable one.*

"The ruling and order of the recorder is affirmed, with costs to defendants in certiorari."

Our argument on this point may be summed up in a sentence from the opinion in the case of *Board v. Oregon etc. R. Co.,* 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195, as follows:

"Commissions of that character are mere creatures of the statute, and possess no power except what the statute expressly confers upon them."

II.

THE ORDER IS INVALID IN SO FAR AS IT REQUIRES CHANGES IN THE CONSTRUCTION AND LOCATION OF THE STATION BUILDINGS AND FACILITIES OF THE PROSECUTOR AT OR NEAR MARKET STREET, KNOWN AS THE MARKET STREET STATION, AND AT OR NEAR RIVER STREET, KNOWN AS THE RIVER STREET STATION, FOR THE FOLLOWING REASONS:

(a) The petition of the Board of Finance of the City of Paterson did not include any prayer for said changes; and even if it did, the evidence does not show that the existing station buildings and facilities are not safe, adequate or proper; and even if it did, no hearing has been given to the prosecutor on the question as to whether or not the same are safe, adequate or proper, or on the question whether in order to have the same safe, adequate and proper, it is necessary or reasonable to make the changes in said station buildings and facilities as specified in said order.

(b) The evidence does not show that said changes in said station buildings and facilities are reasonably necessary or required for

the elimination of the several highway grade crossings.

(*c*) *Said order is also invalid in so far as it relates to the Market street station for the further reason that it requires the prosecutor to take, occupy and use part of the property of another railroad company, to wit, the New York, Susquehanna and Western Railroad Company.*

SAID ORDER IS ALSO INVALID IN SO FAR AS IT RELATES TO THE RIVER STREET STATION FOR THE FURTHER REASONS:

(1) *Because it requires the prosecutor to build and maintain a sidewalk in the public street and to take, occupy and use part of the public street for the purpose of the construction of said station;*

(2) *Because it requires the prosecutor to devote part of its right of way to the use of the public in the form of a sidewalk thereon.*

(Reasons 47, 48, 49 and 50).

The present Market Street station of the prosecutor is located on the southerly side of Market Street and on the westerly side of the tracks with a platform on each side of the tracks. The order directs the prosecutor to reconstruct the railroad and to perform all other work required "according to and as shown on the said plan and profile." Another part of the order refers to the plan and profile as annexed to and made part of the order. According to this, the present Market Street station is to be destroyed, and a new station is to be built at a new location a short distances northerly of Market Street—still on the westerly side of the tracks—with elevated platforms on each side of the railroad tracks. This part of the order was based upon the testimony of the city engineer that there

would be a "difficulty" in maintaining the depot at its present location on account of the fact that no platform could be obtained on the east side of the track. The city engineer said:

> "The street is only twenty-five feet wide, and there is no possible means of having a platform on each side of the track. It would mean that all the passengers for westbound trains would have to walk across the track, walk across the track of the eastbound train to get to the train" (p. 493, ll. 20-35.)

It was suggested that such a relocation of the prosecutor's station might be advantageous because it would permit of a combination station with the present station of another company, namely, New York, Susquehanna and Western Railroad Company (p. 494, 11. 1-10.) The maps on which are indicated the present location of the station show that at the present time passengers for westbound trains walk across the eastbound track to get to such trains. Possibly it would be a desirable improvement to put a railing between the two tracks (as suggested by the city engineer—p. 493, 1. 40; and as shown on the plan attached to the order), but the question involved at this time is whether the Board has any legal right in the present proceeding to include in its order a command to the prosecutor to destroy its present station facilities and to build another station and other platforms in another location.

The same question is involved in that part of the Board's order which requires the destruction of the present station building at River Street and the construction of another station at a new location. According to the city's engineer, "We simply raise the depot up and put a platform on each side of the tracks" (p. 497, l. 18). The map shows he is mistaken about this, as the

depot building is shifted from the easterly side to the westerly side of the tracks.

Whatever may be said as to the validity of the rest of the order, we submit that those parts thereof which require the destruction of the present station facilities and the relocation and reconstruction thereof at Market street and River street are clearly beyond the power of the Board—at least in the present proceeding.

(*a*) The petition of the City did not include any prayer for said changes. It was limited to a prayer for the alteration of certain grade crossings. Even if the petition be considered as amended so as to embrace the question of whether or not the two stations and platforms should be destroyed and reconstructed in different locations, there has been no hearing whatever on the point as to whether the existing station facilities at these points are safe, adequate or proper.

Section 17 (*b*) of the act concerning public utilities gives the Board power *after hearing, upon notice* to require every public utility "to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so." No complaint has been made and no evidence has been offered in the present proceedings to show that the present station facilities at either Market street or River street are not safe, adequate and proper. No hearing has been given to the prosecutor on that question nor has the prosecutor received any notice that such question was to be passed on by the Board in this proceeding.

The first information that the prosecutor had that the Board was seriously contemplating changes in the station was *after* the order under review had been made. Thereupon the prosecutor took

testimony to show the effect of such order upon the present station facilities and the cost of changing same. The testimony on this subject was given by Mr. Brameld. His testimony shows that even if the tracks were elevated, as required by the order the *present* Market street station could still be used without changing its location to the other side of Market street; there is room enough between the tracks and the street known as Ramapo avenue for a platform, and even if there was not sufficient room for that purpose the platform could overhang Ramapo avenue, as the proposed construction would be high enough to enable vehicles to go under the overhang, and stairways could be built from such a platform to the street; and finally, Ramapo avenue, or a part thereof, could be vacated by the city in order to allow room for the platform on the easterly side; and if that were impracticable, then the tracks themselves could be moved towards the present station building and more platform room thus obtained (p. 1952.)

It may further be suggested that if none of these plans was available, the platforms, if elevated to correspond to the elevation of the tracks, could be constructed in exactly the same relative location as they are now. No one has made any complaint of the present construction or offered any evidence to show that the present arrangement of the station and the station platforms and tracks does not furnish safe, adequate and proper service.

The testimony of Mr. Brameld as well as the maps, also show that the present Market Street station in its present location could be modified so as to conform to the proposed reconstruction of the tracks by the obvious method of erecting elevated platforms corresponding to the new track level, with canopies to protect passengers waiting for the trains, and with stairways up and down

from the present building. The cost of building such stairways and changing the roof of the present building would only be between $6,000 and $7,000 as compared with a cost of $116,680—the amount of the *increased* cost due to the reconstruction of a new station at the proposed location. (See Exhibit Erie 17, Vol. IV, p. 2246.) In addition to this increased cost the prosecutor loses the value of the present station building and facilities at Market street. A fair estimate thereof is $21,000 (p. 1953.) If we add this amount to the increased cost of changing the location and deduct therefrom the amount that would have been spent for stairways, etc., if the station is at its present location, it will be seen that by this part of the order the prosecutor sustains a loss of about $130,000—perhaps a small amount compared with the millions which the Board calmly assumed the prosecutor can afford to pay, but nevertheless, an item large enough to justify serious consideration as to whether or not the order in this respect is valid.

The proposed scheme at River street is equally invalid, although not quite so outrageous so far as concerns the cost and the loss to the prosecutor. The plan requires the destruction of the existing building on the easterly side of the tracks and the construction of a new station on the westerly side of the tracks with platforms and stairways on each side and a railing between the tracks. The present station could be adapted to the proposed elevation of the tracks at a cost of not over $1,500, whereas the cost of relocating and rebuilding the station and platforms is $24,265 (Exhibit Erie 19, Vol. IV., p. 2247.) The present value of the River street station, according to the tax reports, is $1,180 (p. 1958.) This part of the order therefore imposes upon the prosecutor an extra cost and

loss amounting to the sum of about $24,000 over and above what it would cost to adapt the present station to the proposed track elevation—an item which is comparatively small, but which is an excellent illustration of how easy it is to spend other people's money without any reasonable necessity therefor.

(*b*) Said changes in the stations at Market street and River street are not reasonably necessary or required for the elimination of the grade crossings. Not even the city engineer claimed that the changes in these two stations were an essential part of the city's plan for the elimination of grade crossings. We do not concede that either change is worthy of serious consideration from the standpoint of safety or operating efficiency, but however that may be, the power of the Board is strictly limited and cannot legally include matters which are not reasonably essential for the carrying out of the general plan of eliminating crossings. A mere examination of the maps will show that there is no necessity whatever for destroying either of the present stations or for relocating the same so far as affects the general plan of elimination. The testimony of Mr. Brameld also shows the same fact (p. 1952).

The same principle applies as in the case of *Bacon* v. *Boston etc. R. R.*, 83 Vt. 121, 76 Atl. 128 where it was held that the Public Service Commission of that State, when it ordered the abolition of a grade crossing and the construction of a subway at the approach to a station, could not require the removal of a number of tracks and the construction of an underground baggage room with an elevator unless such removal and construction were "necessarily incident" to the work which the Commission had the legal right to order.

(*c*) So far as affects these two stations the order is also invalid for the following additional reasons:

In the case of the relocation of the Market street station the prosecutor is ordered to take, keep and use part of the property of another railroad company, to wit, N. Y. S. & W. R. R. Company. The plan shows that the proposed new station platform and the stairways leading thereto on the east side of the tracks encroach upon and occupy property of N. Y. S. & W. R. R. Company. This property has been owned by that company or its predecessors since the year 1882. It is used for purposes of a station and the approaches thereto. One of the important approaches is by means of a street and sidewalk leading in a northerly direction on the east side of the right of way over which the Erie trains run. The title to this street and sidewalk is in the N. Y. S. & W. R. R. Company, subject to the terms of an agreement between that company and Henry B. Crosby, dated November 1, 1884, whereby the railroad company granted to Crosby the right to lay and maintain for ninety-nine years a flag sidewalk ten feet wide along the northerly line of certain property conveyed by the railroad, and a sidewalk six feet wide along the westerly line of this property from the nothwest corner of his property to Willis street (now Park avenue). The company also agreed to keep open a roadway during the period of the agreement twenty-five feet wide around the outside of the sidewalk for the use of both parties, their patrons and customers. Neither of the sidewalks referred to in this agreement (as will be seen by a comparison of the agreement with deeds—and by reference to map, Exhibit Erie-1) is the sidewalk on the easterly side of the right of way of the Paterson & Ramapo R. R. Co., so that the title to that sidewalk remains in the

N. Y. S. & W. R. R. Company under the original deed to that company of March 10, 1882. It appears without dispute that this sidewalk and the roadway leading from Park avenue northerly and thence easterly are used as approaches to the Susquehanna freight and passenger stations.

See testimony of Smith, station agent at Paterson City station of Susquehanna Company (p. 1934 *et seq*).

The order of the Board directs the prosecutor to appropriate for the purpose of this new station the sidewalk and roadway of the Susquehanna Company to the extent indicated on the plan attached to the order. This shows that the new platform and stairways thereto to be constructed on the easterly side of the Paterson & Ramapo R. R. right of way project over and occupy part of the sidewalk already used as a means of access to the Susquehanna station. If it be claimed that the present sidewalk (even though it is owned by another company) might be relocated so as to occupy part of the present roadway, still even under such an arrangement the part of the roadway thus transformed into a sidewalk would have to be abandoned as a means of access to the passenger and freight stations by vehicular traffic, so that from any point of view a certain portion of the property of the Susquehanna Company would have to be appropriated for the purpose of constructing the new Erie platform and approaches thereto. If it be claimed that the Erie Company could acquire by condemnation such part of the Susquehanna property as might be necessary for the purpose of carrying out the Board's plan, the answer is that that property is already devoted to another public use and therefore is not subject to condemnation.

New York etc. R. Co. v. *City of Paterson*, 61 N. J. L. 408.

At River street the Board's plan requires the prosecutor to build and maintain a sidewalk in a public street and to take and use part of a public street for the purpose of the construction of the new station and platforms. It also requires the prosecutor to devote part of the right of way to the use of the public in the form of a sidewalk thereon across the right of way.

Possibly the prosecutor, under the duty to construct and maintain crossings, might be compelled to build a sidewalk across the right of way *provided* a street were laid out at that point. But the city has taken no proceeding to change the location or lines of the streets at the point where the proposed new sidewalk is to be constructed, nor has it taken any steps either to authorize or to compel the prosecutor to construct a sidewalk at that point, nor has it authorized the prosecutor to take part of the existing streets for the purpose of constructing and maintaining sidewalks thereon—and it is at least doubtful whether the city could give the prosecutor any such authority; at least no such authority could be given without appropriate proceeding by the municipality as required by the city charter and the general law of the State.

With reference to the Market street station counsel for defendants may argue that this part of the Board's order was justified by the testimony of the city engineer to the effect that no platform could be obtained on the east side of the track. (Vol. I, p. 493.)

An examination of the maps (without reference to the testimony by Mr. Brameld subsequently taken) shows that the city engineer was obviously in error in this respect, as is demonstrated by the fact that *at the present time* there is a station platform on the east side of the tracks. If the tracks were raised no reason has been suggested why the

station platform should not be correspondingly raised—and this could be done without encroaching upon Ramapo avenue any more than the present platform on the east side encroaches upon that street—which is, not at all. Under the present arrangement of the tracks and the Market street station, passengers now walk across the eastbound track in order to board westbound trains, but there is nothing unusual or extraordinary about such an arrangement; yet, according to the cited testimony of the city engineer, apparently the only reason why he thought there was "difficulty" in maintaining the present station at the existing location was because passengers for westbound trains would have to walk across the eastbound track in order to reach such trains.

If, on the testimony of the city engineer, there was any real doubt about the feasibility of maintaining the Market street station in its present location it was fully cleared up by the testimony of Mr. Brameld, wherein he stated (what would seem to be an obvious physical fact without any formal testimony) that in order to conform to the proposed elevation of the tracks, the present Market street station could be modified (remaining in its present location) by erecting elevated platforms, with stairways leading up and down thereto.

Counsel may argue that in order to maintain the Market street station in its present location it might be necessary to vacate Ramapo avenue. Suppose it were necessary to do so; the city professes itself willing to do whatever is necesssary on its part to carry out the terms of the order. If the vacation of Ramapo avenue results in substantial property damage that is no concern of the city, because the city does not have to pay such damage. It is not, however, necessary to vacate Ramapo avenue, or any part thereof; any one of three methods of

construction, as proposed by Mr. Brameld, would obviate such necessity—first, let the existing platforms be raised and remain in the same relative location with respect to the tracks as they now are; second, if the elevated platform on the easterly side were widened it could overhang the street line without interfering with the use of the street; and, third, let the tracks be moved in a westerly direction toward the station building and thus allow more room on the easterly side for the platform on that side, if more room is necessary than now exists.

Counsel may also argue that the taking of property of the New York, Susquehanna and Western Railroad Company for the proposed relocation of the Market street station does not invalidate the order, because that railroad is a part of the Erie system. It is true that the relations between the two companies are friendly, but it does not follow from that fact that one company has the right to take the property of the other without compensation. Morevoer, the New York, Susquehanna and Western Railroad is not a part of the Erie system, although the latter owns a certain proportion of the former's stock.

With reference to the River street station, counsel may argue that no change of location at this station is ordered. If that is so, the prosecutor would be interested to know what is meant by the word "depot" which appears on Sheet No. 5 of the plan attached to and forming part of the order under review. This is indicated on the *opposite* side of the track from the present location of the station. True, the engineer, Mr. Ryon, said "We simply raise the depot up and put a platform on each side of the tracks." If such was the intention, it is strange that some explanation was not offered as to what was meant by the word "depot" as

shown on the plan. But the question is not what did Mr. Ryon and his associates do, or intend to do, but what has the Board ordered this prosecutor to do.

The prosecutor cannot undertake to make a choice between the intentions of the engineer and the order of the Board. If the order is valid, it, of course, must be obeyed.

On the question of the new sidewalks which are ordered to be constructed at River street, counsel may argue that both of them are on that part of the right of way which is within a public street. We submit that an examination of the map attached to the order shows that a portion at least of the new sidewalk to be constructed within the lines of the right of way and on the westerly side of the existing tracks, is not within the lines of any existing street.

It may also be argued that the prosecutor is not required to build these sidewalks, and that the Board's order directs the city to do this work. But the order is plain that the prosecutor is required to alter the crossings, *inter alia,* "by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile."

Counsel may say that the city makes no objection and is willing to build the sidewalks in River and Putnam streets as ordered. This calmly assumes that the city has the *right* to build such sidewalks on property, part of which at least, is owned by the prosecutor or its lessor, even though neither the prosecutor nor its lessor has consented to such construction, and even though such offer on the part of the city should not include compensation to the prosecutor or its lessor for the value of the property taken or damages thereto.

If, however, counsel should say that the *city* is ordered to construct these sidewalks, the question

still remains, by what authority is such order made? No such authority can be found in the statute under which these proceedings have been taken.

In the Supreme Court counsel for defendants argued that the relocation of the stations were "necessary incidents" of the changes required to be made in the highways and in the railroad. If, these relocations are necessary incidents, and if there is no authority in the Board in the present proceeding to order such changes, *then for this reason the order is invalid and must be set aside.*

Counsel also argued that under 17 (b) of the act concerning public utilities the Board has the power in appropriate cases to order the relocation and reconstruction of stations. For the purposes of argument, this may be conceded; but such changes in stations can be ordered *only after hearing and upon notice, and in a proceeding instituted for that purpose.*

Moreover, we submit that this provision refers to the service which the company renders to passengers, and that the Board has no jurisdiction whatever to receive a complaint, conduct hearings or make any order whatever, except in a case where the safety, adequacy or propriety of the service is questioned from the standpoint of the passenger or the shipper, as distinguished from that portion of the property which may be in use as a public highway. The Board has no more authority to order changes in the stations in this proceeding than it would have if the city intended to open a new street, and it was found that the railroad company's passenger station would interfere with laying out that street, and the city should then apply to the Board for the changing of the location of the station from one point to another.

There being no authority in this proceeding to order a relocation of these stations by virtue of

section 17 of the act concerning public utilities, defendants are driven to the other horn of the dilemma and must take the position that these relocations are "necessary incidents" of the changes required to be made in the highways and in the railroad. But we have previously shown that there is no evidence whatever to justify the conclusion that these relocations were necessary incidents to the plan adopted for the elimination of the crossings. Under these circumstances, it is settled that the Board had no authority to order such relocations. This has been so decided by the Supreme Court of this State in *Potter* v. *Board of Public Utility Commissioners* (Cranford Grade Crossing Case), 98 Atl. 30, in which one of the points involved was whether the Board had the power, as part of a general scheme for the elimination of a grade crossing, to direct the taking of certain property which was not "necessary" for the alteration of the grade crossing, although it was desirable as a "park development" in connection therewith. On this point, the Supreme Court said (italics ours):

> "We think the findings of the board are not supported by the testimony on this branch of the case. This court has the power to review the testimony, to ascertain whether or not the order is supported to any extent by the facts submitted to the board for its consideration. Erie Railroad Co. *v.* Board of Public Utility Commissioners, 98 Atl., 13, not yet reported; West Jersey, etc., R. R. Co. *v.* Board of Public Utility Commissioners, 88 N. J. Law, 94 Atl., 60; Public Service Gas Co. *v.* Board of Public Utility Commissioners, 84 N. J. Law, 463, 87 Atl., 651; Id., 88 N. J. Law, , 95 Atl. 127; Erie Railroad Co. *v.* Board of Public Utility Commissioners, 88 N. J. Law, , 95 Atl., 177. Nor can we find anything in the act of the legislature which gives the Board of Public Uitlity Commissioners jurisdiction to order private

property taken when, as in this case, *such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition and order.* That such property may be desirable for the purpose of park development around the railroad station is not sufficient to give the board jurisdiction under this statute for ordering private property to be taken.

"It is urged, however, the order may be sustained under the act of 1914 (P. L. 1914, p. 490), which confers upon the railroad company power to take by condemnation any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners, upon ascertainment and payment or tender of compensation as provided by law, or under the act of 1911 (P. L. 1911, p. 379, sec. 17 (b)), which confers upon the Board of Public Utility Commissioners power after hearing, upon notice, to require every public uitlity to furnish safe, adequate, and proper service, and to keep and maintain its property and equipment in such condition as to enable it to do so. It requires no argument to show that the order of the board cannot be sustained under either of the statutes. They cannot be made to apply to this proceeding by any accepted canons of statutory interpretation." (For copy of opinion in full, see Appendix XIII.)

In the present case the Supreme Court found *as a fact* that the change in the location of the stations was not incidental to, or rendered necessary by, the elmination of the grade crossings. (See opinion, Vol. IV., p. 2,281, ll. 30-35.) Inasmuch as this finding of fact by the Supreme Court is reasonably supported by the evidence (as shown hereinbefore), it is conclusive on this Court.

But the Supreme Court held that the order did not require such relocations and reconstructions of the stations, saying:

> "The order (leaving out of account the plan and profile) does not require any change in the construction or location of the station buildings. It does not deal with them." (Vol. IV., p. 2281, ll. 10-15.)

In interpreting the order under review, how is it possible to "leave out of account the map and profile"? The petition upon which the order of the Board is based prays for the alteration of the crossings "according to plans to be approved by said Board" (Vol. IV., p. 1787, l. 38); the Board finds in its order that "said crossings and each of them should be altered according to a plan and profile approved by the Board," and recites that such plan and profile have been prepared (p. 1789, ll. 10-15). Thereupon, the Board orders the prosecutor to alter the crossings *"according to the plan therefor annexed to and made part hereof entitled * * * and profile of same also annexed to and made part hereof entitled * * * , which said plan and profile are hereby approved"* (p. 1789, l. 25 to p. 1790, l. 5).

The order then directs that the crossings be altered "by substituting therefor crossings not at the grade of the public highways known as Madison avenue * * * by changing the lines, width and direction thereof * * * , according to and as shown on said plan and profile for said purpose * * * ; *by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile"* (p. 1790, ll. 1-35).

The order further directs that the prosecutor and certain other named companies "proceed with due diligence to the execution of this order, and

comply with all of the requirements thereof and the duties imposed upon them thereby'' (p. 1791, ll. 1-15).

The order further directs the prosecutor to begin the actual work of construction required in the performance and execution of the order on or before the first day of August, 1916, and continuously carry on the same thereafter, ''and perform and *fully comply with the directions and requirements of this order,* and *complete all of the work required to be done,* within eight years from the date hereof * * *'' (p. 1791, ll. 20-25).

The *statute* upon which the order is based makes it necessary for the Board in ordering the alteration of a crossing to alter such crossings *''according to plans* to be approved by said Board'' (see Sec. 1 of Chap. 57, Laws of 1913).

Under the statute some kind of a plan or plans is necessary before any order can be made at all. As shown from the above quotations from the order, the plan and profile were annexed to and made a part of the order. According to those plans the relocation of both stations is required. Under these circumstances, how can it be said that such relocation is not a part of the order—to the same extent as if such changes were specifically mentioned therein? They are just as much a part of the order as the changes in the side tracks and leads thereto, although these are not specifically mentioned in the order; yet the Supreme Court says that these latter changes are proper because they are ''fairly incidental'' to the changes in the crossings. Not one of these sidings is mentioned in the *language* of the order, but they are all shown on the plan and profile, and therefore even according to the Supreme Court they are part of the work which is required to be done.

If the sidings are included within the work to be done, no reason can be suggested why the relocation of the stations are not likewise included. Neither of such changes is mentioned in the order, but both of them are shown by the plan and profile annexed to and made a part of the order.

There is no doubt that it was the intention of the Board to require the reconstruction of the changes as a part of the work to be done by the prosecutor. The *order* refers to a report of the Board filed on January 11, 1915, and makes this report a part of the order (p. 1788, ll. 35-40). Referring to the report it will be seen that the plan approved by the Board is that "generally outlined in Plan No. 2" (p. 1765, l. 25). This plan shows the changes in the location of the two stations. *The cost of making these changes is included in the Board's estimate of the cost of the work required to be done by the prosecutor.* See city's summary and detail of "Cost of Elevation," Ex. P-55, Vol. II., p. 919 *et seq.,* wherein the cost of "depots" in "Plan No. 2" is given as $140,000 (p. 919). See also railroad summary of cost of elevation, "same items as city's estimate," Ex. R-101, Vol. II., p. 1305, *et seq.,* wherein cost of "depots" in "Plan No. 2" is given as $165,000. This item is included as a part of the Board's estimate of the "total cost." See report, p. 1765, l. 10, Schedules C and D attached to report, pp. 1770-1.

III.

THE ORDER IS INVALID IN SO FAR AS IT REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES AS SPECIFIED ON THE PLAN ATTACHED TO SAID ORDER, IN THE BUILDINGS AND FACILITES OF FULLER'S EXPRESS COMPANY AND MORRIS & CO., FOR THE FOLLOWING REASONS:

(a) *The Board of Public Utility Commissioners has no authority to require the prosecutor to make said changes; and even if it had, the prosecutor has no power and is under no legal obligation so to do.*

(b) *The evidence does not show that said changes are reasonably necessary or required for the elimination of the several highway grade crossings.*

(Reason 51)

The order under review requires the prosecutor to eliminate the crossings by reconstructing the railroad and highways, and "by performing all other work required, according to and as shown on the said plan and profile" (p. 1790, l. 35). Another paragraph of the order requires "any telegraph * * * or other company or corporation, co-partnership or individual whose property or construction it may be necessary to change or remove to carry said plan and this order into effect," to change or remove the same, according to said plan" (p. 1790, l. 40).

Another paragraph of the order requires the prosecutor and certain other companies specifically mentioned "and all other parties to this proceeding to proceed with due diligence to the execution of this order and comply with all the requirements thereof," etc. (p. 1791, l. 10).

An examination of the plan and profile attached to and forming part of said order will show that, among other things, the present buildings and facilities used by two companies known respectively as Fullers' Express Company and Morris & Company are destroyed, and new buildings and facilities ordered to be provided for each of them in other parts of the city. The question therefore arises—who is to destroy the existing buildings and facilities, and who is to relocate and rebuild them? Does the order undertake to place such burden upon the prosecutor, or upon the said two companies respectively? These two companies have issued separate writs of *certiorari,* which will be argued with the present writ. We assume that they will claim, either that the Board has no jurisdiction to make any order respecting them and their buildings and facilities, or, if the Board has any such jurisdiction, at least it has no power to order *them* to destroy these buildings and facilities and to relocate and reconstruct the same, at their own expense, either at the sites specified on the plan attached to the order, or elsewhere.

It is submitted that the Board has no power at all over Morris & Company as it is not a public utility; and that it has no power over Fullers' Express Company in the present proceeding (although in certain aspects that company may be considered to be a public utility), because the proceeding does not involve any of the rights and duties of that company as a public utility.

The prosecutor is obliged to assume that the order is intended to command *it* rather than said other two companies, to perform the work of destroying their buildings and facilities and relocating and reconstructing the same at *its* expense. The question therefore arises whether in this respect the order is valid.

(a) *We submit that the Board has no power to require the prosecutor to make said changes; and that even if it has, the prosecutor has no power and is under no legal duty to make them.*

The following is a description of the present and proposed locations (direction noted according to compass):

At the present time the building used by the Express Company is located on the westerly side of the railroad tracks and extends southerly from near the southerly side of Ellison street. There is a sidetrack leading to this building which is used by the Express Company for its business. The plan of the Board orders that a new building be constructed for the use of the Express Company at a point indicated on the plan on the southerly side of Market street and on the westerly side of the tracks. This new building so far as shown on the plan will be substantially in the present location of the Market street station. The building will occupy land the title to which is in the Paterson & Hudson River R. R. See Map, Exhibit R-16, Sheet No. 8.

At the present time the building used by Morris & Company is located on the northerly side of Market street and the westerly side of the tracks; it is practically in the location which the plan proposes for the new Market street station. The proposed new location for Morris & Company, as shown on sheet No. 3 of the plan, is on the easterly side of Railroad avenue between Greene street and Slater street on a plot of ground nearly 100 feet distant from the right of way. This is on property of the prosecutor, on which there are located at the present time several sidetracks forming part of a freight yard.

The cost of the construction of the new building and facilities for the Express Company is the sum

of $12,000, and for Morris & Company is the sum of $40,000. (Testimony of Mr. Brameld, p. 1956; Ex. Erie 18, p. 2247).

The general manager of the Express Company said that the business of his company was to handle express and fast freight between New York and Jersey City, Paterson and Passaic. The building which is now used is leased from the Erie Company. Between 20 and 25 carloads are received each day. There is a side track about 300 feet long between the main line tracks and the express building; the building itself is about 200 feet long and 15 or 20 feet wide (p. 426). The land and building are owned by the railroad and are leased to the Express Company (See Ex. Erie 10, p. 2018). The lease provides that in case the railroad shall deem it necessary or convenient to provide the Express Company with facilities at points in Paterson or Jersey City other than those assigned to that service by the terms of the lease, the railroad may assign other locations suitable for handling the traffic of the Express Company, and the Express Company agrees, at its own expense, to vacate the premises theretofore assigned and to transfer its business to such other place as may be so assigned.

The lease further provides that if the railroad, at the request of the Express Company, shall place or deliver cars at any other points than the freight house at Jersey City and Paterson, assigned to the Express Company business in accordance with the lease, then the Express Company is to pay the railroad company a switching charge for such service in addition to the other payments.

The Express Company agrees to pay to the railroad an amount equal to 30% of the gross revenue, which amount shall not in any event be less than $35,000 per annum.

The lease was made for a period of one year from January 24, 1908, and thereafter until terminated by either party giving to the other one year's notice of intention to cancel the same.

The building occupied by Morris & Company is on the property of and is owned by the railroad company. Morris & Company, however, rebuilt the inside of the building and constructed a new platform and storage room (p. 368, ll. 10-15).

The business of this company in Paterson amounts to $1,500,000 a year (p. 565, l. 20).

The agreement between the railroad and this company is dated May 14, 1910, and leases certain lands and a part of a building of the railroad located on the northerly side of Market street for the term of one year from February 1, 1910, and thereafter until terminated on sixty days' notice by either party. (Ex. Erie 11, p. 2026.)

The lease provides for a payment of $1,000 per year as rent. The lessee agrees to keep the buildings in as good condition and repair as at the beginning of the lease and to put on such additions and repairs as it itself may require.

There has been no request to the railroad company on the part of either of these companies to change the location of the sidetracks and switch connections now used by them, and there has been no complaint that the present facilities are inadequate or improper; on the contrary, both of these companies appeared in this proceeding and objected most strenuously to the proposed changes so far as it affected them (See pp. 364-368; 426-433; 564-568).

We submit that the Board has no power to require the prosecutor to destroy the buildings and sidetracks now used by these two companies; and still less has it any power to require the prosecu-

tor to construct *new* buildings and side tracks for the use of these companies. Furthermore, the proposed site for the Express Company is already in use by the prosecutor for its Market street station, and the proposed site of Morris & Company is already in use as a freight yard. Hence both of the locations which the Board assumes to be desirable for these two companies are already devoted to other public uses and the railroad company cannot be compelled to devote them to any other use, whether public or private. *New York, etc. R. R. Co.* v. *Paterson,* 61 N. J. L. 408.

Moreover, some of the land on the proposed new locations was conveyed or condemned for railroad purposes only; and if no longer used for such purposes, would of course revert to the original grantors or their successors in interest. See for example deed from Society of Establishing Useful Manufactures to Paterson & Ramapo R. R. Co., Vol. II., pp. 1037-8; deed from Colt to Paterson & Ramapo R. R. Co., p. 1041; condemnation of Paterson & Ramapo R. R. v. Cooke, p. 1043.

So far as concerns the proposed site for the Express Company the title thereto is not in the prosecutor, but in the Paterson & Hudson River R. R.; and even if the prosecutor could be compelled to devote its own land to the use required by this part of the order it is difficult to see on what theory the prosecutor could be required to devote to that purpose land title to which is in another company and in which the prosecutor has only a leasehold interest. The order does not require the Paterson & Hudson River R. R. to devote this part of its property to the use of the Express Company—except possibly by implication. It may well be that if the Market street station is abandoned, the Paterson & Hudson River R. R. (or the prosecutor, if it has the right so to do under the terms of the lease with that

company) might desire to use that land for some other purpose.

This part of the order is further open to the objection that it requires the prosecutor to pay the expenses of destroying the present buildings and facilities and also the expense of constructing other buildings and facilities for the private use of these two companies; it therefore takes the property of prosecutor without compensation and takes it for private purposes—which latter could not be done even if compensation were made. See 15 Cyc. 578 and cases cited.

This part of the order is further objectionable because it impairs the contracts of the railroad company with the Express Company and with Morris & Company in that it requires the railroad company to procure another location for the handling of the business of the Express Company, whereas the latter company, in its contract, agreed that if any other location was required it, the Express Company, "at its own expense" would vacate the leased premises and transfer its business to such other place (p. 2020, l. 15). It also impairs the contracts because it compels the cancellation thereof (without the notice provided for in each case), and thereby deprives the railroad company of the benefit of the payment of the rents provided for therein.

The order requires the *permanent* devotion of these lands to the use of the Express Company and of Morris & Company respectively and does not even provide for the termination of their rights by notice (as now permitted by the respective leases) nor otherwise; and in this respect also, impairs the existing contracts of the prosecutor with these companies.

A further criticism of this part of the order is that it does not, and under the act concerning

public utilities, can not, *effectively* order either the Express Company or Morris & Company to occupy and use the new buildings and facilities to be constructed for their benefit. Suppose the prosecutor does construct these buildings and facilities as required by the order, what assurance has it that they will be used by the Express Company and by Morris & Company? There is no obligation on the part of either company to use them after the prosecutor constructs them. It may well be that the Express Company or that Morris & Company might prefer other locations for their business—although it must be admitted that so far as concerns the proposed site for the Express Company it is probably the most valuable location in the city of Paterson. So far as Morris & Company is concerned the order puts that company in the middle of a freight yard 100 feet or more from the main line tracks, and a long distance from the business section of the city.

Moreover, the business of Morris & Company requires peculiar fixtures and apparatus for the handling and storage of meats. Under this order is the prosecutor obliged to construct such apparatus so as to adapt the new building for the use of Morris & Company, or does that duty rest upon that company? If the duty rests upon Morris & Company, how does it appear that that company would be willing to make the large investment required for the construction of such fixtures in a building erected at a location to which the company may not desire to transfer its business.

It is obvious that the proposed location for Morris & Co. in the centre of a freight yard is not as desirable as its present location near Market Street—which is in the centre of the city. No provision is made for access to the new location nor for the construction of side tracks or any of the

other facilities that such company would require in order to continue to handle its business.

According to the plan attached to the order the new building for Fullers' Express Company is about 250 feet long and about 20 feet wide. The new building for Morris & Company is to be about 150 feet long by about 40 feet wide. On what theory does the Board assume that the dimensions of these buildings are suitable for the purposes of their respective business? If they are not large enough, these two companies might reasonably complain; and if they are too large, the prosecutor might reasonably complain because it is obliged to construct buildings larger than are necessary for the purposes for which they are to be used.

Further, on what *terms* are these buildings to be used after they have been constructed? There is nothing in the order which requires the two companies to pay, or which permits the prosecutor to receive, any rent. Does it therefore follow that the Express Company and Morris & Company may use the buildings free of charge? If not free of charge, then what rent is to be paid and by whom is the amount to be determined? If it be said that it is implied that the rent is to be the same as that provided in the existing contracts, then does this order fix that rent for all time to come? Can the rental or other terms of the lease never be changed by agreement of the parties without first obtaining the approval of the Board?

Moreover, there is no provision for the maintenance of either of the proposed new buildings. How can it be determined upon whom this burden falls? Neither is there any provision for the termination of the lease, either on notice given by one party to the other or otherwise. Can it be said that it is necessary for the parties to apply

to the Board to fix these and other terms for the use of the property?

The foregoing are but a few of the absurd results that flow from this part of the order.

(*b*) *Said changes are not necessary for the purpose of eliminating the several grade crossings.*

An examination of the maps will show that it is not necessary to destroy the buildings and sidetracks used by these two companies, nor is it necessary to construct new buildings and sidetracks for their benefit, in order to carry out the general plan for the elimination of the crossings. The testimony of Mr. Brameld is to the same effect (pp. 1955-6).

So far as the Express Company is concerned it may be claimed that it is necessary to destroy the building now used by that company in order to make room for the proposed new Market street station; but it is not necessary to relocate and reconstruct that station for the purpose of eliminating the grade crossings (See Point II).

So far as Morris & Company is concerned it is clear that it is not necessary to construct a new building 100 feet distant from the main line railroad tracks and in the middle of an existing freight yard for the purpose of eliminating grade crossings.

Counsel may defend this part of the order on the theory that these changes are merely "suggestions."

It is difficult to see how this argument can be justified. The order expressly requires the prosecutor to reconstruct said railroad and highways and to perform "all other work required according to and as shown on the said plan and profile" (p. 1790, l. 35). Counsel may say that the

erection of substituted structures for use by Fullers Express Company, and Morris & Company, as lessee, which would not, as the existing structures do not, constitute part of the railroad is not commanded by the order. This *is* commanded by the order, but the fact that these structures do not constitute part of the railroad is an additional, and indeed, an unanswerable reason, why that part of the order, at least, is invalid.

But counsel may say that the above quoted extract from the order is limited by the specific provisions of the order and is limited thereby. It is doubtful whether such rule would be applicable to the construction of an order made by an administrative body, but however that may be, this rule does not control where it clearly appears that no such limitation was intended. Moreover, the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless. See 36 Cyc. pp. 1121, 2. Thus, in the order under review, the railroad company is specifically directed to change certain crossings by doing certain things, and after that subject matter has been covered, it is then directed to perform "all other work required according to and as shown on the said plan and profile."

But whatever may be the interpretation of this part of the order, what is to be said of the subsequent paragraph whereby the prosecutor (and certain others specifically named in said paragraph) are ordered to "proceed with due diligence" to the execution of the order and to comply with all the requirements thereof and the duties imposed thereby, and by the said act under which the order is made, and the laws of the State, and that to that end, it exercise all the powers conferred upon it by the laws of the State (p. 1791, l. 10). It is im-

possible to interpret this as meaning other than exactly what it says.

As there is no evidence to show that these changes were necessarily incident to the general plan for the elimination of the crossings, the order is clearly invalid in this respect. See *Potter* v. *Board of Public Utility Commissioners,* 98 Atl. 30, and other cases cited under Point II.

The Supreme Court in its opinion held that the order under review did not require the railroad company to provide locations or erect structures for the Express Company and Morris & Co., "since neither the existing structures, nor the suggested structures, constitute any part of the railroad" (p. 2282, ll. 30-35). The fact that the structures which are to be relocated for the benefit of these two companies are no part of the railroad is, of course, an unanswerable reason why such relocations could not be properly included in an order like the one now under review. The real question therefore is whether they are so included; if they are, then the order is invalid. As we have shown under Point II, the plan and profile are a part of the order; and as we have shown hereinbefore the relocations now in question are indicated on this plan and profile. If the prosecutor is to "perform all other work," according to this plan and profile (as is expressly directed by the order), it is obvious that, so far as the order is concerned, this particular work *is* required, even though the structures are no part of the railroad.

IV.

THE ORDER IS INVALID IN SO FAR AS IT REQUIRES THE PROSECUTOR TO MAKE VARIOUS CHANGES IN CERTAIN STREETS, AS FOLLOWS:

(a) *To substitute for the existing crossing at Cedar street, a crossing under the railroad at Taylor street, and for the existing crossing at Franklin street, a crossing under the railroad at Montgomery street.*

(b) *To widen and alter existing undergrade crossings at Essex street, Governor street and Fulton street, and to adjust, relocate and reconstruct the existing abutments and other structures at said streets.*

(c) *To change the lines, width and direction of the several highways ordered to be altered and to carry so much thereof as so changed under the said railroad (except in the case of Madison avenue), and to carry Madison avenue over said railroad, and to vacate the remaining parts of said highways within the lines of the right of way of the prosecutor and to vacate a certain specified part of Madison avenue.*

(Reasons 53, 54, 55 and 56; including amendment.)

(a) *As to crossings at Cedar street, Taylor street, Franklin street and Montgomery street.*

The order requires the prosecutor to *substitute* for the existing crossing at Cedar street a crossing under the railroad at Taylor street, and for the existing crossing at Franklin street a crossing under the railroad at Montgomery street (Vol. 4, p. 1790, ll. 20-30). This results in the closing of the two streets known as Cedar street and

Franklin street, and the opening of two new streets across the railroad tracks known as Taylor street and Montgomery street. The excuse given by the City engineers for the proposal to close Cedar street and open Taylor street was that if Cedar street is left as it is there would be a shorter incline to come into the freight yard. It was admitted that it was not "necessary" to make this change, but it was claimed that it was "convenient" to do so, if the yard was to be kept in its present location (p. 481, ll. 20-40). The maps show that to keep Cedar street open would also probably make it necessary to eliminate the sidings of McNab & Harlin and John Agnew. Even admitting that this arrangement might save two important side tracks (neither of them, however, owned by the Railroad Company) and might enable the railroad to maintain one of its freight yards in the present location, such facts do not justify the Board in assuming power which is not given to it by the statute.

The cost to the prosecutor of complying with this illegal part of the order by constructing a new undergrade crossing at Taylor street is the sum of $71,878.20, including $8,000 of property damage (See testimony of Mr. Brameld, Vol. IV., p. 1961; Exhibit Erie 21, Vol. IV., p. 2250).

The excuse given for the substitution of an undergrade crossing at Montgomery street for the existing crossing at Franklin street, and the closing of the latter street was: "It was a little more convenient * * * it gave a better distribution of streets to open Montgomery street and close Franklin street" (p. 483, ll. 30-40).

The idea of the City's engineers, as adopted by the Board, seems to have been that they had the power to establish a "better distribution of streets" —no matter whose property was affected, nor at

what cost. Franklin street is one of the streets included in the City's petition. It must be admitted that it is a very convenient way to eliminate a grade crossing, whether dangerous or otherwise, by simply closing the street, but no power is given to the Board to do that under the statute of 1913. Still less is there any power given to open another and entirely independent street several hundred feet distant and to compel the railroad to pay for it. The expense of the proposed new undergrade crossing at Montgomery street is the sum of $38,451.97 (see testimony of Mr. Brameld, Vol. IV, pp. 1961-2; Exhibit Erie 22, Vol. IV., p. 2250).

The crossing ordered to be constructed at Taylor street as a substitute for the existing crossing at Cedar street is nearly 500 feet from such existing crossing, and cannot, by an stretch of the imagination, be construed to take the place of the crossing at Cedar street; it is an entirely separate and distinct crossing on another street, and located an entire city block from the existing crossing.

The substitution of an undergrade crossing at Montgomery street, in lieu of the existing crossing at Franklin street, is even more obnoxious. The new underground crossing ordered to be constructed at Montogmery street is two entire city blocks, a distance of over 500 feet from the existing grade crossing at Franklin street—with another crossing at Lafayette street in between the existing crossing at Franklin street and the proposed new crossing at Montgomery street. If such a rearrangement of street crossings comes within the purview of the statute, then the Board has practically unlimited power either to close or to open all streets where they intersect railroad tracks regardless of the provision of city charters or other laws.

It is obvious that the streets of a municipality cannot be thus arbitrarily opened or closed unless there be appropriate proceedings on the part of the municipality or the interested property owners or both. No such action has been taken in the present case. True, the Board in its order directs the city of Paterson to comply with all the requirements of the order and the duties imposed upon it thereby and by the act under which the order is made and the laws of this State, and to that end exercise in good faith all of the powers conferred upon it by the laws of this State. We therefore have the anomalous situation of an administrative body undertaking to order a municipality to open and to close certain streets, notwithstanding that at the time the order was made, the municipality had undertaken no proceedings for the opening or the closing of the respective streets, and so far as appears never intended so to do.

An attempt may be made to sustain this part of the order under Section 1 of the statute. This provides that the alteration of the crossing, ordered by the Board may be "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."

It will be noticed that the opening of the *new* highway is to be in conjunction with "vacating, relocating or changing the lines, width, direction or location of" the existing highway. We submit that under this statute the new highway thus opened *must take the place substantially of the old*

one. The language used is "a new highway in the place of the one ordered vacated." This is not the same as "instead of." The fair meaning of the statute is that the new highway must substantially replace or take *the* place of the old one; but what the present order does, is to entirely vacate the railroad crossings at the two streets in question and to open new and independent crossings. The existing grade crossing at Cedar street is one long block, or a distance of about 500 feet from the proposed crossing at Taylor street; the existing crossing at Franklin street is a distance of two blocks, or about 550 feet from the proposed crossing at Montgomery street.

Whatever may be said of the power of the Legislature to pass a statute authorizing the vacating or relocation of streets as incidental to the elimination of grade crossings, it is obvious that the present statute does not confer upon the Board the power to make such changes as are required by the present order. If such an order can be justified under the statute, it practically gives the Board of Public Utility Commissioners power to change the entire lay-out of city streets where they happen to cross railroad tracks, entirely without regard to any action by the municipality or by interested property owners. If two streets can be thus closed, and two others thus opened, 500 or 600 feet distant, by the mere dictum of the Board of Public Utility Commissioners, then the municipality might as well surrender whatever control it has over public streets, and property owners might as well abandon the idea that they have any right to be consulted as to the opening or closing of streets.

The fact of the matter is that these changes were not reasonably incident to or necessary for the general plan of elimination; and if they were not they could not properly be included in this order.

In *Lancaster* v. *County Commissioners,* 113 Mass. 100, held that the power given to the Commissioners under a statute relating to the alteration of railroad crossings was restricted to alterations to be made within the limits of an existing highway crossing and could not be extended "by implication" to the construction of a bridge at a crossing established on a different location.

In *Guenther* v. *Patch,* 135 N. Y. Supp., 629, 631, the court said (italics ours):

> "It is claimed that the elimination of the grade crossing at Dearborn street is merely incidental to the elimination of the grade crossing at Niagara street, a part of the plan therefor, and therefore within the powers of the commission. As above suggested, no express provision is made in the act for the elimination of the grade crossing at Dearborn street. Dearborn street may now be reopened without interference with the Niagara street crossing. The enumeration of certain street crossings in the act limits the authority of the commission to such crossings, or to such other crossings as are necessarily affected by the plan adopted therefor, not merely conveniently related thereto."

In *Sherwood* v. *City of Paterson,* 94 Atl. 311, it was held that the Board of Public Works of the City of Paterson, by virtue of the Act of 1911 (P. L., p. 179), had succeeded to the powers of the Board of Aldermen under the City Charter with reference to the power to open or vacate streets. The Act of 1911 vests in the Board of Public Works all the powers now vested in any such city, either by its charter or by general law, for the construction, operation, maintenance and regulation of streets, etc. This statute does not purport to alter the City Charter as to the details of the procedure required for the opening or

vacation of streets. We therefore look at the City Charter (P. L. 1871, p. 846) for the purpose of ascertaining this procedure. Under the title "Department of Streets and Sewers," will be found power to lay out, open, vacate, widen or alter streets upon making compensation in the manner prescribed. Provisions follow for the giving of notice of an application or proposal for the opening, altering or widening of streets. The notice must be published for twenty days, and the ordinance therefor can be passed only in the manner prescribed for the passage of ordinances affecting personal liberty or the expenditure of money—that is, there must be a vote of two-thirds of all the members of the Board in favor of such ordinance, and every ordinance must be read three times before final passage, and not more than twice at one meeting.

This Board makes an estimate and assessment of the damages and benefits to result from such improvement, giving five days' notice of their meeting. They have power to examine witnesses under oath, to enter upon and view the premises, to make a survey and map of the improvement, and are then required to fairly and equitably assess the cost and compare same with the value of the benefits. Then follow provisions for the filing of the map and report and assessment, and for the filing and hearing of objections, and for an appeal to the Circuit Court and the calling of a jury to determine the value of the lands and the damages.

The provisions of the City Charter, we submit, are still in effect notwithstanding the Grade Crossing Act of 1913, so far as relates to the conditions under which streets may be vacated, altered or opened. The same principle applies as in the case of *Clark* v. *Elizabeth*, 61 N. J. L. 565, where

it was held that the Act of 1874 (P. L., p. 45), which authorize cities to enter into contracts with railroad companies to change the location of or elevate their railroads within the city, and authorized cities to vacate, alter the lines and change the grade of streets or highways, and to do all such acts as might be found necessary to carry out such contracts, did not supersede the provisions of the City Charter providing for the procedure to be followed in changing the grade of streets, and that a contract with the railroad did not operate *ex proprio vigore* to effect such changes in the streets, and that a city ordinance was necessary to effectuate a change of grade in the streets.

To same effect see *Morris & Cummings Co.* v. *Jersey City,* 64 N. J. L. 587, at p. 593; *Newark* v. *Weeks,* 71 N. J. L. 448; *Lewis* v. *Pennsylvania R. R.,* 76 N. J. L. 220; *Flitcraft* v. *Woodstown,* 85 N. J. L. 4.

Furthermore, the statute of 1913 if construed to give the Board of Public Utility Commissioners power to vacate old or open new streets without requiring that such power be exercised in the manner provided by municipal charters, is unconstitutional in that it takes the property of interested property owners (including in this case the railroad company) without affording them the hearing prescribed by the charter, or indeed without giving them any hearing at all on the question as to whether or not said streets should be opened or closed, and the amount of damages or benefits resulting therefrom and the amount of the assessment or assessments to be made therefor. The statute, if thus construed, is also unconstitutional for the further reason that the purpose to give the Board such power with respect to streets, is not expressed in the title. (See Point XXVII.)

(b) *As to crossings at Essex street, Governor street and Fulton street.*

The order (*inter alia*) directs the prosecutor to substitute for certain of the existing crossings, other crossings not at the grade of the several highways "by widening and altering the existing highways known as Essex street, Governor street and Fulton street, adjusting the structures spanning them to the proposed grade or grades." (p. 1790, ll. 20-30.)

So far as these three streets are concerned, we submit that the order is erroneous for several reasons:

1. All of these three streets at the present time pass *under* the railroad tracks; none of them crosses the railroad tracks at the same level. They are not mentioned in the petition of the Board of Finance of the City of Paterson, and there is no prayer for the widening or alteration thereof, nor for the adjustment, reconstruction or relocation of the existing abutments and other structures at said crossings. Even if the petition did refer to these streets or pray for any changes therein, we submit that the Board of Public Utility Commissioners has no jurisdiction to make any order whatever respecting them or any of them; the Board can take action under the statute of 1913 when *and only when* a public highway and a railroad cross each other *at the same level.*

2. It does not appear that the widening and alteration of the said undergrade crossings and the adjustment and relocation of the structures spanning them were reasonably necessary or required for the elimination of the several highway grade crossings. There is no reason for the increase of the width of Essex street from 32 feet to 50 feet as required by the Board's plan (testimony of Brameld, Vol. 4, p. 1950, l. 20.) At Gov-

ernor and Fulton streets the order and plan of the Board require that the abutments and bridges be raised and that new approaches be constructed for a sidewalk (p. 1962, ll. 20-25.) Of course if the existing tracks at these two streets, which already pass above the level of the streets are further elevated, it will be necessary to raise or reconstruct the existing abutments on which the present tracks are carried, if the two streets are to remain open. What the Board does by its order, so far as these two streets is concerned, is to direct that the railroad tracks which are already above the level of the streets be further elevated in order to conform to the new level of the tracks. As we have shown above, the Board clearly has no power to make this order under the statute, for the reason that these streets and the railroad do not now cross *at the same level.* This part of the order, however, is further invalid and beyond the jurisdiction of the Board because it undertakes to prescribe to the railroad that the tracks when raised to the new level must pass above the streets on abutments—which apparently are to be built on top of the existing abutments—without any necessity for so doing. For all that appears the railroad could elevate its tracks by placing abutments at some other more convenient and less expensive place. Indeed, as to these streets there is every reason why the Board should exercise its self-appointed prerogative of ordering public streets to be closed. If the Board has the power to do that in the case of one street, why not in the case of other streets—especially when it will result in a substantial financial saving to the company that has to pay the expense.

In the case of Governor street, the estimated cost of changing the crossing in accordance with the Board's plan is the sum of $28,322.20; and in the case of Fulton street it is $25,820.95. This

does not include the value of the old material which would be destroyed by making these changes. At Governor street this amounts to $4,250, and at Fulton street $3,500 (pp. 1923: Ex. Erie 23 and 24, p. 2251.) Whatever may be the power of the Board to compel the railroad to raise the abutments in order that the streets may remain open, there certainly is no power to require the construction of new approaches to the sidewalk; and whatever may be the necessity of raising the abutments in order to carry the tracks at their new elevation, it is certainly not necessary for that purpose to build said new approaches. The total cost to the railroad company of complying with this illegal part of the order with reference to Governor street and Fulton street is about $61,000.

When we come to examine the situation as to Essex Street, the condition created by the Board's order is even more aggravating from the legal standpoint. The present width of Essex street is 32 feet (Vol. 4, p. 1949, l. 35.) The order of the Board requires that it be increased to 50 feet. The plan shows that the street is to be widened on both sides of the existing location thereof. This would require the tearing down of the existing abutments and the bridge at the present undergrade crossing, and the construction of a new bridge and the necessary abutments to support same. The value of the walls destroyed would be about $14,000, and the total value including both the walls and the existing bridge is $27,535 (Ex. Erie 24, p. 2251.)

The cost to the railroad company of widening the present undergrade crossing at Essex street as required by the order is the sum of $80,225.73 (p. 1949; Ex. Erie 16, p. 2246.) There is no necessity whatever for increasing the width of Essex street (p. 1950). The excuse given by the City's

engineer for the widening of Essex street is that it would help to provide for the traffic at Cedar street, which according to their plans was to be closed. The City's expert said that Essex street at the present time is "very narrow" (p. 482, l. 25.) Even if the Board under the statute has power to change the "width" of a highway which crosses a railroad track at the same level, it certainly has no power to make any order with respect thereto when the present crossing is not at the same level —especially when the evidence shows, as in the present case, that the *widening* of the existing undergrade crossing is not reasonably necessary or required for the elimination of grade crossings.

3. So far as Essex street is concerned, the order of the Board is further invalid because the proceedings prescribed by the City Charter have not been complied with and no steps have been taken by the City or any property owners for the alteration or widening of said street as required by section 98 *et seq.* of the charter of 1871, and the Board is therefore without authority to make any order for the widening or alteration of said street.

4. The order as to Essex street is further invalid because the prosecutor is deprived of its property without a hearing notwithstanding that under the decisions it is entitled to receive compensation for *structural* changes as distinguished from incidental expenses arising by reason of the erection and maintenance of crossing gates, etc.

See *Central R. Co.* v. *Bayonne,* 51 N. J. L. 428; *Morris & Essex R. Co.* v. *Orange,* 63 N. J. L. 252; *Paterson etc. R. Co.* v. *Nutley,* 72 N. J. L. 123; *Freeholders* v. *New York Bay R. Co.,* 84 N. J. L. 354.

(c) *As to crossings at all the highways ordered to be altered.*

The order directs the prosecutor to substitute crossings not at the grade of the public highways (naming them) "by changing the lines, width and direction thereof and carrying so much thereof as so changed under the said railroad, except in the case of Madison Avenue which is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further by vacating 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 * * * (which said new highway shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated)." We submit that this part of the order as well as that part of the statute upon which the same is based are invalid for the following reasons.

1. The prosecutor is under no legal duty and has no legal power to make said changes. The mere fact that the Board of Public Utility Commissioners has ordered the prosecutor to change the lines, width and direction of certain highways and to vacate certain parts thereof does not confer upon the prosecutor the legal *power* so to do. Such power is vested in the municipality under its charter and the general laws of the State. See argument under subhead (a) hereof, to which we refer in this connection. So far as concerns the vacation of a part of Madison avenue and the "remaining parts of said highways within the lines of the right of way" of the prosecutor, on what theory can it be urged that the prosecutor

is charged with the legal *duty* of so doing, merely because this Board tells it so to do?

The only title the prosecutor has to the highways is the leasehold interests given by the Paterson & Hudson River R. R. Co. and the Paterson and Ramapo R. R. Co. to the several corporate predecessors of the prosecutor. The *prosecutor* is directed to vacate certain real estate as if it were the *owner* thereof. Suppose it were the owner and suppose it did vacate the property—what happens? Does not such property—or at least that part thereof which was acquired by condemnation, or which was conveyed for railroad purposes—revert to the original grantors or their heirs? Whether it does or not, by what authority can the prosecutor be *compelled* to abandon its rights therein? Even if the crossings were eliminated, the prosecutor would at least retain certain rights in the land where the several streets cross under (or in the case of Madison Avenue, over) the railroad tracks—such rights perhaps being subject to the public easement to use the lands for street purposes. But to *vacate* the lands is quite different; this would amount to a surrender on the part of the prosecutor of all its rights therein.

But, of course, the obvious further difficulty with this part of the order is that the prosecutor does not *own* the lands at all; it has merely a leasehold interest therein and has no right or power to vacate same.

2. The prosecutor is obliged to pay the entire expense of said changes (except as otherwise provided by the statute) without having any hearing as to the propriety or necessity thereof and the method or the amount of the assessments therefor. The city charter, as above shown, carefully guards the rights of all property owners when changes are made in the streets, by providing for

notice of each step and hearing before the commissioners, and an appeal to the courts, and in certain cases even a jury trial. In the present case not only is the prosecutor's *own* property taken without compensation for the purpose of making the changes in the streets as required by the order, but the prosecutor is obliged to pay the expenses of making the changes, *including damages to adjacent property,* without any hearing whatever on the point as to whether these changes are necessary or required. It is true that the prosecutor had a hearing before the Board of Public Utility Commissioners with respect to the city's proposed plan, but surely the prosecutor was not bound to assume that the Board when it came to make an order, if it made any at all, would undertake to order the prosecutor to make changes which the prosecutor has no power to make and which it is under no duty to make. If the order be sustained in this respect, then it is of great importance to the prosecutor that the procedure prescribed by the charter of the city and other general laws be followed, so that it may have reasonable opportunity to appear and object to such proceedings if it desires to do so.

3. No proceedings have been taken as required by the city charter for the altering or widening of the several highways ordered to be altered (including Madison avenue) nor have any proceedings been taken as required by the charter to change the grade of any of said streets. So far as the altering or widening is concerned, the same argument applies as above stated under subheads (a) and (b); but as to the several streets that are specifically named in the city's petition, it will appear by an examination of the plan and profile that there is still another objection to the Board's order, namely, according to said plan and profile

the grade of Madison avenue is changed by carrying the same over the railroad tracks, and the grades of all the other streets (which are carried under the railroad) are changed (in some cases) to the extent of four or five feet in each case. The procedure for change of grade of a public street is carefully prescribed by sections 109 *et seq.* of the Paterson charter of 1871. No such procedure has been followed in the present case, and no notice has been given to any of the interested property owners. If it be said that the property owners are not objecting to the present order, the answer is that that fact does not make the order any the more legal; but however that may be, the railroad company insists that as a *property owner* it still has some rights notwithstanding the Board's order; and as such property owner it is entitled to have the prescribed procedure followed when its own property is affected either by the opening or the widening or the altering of the streets, or by changes in the grades thereof.

In the event of a change of grade the parties affected thereby are entitled to recover all the damages suffered by reason thereof, *Worth* v. *The Town of Westfield,* 90 Atl. 727.

Property owners who sustain special damage by reason of the re-construction of railroad tracks are entitled to recover damages therefor. *Dickinson* v. *Delaware etc. R. R. Co.,* 93 Atl. 703, 87 N. J. L. 264.

At the time the present proceedings were begun Ch. 238, Laws of 1914 (p. 491) had not been passed. This statute provides that notice of time and place of the hearing (except as to the municipality and the railroad) may be given by publication in a newspaper in which the crossing is located, and that this notice shall be directed generally "to whom it may concern." No such no-

tice was given in this case. According to the city's testimony, private property to the value of nearly $10,000,000 may be affected by these proceedings (Vol. I, p. 120; Exhibit P-42; Vol. II, pp. 864-904). The record in this case does not show that any of these property owners have received any notice whatever—except that some of these owners also happen to be interested in the sidings and after the proceedings were started they received notice as such siding owners.

The railroad company also is entitled to receive notice *as a property owner,* as the changes in and re-location of the several highways seriously affect its rights as such owner. Proceedings to open a street impose an additional burden on the land, and the land owner is entitled to have a hearing thereon. *Erie R. R. Co.* v. *Paterson,* 79 N. J. L. 512.

The Supreme Court in its opinion said that the changes in these highways were "all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroads" (p. 2284, ll. 1-10).

We respectfully submit that in reaching this conclusion the Supreme Court must have overlooked the testimony on these subjects. There was no claim made even by the City that it was "necessary" to substitute for the existing crossing at Cedar street a new crossing at Taylor street, and for the existing crossing at Franklin street a new crossing at Montgomery street. All that was claimed by the City was that it was "convenient" to make these changes. The City engineer testified as follows:

> "Q At Taylor street, I understand Taylor street is not now opened? A No, sir.

"Q You propose to open it, do you? A I propose to open Taylor and close Cedar street.

"Q Is that necessary for any reason? A *Not necessary,* but convenient if the yard is to be kept where it is at present." (p. 481, ll. 20-30.)

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

"Q Why do you show that? A It was *a little more convenient* there, the way the tracks were laid out, and also due to the fact it gave a better distribution of streets, to open Montgomery street and close Franklin street. Franklin street, according to the census given in the testimony before this Commission, has the least number of people crossing of any street in the city." (p. 483, ll. 30-40.)

According to the testimony of Mr. Brameld (which was not disputed), there was nothing in the plan for the elimination of the crossings which made it necessary to construct a new crossing at Taylor street; and the plan could be carried out just as well without a new crossing at that point (p. 1961, ll. 20-30). This is also true as to the proposed new crossing at Montgomery street (p. 1962, ll. 10-15).

There is, therefore, no evidence whatever upon which to base the conclusion of the Supreme Court that the changes in these streets were fairly incidental to or rendered necessary by the separation of the grades; on the contrary, the undisputed evidence shows the exact opposite.

What we have said as to the proposed new crossings at Taylor street and Montgomery street, on the question of necessity, applies equally to the changes at Essex street, Governor street and Fulton street. All of them now pass under the tracks. So far as relates to the general plan

for the elimination of the crossings, there is no necessity whatever for increasing the width of Essex street or changing the abutments and bridges at Governor and Fulton streets (see testimony of Brameld, p. 1950, l. 20; p. 1962, ll. 20-25).

In support of its conclusion on this subject, the Supreme Court cited the cases of *In Selectmen of Norwood* v. *New York & N. E. R. Co.*, 161 Mass. 259, 37 N. E. 199; *Davis* v. *County Commissioners of Hamshire Co.*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750.

In the *Davis* case the court had occasion to consider the Massachusetts statute of 1874. In considering the meaning of this statute the court discussed an earlier statute of 1872 and pointed out the distinction between the two statutes, saying (italics ours):

> "The statutes of 1872, c. 262, §1, provided that if the mayor and aldermen of a city or the selectmen of a town wherein a highway or townway which crossed or was crossed by a railroad was situated, or the directors of any railroad corporation whose road crossed or was crossed by such way, were of the opinion that it was necessary for the security or convenience of the public, 'that the approaches to or method of such crossing should in any way be altered,' the county commissioners, if they should decide that such alteration was necessary, should prescribe the manner and limits within which it should be made. Under this statute, it was determined by this court that the alterations which the county commissioners had power to order *must be made within the limits of the existing highways.* Lancaster *vs.* Commissioners, 113 Mass. 100. The statutes of 1874, c. 305, §1, amended the above provision by striking out the words above placed in quotation marks, and inserting in place thereof the following: 'That any

alteration should be made in such crossing, or in the approaches thereto, or in the method of such crossing, or in the location of the railroad, or in the location of the highway or townway, or in any bridge at such crossing.' Section 2 provided that, if the county commissioners decided that the location of the railroad or of the highway or townway should be changed, land might be taken therefor. By the general railroad act passed in the same year (St. 1874, c. 372), the general policy was established of avoiding crossings at grade as far as possible, and to this end changes in the course of highways were authorized (sections 86, 89). The provisions of St. 1874, c. 305, §§1, 2, were incorporated in sections 96, 97, and afterwards in Pub. St. c. 112, §§129, 130, where the language is compressed, but with no change of meaning. These statutes must be read in view of their obvious purpose to do away, as far as possible, with crossings at grade. It is also to be observed that it is provided in Pub. St. c. 112, §120, that no bridge over a railroad shall be constructed at a height less than 18 feet above the track, except by consent in writing of the board of railroad commissioners. To get such a difference in the grade, it may be important to change the highway to a place at some distance from the existing crossing.

* * * * *

"It may be necessary that the highway should be deflected, so that for a short distance it will be wholly out of the original location. Then within what limits must such changes be confined? This it is not easy to define. It may be said, in general terms, that under the guise of doing away with a crossing at grade the authority of the commissioners would not extend further than to do *what is reasonably necessary* to accomplish the purpose, in view of the situation

> of the ground and of other circumstances. The fact that a location is so changed that the original highway is not again entered before another street is reached is not of itself decisive. Each case must be determined by its own circumstances. In the present case we find nothing to show that the change was any greater than was necessary in order to do away with the crossing at grade. There has been no suggestion that any simpler scheme would have been practicable. The argument addressed to us has been merely that the authority given by the statutes did not extend so far as to warrant the change which was ordered. It may therefore be taken for granted that the scheme is not open to criticism on the ground that it is more of a departure from the original existing highway than was necessary. There is no technical and arbitrary limitation of authority such as is contended for. All that can be said is that the county commissioners must not depart unreasonably from the existing highway, *or more than is reasonably necessary* in order to make a safe and convenient crossing over or under the railroad."

Under the principle of this case it is obvious that no change can be made in the location of existing highways unless such change is "reasonably necessary." The decision does not justify the conclusion of the Supreme Court in the present case, but on the contrary sustains the argument of the prosecutor that the changes under consideration were beyond the power of the Board.

In the *Norwood* case the Court approved a removal of a crossing "for a short distance, in order conveniently to carry the way over or under the track;" and in this connection said (italics ours):

> "It would be too narrow a construction of the language of the statute to hold that

there could be no change of a crossing to a new location, which should leave it *substantially the same crossing, and the same way.*''

In the same decision the court disapproved another part of the proceeding under review, saying (italics ours):

''In one particular, we think there was error on the part of the commissioners and of the court. In substitution for the grade crossing at Railroad avenue, they provide for two crossings, and the construction of two new ways, each of which is a considerable distance from the old one. The master finds that 'neither of said crossings is fair substitute, in the sense of being a fair equivalent for the present grade crossing at Railroad avenue, but both of them constitute more than a fair substitute therefor. There is nothing in the report of the commissioners that tends to contradict or control this finding of the master, but the facts disclosed show, almost conclusively, that the finding is correct. We must assume, therefore, that the rulings and the decree of the superior court were made upon this finding of fact, in connection with the other facts which appear in the report; and the question is whether they were correct, as a matter of law. It may be that the plan adopted by the commissioners is the best that could be devised for the accommodation of the public travel in this vicinity; but we are of opinion that the two crossings—involving, as they do, the construction of two new ways of considerable length—are more than can be ordered under a statute which, when a crossing is discontinued, authorizes new ways to be built only 'in substitution therefor.' It is unnecessary to decide that in no case could two new ways and two crossings be ordered, under the statute, in substitution for a discontinued way

> and crossing. Perhaps cases may be supposed where such a construction would be only a reasonable substitute and fair equivalent for that which is given up; but ordinarily a single new way and crossing is all that can be considered necessary or reasonable as a substitute for a discontinued crossing. It is to be remembered that a railroad corporation can only be liable as an ordinary taxpayer for the cost of construction of new ways which are not necessary to accommodate the travel that is to be provided for at the crossing which is changed. In the present case the two ways and crossings seem to be intended, in part at least, as an improvement of the *general means of communication in the neighborhood,* as distinguished from a provision for the better accommodation of those who have occasion to pass over the railroad *at the existing crossing.* We must therefore set aside that part of the report which pertains to the change of the crossing at Railroad avenue."

This case also, so far from supporting the conclusion of the Supreme Court, is strong authority for the prosecutor's contention that the Board had no power to direct changes in streets merely because in the opinion of the Board such changes would be an improvement of the "general means of communication."

If it be said that the changes at Cedar, Taylor, Franklin and Montgomery Streets may be justified under Sec. 1 of the statute, even though not necessary for the general plan of elimination, the answer is that the proposed new streets do not *re*-place the old streets. As pointed out above, each proposed new crossing is 500 or 600 feet from the corresponding existing crossing.

It is difficult to see on what theory the Supreme Court concluded that any of these changes were

necessary with reference "to the interests of the railroad company." None of these changes facilitated in any way whatever the operation of the railroad, and there is not the slightest advantage to the railroad in closing the existing streets and opening others in the stead thereof. On the contrary, there is very decided disadvantage, in that the cost of constructing the new crossing at Taylor Street is about $71,000, the cost of constructing the new crossing at Montgomery Street is about $38,000, and the cost of widening the present crossing at Essex Street is about $80,000, and of making the changes required at Governor and Fulton Streets is about $61,000—or a total of $250,000.

V.

THE ORDER IS INVALID AND BEYOND THE JURISDICTION OF THE BOARD OF PUBLIC UTILITY COMMISSIONERS IN SO FAR AS IT PURPORTS TO COMMAND THE PROSECUTOR TO ACQUIRE CERTAIN PROPERTY FOR THE PURPOSE OF COMPLYING THEREWITH, AND TO MAKE THE CHANGES SPECIFIED ON THE PLAN AND PROFILE ATTACHED TO SAID ORDER WITH RESPECT TO THE LOCATION OR GRADE OF VARIOUS SWITCHES, SIDE-TRACKS, LEADS, BRIDGES, YARDS, STRUCTURES AND OTHER FACILITIES AND PROPERTY OF THE PROSECUTOR AND OF OTHER COMPANIES, COPARTNERSHIPS OR INDIVIDUALS, AND TO RECONSTRUCT, RELOCATE OR REBUILD THE SAME IN WHOLE OR IN PART, AS SPECIFIED ON SAID PLAN, FOR THE FOLLOWING REASONS:

(a) The petition of the Board of Finance of the City of Paterson did not include therein

any prayer for the relocation, reconstruction or rebuilding of said properties or any of them; and even if it did, the Board of Public Utility Commissioners has no power (either under said petition or otherwise) to command the prosecutor to make such relocations, reconstructions, or rebuildings; and even if said Board of Public Utility Commissioners has any such power, the order with respect thereto has not been made after hearing and upon notice.

(b) Said changes in said properties are no part of the legal duties or obligations of the prosecutor or of said companies, copartnerships or individuals.

(c) Said changes in said properties are not, nor is any or either of them, reasonable, necessary or required for the elimination of the several grade crossings.

(d) The commands of said Board of Public Utility Commissioners to the prosecutor to make said changes in said properties interfere unlawfully with the judgment and discretion of the board of directors of the prosecutor.

(Reasons 45 and 46).

The order under review, when read in connection with the plan and profile attached to and forming part thereof, requires the prosecutor to do the following (*inter alia*):

1. To make certain changes in the station buildings and facilities at or near Market Street and at or near River Street (see Point II.).

2. To make certain changes in the buildings and facilities of Fullers Express Company and Morris & Company (see Point III.).

3. To make certain changes in the properties of Public Service Railway Company (see Point XXI).

4. To make various changes in certain streets (see Point IV).

5. To make certain changes in the location or grade of various switches, side tracks, leads, bridges, yards, structures and other property of the prosecutor and of other companies or individuals.

The last named will be considered under the present point and will be discussed without reference to the question of whether the imposition upon the prosecutor of the expense of making said changes deprives the prosecutor of its property without just compensation and without due process,—which matters will be considered under a separate point numbered XXII.

The changes required to be made in the switches, side tracks, leads, etc., may be ascertained in detail by an examination of the plan and profile attached to the order, and a comparison thereof with other maps offered as exhibits on which are indicated the present locations of the railroad tracks and the several side tracks, etc.

The testimony of Mr. Brameld, taken before a commissioner pursuant to an order of the court, gives the details of the changes as indicated on the various maps, and also gives the details of the estimated cost thereof.

Exhibit Erie—28 (Vol. IV., p. 2254) shows that the total cost of making these changes is the sum of $249,393.92. Of this amount the sum of $83,-846.29 represents work required to be done off of the property of the railroad.

A convenient summary of these changes will be found in Reason 72 (see Vol. IV., p. 1848).

It will be seen that under the order of the Board certain sidings are entirely destroyed; others are required to be reconstructed at different locations,

and new bridges must be constructed across Taylor Street, Hamilton Avenue, Ellison Street, Lafayette Street, Montgomery Street, Fulton Street and Governor Street, in order to carry some of the new sidings or the leads thereto. These bridges are entirely separate and distinct from the bridges upon which the main line tracks are to be carried; some of the reconstructed sidings are to be built on railroad property; others of them are to be built either in whole or in part on property owned by other companies or individuals and in several cases the sidings or leads are to be built across public streets, and in other cases they are to be built longitudinally in, along and through public streets.

Whatever may be said as to the rest of the order we submit that those portions hereof now under discussion are clearly invalid for several reasons:

—(*a*) *The petition of the Board of Finance of the City of Paterson did not include therein any prayer for the relocation, reconstruction or rebuilding of said properties or any of them; and even if it did the Board of Public Utility Commissioners has no power (either under said petition or otherwise) to command the prosecutor to make such changes; and even if the Board of Public Utility Commissioners has any such power the order with respect thereto has not been made after hearing and upon notice.*

The petition of the Board of Finance is limited to a prayer that the Board of Public Utility Commissioners order the railroad company and the Paterson & Hudson River Railroad Company and the Paterson & Ramapo Railroad Company to alter the crossings according to plans to be approved by the Board by substituting a crossing not at grade, etc. (see page 17 of Petition, Vol. IV., p. 1660).

There is no suggestion in this petition that it was the purpose of the City of Paterson to request changes in any of the properties now under consideration, nor was there any suggestion in the evidence taken before the Board that it was the intention of the City, or of anyone else, to ask the Board to order the *railroad company* to make such changes or any of them. But even if there had been any such prayer in the petition and even if there had been any claim at the hearings on said petition that it was any part of the duty of the railroad company to make these changes at its own expense, the fact still remains that the Board of Public Utility Commissioners has no power to command the prosecutor to make such changes.

The legislation respecting public utilities and the powers of the Board of Public Utility Commissioners does not purport to repeal or modify charters of the various municipalities with respect to public streets and the opening, altering or grading thereof—indeed, probably the statute under which the Board is organized, and the supplement thereto, by virtue of which the present order has been made, could not constitutionally make any such changes in the charters of the municipalities. See *Burlington* v. *Pennsylvania R. R.*, 56 N. J. Eq. 259. There might possibly be some excuse for an order directing the prosecutor to make changes in its own side tracks, switches, etc., so far as the same were reasonably incidental to or necessary for the change of grade of the main line tracks (subject to the objection argued under Point XXII. as to just compensation and due process) but on what theory can it be successfully maintained that the Board has power to order a railroad company to make such changes on, or with respect to, properties not owned or controlled by it and on or through public streets? If it be said that the company has

power to condemn for the purpose of carrying out the order of the Board, the question still remains as to whether such power *must* be exercised merely on the Board's say-so, or whether the directors of the railroad still retain both the power and the duty of exercising their "judgment" in order to determine whether (in the language of Section 13 of the General Railroad Law, as amended by Chapter 237 Laws of 1914) the "exigencies of business" demand the condemnation of such properties.

So far as concerns the construction of side tracks *across streets,* the company may have the power to make such construction without the consent of the municipality. See *Allen* v. *Jersey City,* 53 N. J. L. 522. But what can be said to justify the Board in ordering the railroad to build switches and leads *longitudinally* through public streets without the consent of the municipality as provided by Section 34 of the General Railroad Law.

Without statutory authority a railroad placed longitudinally in a street is a nuisance. *Burlington* v. *Pennsylvania R. R.,* 56 N. J. Eq. 259; *Tallon* v. *City of Hoboken,* 60 N. J. L. 212; *Bork* v. *United New Jersey R. R.,* 70 N. J. L. 268.

Without such authority a railroad cannot even occupy a part of the highway for the erection of abutments for a bridge crossing the highway. *Township of Raritan* v. *Port Reading R. R.,* 49 N. J. Eq. 11.

See further *Morris, etc. R. Co.* v. *Newark,* 10 N. J. Eq. 352; *Newark* v. *Delaware, etc. R. Co.,* 42 N. J. Eq. 196.

There is no evidence in the present case of any appropriate municipal action giving consent to the railroad to occupy public streets and even if there had been any such action still it does not appear that the company has acquired the right of

the owners abutting on said streets, as required by Section 34 of the General Railroad Law.

But even if all of the foregoing objections are overruled the fact still remains that the part of the order under consideration has been made without hearing and without notice. It might well be that the railroad company would prefer not to construct the side tracks, leads, etc. in the particular manner or in the particular place required by the order; there may be reasons of operating convenience or there may be financial considerations which would make it inexpedient or inadvisable for the company to make such constructions. The cost of acquiring the rights of abutting owners might be so great as to make it unwise to construct side tracks through a public street even assuming (which is at least doubtful) that said Section 34 is broad enough to include the construction of side tracks as distinguished from the main line. While of course the company has had a hearing on the general proposition of the alteration of the grades of the crossings as included in the specific prayer of the petition, there has been no hearing on the point as to whether it is proper or necessary or even desirable to make the changes in the side tracks, etc., as required by the order.

(*b*) *Said changes are no part of the legal duties or obligations of the prosecutor or of the other companies or individuals.*

The order under review in one paragraph requires the prosecutor to reconstruct said railroad and highways and to perform "all other work required, according to and as shown on said plan and profile." Another paragraph of the order directs that the prosecutor and the city of Paterson and certain other companies and "all other parties to

this proceeding'' proceed with due diligence to the execution of the order.

Among the ''other parties'' are the owners of several sidings. If this order be construed to impose upon them the duty of relocating and reconstructing the sidings, then the prosecutor is not in a position to complain, (except in so far as such relocation and reconstruction might interfere with the prosecutor's own property or privileges) but it is certainly very doubtful whether or not an administrative body, which derives its powers from an act concerning public utilities, can undertake to command private individuals to destroy or to reconstruct their private property. However that may be, if the order be construed to impose upon the railroad the obligation of performing ''all other work''—including the relocation and reconstruction of the switches and sidings, then it is difficult to discover on what theory this part of the order can be sustained, as it is no part of the legal duty of the railroad to do such work. In Section 17 of the act concerning public utilities the Board is given power to require every public utility ''to comply with the laws of this State,'' but there is nothing in the laws of this State which requires a railroad company to construct or reconstruct private switches—indeed, such construction might be a violation of another section of the same statute which provides that no public utility shall ''make or give directly or indirectly any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever'' (Section 18-d).

Another section of the statute, 16-k, gives the Board power to direct any railroad to construct, maintain and operate upon reasonable terms a switch connection with any private side track, which may be constructed by any shipper where, in the judgment of the Board, such connection is reasonable and practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same. But the present order goes far beyond the requirement of the construction and maintenance of a connection with private side tracks, and compels the prosecutor to actually construct the *side tracks.* Moreover, even if this section of the statute could be stretched to include the construction of private side tracks as well as the construction of connections therewith, still this part of the order is invalid because it does not appear that the jurisdictional facts exist upon which the duty of the prosecutor to make such connections depends; and finally, the prosecutor has had no hearing with respect to the jurisdictional facts or any of them as specified in said Section 16-k.

Under the common law there is no obligation upon a railroad company to construct or maintain private side tracks for the accommodation of individual shippers. West Va. v. *White Oak Ry. Co.,* 28 R. H. (A. S.) 1913, and cases cited in note.

Counsel for defendants may say that the order does not *require* either the railroad or the owners thereof to reconstruct the side-tracks, but simply suggests a feasible method of reconstruction.

If that was the intention of the Board of Public Utility Commissioners, it is unfortunate from the standpoint of the prosecutor that such intention was not expressed. The prosecutor cannot take the risk of refusing obedience to the order merely

because counsel may argue that the intent thereof is different from that which is expressed therein.

Counsel may say that the order under review relates only to *existing* sidings, and that it does not contemplate the affording of such facilities, except where the same have heretofore been furnished. This argument assumes that the prosecutor is required by law to *continue* existing sidings, but there is no such requirement either by the State law, or by the Interstate Commerce Act, or by the terms of the contracts between the prosecutor and the siding owners. The prosecutor has the right at any time (subject to whatever notice may be required under the terms of said contracts), to discontinue the sidings.

Counsel may also say that the order only requires others than the company operating the railroad to make such changes in, and removals of, their property and construction as are necessary to carry the order and plan into effect and that in this it accords with Section 4 of the statute. It is true that the paragraph in question of the order purports to be taken verbatim from section 4 of the statute. But the question still remains, what does that part of the statute mean? If it is applicable to the siding owners, they are not public utilities; the said section 4 is, therefore, unconstitutional, and the entire act must fall.

If, however, counsel should argue that the changes in, or the removal of, the private sidings cannot be said to be "necessary" to carry the order into effect, then *that is an additional reason why that part of the order is invalid.*

The fact of the matter is that the order expressly directs the prosecutor to perform "all other work"; this clearly includes the relocation and reconstruction of the switches and sidings. If such is the construction of the order, then we submit it is

invalid because if the Board had any jurisdiction at all to make the order under review its order should at least have been limited to a direction to the railroad to change the grade of the *main line tracks only*. It may be that as a result of such change it will become desirable or convenient for somebody to make corresponding changes in side tracks and the approaches thereto, but that matter is not within the jurisdiction of the Board in this proceeding—which is limited to an application by the City to eliminate certain crossings located on the main line tracks. The statute of 1913 provides in Section 1 "whenever a public highway and *a railroad* cross each other at the same level" etc. We submit that the expression "a railroad" must be limited to main line tracks as distinguished from side tracks, freight yards, stations, etc. The distinction is very important in the present case because admittedly all of the main line tracks are owned by the underlying companies, whereas some of the other property affected by the Board's order which is used for freight houses and yards, side tracks, station facilities, etc., is owned by the prosecutor and other property likewise so used is owned by an entirely different company, known as the Erie Land & Improvement Company—which is not a public utility at all and was not even made a party to the proceeding. (See Ex. R-16, Sheet No. 7—lands bounded by green lines; Sheets 8, 9, 10 and 11—lands bounded by blue lines.)

None of the numerous persons and corporations who own or use side tracks has made any application for changes therein, and no proceedings whatever have been taken other than the City's petition for the purpose of effecting any such changes. We submit that the jurisdiction of the Board under this statute and in the present proceeding is limited to a consideration of the propriety and neces-

sity of changing the grade of the main line tracks only, and that, therefore, the Board had no power to include as a part of this order a general command to the prosecutor to make the numerous changes in the side tracks and approaches which are specified on the plan and profile attached to and forming part of the order.

Counsel may say that only four of the sixty-two siding owners are contesting the present order. No doubt the reason that the other fifty-eight are not objecting is because they assume that the order requires the railroad company to do the necessary work of changing the side tracks to make them correspond to the new grade of the main line tracks. Under such circumstances, of course, they do not object.

In this connection counsel for defendants said in Supreme Court: "Many changes are made in other sidings. All these are necessary if private owners are to be served. If any of these do not desire to continue service the proposed relocated siding need not, of course, be constructed." According to this argument, the question of whether the prosecutor shall in this respect obey the order of the Board of Public Utility Commissioners depends upon the desire or lack thereof on the part of certain siding owners to continue service. If the prosecutor should take counsel of the defendants at their word with respect to this subject, and should decline to obey the order so far as it requires the relocation of those sidings, the owners of which do not desire to continue service after the tracks have been elevated, the prosecutor and its advisers would be liable to penalties under sections 33, 34, 35 and 36 of the Act concerning public utilities (Chapter 195, Laws of 1911).

In the Supreme Court counsel for defendant argued that notice of a proceeding brought under

the Grade Crossing Act of 1913 is "effective" to operate as a notice to the prosecutor of any and all proceedings which the Board might see fit to take and of its intention to exercise whatever powers it might have under any or all of the provisions of the Act concerning public utilities, particularly sections 17 (a) 17 (b) and 16 (k).

Assuming that by the expression "laws of this State," in 17 (a), is meant any and all laws, whether written or unwritten (a violent assumption, in view of the strong hint to the contrary given by this Court in the case of *Public Service Electric Co.* v. *City of Plainfield,* 88 N. J. L. 603), the Board is nevertheless without power to make an order requiring a public utility to comply with the laws of the State, *except* after hearing and upon notice. In the present case the order under review requires the prosecutor to reconstruct not only the main line tracks of the railroads over which it runs trains, but also numerous side tracks and approaches thereto; also certain portions of its freight yards; also two passenger stations; also certain other structures, as specifically pointed out in Points II, III and IV. The evidence shows that these changes are not incidental to, or necessary for, the separation of the grades of the main line tracks and the several highways. But even if they were, we submit the prosecutor is at least entitled to notice that such changes are demanded by the party instituting the proceeding so that it might have an opportunity to be heard on the question of whether they are in fact incidental to or necessary for the elimination of the grade crossings. We do not know whether counsel for defendants conceive that the Board of Public Utility Commissioners has the power to order these changes under some supposed general authority to order public utilities to comply with the laws

of the State under section 17 (a), or whether they conceive that the power must be found in the specific authority given by sections 17 (b) and 16 (k). If the present order is supposed to be founded on the general authority of 17 (a) then the question arises what are the "laws" which the prosecutor is required to "comply with"? An order to "comply with" a law presupposes that the utility receiving such order is not complying with the law. But in the present case the prosecutor is entirely in the dark as to what "laws," if any, it has not complied with in the City of Paterson, and it is equally in the dark as to what "laws" the Board by the present order seeks to compel it to obey. Even the worst of criminals is not condemned without a hearing; he is at least informed what law he is charged with breaking, but no such privileges have been afforded to the prosecutor in this proceeding, so far as relates to the requirements for the reconstruction of the side tracks, approaches, freight yards, passenger stations, bridges and other structures.

If the authority of the Board is related to the specific provisions of 17 (b) and 16 (k), that does not meet the present objection, because under both sections the prosecutor is, of course, entitled to a hearing as to whether its "service" is safe, adequate and proper, and whether the switch "connection is reasonable and practicable."

Furthermore, the prosecutor is entitled to a hearing on the further points as to whether the switch connection "can be put in with safety", and whether it "will furnish sufficient business to justify the construction and maintenance of the same."

The rules of the Board very properly require a petition in such matters, setting forth the facts upon which the complaint or application are based (see Rule 4), but in the present case important

changes are ordered in the side tracks, freight yards, stations, etc., without any complaint and without any application for any change therein. No one has complained that the present service is not safe, adequate and proper, nor has any evidence been produced on that subject; no one has requested a switch connection nor produced any evidence that such connection is reasonable and practicable, nor has any evidence been produced to show that such connection can be put in with safety or that it will furnish sufficient business to justify the construction and maintenance thereof. The Board itself, in its report and order, has made no finding upon such subjects—as, indeed, it could not, in the absence of any evidence relating thereto.

Under section 18 (e) and (h) the Board has certain powers to approve the issue of stocks, bonds, etc. If, in the present case, the Board had power to require changes in the side tracks, freight yards, stations, etc., without any application therefor, why did it not complete the transaction by adding another provision in its order permitting the company to isue stocks or bonds for certain amounts and under certain terms and conditions, in order that it might raise sufficient funds for the purpose of meeting the expense of eliminating the crossings. No one would contend that such a provision could be included in the order in the present proceeding, but why would not that be equally valid as the provision which we find in fact in the order with regard to side tracks, stations, etc. The mere fact that the Board may have certain powers under sections 18 (e) and (h) and 17 (a) and (b) and 16 (k), does not permit it to exercise those powers in a proceeding which was not instituted for the purpose of calling for the exercise of such powers, but for an entirely different purpose.

Under the practice adopted by the Board, a petition must be filed setting forth specifically the na-

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ture of the complaint and asking appropriate relief, and the utility against whom the complaint is made is required to file its answer, in which it must "specifically admit or deny the material allegations of the petition, and set forth briefly the facts which will be relied upon to meet the allegations of the petition" (see Rule No. 8). The rules further provide that "on *issue* joined by the filing of a petition and answer thereto," the Board will assign a time and place for a hearing. Presumably the hearing is on the "issue joined" by the petition and answer. It is obvious that in the case of a petition filed to eliminate grade crossings the railroad is not called upon to assume that this petition contemplates that the Board in that proceeding is to exercise all the other powers conferred upon it by the act concerning public utilities.

(*c*) *Said changes are not reasonably necessary or required for the elimination of the grade crossings.*

The statute upon which the order is based provides that whenever a public highway and "a railroad" cross each other the Board may order the company operating such "railroad" to alter the crossings, etc. There is no reference in the statute about switches or sidetracks. We submit that the terms "a railroad" and "such railroad" as used in the statute must be limited to the tracks of the railroad company and cannot by any possibility be enlarged to include the tracks of any other company or individual, even though there may be a physical connection between such other tracks and the tracks or such railroad company.

It may be that incidental changes in the railroad property, such as are reasonably necessary for carrying out the order of the Board, might be justified, but there is nothing in the evidence in this

case to show that it is necessary to relocate and reconstruct the several sidings for the purpose of carrying out the general plan of the elimination of the grade crossings—indeed, the testimony is directly to the contrary (pp. 1948-1983).

In the very nature of things, it is obvious that if the main line tracks of a railroad company are elevated, it is not necessary to bring side tracks to the same elevation in order to complete the work *on the main line.* It is quite true that the side tracks would be left without any physical connection with the main line tracks, but that fact would not prevent or interfere with the elevation of the main line. If, after such elevation, the owner of any particular side track desires to establish a switch connection he is at liberty to bring proceedings under Section 16-k of the Public Utility Act, and in such proceedings the railroad would be heard on the question of whether such a connection was reasonable or could be put in with safety or would furnish sufficient business to justify the construction and maintenance of same. But the duty of elevating the side track would devolve upon the owner thereof if he desired to establish connections with an elevated main line.

The Supreme Court held that the power given to the Board by the statute to order the alteration of grade crossings included "the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings" (p. 2278, ll. 30-35). This conclusion assumes that there is evidence to show that the changes in the side tracks, leads, bridges, freight yards, etc., are incidental or necessary. The evidence shows directly the contrary. It may be quite convenient, and in some respects desirable, to change the side tracks or the leads or the bridges whereby

the same are reached, so far as concerns the interests of the private individuals or corporations that are now using such side tracks, leads and bridges. But as the railroad company is under no legal obligation to construct same in the first instance, it is difficult to see how the obligation of *re*-constructing same can be imposed upon it by an order of this kind, even though it would be convenient or desirable for other parties. Moreover, these changes are not within the statute, because that is limited to the alteration of crossings at "a railroad"; this, we submit, means the main line and nothing else.

In further discussion of this subject, the Supreme Court says that the order does not require the railroad company to make changes in private sidings "not within the limits of its right of way." The court also says that the order does not require the owners of such private sidings to re-construct them but merely "suggests" to such owners a method by which their property may be conformed to the new conditions; and then the court says:

> "As we have pointed out, in so far as the order directs the prosecutor to make changes in its own side tracks and the like, it was within the power conferred by the statute, if such changes were fairly incidental to the changes of grade of the main line tracks. We think that such ordered changes were of that character" (pp. 2279-2281).

We submit that the difficulty with this line of reasoning is that the order does not purport to make *suggestions* to anybody; it explicity directs *somebody* to make changes in side tracks—both within and without the right of way. True, this direction is found by reference to the plan and profile attached to the order, but inasmuch as that is expressly made a part thereof, how can it be

said that the changes thereby required are not ordered.

That the order *requires* these changes, rather than merely suggests same, is demonstrated by the *report* of the Board of January 11, 1915 (Vol. IV., p. 1748 *et seq*). By the *order* under review this report was made a *part* of the order (p. 1788, ll. 35-40). On referring to the report we find the Board decided "that the plan to be approved should be that generally outlined in Plan No. 2 of the City of Paterson, as modified in the respect hereinbefore referred to" (p. 1765, ll. 20-25). (NOTE: The modification to which reference was thus made had to do with the change in the plan at Madison avenue and does not touch the present inquiry.)

In discussing the plan submitted by the city the report of the Board says (italics ours):

> With Section D modified according to the Erie Railroad plan, no switch owners east of Newark Branch Junction would be affected, neither would the Newark Branch be affected. It appears, from present plans, five industries would be left without any switch connections, and two industries would be moved to a new location with switching facilities equal to the ones they now enjoy. Alterations *will have to be made* in connections to 31 industries by Plan No. 1 and *26* by *Plan No. 2*, some apparently resulting advantageously and others not so much to their advantage; and 20 on Plan No. 1 and 25 on Plan No. 2 will have no change in their present accommodations. At present one has no siding" (p. 1764, ll. 20-38).

There is nothing in the language thus used which indicates that the changes in the sidings as shown on Plan No. 2 were merely "suggestions"; on the contrary this report shows beyond question that

in the opinion of the Board the alterations in the sidings, as shown on this plan, "will have to be made."

The cost of the reconstruction and relocation of the switches and sidings is a part of the city's estimate of the cost of elimination and is included in the Board's report as a part of the total cost of the work required to be done. See city's estimate and details of same, Ex. P-55, Vol. II., pp. 919-931; railroad estimate of same items, Ex. R-101 and R-102, Vol. IV., pp. 1305-1322; Board's report as to cost, Vol. IV., p. 1765, ll. 5-15; and Schedules C and D attached to report, pp. 1770-1.

If the order requires these changes to be made by the private companies or individuals owning same, of course that part of the order is invalid, because obviously the Board cannot compel *such owners* to make these or any other changes in their own property or in the property of the prosecutor. But if the order requires the changes to be made by the *prosecutor,* then it is likewise invalid because in violation of the Constitutions of the State of New Jersey and of the United States, as particularly set forth in Point XXII.

It will be observed that the Supreme Court makes a distinction between sidings within the limit of the right of way and sidings outside of the right of way. As to the former, we submit that under this statute the prosecutor cannot be ordered to make changes therein because (a) they are not part of the main line; and (b) such changes would be for the sole benefit of other companies or individuals and would therefore take the property of the prosecutor for their benefit without compensation.

As to the sidings outside the right of way, we submit that the general mandate at the conclusion of the first paragraph of the order whereby the

prosecutor is required to perform all other work "according to and as shown on the said plan and profile" imposes on the *prosecutor* the obligation of making changes of sidings outside the right of way; but even if the Supreme Court is right in construing this expression otherwise than the plain language thereof, then the question arises as to who is to do this other work. The opinion of the Supreme Court amounts to saying that nobody is *required* to do it. The question then arises what is meant by that part of the order which directs "any telegraph, * * * or other company or corporation, co-partnership or individual, whose property or construction it may be necessary to change or remove to carry said plan and this order into effect, shall change or remove the same, according to said plan." What becomes of that part of the order which directs all the "parties to this proceeding" to proceed with due diligence to the execution of the order and to comply with all the requirements thereof?

If, as the Supreme Court holds, "the changes in or removal of such private sidings cannot be said to be necessary to carry the order to the railroad into effect", then it is obvious that *if* the order does require such changes or removal it is to that extent, at least, invalid; if the order requires the *railroad* to make these changes, then it is invalid because the changes are not necessary; if it requires private companies or individuals to make the changes then it is likewise invalid because such private companes or individuals cannot be compelled to do this work by direction of a board of this kind. There is no escape from this dilemma; the argument of the Supreme Court that the order "simply suggests" to the owners of the private sidings the method by which their property may be conformed to the new conditions, cannot

be sustained in the face of the direct mandate found in the order itself. The fact of the matter is that the Board of Public Utility Commissioners, in its zeal to develop a complete plan for the elimination of the crossings and for the general improvement of the community through which the railroad tracks are constructed, which plan should at the same time interfere as little as practicable with the unusually large number of private companies or individuals whose interests would be necessarily affected by a change of grade of the tracks, has overstepped the bounds of the jurisdiction conferred by the statute upon which the order is based.

(*d*) *The command of the Board of Public Utility Commissioners to the prosecutor to make said changes interferes unlawfully with the judgment and discretion of the board of directors of the prosecutor.*

The charter of the Paterson & Hudson River Railroad Company provides for the election by the stockholders of seven directors. It further provides that in case an election should not be made on the day when it ought to have been made, the election may be held at any other time on certain notice, and the directors for the time being shall continue to hold office until new ones are chosen. It further provides that five directors shall be competent to transact all business of the corporation and that the directors shall have power "to make and prescribe such By Laws, Rules and Regulations as to them shall appear needful and proper, touching the management and regulation of the stock, property, estate and effects of the said corporation, and shall also have power to appoint a secretary, treasurer, engineer, agents, superintendents and such servants as may be required to transact the business of the corporation, with such com-

pensation to them and the president, as to the Board shall seem proper" (Vol. II, p. 961).

The charter further provides that the president and directors shall have power to have constructed or to purchase with the funds of the company all machines, engines, wagons, carriages and vehicles for the transportation of persons or any species of property thereon that they may think reasonable, expedient and right (p. 966).

The directors are also given power to declare dividends and in case of failure so to do they are required to give their reasons in writing to the stockholders for such failure (p. 967).

The charter of the Paterson & Ramapo Railroad Company has substantially similar provisions except that there is no section requiring the directors to explain the failure to declare dividends (pp. 1005 and following).

The General Railroad Law of the State of New Jersey (the rights, powers and privileges of which are possessed by the Erie Railroad by virtue of Chapter II, Laws of 1898, p. 23) provides that in the Certificate of Incorporation not less than seven or more than seventeen directors shall be named. The first directors are those thus named and thereafter directors are chosen at the annual meetings of stockholders. They are given power to appoint a president and various other officers and to fix their salaries or compensation. Section 13, as amended by Chapter 237, Laws of 1914, p. 490, provides (italics ours):

> "Any railroad company may, either at the time of its organization or construction or thereafter, as occasion may require, take by condemnation any of the land and property required for the right of way of its main line and branches, not exceeding one hundred feet in width, unless more shall be required for slopes of cuts or embankments or retaining

walls, and all such other land and property adjoining to such right of way, as *in the judgment of the directors the exigencies of business* may demand, for the erection of freight and passenger depots, and all other legitimate purposes of the company, and any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners, upon ascertainment and payment, or tender of compensation as prescribed by law."

The general power of managing corporate affairs is vested in a board of directors. We respectfully submit that notwithstanding the recent development of administrative legislation, the directors even of a railroad company still have certain powers and duties and that the Board of Public Utility Commissioners has no power to interfere with those matters which depend upon the judgment and discretion of the directors. The recent case of *Towers* v. *United Railways Co.*, 95 Atl. 170, is instructive on this point.

Headnote 4 reads as follows:

"The public service commission may not compel an electric railway company to construct and operate an extension of its line, where the construction and equipment of the extension in the manner directed by the commission would in the honest judgment of the directors of the company, result in annual loss to it, for the commission cannot so control the discretion of the directors."

The Court said (italics ours):

"It is apparent from an examination of the record that the construction and equipment of this extension in the way the directors of the company, in the exercise of their honest judgment, considered that it should be constructed or equipped, and operated, would result in an annual loss to the company. That

such would be the case cannot be doubted, and is not denied by the appellant. What the commission has done and what it intended to do is to order the construction of a 'jerk-water' line equipped with one car only from Overlea to the point indicated in the order. This they did against the judgment of the directors of the appellee company. If the conclusion of the commission as to question of fact be accepted as sound, this was the only possible construction and equipment that could have been ordered that would have shown any profit at all. In the judgment of the company, this kind of a road is highly undesirable from a business, engineering, and operating standpoint, and the construction of such a road is disapproved of by its directors. The manner of construction, equipment, and operation of such an extension are, in our opinion, matters to be determined by the directors of the company. *As to such matters, the legislature did not intend that the judgment and discretion of the directors of the company, when honestly exercised, should be controlled or ignored either by the public service commission or the courts.* The company submitted to the court abundant evidence to show why they regard this 'jerk-water' line as an unprofitable and unbusinesslike undertaking.

"In overruling their judgment and requiring this extension to be made upon the terms specified in the order the public service commission *substituted its judgment for that of the directors* of the appellee company. This, under the principles announced by this court in Laird *v.* B. & O. R. R. Co., 121 Md. 179, 88 Atl. 347 348, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915-B, 728, and Pa. R. R. Co. *v.* Towers *et al.*, 94 Atl. 330 (decided 1915, not yet officially reported), *it had no power to do.*"

In *Wisconsin &c R. Co.* v. *Jacobson,* 179 U. S. 287, the U. S. Supreme Court said:

> "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. (Citing cases.)
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> "While this power of regulation exists, it is also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. Lake Shore &c. Railway Company *v.* Smith, 173 U. S. 684."

The authority of a railroad commission is to supervise and regulate the duties of railroads to the public and not to arbitrarily control and manage their property. 8 Thompson (second edition) Sec. 451, p. 50 citing *State* v. *Atlantic Coast Line R. Co.,* 60 Fla., 465, 54 So. 394; *State* v. *Great Northern R. Co.,* 68 Wash. 257, 123 Pac. 8.

In *Bacon* v. *Boston & Maine R. R. Co.,* 83 Vt. 421, 76 Atl. 128, held that the power of the Board of Railroad Commissioners was to *regulate* and not to *manage* the business of the company. "To demand of railroad companies the surrender of the right to manage and administer their affairs would be to demand a surrender of the beneficial use of their property and franchises. * * * With regulation, obtruding itself into the place of manage-

ment, capital will recede from the channels of public service, and the industries most useful to the people at large will dwindle, for the incentives to the development, extension and skillful operation of those branches of business which can be said to be 'affected with the public interest' will, in great measure, be removed."

Also see *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 64 (affirmed 18 N. J. Eq. 518) holding that the grant to one of the power to manage the property of another without his consent and contrary to his judgment, even for his benefit, violates Article I, Section 1 of the State Constitution.

Under Chapter 237, Laws of 1914, can it be said that the directors may be *compelled* to take the necessary proceedings for condemnation in order to carry out the terms of an order of the Board? It is true that under that statute the directors are given *power* to condemn property required for the purpose of complying with any order made by the Board of Public Utility Commissioners, but the statute still imposes upon the directors the duty of exercising their judgment as to whether or not the exigencies of the business may demand the particular property, which may have to be taken in order to comply with the Board's order. In the present case the directors have not in fact exercised any "judgment" as to whether the exigencies of the company's business demand the taking of this property. Moreover if their "judgment" in that respect is subject to the command of the Board, then the directors are no longer business men exercising their honest judgment, but are merely puppets who have to dance when the Board pulls the strings. "Judgment" implies the exercise of discretion; that is, the power of choice. But under the present order the directors have no such power.

Under this order it makes no difference what the judgment of the directors may be, nor, indeed, whether or not they have any judgment whatever on the subject. It makes no difference what the "exigencies" of the company's business demand—that matter is decided once for all by the Board of Public Utility Commissioners and the directors can do nothing but protest.

Counsel for defendants may argue that under Chapter 237, Laws of 1914, the railroad company has the power of eminent domain for the purpose of condemning any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners. It may be that under this statute the railroad has the *power,* but how can the directors be *compelled* to take condemnation proceedings for the purpose of carrying out the terms of an order of the Board. The statute in question permits the company to take such property, etc., "as in the judgment of the directors the exigencies of business may demand." Who is to decide what is the "judgment" of the directors unless it be the directors themselves, and if they are of the opinion that land and property required for the purpose of complying with an order of the Board is not necessary for the "exigencies" of business, then who can compel the directors to change their opinion on that subject? If the Board of Public Utility Commissioners can compel such change, what is the use of having a Board of Directors? The *power* may be with the company, but the right to exercise the power and the duty of forming a judgment as to the necessity of its exercise must still remain with the Board of Directors.

In the Supreme Court counsel for defendants cited certain cases for the proposition that the "imposition" of certain duties upon the railroad

carries with it the power to perform them. These cases, however, relate to the construction or the reconstruction of crossings within the limits of the right of way. There is no suggestion in any of them that a railroad has any right to condemn or occupy land outside of the right of way—except, possibly, for the purpose of construction of abutments in a case where the tracks pass over the highway. Still less is there any suggestion that a railroad has power to relocate public streets, or to condemn for railroad purposes public streets or other property, or any part thereof, which has already been devoted to some other public purpose. Among the cases cited by defendants is *Easton & Amboy R. R.* v. *Greenwich,* 25 N. J. Eq. 565. In that case there was express legislative authority in the railroad to change the location of a public highway, but even under that broad power an attempt on the part of the railroad to exercise it was restrained when it did not appear that the change in the highway was "necessary."

In the present case we submit that there are many changes in the location of public streets and in the property of other public utility companies required by the order under review, for which no *necessity* has been shown. In any event, the question of whether such changes are necessary must, we submit, be determined by the Board of Directors of the railroad—otherwise the provision in section 13 of the General Railroad Act which requires the "judgment" of the directors upon the question of what the "exigencies of business" demands is a mere sham.

It must also be remembered in this connection that the directors owe a duty to stockholders to exercise an honest judgment on all such matters as involve the management of the company's business; and for failure to exercise such judg-

ment they may be held responsibile either civilly or criminally, or both.

Counsel also argued that from the statute and the order there must flow to the company "powers co-extensive with the acts required to be done." If that be so, then it is no longer necessary for railroad or other corporations in New Jersey to obtain charters or to act in accordance with provisions of the charters. All that is necessary is to obtain an order from the Board requiring or permitting certain things to be done, regardless of restrictions of the charters or of other statutory limitations.

The order of the Board makes no provision for changes in the plans as the work progresses, and it makes no provision for any changes whatever in the lay-out of the tracks, yards, sidings, etc., *after* the work has been completed. Even while the work is proceeding it may become necessary to make certain changes, but under this order the officers and directors of the company have no right to make any such changes. But after the work has once been completed, the company is in a still worse position, because then the entire railroad company and the various facilities used in connection therewith have become, as it were, petrified. The character and the extent of the use of the railroad property and facilities which the company is to have, is fixed for all time and there is nothing left to the judgment or discretion of the directors to determine what should be the character and extent of the future use, no matter what may be the future necessities.

The Supreme Court held that insofar as the execution of the order may require the exercise of the power of eminent domain, said Sec. 13 of the General Railroad Act as amended (Chap. 237, P. L. 1914, p. 490) confers upon the railroad com-

pany power to take by condemnation any land and property required for the purpose of complying with such an order. That is a correct statement of that section, but the question still remains as to who can *compel* the directors to exercise their "judgment." As shown above judgment implies discretion. But a *forced* discretion is no discretion at all.

VI.

IN SO FAR AS THE ORDER REQUIRES THE PROSECUTOR TO RECONSTRUCT THE RAILROADS OVER THE SEVERAL HIGHWAY GRADE CROSSINGS (EXCEPT MADISON AVENUE), BY ELEVATING THE RAILROAD AT SUCH PUBLIC HIGHWAYS AND BY DEPRESSING THE GRADE OF SUCH HIGHWAYS, IT IS INVALID BECAUSE IT IS NOT MADE IN ACCORDANCE WITH THE PROVISIONS OF THE STATUTE.

(Reasons 57 & 58.)

In the case of all the streets named in the City's petition (except Madison avenue) the order of the Board requires the prosecutor to reconstruct the railroad tracks over the streets by elevating the tracks at such highways and by depressing the grade of such highways. We submit that such an order is not in accordance with the power given to the Board by the statute. The power is to alter a crossing in a certain maner, to wit, "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." In other words, under this statute either the highway itself must be carried under or over the railroad (this is illustrated in

the present case by the reconstruction of Madison avenue which is carried over the railroad, leaving the tracks at that point at the existing grade); *or* the railroad itself must be reconstructed under or over the righway without any change of grade of the highway. But the present order (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. An administrative body of this kind has just the kind and extent of jurisdiction which the statute gives, and no more. See authorities cited under Point I.

Moreover, the order in this respect is not based upon the prayer of the petition. Paragraph 18 of the petition says:

> "Your petitioner shows and insists that it is not practicable to change the grade of said highways or any of them so as to carry the same under or over the said railroad. The said highways are all in the center of a thickly populated city and all contain large numbers of buildings which would be ruined or destroyed by any such change of grade."

Paragraph 19 of the petition says:

> "Your petitioner insists that the said grade crossings should be altered by depressing the tracks of the said railroad so that the same will pass under the said highways, or in case such a plan should be impracticable for any reason that the said railroad should be elevated to pass over said highways."

It should be noted that the petition first insists that the grade of none of the highways should be changed; next that the railroad tracks should be depressed; and finally as a last alternative in case such a plan should be "impracticable" that then the railroad should be elevated to pass over

said highways. There is nothing in the petition which suggests that the railroad be elevated in part and the highways depressed in part.

The plan offered by the city calls for a partial elevation of the tracks and a partial depression of the highways so that (except in the case of Madison avenue) the tracks should pass over the highways; but there was not a particle of evidence offered by the city to show that the method of elimination by *depressing* the tracks was impracticable. On the contrary, the city's engineers carefully refrained from discussing that subject. All they said was that the plan which they *proposed* was practicable from an engineering standpoint. The only apparent ground of objection to depressing the tracks was the expense (p. 486, ll. 10-15). It is hard to believe that the cost to the railroad of depressing the tracks would exceed the enormous amount required to carry out the present order, namely, $3,000,000 and upwards. The city's engineers apparently gave no serious consideration to the method of elimination originally demanded in the city's petition. The expert called to prepare plans for the city said he did not consider "to any extent" the question of lowering the tracks below the level of the streets. "It didn't seem to be feasible at reasonable expense." He also said that there was no way to lower the river bridge and that to go below grade in the main part of the town would require the cutting down of several important streets (p. 485, ll. 10-15). The suggestion that it might interfere with the river bridge is obviously without any substantial basis, as the same engineer further said that if the railroad were lowered the present grade would be "struck" again at Broadway (p. 486, ll. 1-10). The real objection to any such plan seems to have been the fear of interfering with several

streets. There was no attempt made to figure the cost of lowering the tracks as compared with the scheme of raising the tracks. Perhaps the prosecutor should be thankful that no such scheme was considered, in view of the engineer's idea that the cost of doing the work by raising the tracks (as required by the Board's order) is about $3,000,000, and that such cost is "reasonable" as compared with what it might cost to lower the tracks.

However that may be, we call attention to this failure of proof on the part of the City as bearing upon the point that the order made by the Board does not conform into the City's petition; and that, in any event, the alteration of the grades as required by the order does not come within the terms of the statute.

VII.

THE ORDER IS ILLEGAL IN SO FAR AS IT REQUIRES THE PROSECUTOR TO RELOCATE AND RECONSTRUCT THE SEVERAL HIGHWAYS IN THE MANNER SPECIFIED IN THE PLAN ATTACHED TO SAID ORDER AND TO CHANGE THE GRADE OF SAID HIGHWAYS OUTSIDE OF THE RIGHT OF WAY OF THE PROSECUTOR AT SAID CROSSINGS.

(Reason 62.)

The plan attached to the order shows that the several streets (except Madison avenue) are to be carried under the railroad tracks, and that the necessary clearances are to be obtained by a partial elevation of the tracks and a partial depression of the highways. In the case of Madison avenue the tracks remain at the existing level and the highway is carried *over* the tracks—the lines thereof being changed as shown on the plan.

At Madison avenue the plan as ordered provides for a five per cent. grade of the highway on each side as it approaches the tracks. The right of way at that point is only 60 feet wide, and this grade therefore necessarily begins a considerable distance outside of the right of way lines. The plan shows that the grade on the south side of the right of way begins at a point 325 feet distant therefrom, and on the north side 460 feet therefrom.

At the other streets (which pass under the tracks) the highway grade carries from .35 to 5 per cent., and in every case the new grade begins outside of the right-of-way lines. In order to make these changes in the grades of the several highways a very considerable amount of fill and excavation is required, as shown in detail on the estimates submitted by the city and by the railroad engineers, the cost whereof amounts to $56,-849.72 (see Exhibit P. 55, p. 919 and Exhibit R. 101, p. 1305).

Under the order the prosecutor is commanded to reconstruct the railroad and *highways,* and "perform all other work required, according to and as shown on said plan and profile." The result therefore is that the prosecutor in order to comply with the order must undertake the work and pay the cost of changing the grades of the several streets so far as such changes are indicated on the plan attached to the order. This part of the order is clearly invalid; and if the statute requires the order to be made in this way, then we submit that the statute is unconstitutional.

In the first place, the statute gives no power to the Board to order that the grade of highways be changed. Its power as to highways is limited to vacating, relocating or changing the lines, width,

direction or location of the highway, and the opening of a new highway in the place of the one ordered vacated. In the next place, the prosecutor has no power to change the grade of highways even within its right of way; *a fortiori* it has no such power without its right of way. In the next place no municipal action and no consent has been given by the municipality to such change of grade, and no notice has been given the property owners of the purpose to make any such change. We submit that before such changes can be made the proper municipal action must be taken and the proper notice must be given to all interested owners of property, including the prosecutor itself as one of such owners.

It cannot be claimed that the expense of making this change of grade and the necessary excavation in connection therewith is a part of the cost which is chargeable to the municipality under Section 3 of the statute of 1913. That section requires the municipality to pay the expense of "paving, curbing and flagging the highway constructed as the result of the change of grade." This does not include the cost of excavation—which is a very large item. All such cost falls upon the prosecutor under Section 2 of the statute. The statute and the order are further objectionable in this respect because they impose upon the prosecutor an obligation which is more onerous than those imposed by the charters of the predecessors of the prosecutor, and than those imposed by general law upon the prosecutor. Whatever may be the obligation of the prosecutor as to those parts of the highways which are within the right of way lines, such obligation clearly does not extend to the performance of work outside of the right of way—indeed the prosecutor could not undertake such work without ex-

posing itself to liability for suits for trespass and damages, and to indictment for nuisance by interfering with public streets. See *Central R. R.* v. *State,* 32 N. J. L., 220; *State* v. *Lackawanna R. R.,* 84 N. J. L., 289.

Under this order and the statute upon which the same is based, the contracts between the State of New Jersey and the predecessor of the prosecutor, to whose rights in this respect the prosecutor has succeeded, are impaired, in violation of the Constitution of the United States, because the order and statute undertake to enlarge the duty imposed upon the prosecutor with respect to the construction and maintenance of highway crossings (see Point XXX).

But even if this point is not well taken, the question still remains, by what authority the Board of Public Utility Commissioners can undertake to order the prosecutor to perform the work of excavation in streets for the purpose of changing the grade therein, when said work is to be performed *outside of the right of way.* Section 26 of the Railroad Law requires railroad companies to construct and keep in repair bridges and passages under and across "the railroad or right of way," with the proviso that this section shall not enlarge the duty imposed by its charter upon any company incorporated by Special Act and whose railroad was constructed before April 2, 1873. Whatever else this section may do, it therefore cannot enlarge the duties of the Paterson & Hudson River Railroad Company and the Paterson & Ramapo Railroad Company, as the evidence shows without dispute that they were both constructed many years before the date fixed by this section. The charter of the Paterson & Hudson River Railroad Company makes it the duty of the company to construct and keep in repair bridges or pas-

sages over and under the "said railroad or roads." The charter of the Paterson & Ramapo Railroad Company makes it the duty of the company to construct and keep in repair bridges or passages over or under "the said railroad." The word "railroad" or "roads" as used in these two early charters, and the expression "right of way" as used in Section 26 of the General Railroad Law, cannot be construed to require the railroad to do work extending for several hundred feet outside of the right of way line as an incident to the construction of an undergrade or overhead crossing. The order might as well require the railroad to change the grades of all the streets in the city. The duty of railroad companies as to the construction or maintenance of highway crossings does not require them to do any work outside of their right of way.

Under section 26 of the general railroad law we submit that there is no duty on the part of the railroad company to do any work outside of "the railroad or right-of-way." In the case of *State* v. *N. Y. S. & W. R. R. Co.*, opinion filed February Term, 1914, this court denied a motion to quash an indictment—found against the company for alleged failure to maintain a bridge and passage over certain part of its right-of-way. The court said:

> "The motion to quash is denied. We think the averment that the railroad and the right-of-way for the railroad to cross the public highway, suffices to show a duty to maintain a bridge and passage-way over and across both the railroad and the right-of-way, and that it is not in effect combining two distinct offenses to charge the duty in the conjunctive. We think also the indictment charges sufficiently want of repair of the bridge."

This opinion implies that the duty of the railroad is limited to the performance of work within

the limits of its "railroad or right-of-way," and does not require it to do any work outside of the right-of-way.

It may be that under this section a railroad might be required to construct and maintain not only the crossing itself, but the approaches thereto so far as is reasonably necessary for the accommodation of public travel; (see 33 Cyc. pp. 261 and 273 and cases cited); but that is entirely different from making changes in the grade of streets for a distance of 100 feet or more outside of the right-of-way.

The following summary is based upon the plan and profile attached to the order under review and shows the extent of the changes in the grades of the street (first column shows per cent. of grade of highway; second column shows extent of change *outside* limits of right of way):

"A"—Madison Avenue.

South side, 5.0%	350 feet
North side, 5.0%	440 "

"B"—Straight Street.

South side, 4.0%	325 feet
North side, 0.35%	475 "

"B"—Clay Street.

South side, 5.0%	225 feet
North side, 0.5%	255 "

Taylor Street.

South side, 5.0%	250 feet
North side, level	175 "

"C"—Cedar Street.

Closed.

"D"—Market Street.

South side, 1.0%	90 feet
North side, 4.0%	200 "

PARK AVENUE.

North side, 4.5% 250 feet

"E"—ELLISON STREET.

South side, 1.7% 75 feet
North side, 2.0% 87 "

"F"—VAN HOUTEN STREET.

South side, 0.5% 140 feet
North side, 5.0% 120 "

"G"—BROADWAY.

South side, 0.5% 75 feet
North side, 5.0% 312 "

"H"—FAIR STREET.

South side, 3.3% 75 feet
North side, 5.0% 160 "

"I"—HAMILTON AVENUE.

South side, 4.3% 62 feet
North side, 4.8% 160 "

MONTGOMERY STREET.

South side, 0.5% 125 feet
North side, 3.0% 90 "

"J"—LAFAYETTE STREET.

South Side, 0.5% 100 feet
North side, 3.0% 65 "

"K"—FRANKLIN STREET.

Closed.

"L"—KEEN STREET.

South side, 1.7% 70 feet
North side, 1.3% 40 "

"M"—WARREN STREET.

South side, 1.7% 70 feet
North side, 2.0% 40 "

"N"—River Street.

South side, level; changed from nearest rail on centre line of present street 190 feet, existing grade, 1.5%.

North side, 5.0%, changed from nearest rail on present centre line of street 340 feet.

"N"—Putnam Street.

South side,	0.5%	170 feet
North side,	5.3%	165 "

It will be seen that in some cases the change of grade required by this order extends for a distance of over 400 feet outside the railroad property. The railroad company surely cannot be required to change the grades of the streets to such an extent, outside of its right-of-way lines—it certainly cannot do so without notice to the owners of the property who would be affected thereby.

To hold that the prosecutor can be required to do this work, outside its right of way, would amount to saying that the statute has operated to amend the charters of every municipality in the State, as well as of all general laws relating to the powers of municipalities concerning public streets and changes of grade or location thereof; and has also operated to bring all municipalities within the classification of a public utility in the sense in which that word is used in Chapter 195, Laws of 1911. But a municipality is not a "public utility." This is shown by the fact that in two recent statutes providing for the construction and operation of municipal railroads the Legislature deemed it essential to expressly provide that the municipality "is hereby declared to be a public utility in relation to its railroad" (Laws of 1915, pp. 655 and 866).

On this point the Supreme Court said that the changes now in question were "fairly incidental to the changes in the crossings of the railroads," citing

the *Norwood* and *Davis* cases, *supra*. We have discussed these cases under Point IV. So far as the present subject is concerned, it is sufficient to say that they do not deal at all with the question of the power of the Board to require changes outside of the right of way. Apparently the highways in question in both of those cases were changed only within the right of way—at least, there is nothing in the opinions to indicate that the railroad company was, or could be, required to change the grade of highways outside of the right of way. As we have shown above, under this order the company is given what might be called a "roving commission" to work outside of the right of way for a distance of several hundred feet and to change the grades of the streets for that distance without regard to the charter restrictions of the City, without any appropriate action by the municipality and without any notice whatever to the owners of property affected by such change of grade—indeed, the owners of such property have not even had any notice of the application for the elimination of these crossings.

CHAPTER SECOND.

Reasons attacking said order on the ground that it is not reasonable nor justified by the evidence taken before said Board.

VIII.

THE ORDER IS INVALID BECAUSE THERE IS NO EVIDENCE TO REASONABLY SUPPORT THE CONCLUSIONS OR FINDINGS OF THE BOARD AND THE DECISION OF THE SUPREME COURT AFFIRMING SAME THAT THE SEVERAL CROSSINGS AND EACH OF THEM ARE DANGEROUS TO PUBLIC SAFETY.

(Reasons 1-10; and 12.)

The Supreme Court concluded that it had power to review the Board's findings of fact, citing *West Jersey R. R. Co.* v. *Board of Public Utility Commissioners,* 87 N. J. L. 170, and other cases, and then said:

> "We think after reading the evidence, the conclusion of the Board is supported by the facts that were before it. The question is one of fact, to be determined according to the circumstances of each case."

It being settled that the Supreme Court will review the findings of the Board on questions of fact, the next inquiry is to what extent this Court will review the Supreme Court on like questions. We recognize the well settled principle that this Court will not review findings of the Supreme Court on questions of fact—the latter court being the final arbiter as to such questions. But the principle is equally well settled that this Court will review the judgment of the Supreme Court when it appears that there is no substantial evidence to justify its conclusions as to the facts, or if it appears that

the principles applied by that court to the facts found by it are erroneous.

Yellow Pine Co. v. *State Board of Assessors,* 72 N. J. 182;
Lehigh Coal Co. v. *Junction,* 75 N. J. L. 922;
Long Dock Co. v. *State Board of Assessors,* 86 N. J. L. 592, at p. 596.

We therefore feel justified in asking this court also to examine the evidence so far as may be necessary for the purpose of determining whether there was any substantial evidence to justify the conclusions of the Supreme Court or whether that court adopted erroneous legal principles in reaching its conclusions.

One of the jurisdictional facts upon which the jurisdiction of the Board to order the elimination of a grade crossing is that such crossing "is dangerous to public safety" (Section 1 of Chap. 57, Laws of 1913).

In determining what the Legislature meant by this expression, consideration must be given to the history of railroads and the course of legislation and judicial construction thereof in regard to grade crossings.

While, of course, in one sense grade crossings, no matter where located, nor to what extent used, are "dangerous to public safety," yet no one can reasonably claim that the Legislature, by the enactment of the statute of 1913, meant to demand the elimination of *all* grade crossings. It is a question of the degree of the danger. This was pointed out by Reed, *V. C.* in the case of *In re West Jersey Traction Company,* 59 N. J. Eq. 63. That was an application to define the mode of crossing a steam railroad by a trolley company. As it appeared that an undergrade crossing could be built for the trolley company at a comparatively small expense and with but little inconvenience to all interested par-

ties, he decreed an undergrade crossing. In the course of the opinion he said, (italics ours):

"The question then is whether the trolley shall be compelled to cross the railroad otherwise than at grade.

"No one suggests that it should be compelled to build a structure which will permit the passage of the trolley cars above the railroad tracks.

"The insistence is that it should build a tunnel so as to permit its cars to pass underneath the railroad. The argument in favor of such a crossing is grounded upon the danger of collision which will arise from a grade crossing. It cannot be denied that there is an element of danger in every grade crossing of a steam railroad. Every public road that crosses a steam railroad at grade presents a point of possible peril. If all persons were constantly vigilant danger would disappear or be reduced to infinitesimal proportions. So long, however, as men are careless, as they always will be, the instances of collision on grade crossings will engage the attention of courts and create the wish that grade crossings may be abolished. The policy of the State in fostering the building of railroads as instruments for the transportation of persons and merchandise has not required elevated or underground crossings. The expense which would attend the construction of railroads, if so compelled, would be a practical prohibition against the opening up of new sections of the country by new railroads. So grade crossings have been permitted, and where such crossings are, by their environments, exceptionally perilous, such dangers have been guarded against by such provisions as gates, flagmen and signals.

"It cannot be said, therefore, that because there is an element of danger in a grade crossing, some other method is to be provided. The question is whether, taking into account *the*

> *degree of such danger* in the particular instance, and also the *facility and economy* with which such danger may be avoided by adopting some crossing other than at grade, the latter method should be required. The statute in the present case fixes the conditions upon which a crossing other than at grade may, in the discretion of the chancellor, be ordered, namely, first, when such other method is reasonably practicable, and second, where the public safety so requires. The discretion of the chancellor must be controlled by the conditions attending the particular crossings."

This was also pointed out by Stevens, *V. C.* in the case of *Newark* v. *Central R. Co.,* (67 Atl. Rep. 1009, 73 N. J. Eq. 469), in which he says (italics ours):

> "If safe and convenient use will not permit of a grade crossing, then it is its (the railroad's) duty to cross in some other way. In determining this question, however, the court cannot start out with the assumption that all grade crossings are unsafe; for the legislature has said otherwise. The charter of this company, and the charters of other companies and the General Railroad Act itself, as it stand today, *contain an implied assertion that grade crossings are or may be safe,* unless some peculiarity in the situation—for instance, a crowded thoroughfare with frequently passing trains or a multiplicity of tracks—makes them unsafe."

In that case the city filed a bill to compel the railroad, among other things, to cross a certain street in some manner other than at grade. This part of the prayer in the city's bill was denied.

The same matter was further discussed by Stevens, *V. C.* in *Newark* v. *Erie R. Co.,* 75 N. J. Eq. 20. In that case the Court of Chancery gave careful consideration to the question of the circum-

stances under which it should exercise its power to order the elimination of grade crossings. After citing the various statutes providing for the elimination of grade crossings, either by agreement between the railroad and the municipality or by petition to the Supreme Court, Stevens, *V. C.* said (italics by the court):

> "In view of this legislation it is quite impossible to hold that grade crossings are, *per se,* illegal structures, even in cities, or that streets are not *safe* in the legislative sense of that word, merely because they are crossed at grade by railroad tracks. There must be something in the situation so peculiar as to compel the court to say that gates will not adequately protect the public; that flagmen will not; that nothing but track elevation will. * * *
>
> "The question, then, must be, as I have said, whether gates and flagmen and other expedients are, in the given case, so inefficacious that nothing but track elevation will give to the public, in fact as well as in name, the joint use of the highway." (pp. 28, 29.)

The Court of Chancery on the facts of that case refused to order the elevation of the tracks, but did order that three of the six tracks at the crossing in question should be taken up and the "unlawful" use of one other track enjoined, saying:

> "If the three tracks first spoken of, where they cross the highway, be eliminated and the unlawful use of the other enjoined, I do not think that the crossing, properly guarded, will be more dangerous in an absolute sense than most of the other grade crossings in the cities and many of the other municipalities of the State." (pp. 31, 32.)

The opinion also has a summary of the evidence showing the extent of the use of the crossing in question. We quote as follows (italics ours):

> "The general lay of the land in the immediate vicinity is level, and the tracks, if unobstructed by cars, moving or standing still, may be seen eastward and westward by a person standing from twenty to thirty feet away, for about a quarter of a mile. *From one thousand to one thousand two hundred people and over one hundred vehicles cross daily between six o'clock A. M. and six o'clock P. M., and about a third as many at night.* From twenty-two to twenty-eight passenger trains each way pass over the crossing every twenty-four hours. The number of freight trains running through is small, but in the operation of the local yard, and in the making or breaking up of trains, freight cars frequently cross and recross the avenue. The yard and freight station are between Summer Avenue and Washington Avenue. The obstruction to travel seems to be mainly due to the freight cars. The gates are frequently lowered and the delay amounts, at times, to several minutes. According to complainant's count, in the twenty-four hours between 6 A. M. of August 2d and August 3d, 1907, the gates were down thirty times for three minutes or more. The report shows that the delay to travel thus occasioned resulted chiefly from the handling of freight cars. As the freight-house and water tank, as well as the yard, are in the vicinity, the side tracks are seldom unoccupied and the cars standing on them are a serious obstruction to the view up and down the tracks."

Both parties appealed to the Court of Errors and Appeals. The City appealed from so much of the decree as denied a mandatory injunction directing the railroad to effect its grade crossings in some other manner than at the grade of the street. This

part of the decree was unanimously affirmed, Voorhees, *J.*, speaking for the court, saying:

> "Taking up the appeal of the city, we agree with the learned vice-chancellor in his conclusion that the facts of the case do not warrant so drastic a remedy as track elevation or depression, and that therefore on the merits of the case the appeal of the city should be dismissed, and the decree affirmed so far as that appeal has questioned it." (76 N. J. Eq. 319.)

That part of the decree which ordered the removal of certain of the tracks and the cessation of the use of one other track was reversed on the railroad's appeal because it was not within the scope of the bill.

By comparison of the statement of facts in the Newark case with the foregoing review of the evidence as to highway traffic in the present case, it will be seen that as to some of the crossings the Board of Public Utility Commissioners does not agree with the Court of Chancery and the Court of Errors and Appeals as to what renders a grade crossing sufficiently dangerous to require the elimination thereof. In the case of Madison Avenue, Fair Street, Franklin Street, Keen Street and Warren Street, the extent of the highway traffic at the crossings is practically the same as in the Newark case. It is true that at some of the other streets involved, to wit, Market Street, Broadway and River Street, the traffic is largely in excess of that in the Newark case; but even if it is, that fact would not justify the Board in ordering the elimination of the other crossings where the traffic is not sufficient to bring the crossings within the classification of "dangerous to public safety." It would no doubt be very convenient, and indeed, from the operating and the engineering standpoint, it might even be necessary to eliminate the non-dangerous crossings, or some of them, at the same time or in connection

with the elimination of those that might be found to be dangerous; but the fact does not justify the Board in ordering the elimination of *all* the crossings and *in imposing the expense of eliminating the non-dangerous crossings on the railroad company.*

When railroads were first constructed it was the view of all the parties interested therein that crossings should be at grade—in fact, the only way in which railroads could have been constructed in the first instance was to have the crossings at grade, as the income that was expected from the operation thereof was not enough to justify the expense of constructing crossings other than at grade.

Moreover, under the charters themselves such construction was *required.*

In the cases of the two railroads that own the right of way in Paterson used by the Erie Railroad Co., the charters specifically provide that each road authorized thereby is declared to be free for the passage of *any* railroad carriage thereon, with passengers or property upon payment of the tolls prescribed by the charter; and in the case of the P. & H. R. R. R. 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 travelling 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 P. & R. R. R. 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 P. & H. R. R. R. charter, Vol. II, p. 969; Sec. 16 of P. & R. R. R. chater, 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 P. & H. R. R. R. "by

steam" and others were drawn "by horses" (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, and in order that the members of the general public might drive their own "carriages" thereon, if they so desired.

That grade crossings, as such, are not "dangerous" in the contemplation of the Legislature, is shown by the course of legislation ever since the first railroad was built in this State. The statutory history of the State abounds in illustrations of legislative recognition of the legality and necessity of grade crossings if railroads are to be built and operated at all. Reference to many of these statutes will be found in the opinion of Stevens, *V. C.* in *Newark* v. *Erie R. Co., supra.*

A recent illustration is Chapter 181, Laws of 1914, p. 340. This provides for certain forms of protection at grade crossings in the way of safety gates, flagmen, electric bell, electric signs or other recognized system of alarm or protection which shall receive the approval of the Board of Public Utility Commissions. This statute applies to every public road or street crossing railroad tracks at grade, meaning thereby all roads or streets which have been improved by joint action of this State and a municipality, county or township, under the laws of the State relative to the improvement of public roads; as to other roads the power of compelling "protection" remains. (See Section 7 of statute.)

This statute also recognizes that whatever danger to public safety there may be at grade crossings may be reduced or eliminated by methods of protection other than the elimination of the cross-

ing itself by altering such crossing to a crossing not at grade. It so happens that in the present case every one of the crossings involved is already provided with one of the forms of protection specified in this statute.

The right to cross streets *at grade* is also recognized, and expressly conferred upon the municipal railroads authorized to be constructed and operated by the Legislature of 1915. (See Chap. 350, p. 647, Laws of 1915, Sec. 6; Chap. 412, p. 860, Laws of 1915, Sec. 1.) The same right is impliedly recognized in the very act under which the Board of Public Utility Commissioners is organized; Section 21 of the statute of 1911 permits the construction of grade crossings on obtaining the permission therefor from the Board; Section 22 permits railroads and street railways to cross each other at the same level on making "reasonable provision for the protection of the travelling public," and gives the Board power to order the adoption of such provision as the Board deems necessary.

Under this Section 22 the question to be considered is whether the safeguards "measure up to the danger to be encountered." See *Erie R. R. Co. v. Board of Public Utility Commissioners and Hudson County* (Re Belleville Turnpike), 95 Atl. 177.

The right to establish and maintain grade crossings being clear, the next point to consider in determining the meaning of the expression "dangerous to public safety" is what the courts have already decided in analogous cases. Such analogy may be found in the numerous decisions relative to contributory negligence on the part of highway travelers. A few of many that might be cited are the following:

In *Pennsylvania R. Co.* v. *Righter*, 42 N. J. L. 180, the clear view was 25 feet from the near-

est track, and it was held that a highway traveller was chargeable with contributory negligence.

In *Swanson* v. *Central R. Co.*, 63 N. J. L. 605, non-suit was affirmed when the clear view to a pedestrian was only 21 feet 2 inches from the track.

In *Dotty* v. *Atlantic City R. Co.*, 64 N. J. L. 710, the plaintiff was held chargeable with contributory negligence when the clear view was 27 feet from the track.

In *Diele* v. *Erie R. Co.*, 70 N. J. L. 138, the first clear view was at 35 feet.

In *Van Riper & N. Y. S. & W. R. Co.*, 71 N. J. L. 345, the verdict for the plaintiff was set aside, although his view was obstructed up to a point 32 feet from the track.

In *Willoughby* v. *Erie R. Co.*, 77 N. J. L. 149, the verdict for the plaintiff was set aside when the driver stopped 20 feet from the crossing gates, at which point he had a view for 700 feet.

In *Lindsay* v. *Pennsylvania R. R.*, 78 N. J. L. 704, a pedestrian traveller on the highway was held chargeable with contributory negligence as a matter of law, when he had an "effective" view four feet from the track.

The Board in its report in discussing the question of the extent of the view at the several crossings said:

> "Schedule 'B', attached to this report contains a statement based upon testimony as to the view at each crossing. The terms 'Good,' 'Fair,' 'Poor' and 'Bad' as used in this schedule, indicate the judgment of the Board as to the view obtainable at each crossing, from a point about 35 feet from the nearest rail, and may generally be defined as follows:
>
> "Good—A clear view; anything beyond 1,000 feet.

"Fair—From 1,000 feet to 500 feet.
"Poor—From 500 feet to 100 feet, and
"Bad—Below 100 feet."
(Vol. IV., p. 1754, ll. 20-30; for Schedule "B" see pp. 1768, 9.)

The selection of a point 35 feet from the nearest rail as the point of danger is purely arbitrary and has no relation to, nor is it in conformity with, the cases above cited.

Under the decisions highway travelers are held to be in a place of *safety* and chargeable with the duty of looking at points much nearer than 35 feet from the track, and that they are guilty of contributory negligence if they either fail to look at such points or, in looking, fail to see approaching trains which under the physical conditions that may happen to exist at the crossing were in plain sight of an observing traveler.

Of course each case must depend on its own special circumstances, and these circumstances are not limited merely to the extent of the view (although that is an important factor), but depends also upon other considerations, such as the speed of the train, temporary obstructions to sight, hearing, etc.

The dictum of the Board as to what kind of a crossing is good, fair or otherwise, overlooks the important principle established by a long line of cases that a railroad company is responsible for extra hazardous conditions at a grade crossing *only* when such conditions have been *created* by the company.

A few of the leading cases on this subject are as follows:

Pennsylvania R. Co. v. *Matthews,* 36 N. J. L. 531.

D. L. & W. R. Co. v. *Shelton,* 55 N. J. L. 342.

Hires v. *Atlantic City R. Co.,* 66 N. J. L. 31.

Siracusa v. *Atlantic City R. Co.*, 68 N. J. L. 446.

Horandt v. *Central R. Co.*, 78 N. J. L. 190.

Kyle v. *L. V. R. Co.*, 80 Atl. Rep. 934; 81 N. J. L. 186

This principle was applied by Stevens, *V. C.* in the case of *Newark* v. *Erie R. Co.* involving a grade crossing at Summer Avenue (75 N. J. Eq. 20); he refused to order the elimination of the crossing as dangerous, and the city's appeal from that portion of his decree was sustained by the Court of Errors and Appeals (76 N. J. Eq. 319). In the course of his opinion Stevens, *V. C.*, after referring to the statutes requiring the ringing of a bell on the locomotive, or the blowing of a steam whistle and the erection of a sign board at crossings, said:

> "These have been the only precautions that were generally deemed indispensable by the Legislature where trains crossed highways at grade. But the courts went further. They held that under circumstances of special danger—for example, where there was a railroad curve within a short distance of the highway, or where the company itself had erected buildings close to the tracks so as to obstruct the view, a duty to take special precautions arose, and the company must provide gates or a flagman. Pennsylvania R. R. Co. v. Matthews, 30 N. J. Law (7 Vr.) 531. But in a long series of cases the courts have decided that if the element of *special* danger be wanting, then neither the court nor the jury can require more than the Legislature has seen fit to prescribe, viz., a ringing of a bell, or the blowing of a whistle, and the erection of sign posts. New York R. R. Co. v. Leaman, 54 N. J. Law (25 Vr.) 202. This is the law today."

In their brief in the Supreme Court counsel for defendants called attention to the cases of *Corse* v. *Phila. &c. Ry. Co.*, 88 N. J. L. 348, and *Wilson* v.

Central R. R. Co., 88 N. J. L. 342. These cases do not at all affect the principles laid down in the above decisions. In the *Corse* case the reason why this court held that they would not, on the ground of contributory negligence, disturb a verdict for the plaintiff, was because of the testimony which showed that the attention of the plaintiff was distracted by the noise of the exhaust of several engines which stood on an adjoining track within 5 or 6 feet of the highway. Furthermore, in view of the fact that the accident happened after the passage of the so-called crossing statutes (Chapters 35 and 95, Laws of 1909; Chapter 278, Laws of 1910,) it may be that the decision was based in part upon one or the other of those statutes, although the opinion does not specifically refer to them.

In the *Wilson* case a verdict for the plaintiff was sustained because in the opinion of the court it was a question for the jury whether the driver of the automobile was exercising due care " in the emergency," which arose by reason of the unexpected failure of his automobile brake to work properly, and the sudden approach of the train from behind a line of trees at a speed of 55 miles an hour.

There is nothing in the opinions in either of these cases which modifies the principles laid down in the above cases. These principles have recently been re-affirmed in the case of *Lynch* v. *Penna. R. Co.*, 96 Atl. 395 (opinion filed Jan. 13, 1916), wherein a verdict for plaintiff (a pedestrian) was set aside when it appeared that he had a view of the approaching train at a time when it was about 250 feet from the crossing and when he was at a point *five feet* from the nearest rail.

The Board in its report relied for its conclusion as to the "danger to public safety" upon the density of the railroad and highway traffic, the

number of accidents said to have occurred at the crossings and the alleged obstructions to view.

The records show that the average number of trains was 103 per day of 18 hours. But this does not indicate any unusual or extraordinary density of railroad traffic. This would only be an average of 5 or 6 trains per hour. They are limited to a speed of 15 miles per hour, and hence the situation is not complicated, as it sometimes is in similar cases, by the passage of express trains moving at a high rate of speed. There are comparatively few freight trains, averaging perhaps 10 to 12 per day of 18 hours, or less than one an hour. It is true that the movements of drill engines at Straight Street, Clay Street, Cedar Street and Market Street may be said to increase the danger at those streets; at Straight and Clay Streets these movements average a little more than 5 per hour; at Cedar Street a little less than 5 per hour, and at Market Street a little more than 3 per hour. These movements are necessarily much slower than the movements of the passenger trains, as they are all drills either to and from the freight yard or to or from various sidings; the drill engines, therefore, have to move slowly and subject to instant control—not because they are passing over highway crossings but because the nature of the work is such that the movements have to be slow in order to be safe and efficient.

At the other crossings the drill movements average less than one per hour and are therefore of trifling importance.

One of the principal reasons why the Board concluded that each of the crossings in question was "dangerous to public safety" was the "fact" (as stated in the report) that a number of accidents had occurred at the crossings and that the railroad company had undertaken to provide certain meas-

ures of protection in the way of gates and watchmen. We quote from the report as follows:

> "From all the testimony, it appears that the crossings in question are dangerous to safety; that a number of accidents have occurred at many of the crossings, resulting in injury and death; and that a high degree of protection is necessary in order to avoid more frequent accidents. For such protection the railroad company showed (Ex. R. 12) that it expends $14,736.87 for employes and $2,101.59 for costs of maintenance each year. A statement of such expense is appended hereto and marked Schedule 'A.' This sum is the interest at 5% upon approximately $350,000. Notwithstanding the measures adopted to prevent accidents, the testimony shows that they have occurred at some of these crossings within the year 1913 (p. 234). That some of the crossings are regarded as especially dangerous is further evidenced by the fact that at two of them two men are constantly on duty, one operating gates and one on the crossings." (Vol. IV., p. 1753-4.)

The testimony as to accidents was given by the Board's inspector, Mr. Maybury (pp. 173-4). These reports covered the period from the beginning of the Railroad Commission in the year 1909 to the date of the testimony, which was December 4, 1913, (p. 175, ll. 1-5; p. 161, l. 5).

After these reports were offered in evidence counsel for the city asked permission to make a further search, saying, "I believe there are many more accidents that have happened" (p. 175, l. 40). It was agreed that such search should be made. It was apparently without result, as no further testimony was offered on that subject.

The Act of 1909, to which Mr. Maybury referred, was approved April 19 of that year. Let us now examine the accident reports which

were made between that date and the date of the hearing on December 4, 1913, a period of four years and eight months. The following is a list of these accidents arranged in order of dates and giving a summary of the location and circumstances:

April 8, 1909.
(Ex. P. 45, pp. 907-8.)

Unknown man attempted to board train on Market Street crossing; was injured and killed; ran under gates on this crossing.

August 26, 1910.
(Ex. P. 46, pp. 908-9.)

Automobile struck at Broadway; 2 persons killed and 3 injured.

December 11, 1911.
(Ex. P. 44, pp. 905-6.)

Accident at Fifth Avenue; man standing on crossing trying to pry a flagstone.

(Note: This crossing is not included in the crossings described in the petition or ordered to be eliminated.)

July 15, 1912.
(Ex. P. 47, pp. 910-11.)

Accident at Clay Street; man went under gates, looked towards approaching train but paid no attention and was struck and killed.

September 7, 1912.
(Ex. P. 48, pp. 911-12.)

Wagon struck on Keen Street crossing. Two persons injured and wagon slightly damaged. Wagon approached the crossing from the north side and driver should have seen the train.

September 18, 1912.
(Ex. P. 49, pp. 913-14.)

Wagon struck at Clay Street and driver killed and wagon damaged. Wagon drove onto crossing from south side at extremely slow

pace. Watchman called to driver to move quickly but he apparently paid no attention.

November 6, 1912.
(Ex. P. 50, pp. 914-15.)

Freight train struck horse and wagon at Madison Avenue, injuring the driver and killing the horse. Engine whistle blown and bell ringing. Crossing alarm bell O. K.

March 24, 1913.
(Ex. P. 51, pp. 916-17.)

Accident at Keen Street, man killed, crossing bell ringing, engine whistle sounded, crossing man tried to prevent a man from crossing. Speed of train—12 miles per hour.

The foregoing is a list of all accidents, reports of which were offered in evidence. The Board in its report referred to accidents which occurred at "some" of the crossings within the year 1913, but there was only one accident during that year, according to the Board's own reports, and that was on Keen Street, which is probably one of the least dangerous of the several crossings so far as the danger may be said to depend upon the amount of public travel or the extent of view; and even in the case of that one accident at that street in the year 1913 it appears from the report that the accident was not due to the dangerous character of the crossing at all, but to the negligence of the highway traveller in paying no attention to the signals given by the crossing bell and by the locomotive, and in disregarding the efforts made by the crossing watchman to stop him from crossing. So far as can be determined from this report it was a case of suicide rather than an "accident."

By reference to the foregoing reports it will be seen that during a period of four years and eight months there were seven accidents (omitting

the accident at Fifth Avenue, because that crossing is not included in the proceedings) at fifteen crossings—or an average of one accident to about every two crossings during that period; or to put it the other way, an average of one accident in each eight months of the time covered by the reports.

It will further be observed that of the fifteen crossings involved in the proceedings there were no accidents at all at ten of the crossings, to wit, Straight Street, Cedar Street, Ellison Street, Van Houten Street, Fair Street, Hamilton Avenue, Lafayette Street, Franklin Street, Warren Street and River and Putnam Streets. There was one accident at Market Street, one at Broadway, two at Clay Street, two at Keen Street and one at Madison Avenue.

In view of this record it is difficult to understand just what the Board meant in saying that a "number" of accidents have occurred at "many" of the crossings. We by no means concede that the frequency of accidents at any particular grade crossing is to be considered as the test of whether or not that particular crossing is "dangerous to public safety" within the meaning of the statute. It is common knowledge that grade crossing accidents frequently happen at crossings where both the train and highway traffic are comparatively light. But inasmuch as the Board in its report lays great stress upon the "number of accidents," we feel justified in critizing the conclusion that it apparently drew from the number of accidents—when, as a matter of fact, there is probably no stretch of railroad line in the United States of equal length, considering the number of crossings, where there were so few accidents during the period covered by these reports. So far from proving that the crossings are dangerous to public safety, the record of ac-

cidents prove directly the contrary, because it appears that at ten of them there were no accidents at all, and at the other five there were only seven during the period of time covered by the testimony.

Moreover, the reports of these accidents, so far as they give the detailed information as to the circumstances under which they occurred, show that in every case the accident was not the result of danger at the crossing, but was caused directly by contributory negligence of the person killed or injured.

The Board in its report then lays stress upon the fact that "a high degree of protection is necessary in order to avoid more frequent accidents" (Vol. IV., p. 1753, l. 40). The details of the protection at each of the several crossings will be found in the form of a schedule attached to the original answer of the prosecutor (Vol. IV., p. 1674; also printed as Appendix No. IV). The Board in its report says that "some" of the crossings are regarded as "especially dangerous" because of the fact that at two of them two men are constantly on duty, one operating the gates and one on the crossing. The evidence shows that these crossings were Broadway and Market Street. It is true that at the other crossings there were gates, although in two cases, to wit, Franklin Street and Keen Street, the gates were not in operation during the entire period of twenty-four hours each day.

It seems to have been the thought of the Board that the mere fact that the railroad company established gates or other protection was sufficient to justify the Board in concluding that the particular crossing was dangerous to public safety. If such be the correct test, or one of the tests, upon which the application of this statute is to depend, it will be very easy for the railroads to

eliminate danger at grade crossings and to make all such crossings safe by the simple expedient of demolishing the gates and withdrawing the watchmen. If the existence of gates or a watchman is proof of the dangerous character of a grade crossing, then *per contra,* the non-existence, or the withdrawal of gates or watchmen proves there is no danger.

The existence of crossing gates and watchmen at these crossings so far from proving that the crossings are dangerous proves that the crossings are not dangerous because the public is in fact protected. The fact that the railroad company, for the purpose of protecting the public, incurs a substantial expense amounting to about $16,800 per year seems to require that the company which undertakes to make such expenditures, to protect the public from itself, must be visited with the penalty of eliminating the grade crossings at its own expense; in this case the fact that the prosecutor is spending something for protection has called down upon its head an enormous and a crushing penalty amounting to about $3,000,000, exclusive of property damage.

In discussing highway traffic the Board in its report has selected the traffic at Market Street, as if that were a fair illustration of the traffic at all the other crossings involved. The report says:

> "On October 4, 1913, it is shown that 34,517 pedestrians, 593 trolley cars, 1901 horse drawn vehicles, 1700 automobiles and 827 bicycles passed over Market Street crossing between 5 a. m. and 11 p. m." (Vol. 4, p. 1755, lines 5 to 15.)

The Board omits to call attention to the fact that the highway traffic is far heavier at the Market Street crossing than at any of the other crossings; in fact, it nearly equals the highway traffic at all of the other crossings combined, excepting Broad-

way and River Street; it considerably exceeds the traffic at Broadway and River Street, combined. The Board also in its report fails to point out that it has selected the highest record at Market Street for any particular day. From a cursory reading of this report it would appear as if the figures stated therein were not only a fair sample of the conditions as to highway traffic at all the other crossings, but were also a fair sample of the average daily conditions at the Market Street crossing itself; but the same exhibit (P. 4) to which the Board refers, shows that on October 6, 1913, the number of pedestrians was 27,699—a mere trifle of 7,000 less than on the date selected by the Board; and on October 7th the number of pedestrians was 24,220, another mere trifle of about 10,000 less than on the date selected by the Board; the vehicular traffic was also substantially less on October 6th and 7th than it was on October 4th, yet we find the Board makes no reference to this fact. (See Exhibit P. 5, p. 849; Ex. P. 6. p. 852.) The reports of the City's "Traffic Inspector" on certain other dates show that the traffic at Market Street is very considerably less than the amount selected by the Board on October 4th; thus, on March 28th, 1913, from 6 a. m. until 12.30 p. m. there were 415 automobiles, about one-fourth the number mentioned by the Board; and 942 wagons, less than half the number mentioned by the Board. (See Ex. P. 34, p. 855.)

The counts of the Erie inspectors also show a considerably smaller amount of traffic than on the date selected by the Board. (See Ex. R. 25, pp. 1079 to 1081.)

We do not pretend to say that there is not a substantial highway traffic at Market Street, but we insist that the Board, in its report, has selected the highest report, on the most thickly traveled

highway, as if that were a fair sample of the highway traffic, both at that crossing and at the other 14 crossings, whereas the evidence shows directly to the contrary.

The Board makes no reference to the highway traffic at any of the crossings other than Market Street, but on the strength of the counts at Market Street comes to conclusion that there is danger and impediment to public travel at *all* of the crossings.

The Board's report also calls attention to the number of trolley cars at Market Street, but omits to say anything about the fact that there are no trolley cars at any of the other 14 crossings except Broadway and River Street. So far as concerns the three crossings where the trolley tracks intersect the railroad tracks, ample protection is provided, so far as trolley cars are concerned, by the agreement between the trolley company and the railroad company. (See Ex. Erie 13, p. 2034, par. 3, at p. 2035, line 25; also par. 6, at p. 2036, lines 10 to 20; also Erie 514, pp. 2036-2042.) This latter exhibit is an agreement dated February 6, 1912, supplementing Exhibit Erie 13, dated February 25, 1892. This supplementary agreement is of special interest in the present discussion, because it recites that

> "The Board of Public Utility Commissioners on September 6, 1910 approved an ordinance of the City granting permission to the street railway company to construct, operate and maintain additional tracks and connections at grade across the railroad tracks."

and it further recites,

> "That said board, by certificate dated January 2, 1912 determined that the construction of said additional track by the Public Service Company across the tracks of the Paterson and Ramapo Railroad Company at Market

> Street and Park Avenue in the City of Paterson will constitute an added factor of safety."

(p. 2040, lines 30 to 40.) But now we find that the same Board, which permitted the construction of an additional trolley track in 1912 on the theory that it would be "an added factor of safety," concludes that the existence of this very track—together with other tracks that were already in existence—creates a condition that is "dangerous to public safety" at the very crossing where the additional track was constructed.

None of the accidents upon which the Board lays so much stress involved trolley cars. On the basis of 600 trolley cars a day, for 300 days, nearly 200,000 cars pass over this crossing each year. No doubt, the number of cars passing over the crossing was much less in 1892 and for several years thereafter than in recent years, but the fact remains that literally hundreds of thousands of trolley cars have passed over this crossing without an accident of any kind, due to the operation of the railroad. By what process of reasoning can it be said that such fact proves that the crossing is "dangerous?" On the contrary, it shows that the methods adopted by the trolley company and the railroad company have furnished, and still continue to furnish, adequate protection to the traveling public.

So far reference has been made only to the traffic at Market Street. But let us examine the reports as to the traffic at the other crossings, to which the Board in its report makes no reference. As the Board, in its report saw fit to pick the crossing on which the highway traffic is the densest, let us, by way of contrast, call attention to the crossings where the highway traffic is lightest. These are Madison Avenue, Fair Street, Franklin Street, Keen Street and Warren Street. Exhibit

R. 25 (the Traffic Record of the Company) shows the following:

MADISON AVENUE.

Pedestrians	(Nov. 29, 1913)	1084
Horse drawn vehicles	(Nov. 28)	389
Automobiles	(Nov. 28)	144
Bicycles	(Nov. 29)	27
Motorcycles	(Nov. 28)	2

FAIR STREET.

Pedestrians	(Nov. 28, 1913)	938
Horse drawn vehicles	do.	114
Automobiles	do.	33
Bicycles	do.	20
Motorcycles	do.	0

FRANKLIN STREET.

Pedestrians	(Dec. 2, 1913)	938
Horse drawn vehicles	do.	66
Automobiles	(Dec. 1, 1913)	8
Bicycles	do.	8
Motorcycles	do.	0

KEEN STREET.

Pedestrians	(Dec. 2, 1913)	1178
Horse drawn vehicles	do.	140
Automobiles	do.	17
Bicycles	(Dec. 1, 1913)	21

WARREN STREET.

Pedestrians	(Dec. 1, 1913)	1225
Horse drawn vehicles	(Dec. 2. ")	161
Automobiles	do.	25
Bicycles	(Dec. 1, ")	27
Motorcycles	(Dec. 2, ")	0

The counts at these streets made by the Traffic Inspectors of the City are substantially the same,

although in some cases they are a trifle in excess of the figures shown by the company's reports. (See Exhibits P. 33, 34, 35 and 36, pp. 854 to 863.)

The counts made by the Board of Trade were limited to four streets, namely, Clay Street, Market Street, Broadway and River Street (see pp. 845 to 853), and hence it is not possible to compare them with the counts above mentioned at the other streets.

It is true that at the other streets the highway traffic is somewhat in excess of the five streets, the details of which we have given above. A summary thereof will be found in Schedule "B" attached to the Board's report of January 11th, 1915 (see p. 1768), but in none of them, we submit, is the highway traffic sufficiently heavy to justify the conclusion that the crossings at grade "are dangerous to safety."

It is interesting to compare the present claim of the city, that all these crossings are dangerous, with the statement made to the Board of Railroad Commissioners in response to an inquiry from that Board to the City of Paterson. This will be found in the Second Annual Report of the Board of Railroad Commissioners for the year 1908 (pp. 38 to 41). It covers all of the 15 grade crossings included in the petition, (together with three other crossings which are not involved in the present proceeding); six of the crossings, namely, Straight Stret, Clay Street, Cedar Street, Market Street, Broadway and River Street are reported as "dangerous;" the others are not so described, thus justifying the inference that at that time the city officials did not consider any of the crossings "dangerous" except the six that were specifically so described.

That the officials of the City of Paterson do not consider all grade crossings dangerous is further

shown by their attempt to obtain the approval of the Board to the construction of another crossing *at grade* at Sixth Avenue. This application was denied. (See report of Board for year 1913, p. 64.)

The Board's classification of the views obtainable by highway travelers is "Good," "Fair," "Poor," "Bad," with reference to a point 35 feet from the nearest rail. (See Report, p. 1754, lines 20 to 30; Schedule "B," p. 1768.)

This classification is open to the criticism that it loses sight of the fact that the limit of speed on train movements over these crossings is 15 miles an hour, and that the drill movements are much slower even than that. Automobiles and horse drawn vehicles can approach much nearer than 35 feet to the nearest rail and still be in a position of perfect safety, and pedestrians can, of course, approach even nearer than vehicles without risk of personal injury—especially from slow moving trains or engines. If we assume that every movement within the city is at the maximum limit of 15 miles per hour, a train or engine at that rate of speed moves 22 feet per second. If we assume the average speed of vehicles as they approach a grade crossing to be 5 miles per hour, it will be seen that the trains would be moving 3 times as fast as the vehicles; a movement at the rate of 5 miles per hour is 7.33 feet per second. When a vehicle is 35 feet (the distance selected by the Board as a point of safety) from the crossing, and is moving at the rate of 5 miles per hour, the train would be 105 feet distant and would therefore be in perfectly plain view—although the Board in its classification of views limits "good" view to "anything beyond 1000 feet" and says that any view from 500 to 100 feet is "poor." If, however, it be said that vehicles, especially automobiles, usually approach rail-

road crossings much faster than at the rate of 5 miles per hour, the answer is, first, that they have no lawful right to approach a railroad crossing at a dangerous rate of speed, and, next, even if the automobile were going at the rate of 15 miles an hour, or as fast as the maximum speed of the train, then the train would be seen, if the driver of the automobile were exercising reasonable care, at any point beginning 35 feet before the crossing is reached by the approaching train, and hence would be in sight of such driver of an automobile, even if the extent of the view were less than 100 feet —which the Board describes as "bad."

According to the motor vehicle law, the speed limit for automobiles in the "built-up" portion of the city is 12 miles per hour with the proviso that nothing in the section fixing such speed limit "shall permit any person to drive a motor vehicle at any speed greater than is reasonable, having regard to the traffic and use of highways, or so as to endanger the life or limb or to injure the property of any person." (3 Comp. Stat. p. 3436.)

It can hardly be claimed that there is any obligation on the railroad company to elevate its tracks in order that the drivers of automobiles may exceed the speed limit with impunity. In dealing with the question of whether any crossing is "dangerous to public safety" so far as relates to automobile traffic, it must be assumed that the members of the public whose safety is to be guarded are themselves acting according to the mandate and restriction of the law. The fact that an automobile accident happens at a grade crossing, when the driver of the automobile is himself violating the law, does not prove that such a grade crossing is "dangerous" in the legal sense. If, in such a case, the law were obeyed there would be no accident; in other words, the cause of such an accident is not

the existence of the grade crossing, but the violation of law by the highway traveller.

The same speed limit of 12 miles per hour also applies to persons driving horse-drawn vehicles or riding bicycles. See Chapter 156, p. 285, Laws of 1915, Section 5, at p. 290.

So far as pedestrians are concerned, if we take a distance of say 10 feet from the nearest rail as a place of safety, and if we assume that a pedestrian moves at the rate of only 3 miles an hour, or only one-fifth as fast as the approaching train, then the pedestrian, when he comes to a crossing and is 10 feet therefrom, has an opportunity to see the train when it is as close as 50 feet to the crossing —and yet under those circumstances, the Board would classify the view as "bad." The first difficulty with any such arbitrary classification is that there is nothing in the statute which permits or requires it; and, secondly, it is directly opposed to all the decisions of the courts of this State dealing with the question of contributory negligence on the part of highway travelers. If the views at these crossings are to be classified as "good," "fair," "poor" or "bad," then, we submit, that such classification should have some reasonable relation to the decisions of the courts.

Counsel for defendants may argue that in determining the question of obstructions to view the Board was justified in considering *temporary* obstructions due to the passage of trains. We submit that this is not a proper element for consideration because under the cases it is settled that a highway traveller who is about to pass over a grade crossing cannot do so in the face of temporary obstructions to the sense of sight or of hearing or both, without subjecting himself to the charge of contributory negligence; if there are temporary obstructions to sight or to sound then

he must wait until such obstructions are removed —otherwise he crosses at his own risk.

Merkle v. *N. Y., L. E. & W. R. R.*, 49 N. J. L. 473.

W. Jersey R. R. v. *Ewan*, 55 N. J. L. 574.

Central R. R. Co. v. *Smalley*, 61 N. J. L. 277.

Conkling v. *Erie R. R.*, 63 N. J. L. 348.

Applying the principles of these decisions to the physical conditions at the several crossings, we submit that in practically every case the court would be obliged to decide that a highway traveller who was struck at one of the crossings would be chargeable with contributory negilgence.

Summary of Views.

The following memorandum of the views and obstructions to same gives a summary of the number of tracks at each crossing, the Board's report as to the extent of the views as found in Schedule "B" (p. 1768); the *proof* as to the views, looking first from the south side in an easterly directly or the direction from which westbound trains normalmally approach, measured from the nearest rail the westbound track; and then in a westerly direction or in the direction from which eastbound trains normally approach, measured from the nearest rail of the eastbound track; and second, from the north side looking in an easterly direction or the direction from which westbound trains normally approach, measured from the nearest rail of the westbound track; and then in a westerly direction or in the direction from which eastbound trains normally approach, measured from the nearest rail of the eastbound track. These summaries have been prepared by reference to exhibits R-27 to R-40 inclusive, consisting of a series of blue prints lettered from A to N inclusive—correspond-

ing to the letters on the maps prepared by the City and to the designation of the streets as given in the City's petition (p. 1637, ll. 20-30); and by reference to a series of photographs taken at each of the crossings in question and bound together in one volume marked Exhibit R-41. At each crossing the photographs are numbered from one upward; and there is indicated thereon by the letter N or S the side of the main line tracks on which the camera stood, and by the letters E and W the direction in which the camera was looking; for example, N-E indicates that the camera was placed on the north side of the main line tracks in the centre of the highway looking in an easterly direction. The points of compass are given by reference to the railroad nomenclature, that is, looking towards Jersey City is considered east and looking away from Jersey City is considered west—although as a matter of fact, according to the compass the tracks run nearly north and south. The main line tracks indicated on these maps are designated respectively as eastbound on which trains run to Jersey City, westbound on which the trains run from Jersey City. The several maps are tracings from the corresponding maps offered in evidence by the City and on each map there is indicated the points at which the views were made on each side of the track; on each map there is also indicated by an arrow the position in which the camera stood and the direction in which the picture was taken. Each map also has on the face thereof a table showing in detail the extent of the views at various points and a table showing the location of the camera when photographs were taken. (See testimony of Mr. Hoppin, surveyor, pp. 301-305; testimony of Mr. Bailey, photogapher, pp. 305-307).

"A"

MADISON AVENUE.

Two main line tracks—no sidings.

Report of Board as to views:

From south side, poor.

From north side, good.

Proof as to views:

From south side:

Looking east from near rail of westbound track: Up to a point about 39 feet from the rail the view is nearly 900 feet. This is arrived at by reference to the table on blue print A, showing that at 24 feet measured from *east*bound track the view is 887 feet, but the distance from the southerly rail of the eastbound track to the southerly rail of the westbound track, as scaled on the map is 15 feet, thus giving the view of 887 feet up to a point 39 feet from the near rail of the *west*bound track.

Up to 49 feet (34x15) the view is 525 feet and thereafter it gradually decreases.

Looking west from near rail of eastbound track: There is a view of over 1,000 feet up to a point 24 feet from near rail; thereafter the view gradually decreases until at 39 feet it is 575 feet, and after that up to 139 feet the view is for more than 1,000 feet.

From north side:

Looking east from near rail of westbound track: There is a clear view of over 1,000 feet up to a point 139 feet from near rail of *east*bound track or 124 feet from near rail of westbound track—without any obstruction except for a short distance at a point 19 feet to 29 feet from eastbound track, where the view is interfered with by an elevated tower from which the gates are operated.

Looking west from near rail of eastbound track: View is clear up to 89 feet and thereafter gradually decreases.

Remarks: The photographs show that on the south side there is a large brick building and fence located about 34 feet from the nearest rail of eastbound track. See photo No. 2. But these obstructions are off the right of way and the company is therefore not responsible for them. On the north side there is open country for considerable distance from the right of way with nothing to obstruct the view except the gate tower, as shown in photo No. 7.

"B"

STRAIGHT AND CLAY STREETS.

Straight street:

Two main line tracks, two sidings, both on southerly side of main line.

Report of Board as to views:

From south side, fair.

From north side, fair.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to a point about 122 feet (103 feet)—distance measured from near rail of east bound track, plus 19 feet estimated distance from southerly or near rail of eastbound track to southerly rail of westbound track.

Looking west from near rail of eastbound track:

View of 800 feet up to a point 1,131 feet from track.

From north side:

Looking east from near rail of westbound track:

Clear view up to a point 43 feet and thereafter view gradually decreases until at 113 feet it is 517 feet and at 183 feet it is 472 feet.

Looking west from near rail of eastbound track:

View is over 400 feet up to a point 63 feet from nearest rail of *west*bound track or (adding 19 feet for a distance between rails—the highway crossing at an angle) up to a point 82 feet from rail of eastbound track; thereafter view gradually decreases to about 300 feet up to a point about 200 feet from eastbound track.

Remarks: Photos Nos. 1, 3 and 7, taken from the south side, show a stone building which partially obstructs the view on that side, but this building is not on the railroad property.

Clay street:

Two main line tracks, three sidings, all located on southerly side of main line.

Report of Board as to views:

From south side, poor.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View is clear up to 44.5 feet measured from near rail of eastbound track or up to a point about 60 feet from near rail of westbound track.

Looking west from near rail of eastbound track:

View obstructed on account of a curve in the tracks and a number of buildings not on the railroad property up to a point 114 feet from the tracks where the view is clear. Thereafter, view is obstructed by other buildings. See photo No. 8.

From north side:

Looking east from near rail of westbound track:

Clear view up to 19.5 feet and thereafter view gradually decreases from 970 feet at 24.5 feet; at 189.5 feet view is over 400 feet—and between the two last named points the view continues to be from 400 to 800 feet approximately.

Looking west from near rail of eastbound track:

View is 302 feet at 19.5 feet from near rail of westbound track, or adding about 15 feet to cover distance from that rail to near rail of eastbound track, gives view of about 300 feet up to a point about 35 feet from eastbound track.

Remarks: Aside from the curve in the tracks the obstructions to the view at this street are due to buildings off the railroad property (see photos Nos. 10 and 13), except for an elevated gate tower and small coal sheds which appear in photos Nos. 12 and 15.

"C"

CEDAR STREET.

Two main line tracks; one side track on northerly side and seven side tracks on southerly side of main line.

Report of Board as to views:

From south side, fair.

From north side, bad.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View is 780 feet at a point 36 feet from near rail of eastbound track or 48 feet from near rail of westbound track.

Looking west from near rail of eastbound track:

View is 866 feet at 31 feet from track and then it gradually decreases to 482 feet up to a point 56 feet from track.

From north side:

Looking east from near rail of westbound track:

View is 220 feet at 11 feet from track.

Looking west from near rail of eastbound track:

View is clear up to a point 31 feet from near rail of westbound track or about 43 feet from near rail of eastbound track; thereafter view decreases.

Remarks: On the north side the view looking east is poor but this is due in large part to the existence of several buildings and a high fence off the railroad property. See photo No. 2.

"D"

MARKET STREET AND PARK AVENUE.

Two main line tracks; no side tracks.

Report of Board as to views:

From south side, poor.

From north side, fair.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View is 500 feet up to a point 20 feet from near rail of eastbound track—or about 32 feet from near rail of westbound track. (See photos Nos. 3 and 6).

Looking west from near rail of eastbound track:

View is clear at 20 feet; and at 25 feet view is 420 feet and thereafter decreases.

From north side:

Looking east from near rail of westbound track:

View is clear up to point about 40 feet from track. See photos Nos. 11, 12 and 13.

Looking west from near rail of eastbound track:

View is 748 feet or more up to a point 20 feet from near rail of westbound track or about 32 feet from near rail of eastbound track. See photos Nos. 7, 9 and 10.

Remarks: Views were made and photographs taken at various points in Park avenue also, but they are substantially the same as at Market street. See "Park avenue" photos, Nos. 1 to 7.

"E"

ELLISON STREET.

Two main line tracks; one siding on northerly side of main line.

Report of Board as to views:

From south side, bad.

From north side, bad.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view up to a point 18 feet from track. This appears from the legend on the map showing clear view at 6 feet from near rail of eastbound track, and adding 12 for distance from that rail to near rail of westbound track gives 18 feet.

Looking west from near rail of eastbound track:

View of 360 feet up to a point 11 feet from track:

From north side:

Looking east from near rail of westbound track:

View of 247 feet at 11 feet and gradually increasing to over 1,000 feet as one approaches the track.

Looking west from near rail of eastbound track:

View of over 1,000 feet up to point 33 feet from track and thereafter gradually decreasing. Distance of 33 feet obtained by reference to engineer's figures of 21 feet from near rail of westbound track and adding 12 feet for distance between tracks.

Remarks: The tracks are straight in either direction for a considerable distance. Obstructions to view are caused by buildings off the railroad property except a freight station and tower located on the southerly side of main line and on easterly side of Ellison street. See photos Nos. 1 to 6.

"F"

VAN HOUTEN STREET.

Two main line tracks; no sidings.

Report of Board as to views:

From south side, bad.

From north side, bad.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 18 feet. This is obtained by taking the engineer's clear view at 6 feet from near rail of *east*bound track and adding 12 feet for distance between rails.

Looking west from near rail of eastbound track:

View of 800 feet up to 11 feet from track.

From north side:

Looking east from near rail of westbound track:

View is clear at 6 feet; decreases to 330 feet at 11 feet; is clear again at 16 feet and drops to 200 feet at 21 feet and thereafter decreases.

Looking west from near rail of eastbound track:

View of 700 feet up to 18 feet from track. This is obtained by taking engineer's distance of 6 feet from near rail of westbound track and adding 12 feet for distance between tracks.

Remarks: Obstructions to view at this street are due to buildings located outside of the railroad property, except an elevated gate tower located on southerly side of tracks and westerly side of highway. See photos Nos. 1 to 4.

"G"

BROADWAY.

Two main line tracks; no sidings.

Report of Board as to views:

From south side, poor.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View of over 1,000 feet up to a point 18 feet from track. This distance is obtained by adding to engineer's figures 5.85 feet measured from near rail of eastbound track 12 feet for a distance between tracks.

Looking west from near rail of eastbound track:

View of 1,000 feet up to about 6 feet from track.

From north side:

Looking east from near rail of westbound track:

View of 1,000 feet up to 5.85 feet from track. View of 487 feet at 10.85 feet; thereafter view decreases.

Looking west from near rail of eastbound track:

View of over 700 feet up to a point to 38 feet. This distance is obtained by adding to engineer's figures of a view of 704 feet at 25.85 feet with allowance of 12 feet for distance between tracks.

Remarks: All the obstructions to view are off the railroad property except an elevated gate tower and a coal box located on southerly side of right of way and on westerly side of street. See photo No. 3. The tracks are straight for a considerable distance in each direction. See photos Nos. 1, 6, 8 and 9.

"H"

FAIR STREET.

Two main line tracks; no side tracks.

Report of Board as to views:

From south side, poor.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 23 feet. Distance obtained by adding 12 feet for a distance between tracks to engineer's figures of 11 feet as distance to near rail of eastbound track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to a point 26 feet from track.

From north side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet at 6 feet. View is 421 feet at 11 feet; view of 800 feet at 16 feet, thereafter gradually decreasing.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to 23 feet from track. View of over 700 feet up to 33 feet from track—both distances obtained by adding 12 feet for the distance between track to the distance given in the engineer's statement as from near rail of *west*bound track.

Remarks: Obstructions to view are all off the railroad property except elevated gate tower located on southerly side of tracks and westerly side of highway. See photo No. 6.

"I"

HAMILTON AVENUE.

Two main line tracks; one siding on southerly side of main line.

Report of Board as to views:

From south side, poor.

From north side, fair.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 33 feet from track. This distance obtained by adding 12 feet for distance between tracks to engineer's figures of 21 feet measured from near rail of *east*bound track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to 21 feet from track.

From north side:

Looking east from near rail of westbound track:

View of over 500 feet up to a point 36 feet from track and thereafter gradually decreasing.

Looking west from near rail of eastbound track:

View of over 600 feet up to point 38 feet from track. This distance obtained by adding 12 feet for distance between tracks to engineer's figures of 26 feet measured from near rail of *west*bound track.

Remarks: Obstructions to view are houses and other buildings located off the railroad property, except an elevated gate tower located on northerly side of tracks and easterly side of street.

"J"

LAFAYETTE STREET.

Two main line tracks; one siding located on southerly side of main line.

Report of Board as to views:

From south side, fair.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view up to 33 feet. Distance obtained by adding 12 feet to engineer's report of 21 feet measured from near rail of eastbound track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet at 11 feet. View of 675 feet at 16 feet and thereafter view decreases.

From north side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 33 feet. Distance obtained by adding 12 feet for distance between tracks to 21 feet distance in engineer's report measured from near rail of *east*bound track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet at 41 feet.

Remarks: Obstructions to view are all off the railroad property, except an elevated gate tower located on northerly side of main line and easterly side of street. Tracks straight for considerable distance in each direction. See photos Nos. 1 to 10.

"K"

FRANKLIN STREET.

Two main line tracks; one siding on southerly side; one siding on northerly side of main line.

Report of Board as to views:

From south side, poor.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 42 feet from track. Distance obtained by adding 12 feet to engineer's figures of 30.45 feet measured from near rail of eastbound track.

Looking west from near rail of eastbound track:

View of 450 feet at 15 feet from track. View of 320 feet at 20 feet and thereafter gradually decreases.

From north side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet at 40 feet from track. View of over 400 feet up to a point 90 feet from track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet at 27 feet from track. View of 545 feet at 32 feet from track. Distance obtained by adding 12 feet to engineer's measurements of 15.45 feet and 20.45 feet taken from near rail of *west*bound track.

Remarks: Obstructions to view are all off the railroad property except a gate tower on northerly side of tracks and westerly side of street. Tracks straight in each direction. See photos Nos. 1, 4 and 6.

"L"

KEEN STREET.

Two main line tracks; one side track on southerly side and two side tracks on northerly side.

Report of Board as to views:

From south side, bad.

From north side, poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Photo No. 8 taken at 19 feet from westbound track and looking in an easterly direction shows a view of over two blocks—not less than 800 feet.

Looking west from near rail of eastbound track:

View of 375 feet at 10 feet from track. See also photo No. 7 taken at 18 feet.

From north side:

Looking east from near rail of westbound track:

View of 950 feet at 20 feet from track. View of 450 feet at 30 feet from track and thereafter gradually decreasing.

Looking west from near rail of eastbound track:

View of 600 feet up to 42 feet from track. This is obtained by adding 12 feet to engineer's measurements of 30 feet from near rail of westbound track. See also photos Nos. 1 and 4.

Remarks: The obstructions to view are all off railroad property, except a small watchman's shanty and coal box on the northerly side of tracks and the westerly side of street.

"M"

WARREN STREET.

Two main line tracks; no sidings.

Report of Board as to views:

From south side, poor.

From north side, fair.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View of 237 feet up to 23 feet from track. This distance is obtained by adding 12 feet to engineer's figures of 11.05 measured from near rail of *east*-bound track.

Looking west from near rail of eastbound track:

View of 324 feet at 11 feet, and view of over 700 feet up to 51 feet.

From north side:

Looking east from near rail of westbound track:

View of over 900 feet up to 21 feet.

Looking west from near rail of eastbound track:

View of over 1,000 feet up to 33 feet, obtained by adding 12 feet for a distance between tracks to engineer's measurements of 21.05 feet taken from near rail of *west*bound track.

Remarks: No obstructions to view on railroad property except elevated gate tower located on southerly side of tracks and westerly side of highway. See photo No. 7.

"N"

RIVER AND PUTNAM STREETS.

Two main line tracks; no sidings.

River street:

Report of Board as to views:

Both sides, fair.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet at 45.8 feet. This distance is obtained by adding 12 feet for a distance between tracks to engineer's report of 33.8 feet measured from near rail of *east*bound track.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to 38.8 feet; view of 600 feet at 98.8 feet.

From north side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 58.8 feet.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to 60.8 feet. This is obtained by adding 12 feet to engineer's figures of 48.8 measured from near rail of westbound track.

Putnam street:

Report of Board as to views:

Both sides poor.

Proof as to views:

From south side:

Looking east from near rail of westbound track:

View of about 400 feet up to a point 87.65 feet. This figure obtained by adding 12 feet to engineer's figures of 75.65 feet measured from near rail of eastbound track.

Looking west from near rail of eastbound track:

View of 400 feet up to a point 75.65 feet. View of 350 feet up to 90.65 feet.

From north side:

Looking east from near rail of westbound track:

Clear view of over 1,000 feet up to 30.65 feet.

Looking west from near rail of eastbound track:

Clear view of over 1,000 feet up to 22.65 feet and of over 400 feet up to 42.65 feet. Figures obtained by adding 12 feet to the corresponding figures of engineer's report measured from near rail of westbound track.

Remarks: These two streets form only one crossing, Putnam street passing over the tracks at right angles and River street at an acute angle—the two streets intersecting on the railroad right of way. The tracks are straight for a considerable distance in each direction. See photo No. 6, Putnam street. Whatever obstructions there are to the view are off the railroad property except the River street station, located on the northerly side of the tracks and on the westerly side of River street. See photos Nos. 1 and 2, River street.

It is quite evident that the Board's arbitrary classification, based upon the extent of the view from a point about 35 feet to the nearest rail, practically amounts to the overruling of the decisions

hereinbefore cited. It also entirely disregards other decisions to the effect that the railroad company is not responsible for dangers at grade crossings which are not the result of conditions *created by it.*

But even on the Board's statement of how it arrives at its "judgment" of the character of each of these crossings, it will be seen from the foregoing summaries of the extent of the views at each crossing that the Board in several instances came to an unjustifiable and inaccurate conclusion. This may have been due to the fact that it did not give due consideration to the fact that under normal conditions eastbound trains operate on the eastbound track and likewise westbound trains operate on the westbound track. Hence, a highway traveler approaching the crossing from the south does not come to the point of danger from the westbound train until after he passes the *east*bound track and is close to the westbound track. So, also, a highway traveler approaching a crossing from the north does not come to the point of danger from eastbound trains until after he has passed the westbound track and is close to the eastbound track. The average distance between tracks, according to the maps, is about 12 feet, varying slightly according as to whether or not the highways cross the tracks at right angles or otherwise. Hence, a traveler approaching from the south has about 12 feet further to go beyond the first rail of the eastbound track before he reaches the point of danger on the westbound track; and likewise a traveler approaching from the north after passing the westbound track has about 12 feet to go before he reaches the point of danger on the eastbound track. If consideration be given to these facts, there is a decided increase in the respective zones of safety. Of course, so far as concerns the eastbound movement of trains, a traveler approaching from the

south is in danger as soon as he reaches the first rail of the eastbound track; and likewise so far as concerns the westbound movement of trains a traveler approaching from the south is in danger from westbound trains as soon as he reaches the first rail of the westbound track, and in these two cases the views must therefore be taken with reference to the respective nearest rails before crossing either track. The foregoing summaries have been worked out on this basis; and by comparison with the Board's "judgment" it will be seen that even on the basis of the arbitrary schedule, from which the Board has arrived at its conclusion, the proof in several instances does not sustain such conclusions. If the matter be considered from the standpoint of the decisions of the courts the error of these conclusions becomes still more apparent.

In the Supreme Court counsel for defendants argued that the Grade Crossing Act of 1913 has left to the Board the decision of the question of whether a crossing is dangerous to public safety or that public travel is impeded, and then they said: "The Board by reason of its experience is peculiarly fitted to pass on this question. It has the opportunity of personal inspection of operations at the crossings. This is vastly more useful than the statement of witnesses and the examination of maps and photographs, no matter how carefully prepared." It may be that under the Grade Crossing Act the question of whether a crossing is dangerous or that public travel is impeded must be determined *in the first instance* by the Board. But it cannot be seriously urged that the decision of that question is to be determined exclusively and finally by the Board. If such is the proper construction of the statute then it is invalid because it deprives the company of its property without a hearing and therefore without due process, and also because

it impairs the constitutional jurisdiction of the Supreme Court of the State of New Jersey to review the proceedings of statutory tribunals.

The argument that the Board can base its conclusions upon its "experience" and upon a "personal inspection" of the crossings is directly contrary to the views of the United States Supreme Court, as stated in *United States* v. *B. & O. Southwestern R. R. Co.,* 226 U. S. 14. In that case a suit was brought by the railroad to set aside an order of the Interstate Commerce Commission directing it to establish certain switch connections. The Commerce Court set aside the order (195 Fed. 962). On appeal this decree was affirmed, the U. S. Supreme Court saying:

> "It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, etc., to establish the switch. We remark that it is stated in the Commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. See *Washington ex rel. Oregon R. R. & Nav. Co.* v. *Fairchild,* 224 U. S., 510, 525. Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record, and the facts thus noticed are specified, so that matters of law are saved."

The Fairchild case referred to in the above quotation held that an order of a State Railroad Commission requiring a railroad company to make

a track connection was a taking of property, and that the validity of it must be tested by considering whether in view of all the facts the taking was arbitrary and unreasonable, or was justified by the public necessity which the carrier could lawfully be compelled to meet; and that in the absence of evidence to show that there was such public necessity the order was invalid and deprived the railroad company of its property without due process of law.

Another illustration of the same principle is *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.,* 227 U. S. 88, from which we quote as follows:

> "On the appeal here, the Government insisted that while the act of 1887, to regulate commerce (24 Stat. 379, c. 104, §§14, 15, 16), made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, c. 3591, §15), that rates should be set aside if, after a hearing, the 'Commission shall be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S. 541, 547, was to the contrary), could be set aside, even if the finding was wholly without substantial evidence to support it.
>
> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless, and if the Government's contention is correct it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean

> that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

These principles have recently been applied in the courts of New Jersey in two cases; in *Erie Railroad Co.* v. *Board of Public Utility Commissioners,* 85 N. J. L. 420, 89 Atl. 1001, an order of the Board requiring the railroad to furnish drinking water under certain conditions specified in the order was set aside on the ground that there was nothing in the *evidence* to justify the Board in requiring water to be furnished under the conditions named in the order.

In *Long Dock Co.* v. *State Board of Assessors,* 86 N. J. L. 592, 92 Atl. 438, it was held that on review of an assessment in a railroad tax case the Board of Assessors was permitted under the statute by which they were constituted to use their own knowledge of the facts, *but* that the objecting taxpayer had the right to know what knowledge the members of the Board had upon which to pass their valuation, and for that purpose might call the members as witnesses and examine them.

> "It is not consistent with the methods of judicial tribunals nor of special tribunals seeking to do justice, to give the taxpayer no chance to know what the case made against him may be" (p. 601).

It may be that the experience and the personal inspection of the Board of Public Utility Commissioners of the State of New Jersey is "vastly more useful" than the evidence of witnesses, but

the trouble with an order based in whole or in part upon such experience and inspection is that the company whose property is to be taken is deprived of its property and the enjoyments thereof, without any opportunity to protect the same, and without a hearing, in violation of both the State and the Federal Constitutions. The company has no notice or knowledge of what "experience" the members of the Board may have had, nor is it informed how or why the members became "peculiarly fitted" to pass on the question under consideration, nor is it informed what mental elements influence the Board in determining the question; likewise it has no notice or information as to what inspection, if any, the members may have made of the crossings or of the operations thereat.

In the Supreme Court counsel also argued: "There are many elements of danger at a grade crossing and it is impossible to lay down any hard and fast rule, or set of rules, by which it may be determined whether or not a crossing is dangerous within the contemplation of the statute." If this statement is correct then the conclusion follows that the statute upon which the order under review is based is in violation of the Constitution, because it confers arbitrary power on the Board and purports to give the Board authority to make an order for the elimination of a grade crossing without specifying any reasonable standard, or indeed any standard, upon which the action of the Board is made to depend. If it is "impossible" to determine whether or not a crossing is "dangerous," within the contemplation of the statute, then we submit that the statute is unworkable and unenforceable; in that event some standard other than the existence or non-existence of danger to public safety must be discovered in order that this or any other

statute for the elimination of grade crossings may be effective.

After stating that it is "impossible" to lay down rules for the purpose of determining whether a crossing is dangerous, counsel in their argument in the Supreme Court then called attention to the rules which the *courts* have laid down, and at the same time they asserted that these rules cannot be *used* to fix a "standard of danger" in the construction of the statute. This argument is inconsistent. First, counsel say it is impossible to fix a standard of danger at a grade crossing; then they say the courts have fixed a standard, but that it cannot be used in the construction of the statute of 1913; then they proceed to criticise the standard that has been fixed by the courts in considering the question of danger at grade crossings; but in all of the discussion we find no hint of *any other standard* except that which has been fixed by the courts. If there is no standard at all by which this question may be determined, then the statute is invalid (for the reasons above suggested), but if there is a standard, where are we to find it except in the *decisions* of the courts? Counsel do not suggest any other source of information on this point—unless, indeed, it is to be found in the "experience" of the members of the Board and their "personal inspection" of the crossings.

But even if the evidence justifies or supports the conclusions or findings of the Board with respect to some of the said crossings, it does not justify or support like conclusions or findings with respect to the other of said crossings; and the order is therefore invalid and should be set aside as to the said other crossings.

The foregoing review of the evidence as to the several crossings shows that the Board was not justified in concluding that all of them were dan-

gerous to public safety or that public travel was "impeded thereby." Some of them at least cannot be so classed. At Madison Avenue, Fair Street, Franklin Street, Keen Street and Warren Street, particularly, the highway traffic (if that be considered as the test of danger or impediment), is comparatively light and under the precedent of the Newark case, *supra,* the situation is not such as to justify the elimination of a grade crossing. The traffic at Straight Street is but little heavier than at these five streets and after that the figures gradually increase until we come to Market Street, where the records show traffic more than double the highest street. Assuming for the sake of the argument that the Board might be justified in directing the elimination of the crossing at Market Street (and possibly also even at Broadway and River Street), the question still remains whether the Board can justify an order at the other streets where the traffic is light, simply because the city decided to include these other streets in the same proceeding in which other streets where the traffic was much heavier were also included. We have shown under Point I that the statute upon which this order is based should be construed to require that each crossing receive separate consideration. That such is the proper construction of the statute is further demonstrated by the difficulty into which the Board fell in the present case. They seek to justify an order directing the elimination of *all* of the fifteen crossings on the theory that it is necessary to consider them all by one comprehensive plan or scheme (Vol. IV, p. 1756, l. 20). It is quite true that the city's engineers presented a plan which involved all of the fifteen crossings. For that matter, it involved still another crossing, that known as Fifth Avenue—which is not in the

petition at all; and yet the Board had no difficulty in dismissing Fifth Avenue from consideration in this proceeding. When this plan was presented it is also true that the railroad engineers prepared their estimates on the basis of such a plan, but at no time was there any acquiescence on the part of the railroad company to the proceedings either in whole or in part, nor was there any acquiescence to the suggestion that *all* the crossings must be considered together. The plans both of the city and the company show that it is entirely possible and practicable to consider at least some of the crossings entirely separate from the others. The city's plans and estimates were prepared on that theory and the very order of the Board itself recognizes that condition by providing that the work is to be done in sections.

But even if we assume for the sake of argument that the elimination of one crossing—such as that where the traffic is admittedly the heaviest, namely, Market Street—necessarily involves the elimination of fourteen others (although the two farthest apart are two miles distant from each other), we still insist that the *statute* does not provide for any such contingencies. The Board has no jurisdiction with respect to this subject except that which is conferred by statute. It might be desirable from the standpoint of accomplishing the purpose of the statute to have a provision that whenever the elimination of one crossing that might be found to be dangerous, etc., necessarily involves the elimination of another crossing, then the Board should have the power to order the elimination of such other crossing even though it does not come within the class of "dangerous." If the city undertakes to include more than one crossing in the same proceeding or if it undertakes to include in the same proceeding a variety of crossings, some of

which may and others of which may not be in such locations as to necessarily require the joint consideration, then we submit it undertakes the burden of proving that *all* of the crossings thus included in the same petition are dangerous, etc., and if the proof fails as to any one of such crossings, then on the theory that all of them must be considered together, the whole plan must fail and the order must be set aside *in toto,* as there is nothing in the statute which justifies the Board in ordering one crossing to be eliminated simply because its neighbor happens to come within the class of dangerous.

Even if these said other crossings are affected by or involved in the alteration or elimination of such crossing or crossings as may be found to be dangerous to public safety the Board has no power under such statute to order at the expense of the prosecutor the alteration or the elimination of the crossings thus affected or involved, when it does not appear that such other crossings are themselves dangerous to public safety or an impediment to travel.

But the argument we have been considering goes one step further. Suppose that the statute be construed to justify the institution of a proceeding which involves more than one crossing; suppose, further, that the statute, although it does not so state, justifies the Board in ordering the elimination of all crossings (though non-dangerous) which may be held to be necessarily or even conveniently included within the elimination of crossings found to be dangerous. Suppose, further, that the proof in the present case justifies (which it does not) the conclusion that the elimination of one or more of the crossings where the traffic is heaviest necessarily involves the elimination of all the other crossings—even though the proof as to the other

crossings, or some of them, does not show that such crossings or some of them, come within the class of dangerous. Even after assuming all these conditions, the question still remains whether the statute justifies the Board in ordering that the elimination of the non-dangerous crossings be done *at the expense of the railroad company.* So far as the railroad company is concerned this statute is highly penal and permits the Board to impose upon the railroad the entire cost (in this case $3,000,000 and upwards) of eliminating grade crossings. How can such a statute be construed to permit the Board to *increase* the penalty by compelling the railroad, at its own expense, to eliminate other crossings which do not come within the classification specified in the statute? It may be asked who then is to pay the cost of the elimination of the non-dangerous crossings that may be involved in the elimination of the dangerous crossings? It is not necessary to answer that question in the present case, except to say that the railroad cannot be compelled to meet this burden or to pay this penalty unless there is something in the statute which either expressly, or by necessary implication, put such burden and penalty upon it. It is, of course, quite within the bounds of possibility that if a railroad company were ordered to eliminate any one crossing that happens to be found to be dangerous, it might then be desirable and convenient or even necessary for the railroad to eliminate one or more crossings in connection with the first one. But even in such a case the railroad should at least have the privilege of deciding whether it is necessary to eliminate such *other* crossing or crossings and the time and manner of doing the work. But in the present case the Board has undertaken to *order* the company to eliminate all of the crossings—some of which at least, we claim, have not by the proof been brought within the class of crossings that are dangerous to

public safety, etc.; and hence, the Board had no right to make any order whatever with respect to such non-dangerous crossings; or at least, if any order was made including the same, then the Board had no right to direct the railroad to do the work at its own expense.

The Supreme Court sustained the finding of the Board that *each* of the crossings was dangerous to public safety, and then said that this conclusion disposed of the prosecutor's contention "that the evidence as to one crossing cannot be extended to include other crossings, or that non-dangerous crossings cannot be ordered to be eliminated at the expense of the prosecutor." Of course, this conclusion is necessarily based on the premise that *each* of the crossings in question was "dangerous to public safety." If some one or more of the crossings was not thus "dangerous", then we submit, for the reasons above stated, that the prosecutor could not be compelled to eliminate such non-dangerous crossings, simply because it might be convenient to eliminate one or more of such non-dangerous crossings in connection with some one or more other crossings that might be found to be dangerous. If, as we have hereinbefore contended, there is no substantial evidence to justify the conclusion that *all* of the crossings were dangerous, then we submit the order must be set aside because obviously the statute does not justify an order requiring the elimination of one or more non-dangerous crossings simply because the city has chosen to include in one and the same proceeding one or more such non-dangerous crossings with other crossings that might fairly be found to be dangerous; in other words, if the city includes more than one crossing in the same proceeding, it must prove the jurisdictional fact as to all of them —otherwise the proceeding falls, and the order based thereon must be set aside.

But even if one or more of the non-dangerous crossings is necessarily included in the elimination of one or more other crossings that may reasonably be found to be "dangerous", still it does not follow that the prosecutor can be compelled to pay the expense of the non-dangerous crossings. It may be said that this argument would lead to an impassé in that the Board's order as to dangerous crossings would be impossible of fulfillment because such crossings could not be eliminated without at the same time destroying the non-dangerous crossings. If such is the result, then the blame must rest upon the statute. It may be that the statute is defective in this regard, but that is no excuse for imposing upon the prosecutor the expense of eliminating crossings concerning which there is no sufficient proof as to the jurisdictional facts upon which the order of the Board must be predicated.

IX.

THE ORDER IS INVALID BECAUSE THERE IS NO EVIDENCE TO REASONABLY SUPPORT THE CONCLUSIONS OR FINDINGS OF THE BOARD AND THE DECISION OF THE SUPREME COURT AFFIRMING SAME THAT THE PUBLIC TRAVEL ON SAID CROSSINGS AND EACH OF THEM IS IMPEDED.

(Reasons 1-10; and 12.)

But it will no doubt be urged by counsel for the defendants that under Section 1 of the statute it is not necessary for the Board to find *both* that the crossing is dangerous and that public travel is "impeded thereby" and that even if the crossings are not dangerous nevertheless the order may be sustained if there is evidence to justify the

conclusion that public travel is "impeded." This involves a consideration of the meaning of this expression.

The language is similar to that used in Section 9 of the charter of the Paterson and Hudson River Railroad, and in Section 11 of the charter of the Paterson and Ramapo Railroad, which requires the company to construct and keep in repair bridges, or passages, etc., "so that the passage of carriages, horses and cattle on the said road shall not be prevented thereby" (pp. 966, 1013).

Most of the old charters use the expression "impeded thereby." See, for example, the charter of New Jersey & Hudson River Railroad Co., P. L. 1832, p. 104; Charter of Montclair Railway Co., P. L. 1867, p. 301; Charter of Monmouth and Middlesex Agricultural Rail Road and Transportation Company, P. L. 1836, p. 158; Charter of Mount Holly and Camden Rail Road and Transportation Company, P. L. 1836, p. 245; Charter of Rahway & Elizabethport R. R. and Transportation Co., P. L. 1837, p. 140; Charter of Paterson and Hackensack R. R. Co., P. L. 1850, p. 41; Charter of Mount Holly and Pemberton R. R. and Transportation Co., P. L. 1850, p. 264; Charter of Belvidere and Water Gap R. R. Co., P. L. 1851, p. 37; and Charter of Sussex & Warren R. R. Co., P. L. 1851, p. 78.

Similar expressions are used in the General Railroad Law of 1873 (P. L. 1873, p. 97, §14) and in the General Railroad Law of 1903 (P. L. 1903, p. 659, §26).

The obvious purpose of these statutes was to make the surface of the railroad ties and rails conform to the surface of the highway; at a railroad crossing, the rails and ties as they passed the highway would impede travel; if the railroad happened to be constructed in a cut or on an embankment, the impediment to travel would thereby be increased. The old charters and the General Railroad Law of

1873 refer to the "passage of carriages, horses and cattle." The General Railroad Law of 1903 uses the expresion "public travel" in the generic sense, including not only carriages, horses and cattle, but other kinds of public travel—the purpose being the same as in the previous laws, to wit, to mitigate the necessary inconvenience to public travel of any kind arising by the mere existence of railroad tracks on and across a public highway. The word "thereby" as used in the railroad statutes, we submit, refers to the railroad as a visible impediment due to the existence of its tracks or ties—or, in some cases, cuts or embankments—which in the very nature of things would operate to impede the passage of carriages, horses and cattle and other public travel, unless a reasonable method was provided for passing across railroad structures and approaching thereto. Such language was not intended to refer to the inconvenience of temporary delay to public travel caused by the mere passage of locomotives and cars along the railroad tracks and across the highway. A moving train must necessarily obstruct the passage of crossings as it moves along, but that is different from an impediment. The word as used in these statutes refers to permanent, physical obstacles, due to the very nature of the construction of railroad tracks.

In obedience to these statutes, ever since railroad tracks were first constructed, planking or similar construction has been placed alongside of the rails, so as not to "impede" the passage of horses, &c., or other public travel. It has universally been admitted for the last eighty years that such an arrangement was a compliance with the charter or statutory duties of the railroad companies.

In the case of appeal of *North Manheim Township,* 14 Atl. 137, the Supreme Court of Pennsylvania said:

> "Is the defendant's railway constructed across the public highway in the manner required by law? The act of assembly of April 4, 1868, under which the defendant's railroad company is incorporated, provides that the corporation shall be entitled to exercise all the rights, powers, and privileges, and be subject to all the restrictions and liabilities, of the act regulating railroad companies, approved the 19th of February, 1849, and the several supplements thereto. The 12th section of said act (2 Purd. Dig. 1220) provides that 'whenever, in the construction of such road or roads, it shall be necessary to cross or intersect any established road or highway, it shall be the duty of the president and directors of said company so to construct the said railroad across such established road or way as not to impede the passage or transportation of persons or property along the same.' A railway company may construct its railway across any established road or way whenever it may be necessary to cross or intersect it; but it must so construct it that it will not impede the passage or transportation of persons or property over said road or way. If it so constructs its railway as to be a serious inconvenience and dangerous obstruction to travel along the way or road it may be indicted therefor. Railway Co. v. Com., 90 Pa. St. 300; Richards v. Railroad Co., 45 N. Y. 846; Swenk v. Railroad Co., 2 Chester Co., Rep. 177. In Com. v. Railroad Co., 27 Pa. St. 371, Lewis, *J.*, says: 'The duty to do as little damage to the common highway as possible, consistent with the fair uses of the railroad, carries with it the power to do such acts as are absolutely necessary to avoid such damage. If the common road can be crossed at grade, the body of it must be so altered and

constructed as to make the crossing as convenient as possible for wagons, carriages, etc. If the railroad crosses at an elevation too great for this, the common road may be raised to a reasonable degree by embankment and a bridge substituted for the road, as it may be depressed so as to admit of a passage under the railroad.' When, therefore, a railroad has a right to cross a highway, or run in proximity to it, but in doing so is bound to so use its privilege as not necessarily to interfere with the public highway, it must be allowed to create such impediment as cannot be avoided, but those which are not absolutely necessary to the making and using of the railroad are unlawful. It makes no difference whether the road is a main thoroughfare or an unimportant one, the law protects all alike. Com. v. Railroad Co., supra. (p. 142). * * * * *

"The twelfth section of the act of 1849 (P. L. 84) contains this language: 'Whenever, in the construction of such road or roads, it shall be necessary, to cross or intersect any established road or way, it shall be the duty of the president and directors of the said company so to construct the said road across such established road or way as not to impede the passage or transportation of persons or property along the same.' There can be no doubt of the right of the defendant to cross or intersect a public highway under the provision of the act, either at grade, above or below grade. See Struthers v. Railway Co. 87 Pa. St. 282; Com. v. Railroad Co., 27 Pa. St. 354, 371; and Railroad Co.'s Appeal, 18 Wkly Notes Cas. 421, 5 Atl. Rep. 872. It becomes important to determine how the language, 'so as not to impede the passage or transportation of person or property along the same,' shall be understood. The word 'impede' is almost synonymous with the word 'obstruct,' except that it is seldom, if ever, used to signify an entire blocking up of

the way. It is an obstacle, not an impassable barrier. To understand this word in this way, and say that a grade crossing must be of such a character as not to be an obstacle in the way, or an obstruction to the passage or transportation of person or property, is to prohibit grade crossings entirely. In the railway laws of Massachusetts it is provided that crossings shall be constructed so as not to obstruct a turnpike or road. In Spear v. Cummings, 23 Pick. 226, it was held to mean that they should be built so as to cause the least possible inconvenience or impediment. By a statute of this commonwealth, owners of lands adjoining navigable streams, were permitted to build dams, provided they did not obstruct or impede navigation or prevent fish from passing up the stream. In Bacon v. Arthur, 4 Watts. 440, our Supreme Court held that if these words were taken literally, the owners could not avail themselves of the privilege at all; but as this construction would have been contrary to the grant itself, a more liberal one was adopted. In Com. v. Railroad Co., *supra,* the words 'impede,' 'obstruct,' and 'hinder' were considered and construed by BLACK, *C. J.,* and LEWIS, *J.,* to mean, so as not to unnecessarily interfere with the public highway. Accepting these decisions as authorities upon this subject, we conclude that where a crossing is so constructed as not to endanger the reasonable passage of persons and transportation of property, or as not to unnecessarily interfere with the public highway, it is a substantial compliance with the twelfth section of the act of 1849. p. 145)."

In the case of *Commonwealth* v. *Erie and North-East Railroad Company,* 27 Pa. St. Rept. (3 Casey) 339, the charter provided "the said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane, or bridge,

now laid out, opened or built." It was held that the railroad had no right to "appropriate" a publice street in the absence of express power given in the charter, nor to construct the tracks to any point not authorized in the charter.

In the course of the opinion, the court said:

> "A large part of the evidence refers to the danger encountered by persons obliged to cross the railroad when trains were approaching, and the delay and inconvenience caused by cars, which totally blocked up the crossing places. If the defendants have a right to make the road on a street, they have also the right to use it when made. They may carry all the freight and passengers they can get. If the number of cars and locomotives necessary to do their business be so great as sometimes to choke the thoroughfares over which they pass, it must be remembered that the same thing would happen in a much greater degree, if the twentieth part of the business was done in carriages, coaches, and common road wagons. If the cars are suffered to stand for an unnecessary length of time, at places inconvenient to the public, the act is indictable as a nuisance, and for any want of proper care, the defendants are liable in damages to the persons injured by it. But it cannot be said that they have violated their charter in causing obstructions of this kind, unless such obstructions could have been prevented or diminished by a different construction of the road."

The word "impediment," as used in a statute prohibiting the obstruction of any public road by "a fence, bar, or other impediment, except by gates" erected by leave of county commissioners, means an obstruction of a non-temporary nature of the same character as a fence, bar, or gate erected across the highway, and does not include a freight car pushed by a railroad employe across a

public road and permitted to remain there for a space of seven hours, when it is voluntarily removed. *Central of Georgia Ry. Co.* v. *State,* 40 South. 991, 992, 145 Ala. 99.

It will be seen from the foregoing cases that the word "impede" does not mean the delay to highway travel caused by the passage of engine and trains along the railroad tracks (to which operation the lowering of the crossing gates is merely incidental) but it refers to the duty of the railroad to *construct and maintain* its highway crossings (whether at grade or otherwise) in such a way that the railroad tracks and the necessary appurtenances do not obstruct, or unreasonably interfere with, the use of the crossings by the traveling public. The very purpose of organizing a railroad company is to run railroad trains. If the Legislature intended that the trains must be run in such a way as not to obstruct public travel it was obvious that the only way in which such a result could be obtained would be by the construction of the tracks across highways other than at grade. But no one contemplated at the time of the original construction of railroads that the crossings would be other than at grade. On the contrary, it was necessary that the crossings be at grade in order that the general public might avail themselves of the privilege given by the early charters of running "carriages" on the railroad tracks, if they so desired.

There may be a question as to whether the charters of the Paterson & Hudson River R. R. Co. and the Paterson & Ramapo R. R. Co. are to be construed in the same way as the charters of the other early companies, most of which use the word "impede," in dealing with the duty of such companies with respect to the construction of bridges and passages at highway crossings. The charter of the Paterson & Hudson River R. R. Co. requires bridges, etc., so that the passage of carriages, etc.

"shall not be *prevented* thereby" (p. 966, Section IX). The charter of the Paterson & Ramapo R. R. Co. uses the same language (p. 1013, Section XI). The word "prevent" conveys the idea of prohibition. See *Re Jones,* 78 Ala. 419, 421. It has also been construed as meaning to "hinder" or to "intercept". *Green* v. *State,* 35 S. E. 97, 109 Ga. 536. It is also used in the sense of "hinder, check or retard". *Lake Erie, etc., R. Co.* v. *McFall,* 76 N. E. 400, 165 Ind. 574. According to the Standard Dictionary, the word means:

> "1. To stop or hinder from happening by means of previous measures; keep from occurring or being brought about as an event or result; ward off; preclude; thwart; hinder. 2. To stop in advance, as a person, or thing, from some act or operation; intercept or bar the action of; check; restrain."

The evidence shows that these crossings at the present time are maintained (and for that matter have always been maintained) in such a manner "that the passage of carriages, horses and cattle" is not "prevented."

The sections of the respective charters in which the word is used concludes, "so that persons may conveniently pass the same" (in the case of the Paterson & Ramapo R. R. Co.) and "so that they may conveniently pass the same" (in the case of the Paterson & Hudson River R. R. Co.). This language sustains the construction which we have urged, namely, that the *highway crossings* are to be so constructed and maintained as not to unreasonably obstruct the use of the crossings by highway travelers.

The Supreme Court discussed the foregoing argument in its opinion and then held that to limit the word "impede" to permanent physical obstructions, due to the grade and construction of the railroad (as held in *North Manheim Township,* 14

Atl. 137, *supra*) would be "too narrow"; and that the word should be construed as "synonymous with check, hinder, delay"—and concluded (italics ours):

> "The evidence and the record shows the public travel is impeded, *in this sense*, at each of these crossings, and the board so found."

It will be observed that in reaching this conclusion the Supreme Court refused to follow the authority of the *North Manheim* case and put a construction of its own upon the meaning of the word "impede," based solely upon the "dictionary definition."

We submit that the Supreme Court has disregarded the cases in this State in which the question has arisen as to the construction of the word "impede," as used in the early railroad charters and in Section 26 of the general railroad law. It has uniformly been held that this word related to *some defect in the crossing* by reason whereof the same was not in a reasonable convenient condition for the use of highway travelers. There has never been any suggestion that this word had any reference to the incidental and necessary *delay* to highway travel caused by the use of the railroad tracks for the very purpose for which a railroad company is organized, to wit, to run trains. Examples of such decisions are:

Sonn v. *Erie R. R.*, 66 N. J. L. 428;

Weller v. *Lehigh & Hudson River R. Co.*, 81 N. J. L. 95;

Sankiwicz v. *Atlantic City R. R.*, 82 N. J. L. 478;

Taylor v. *Lehigh Valley R. R.*, 87 N. J. L. 673.

The conclusion of the Supreme Court also disregards the usual rule of construction of statutes that the Legislature in using words that are found in other statutes is supposed to have used such

words in the same sense in which they are used in such other statutes, and the cognate rule applicable to the case of the adoption of a statute from another State, under which circumstances it is presumed that the interpretation adopted in the State from which the statute is taken has been accepted as well as the words of the statute.

Fritz v. *Kuhl,* 51 N. J. L. 191, 9;
DeRaismes v. *DeRaismes,* 70 N. J. L. 15, 18;
Rutkowsky v. *Bozza,* 77 N. J. L. 724;
Clay v. *Edwards,* 86 Atl. 548.

It is to be presumed, we submit, that the Legislature used the word "impede" in the same sense in which it has been used in other statutes and in railroad charters ever since the first railroad company was organized.

> "Whenever there is a debatable question as to the proper construction of a statutory provision the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the courts as the true one. *State* v. *Kelsey,* 44 N. J. Law (15 Vr.), 1; *Fritz* v. *Kuhl,* 51 N. J. Law (22 Vr.) 191, 200; *McNeal Pipe Co.* v. *Lippincott,* 57 N. J. Law (28 Vr.), 540."

(*Commonwealth Roofing Co.* v. *Riccio,* 81 N. J. Eq. 486, 8.)

We submit that the word "impede" as used in the statute of 1913 does not mean an obstruction to highway travel caused by the mere passage of trains, but refers to a permanent structural impediment.

There was no claim in the present case that there was any impediment to public travel caused by any failure on the part of the prosecutor to construct and maintain proper crossings and approaches thereto. On the contrary the evidence shows without dispute that in this regard the prose-

cutor performed its full duty. Hence, there is no impediment to public travel unless the mere passage of engines and trains over the crossing, and the lowering of the gates in connection therewith, be considered such. The finding of the Board that the public travel on each of the crossings "impeded thereby" is therefore not justified.

It is, of course, conceded that public travel on a street or highway other than a railroad is necessarily interfered with to some extent when trains pass over the crossing. This must be so in the very nature of things, as otherwise the trains could not pass over the crossings at all. But a railroad is a public highway just as much as a street. Traffic on the railroad is quite as important as traffic on the street—perhaps more so, if considered from the standpoint of the number of passengers and the volume of freight transported. Moreover, there is nothing the statute which justifies the Board in ordering the alteration of a crossing when the traffic is (whether temporarily or otherwise) "blocked"—unless the word "impede" as used in the statute is construed to be the equivalent of "block."

Temporary interference with highway travel is not peculiar to railroad operation. Highway travel is constantly blocked or temporarily interrupted by other conditions, such as state or municipal traffic rules; indeed, there are many places in large cities where such rules interfere with highway traffic even more than by the mere passage of a railroad train across a highway. Numerous restrictions as to stopping or slowing up at the intersections of streets are imposed by such rules, but no one would claim that they operated to "impede" public travel.

If there was any unreasonable or illegal blocking of highway travel by the passage of trains, that is a matter which the City itself could control and

regulate by ordinance under Section 26, Paragraph XIV of the City Charter of 1871. See *Pennsylvania R. R.* v. *Jersey City,* 47 N. J. L. 286.

Moreover, some at least of the delay caused by the passage of trains over the crossings is the result of a recommendation made by the Board itself that the company limit the speed of trains through the City. Mr. Muzzy was of the impression that the speed limit was 6 miles an hour (p. 150, l. 10). But he was mistaken in this. The Board's recommendation was that the speed not exceed 15 miles an hour—which was adopted by the railroad (See Annual Report of Board for 1910, p. 226).

We therefore have the curious condition of a recommendation made by the Board (and obeyed by the company) as a result of which the trains run more slowly and therefore occupy more time in passing over crossings; and as a result (in part at least) of the delay thus caused to highway traffic, the same Board determines that it has jurisdiction to order the crossings to be altered because, as a result of the company's following the Board's own recommendation, the public travel is "impeded."

The Board in its report construed the word "impede" to mean any temporary delay caused by the passing of trains and the lowering of crossing gates incident thereto (p. 1755, l. 35).

If this is so, then the running of a single train may be construed to impede public travel within the meaning of the statute. It will be noted that the statute does not attempt to qualify the impediment or to describe the degree thereof; it does not even say that the impediment to public travel must be unreasonable. The mere fact of *any* impediment, whether it be caused by the running of one train or a hundred trains, would be sufficient under the construction adopted by the Board, and approved by the Supreme Court, to justify the Board in ordering the elimination of

any particular crossing. In other words, such a construction of the statute requires the elimination of every crossing where any trains at all are run.

If the Board was correct in this construction of the language of the statute, then, of course, it must be conceded that its conclusion in that respect, when affirmed by the Supreme Court, is binding on this court so far as such conclusion is the determination of a question of fact. But the question of whether such is the proper construction of the statute is a question of law upon which this court must pass its own judgment. If we are right in our contention as to the meaning of the word "impeded," then there was *no* evidence before the Supreme Court to justify the conclusion that public travel was "impeded."

X.

THE ORDER IS UNREASONABLE, FOR THE REASON THAT THE PROSECUTOR IS NOT GIVEN THE ALTERNATIVE OF DECREASING OR ELIMINATING THE ALLEGED DANGER TO PUBLIC SAFETY AND THE ALLEGED IMPEDIMENT TO PUBLIC TRAVEL BY DECREASING THE NUMBER OF TRAIN MOVEMENTS OR BY ABANDONING THE RAILROAD.

(Reasons 40; also, 77 (f) 78 (on petition for *further* hearing); also Reasons 1 to 6 on *second* writ, re petition for *re*hearing.)

If, however, the court concludes that the Board was justified in its conclusions that *all* the crossings are dangerous to public safety and that public travel thereon is impeded, the question still remains as to whether under the facts of the case at bar the Board should have exercised its discretion

by commanding the prosecutor to eliminate the crossings. Involved in this is the further question of whether the statute itself, in order to be sustained as a constitutional exercise of the police power, should not have some provision whereby the Board might be empowered to decrease or eliminate the danger to public safety and the impediment to public travel by some means other than the alteration of the crossings themselves.

In the present case, as will be shown hereinafter, the prosecutor is required to spend an enormous sum without any compensating advantage in the way of increased receipts or decreased expenses; it is required to spend such sum in the improvement of properties belonging to other companies or individuals; and the sum thus expended nearly equals the total value of the very properties upon a *small part* of which the money must be spent.

Under such circumstances we submit that the Board should have exercised its discretion either to refuse to make an order directing the elimination of the crossings, or it should at least have given the prosecutor the alternative of decreasing or removing the danger and the impediment by reducing the number of train movements over the crossings; or, if need be, by abandoning the operation of the railroad at and over such crossings; and if it be said that under the statute the Board has no jurisdiction to permit such an alternative, then we submit that the statute itself is invalid as an unreasonable exercise of the police power.

After the filing of the report wherein the Board concluded that all of the crossings were dangerous to public safety and impeded public travel, the prosecutor filed a petition for a further hearing in which it asked that if the Board concluded that an order just be made for the elimination of the grade crossings, that then the Board give consideration to the question of whether the danger to

public safety and the impediment to public travel could not be removed by reducing the number of train movements over the crossings or some of them, in accordance with the plans which the prosecutor professed itself willing to submit (p. 1772).

The Board denied this petition without even offering the prosecutor an opportunity to be heard thereon, except to permit the same to be read before the Board. It declined to permit any testimony to be offered on the prosecutor's prayer that the Board consider reducing the number of train movements, saying:

> "As to the reduction of train movements, the company was offered every opportunity to furnish such proof, if it had any, and did not avail itself of such opportunity. In addition, the offer on this score was so indefinite that it does not appear reasonable to delay the proceeding for the purpose." (See Report of Board, filed April 20, 1915, Vol. IV, p. 1793.)

We submit that this ruling was arbitrary and unreasonable and that the prosecutor should at least have been given an opportunity to present evidence on this subject before the Board denied the prayer of this petition. It may be conceded that the reduction of train movements was proposed only as a last resort, but the prosecutor had no means of telling in advance of the Board's report what the Board's conclusions would be as to the necessity for the elimination of the crossings. But when the Board's report was filed requiring the prosecutor to eliminate all the crossings at an expense of $3,000,000 (exclusive of property damage), the question at once arose whether the alleged dangers and impediments could not be substantially reduced, or even entirely removed, by the comparatively simple and inexpensive expedient of reducing the train movements. It is obvious from the report of the Board filed January

11, 1915, that in the Board's opinion one of the important elements in the danger to public safety and the impediment to public travel was the number of train movements over the several crossings. It is obvious that such element of danger and impediment could be readily removed by decreasing, or, if necessary, abandoning train movements over the crossings. No previous opportunity to furnish such proof had been offered to the company for the reason that up to the time of the filing of the report of January 11, 1915, such question had not been raised by the City or by the Board either in the petition of the City for the elimination of the crossings or in any of the proceedings taken before the Board on said petition.

As to the criticism that the company's offer on this point was "indefinite," we submit that the petition for further hearing was amply sufficient to fairly present the matter to the Board. Paragraph 12 thereof recites that the conclusions of the Board (referring to the report of January 11, 1915) are predicated upon the finding that a large number of freight trains, passenger trains and drill engines pass daily over the crossings, thereby endangering public safety and impeding public travel; and that inasmuch as the prosecutor could not assume the cost which would be imposed upon it by an order requiring it to eliminate the grade crossings, the prosecutor urged that "if the Board concludes that under existing circumstances such an order must be made, an opportunity should be given this respondent (prosecutor) to present plans whereby the number of train or engine movements or the manner of the same or both, over said crossings may be changed so as to remove the danger and impediment to public travel" (Vol. IV, p. 1782). What more could be said in such a petition? Is it necessary that detailed plans and schedules be presented *in the petition?* It would

obviously be supererogatory on the part of the prosecutor to undertake the preparation of such details until and unless the Board first signified its willingness to give reasonable consideration thereto.

On the same date that this petition for further hearing was denied, the Board made the order which is now under review. Thereafter, the prosecutor, conceiving it to be its duty to its stockholders and creditors to exercise every possible means to avert the catastrophe threatened by such order, filed a petition for a *re*hearing, in which it sought to meet the criticism of the Board that its previous petition was "indefinite." This petition was also denied, the report of the Board thereon being dated July 9, 1915. The proceedings with respect thereto are the subject of a separate certiorari; the return to which is for convenience included in the record of the proceedings relative to the Board's order of April 20, 1915. The prosecutor was obliged to institute proceedings to review the last named order before the Board had an opportunity to give consideration to the petition for re-hearing, for the reasons that under Section 38 of the Act concerning public utilities application for review of an order of the Board must be made within thirty days from the date upon which such order becomes effective.

In this petition for re-hearing the railroad submitted a detailed plan, with accompanying maps, wherein it proposed that the alleged dangers and impediments at the crossings beginning at Market Street and extending northerly to and including River Street, be removed by the construction of a connection between the Erie Railroad Company and the tracks of the New York, Susquehanna & Western Railroad Company at Market Street and Straight Street, thereby entirely eliminating the Market Street grade crossings of the Erie Rail-

road (and incidentally a grade crossing at Straight Street of the N. Y. S. & W. R. R.) by elevating the tracks of the two railroads and slightly depressing the grade of the streets and by closing Ellison Street. The plan further contemplated the abandonment of the existing Susquehanna station at Straight Street and the consolidation thereof with the Market Street station of the Erie Railroad which latter station was to be raised and reconstructed. The plan involved the construction of a track connecting the Paterson City branch and the Main Line of the Susquehanna R. R. near the present Broadway, Paterson, station of that company and the construction of a connecting track between the Susquehanna company and the Erie company at Hawthorne.

By means of these connections it was proposed to have westbound Erie trains pass from the Main Line at Market Street over the present Paterson City branch of the Susquehanna company and the Main Line of the latter company returning to the tracks of the Erie company at Hawthorne; and to have eastbound Erie trains pass from the tracks of the Erie company at Hawthorne to the tracks of the Susquehanna company and thence over the Paterson City branch to the Main Line of the Erie company at Market Street. It was also proposed to run trains from Jersey City to Market Street via the Erie company and to run them to Jersey City via the Susquehanna company and *vice versa*, thus making a continuous direct forward movement.

As a part of the plan it was proposed to reduce the passenger train movements over the tracks of the Erie company north of Market Street to not more than seven per day—and even these could be removed if desired. The advantages of the proposed changes, from the standpoint of improvement in the passenger train service, were set forth in detail in the petition, and it was shown that by

means of such operation the switching work at Market Street and to the north thereof would be greatly decreased, certainly over 50%. The proposed plan, it was shown, would also avoid any interference with private side tracks except two or three between Van Houten Street and Market Street. The respondent (prosecutor) in the petition proffered itself as willing to undertake this construction and to make the necessary changes in the operation of its trains and to begin work thereunder not later than the date specified by the Board in the order of April 20, 1915, and to complete the same within the time limited by said order for the completion of the section of the work therein designated as section "A" (Vol. IV, p. 1879 *et seq.*).

After the filing of this petition the Board fixed a date for taking testimony thereon and the same was taken on June 28, 1915. The proposed plan was explained in detail to the Board by the General manager of the prosecutor. The principal ground of sition thereto was offered. The principal ground of objection that was suggested in argument was that the plan might make additional train movements over the tracks of another company, to wit, N. Y. S. & W. R. R. Co., and thereby increase the danger at certain grade crossings on the line of that company. Another objection was that the connection between the Erie and the Susquehanna tracks near the Broadway station of the Susquehanna company would create another grade crossing at the street known as Broadway. It is quite true that the number of train movements on the Susquehanna would be increased—indeed, it is difficult to figure out any scheme by which train service can be improved without increasing the number of train movements, but it was admitted that the existing crossings on the line of the Susquehanna company did not have as much traffic as the crossings on the line of the Erie company which it was sought

to have eliminated. There was also another objection to the closing of the existing crossing at Ellison Street but this was not very seriously pressed. At this hearing the city, by its counsel, went so far as to say that it was willing to agree with the company to adopt this plan, provided the proposed crossings at Ellison Place, Eighteenth Street and Broadway could be eliminated (p. 1919).

Whether or not the city would be willing to agree to such a plan is beside the point, because of course it was the duty of the Board to pass on the merits of such a proposition without regard to whether it pleased or displeased the interested parties.

Certain arguments against this plan were urged in the Supreme Court by counsel for defendants and it is proper to anticipate such arguments. Thus counsel asserted that the Board had no authority to order any plan which simply "reduced" the danger or the impediment to public travel. This overlooks the fact that the petition for rehearing did not propose to reduce but to *remove* the danger (Vol. IV, p. 1881, l. 18).

It was further argued that the plan submitted by the company for the diversion of certain trains to the Susquehanna railroad only transferred the danger from one set of crossings to another. This is hardly a fair criticism of the plan, in view of the fact that the plan proposed to eliminate the crossing at Market Street, where admittedly the railroad and the highway traffic is the heaviest. It would also eliminate an existing grade crossing at Straight Street on the line of the Susquehanna railroad. The plan also contemplated the closing of Ellison Street, and, therefore, the elimination of the existing grade crossing at that point.

Counsel also criticized this plan because they said it would materially reduce the train service over all crossings west of Market Street. That is true—indeed, that is one of the principal *ad-*

vantages of the plan. But such reduction of train service west of Market Street would not impair the train service for that part of the City, because the patrons of the railroad from that section of the City could board trains at the present Riverside station of the Susquehanna railroad, which is not very far from the present River Street station of the prosecutor (See Vol. IV, p. 1889, l. 2). Furthermore the Riverside station would be relocated so far as necessary for the purpose of serving that territory (Vol. IV, p. 1890, 1).

Counsel also criticized this plan because it would increase the number of train movements over existing grade crossings on the line of the Susquehanna railroad. That is true, but counsel fail to suggest how it is possible to give better train service without increasing the number of train movements. However that may be, the crossings in that part of the City, through which the Susquehanna railroad passes, are not used as much as the crossings on the Erie line in question in the present proceeding (Vol. IV, p. 1913).

Counsel also claimed that "a serious objection" to the consideration of the plan was the fact that the Susquehanna railroad did not join in the petition nor appear at the hearing thereof. But if the rehearing had been granted, then, of course, the Susquehanna could readily have been made a party and given an opportunity to be heard thereon.

We submit that the action of the Board in denying the prosecutor's petition for rehearing was unreasonable and unjustified. The plan proposed in this petition would successfully solve the problem of grade crossings at Market Street and at all the other crossings north, to and including River Street; in addition, it would greatly improve the passenger train service at Paterson and would not interfere to any material extent with the present side tracks. It would also enable the service

to the side tracks located north of Market Street to be greatly improved, as the switching could be done without the present interference by the movement of passenger trains. There was no testimony offered to contradict that given by the General Manager of the company, but the Board entirely disregarded this testimony and rejected the plan.

We submit that such action of the Board was erroneous and that the prosecutor's application should have been granted, as it appeared by the undisputed testimony that it was feasible and practicable to remove danger, if any, to public safety and the impediment, if any, to public travel at the several highway crossings by adopting the plan proposed by the prosecutor in its said petition in lieu of the plan required by the order under review.

Under such conditions the prosecutor should at least be given the alternative of abandoning the railroad, and if the statute upon which the order is based be construed as not to give such option to the prosecutor then the statute itself is unreasonable and invalid.

While as a general rule it is the duty of a railroad company to operate its railroad, yet under certain conditions it may abandon the operation of the whole or part thereof when it appears that such operation cannot be conducted without great financial loss. *State of Iowa* v. *Old Colony Trust Co.*, 215 Fed. 307; *State of South Carolina* v. *Jack,* 145 Fed. 281; *Commonwealth* v. *Fitchburg R. R.,* 78 Mass. 180; *Amesbury* v. *Citizens Electric Ry.,* 199 Mass., 394.

To the same effect is *Northern Pacific R. Co.* v. *Washington,* 142 U. S., 492; 35 L. ed. 1092, where the U. S. Supreme Court said:

> "If the charter of a railroad corporation simply authorizes the corporation, without re-

> quiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative. York & M. R. Co. *v.* Reg., 1 El. & Bl., 858; Great Western R. Co. *v.* Reg., 1 El. & Bl., 874; Com. *v.* Fitchburg R. Co., 12 Gray, 180; State *v.* Southern Minnesota R. Co., 18 Minn., 40."

The claim that a railroad may not be compelled to continue the operation of trains at a financial loss it not met by the provisions of Section 86 of the General Railroad Act of 1903, which provides for the appointment of a receiver by the Chancellor if the company neglects to run daily trains on any part of its road for the space of ten days. Operation by such a receiver would not be operation by the company. In such a contingency, can it be supposed that the Chancellor would order the receiver to continue an unprofitable operation?

It may be urged that the Board of Public Utility Commissioners, under section 17 of the act concerning public utilities (which provides that the Board shall have power to require every public utility "to comply with the laws of this State * * * and to conform to the duties imposed upon it thereby or by the provisions of its own charter * * * to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so") could compel the continuance of operation, but it seems obvious that the Board is not sufficiently omnipotent to compel the railroad company, or any other public utility, to continue business at a loss. Section 20 of the act concerning public utilities provides that no railroad shall abandon any railroad *station* without the approval of the Board, but there is nothing therein which prohibits the abandonment of the *railroad.*

But if it should be concluded that the company has no legal power to abandon the railroad no matter how great the financial loss may be, it should at least be given the alternative of decreasing the alleged danger and impediment by decreasing the number of train movements—especially when it proposes a reasonable and practicable scheme therefor which would greatly improve the train service to and from Paterson and would result in a saving of at least half (and probably more) of the great burden imposed upon it by the order under review.

In discussing the foregoing argument the Supreme Court said:

> "Insofar as this reason challenges the discretion exercised by the board in making its order, we are not concerned with it in this part of our opinion."

In reaching this conclusion we respectfully submit that the Court seems to have overlooked the claim of the prosecutor that even if the Board did have "discretion" to make the order under review (as well as discretion to refuse to permit the alleged danger and impediment by decreasing the number of train movements, or if necessary by abandoning the railroad), such discretion was improperly exercised and the ruling of the Board on the subject was arbitrary and unreasonable.

The Supreme Court also said (italics ours):

> "The decrease in the number of train movements was a matter primarily under the control of the prosecutor, and hence required no statutory permission; if by such decrease the danger and congestion at the crossings were in fact eliminated or reduced to a negligible point, that fact would doubtlessly be recognized by the board and dealt with accordingly. *It was for the prosecutor to make that fact appear,*

and its failure to do so involved no constitutional infirmity in the statute."
(Vol. IV., p. 2291, l. 35 to p. 2292, l. 2.)

What more could the prosecutor do to make the facts "appear" than was done when testimony was taken on the prosecutor's application for *re*hearing? As shown above, the prosecutor submitted detailed plans and maps, with a full explanation by its operating officials of the effect of the proposed changes. It is difficult to surmise what more the prosecutor could do, except possibly to actually abandon that part of the railroad which passes over the crossings or to actually reduce the train movements at those points. Can it be said that it was necessary for the prosecutor to do either of these things before the Board (or the Supreme Court) was under any obligation to consider these proposed methods of eliminating the alleged danger and impediment? If train movements over these crossings were discontinued for a single day, the result in all probability would be an immediate application for a receivership under Sec. 86 of the General Railroad Law.

We submit that the prosecutor could not reasonably be required to do more than it actually did, namely to show by testimony (which was *undisputed*) the probable effect of its proposals.

XI.

THE ORDER UNDER REVIEW IS ILLEGAL IN SO FAR AS IT REQUIRES THE PROSECUTOR TO CONSTRUCT BRIDGES OR PASSAGES OVER OR UNDER THE RAILROAD TRACKS AT THE HIGHWAY CROSSINGS IN QUESTION, OR SOME ONE OR MORE OF THEM, FOR THE REASON THAT THE EVIDENCE DOES NOT SHOW THAT THE SAID HIGHWAYS, OR ANY OR EITHER OF THEM, WERE LAID OUT AND OPENED BEFORE THE RAILROAD TRACKS WERE CONSTRUCTED. (Reasons 59, 60 and 61; also last paragraph of Reason 33.)

The statute upon which the jurisdiction of the power of the Board of Public Utilities is alleged to depend is general in its terms and on its face applies to every crossing at grade of a public highway by a railroad. It is not limited to highways which existed at the time the railroad was constructed. Under this statute, if it be valid, the Board has the power, and in the present case, it has, by its order attempted to exercise the power, to enlarge the duty imposed upon the prosecutor by virtue of its alleged succession to the statutory duty of its predecessors with respect to the construction and maintenance of bridges or passages over or under the railroad at the said crossings. The statute therefore delegates to the Board arbitrary power to alter or amend such charters so far as relates to the specific duty thereby imposed with respect to the construction and maintenance of such bridges or passages.

In its original answer the prosecutor set up that "certain" of said crossings were laid out and constructed by the City of Paterson across the existing tracks and right of way of the Paterson & Hudson River R. R. Co., incorporated by act approved Jan-

uary 21, 1831 (P. L. 1830-1, p. 24) and of the Paterson & Ramapo R. R. Co., incorporated by act approved March 10, 1841 (P. L. 1840-1, p. 97), subsequent to the construction and commencement of operation of said railroads and that as to these crossings the Board of Public Utility Commissioners was without jurisdiction to order the prosecutor to alter or change the grade thereof or to construct another crossing in the place and stead thereof not at grade (Par. 24 of Answer, Vol. IV, p. 1671).

After the filing of this original answer the Board, at the request of counsel for the City, directed the prosecutor to file a further amendment to its answer specifying which crossings were constructed subsequent to the construction and the commencement of operation of said railroads (pp. 132-4).

If our present claim is correct, that the prosecutor, as the successor in interest of the two original railroad companies, cannot legally be required to construct bridges or passages over or under the railroad tracks at the crossings where the streets were not in existence at the time the tracks were constructed, then this action of the Board, in requiring the prosecutor to specify to which of the crossings the point was applicable, was unreasonable, as the burden of proof was upon the City to show that the streets were laid out at the time of the original construction of the railroad tracks, and not upon the prosecutor to show that they were not laid out at that time.

However that may be, the prosecutor, pursuant to this direction of the Board, filed a further amendment in which it alleged that Madison Avenue, Cedar Street, Putnam Street, Straight Street and Clay Street were all laid out and opened subsequent to the construction of the railroad tracks; and further alleged that it had no knowledge as to whether the other streets involved in the pro-

ceedings were laid out and opened before or after the construction of the railroad tracks (Vol. IV, p. 1678).

As the evidence in the case developed after the filing of this amendment, it appeared that this point was applicable to all of the streets—as is hereinafter shown.

The order under review requires that at all of the crossings except Madison Avenue the crossings be altered by carrying the streets *under* the railroad; and in the case of Madison Avenue by carrying the street *over* the railroad, according to the plan and profile attached to the order. The result, therefore, is that at Madison Avenue the railroad is required to construct an overhead highway bridge above the tracks; and at all the other streets the railroad is required to construct railroad bridges above the several streets—the present grades, both of the streets and of the tracks, being partially changed in order to permit the streets to pass under the tracks. In both cases the entire expense of the work is ordered to be paid by the railroad company, less 10 per cent. to be paid by the Public Service Railway Company at three of the crossings. We therefore have a situation where in the one case the prosecutor is required to pay the expense of carrying a public street over its tracks, and in the other cases it is required to pay the expense of carrying several streets under its tracks.

We submit that such an order, under the well-settled law of this State, is invalid, because it does not appear that the streets to which it applies were laid out and opened at the time the railroad tracks were constructed; and the statute itself is unconstitutional because it delegates to the Board power to alter or amend the original charters of the railroad companies in question in this case, to the extent that it enlarges the duty imposed upon such

companies with respect to the construction or maintenance of bridges or passages across their respective tracks by extending such duty to include streets that were not laid out and opened until after the construction of the railroad tracks. It is also unconstitutional as to the crossings located on the line of the Paterson & Hudson River R. R., because it impairs the obligation of the contract between that company and the State, as expressed in the charter of 1831.

The charter of the Paterson & Hudson River R. R. Co. provides in Section 9 as follows:

> "It shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over and under the said railroad or roads, where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle, on the said road shall not be prevented thereby; and also where the said road shall intersect any farms or lands of any individual, to provide and keep in repair, suitable wagonways over or under said railroad, so that they may conveniently pass the same." (Exhibit R. 15, p. 966; Laws of 1831, p. 29.)

The charter of the Paterson & Ramapo R. R. provides in Section 11 as follows:

> "It shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be prevented thereby, and where the road shall intersect any farm or lands, they shall provide and keep in repair suitable wagonways over or under the said railroad, so that persons may conveniently pass the same." (Exhibit R. 15, p. 1013, 14, Laws of 1841, p. 97.)

On September 9, 1852, the Paterson & Hudson River R. R. Co. was leased to Union Railroad Co. (See Exhibit R. 15, pp. 986-1005.) On the same date the Paterson & Ramapo R. R. Co. was also leased to Union Railroad Co. (See Exhibit R. 15, pp. 1025-1031.)

Both leases provided that the lessee would "keep and maintain and run" the railroad and other premises "in such manner, order and condition" as the lessor was bound to keep and maintain and run the same by its charter and supplements (p. 992, 1030).

On September 10, 1852, both of these leases were assigned by Union Railroad Co. to New York & Erie Railroad Co., and on March 14, 1853, said assignments were affirmed and approved by the Legislature of the State of New Jersey (P. L. 1853, p. 480.) (See Vol. II, pp. 1031-35, for copy of said assignment; pp. 977-9 for copy of statute.)

The New York & Erie Railroad Co. was a corporation organized under the laws of the State of New York in the year 1832 "with power to construct a single, double or treble railroad or way from the City of New York to Lake Erie" and previous to the year 1852 that railroad was constructed (p. 951-2).

The prosecutor, Erie Railroad Co., was organized under the laws of the State of New York by certificate filed November 14, 1895. By sundry foreclosures and conveyances the property, rights and franchises of New York & Erie Railroad Co. became vested in the prosecutor, and thereafter the prosecutor complied with the conditions and requirements of Chapter 11 of New Jersey Laws of 1898, by virtue of which it was authorized to operate in New Jersey certain railroads, including the railroads of Paterson & Hudson River R. R. and Paterson & Ramapo R. R. A summary of

these various proceedings will be found in Exhibit R. 15, pp. 950-7.

Section 2 of said Chapter 11, Laws of 1898, provided as follows:

> "2. After such approval and confirmation, any railroad corporation duly created under the laws of the state in which the greater part of the mortgaged premises are situated and which have acquired or become possessed of the greater part of said mortgaged premises, may acquire, possess and operate the part of the mortgaged premises with their appurtenances, in this state, and the other property and rights covered by said mortgage, and shall have and possess all the rights, powers. privileges and franchises (subject to the duties and obligations attached thereto) theretofore possessed, in this state by the corporation executing the mortgage resulting in such judgment or decree of sale, and also all such as now are or hereafter may be conferred upon railroad corporations organized under the general laws of this state."

The prosecutor claims that the charter duty imposed upon the Paterson & Hudson River R. R. and Paterson & Ramapo R. R. relative to the construction and maintenance of "good and sufficient bridges or passages over and under the railroad" has not devolved upon the prosecutor. If it has not, then the present order is invalid because not directed to those two companies instead of to the prosecutor. See argument under Point XIII.

However that may be, we shall assume in the present discussion that the Erie R. R. is charged with the same duty as the two original companies. We therefore inquire what would be the duty of those companies under the charter provisions above quoted.

In *West Jersey, etc., R. R. Co.* v. *Woodbury,* 84 Atl. 1047, 80 N. J. E., 412, the Court of Chancery

had occasion to construe a section of a railroad charter providing as follows:

> "It shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad where any public road shall intersect and cross the same, so that the passage of carriages, horses and cattle along the said road shall not be obstructed, and likewise when said railroad shall intersect any farm or lands of any individual, to provide and keep in repair suitable and convenient wagon ways over or under said road." (P. L. 1853, p. 45.)

It was held that this section relates only to public roads which existed at the time the railroad was constructed. Leaming, *V. C.*, said:

> "I am unable to reach the conclusion that this can be regarded in this court as an open question. In Morris Canal & Banking Co. *v.* State, 24 N. J. Law, 62, a somewhat similar provision contained in the charter act of the canal company was treated as a legislative provision contemplating a work about to be constructed, and imposing upon the company no duty in relation to highways laid out across the canal after it should be constructed. In the subsequent case of Morris & Essex Railroad Co. *v.* Orange, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363, it became necessary for the court to determine what compensation the railroad was entitled to receive as damages arising from laying out a highway across the railroad at grade. The charter act of that company contained a provision of almost exactly the same terms as the one here in question. Two justices construed the provision as including highways laid across the railroad at any time, and on that ground determined that substantial damages should not be allowed to the company except for injuries not usually

incident to the mere crossing of the railroad by a highway. With the provision there under consideration understood as imposing upon the company a statutory duty of maintenance of safe crossings where highways should thereafter be laid out across the railroad, it necessarily followed that no substantial compensation could be exacted by the company for expenses appropriately incident to such maintenance. The failure of the majority of the court to give recognition to the possible existence of such a statutory duty must, I think, be regarded as a repudiation of the views expressed to that effect in the minority opinion referred to. In a still later case before the same court (Marino *v.* Central R. R. Co., 69 N. J. Law, 628, 56 Atl. 306), the latter part of a similar charter provision (that relating to intersected lands) was under consideration and was deemed to relate only to lands intersected by the railroad when the railroad right of way was acquired. With the charter provision above quoted, understood as contemplating only such public roads as were then in existence, the provisions of section 26 of the general railroad act of 1903 (P. L. 1903, p. 659), are also without application."

At this point we may anticipate the claim made by counsel for defendants in the Supreme Court that the view of the Court of Chancery, as stated in the *West Jersey* case, was unsound, and that the "contrary" rule as set forth by Dixon, *J.*, in *Morris & Essex Railroad Co.* v. *Orange,* 63 N. J. L., 253, at p. 273, should be sustained. But this argument cannot be justified in view of the fact that the view of Dixon, *J.*, as set forth in that case, was not that of the majority of the members of this Court—indeed, only one member agreed with his view, as appears on p. 275 of 63 N. J. L.

Counsel for defendants also claimed that the view of Dixon, *J.*, in the *Morris & Essex* case was sustained by this Court in *Erie R. R. Co.* v. *Paterson,* 79 N. J. L., 512. This is not an accurate statement of the latter decision that was a case in which the present prosecutor brought proceedings to review an ordinance of the City of Paterson for the opening of a certain street, known as Paxton street, which involved the construction of an overhead bridge at the street when thus opened. The opinion does not state, but the record of the case shows that that particular street was not located on the line of either the Paterson & Hudson River R. R. or the Paterson & Ramapo R. R., but on the line of an entirely different railroad, known as the "Newark Branch." The question of the duty of the prosecutor to construct a bridge at the street in question in order to comply with the terms of the order, so far as that case was concerned, did not turn at all upon the question of the interpretation of the railroad charter, nor upon the question of whether the railroad was constructed prior to the opening of the street. The decision was that the effect of the ordinance was to impose an "additional servitude" on the prosecutor's lands and that therefore it was entitled to a hearing before it could be subjected to such burden (79 N. J. L., at p. 514). The Court then concluded that no such hearing had been given and that therefore the ordinance was invalid.

The case of *Morris Canal & Banking Co.* v. *State, supra,* was an indictment against the company for failure to keep in repair a certain canal bridge at a public highway. The highway was laid out and opened after the canal was constructed and in use. The section of the canal charter in question (12) provides:

> "When the canal shall cross any road or farm, it shall be the duty of the company, at

their proper expense, to make good and sufficient bridges across said canal, and to keep the same in repair, so as to prevent any inconvenience in the usage of the said road or farms, by reason of the said canal crossing the same."

This court entered judgment for the company, saying (italics ours):

"It is certainly true, as was contended by the counsel of the state, that where a canal and highway intersect each other, it is grammatically and mathematically correct to speak of the canal crossing the road, or the road crossing the canal. In describing an existing state of things, either form of expression might be adopted with equal propriety. But at the passage of the act, the canal had no existence. The legislature were making provision for a work about to be constructed, and they declared that when the canal shall cross any public road or farm, that is when the canal shall be constructed across any public road or farm, it shall be the duty of the company to build and repair bridges. Such is the plain and obvious import of the language. To construe it to mean, when the canal shall cross *any* public road, or when any public road shall *hereafter be laid out across* the canal, the company shall build and repair bridges, is giving a broader meaning to the requirements than the language fairly imports, and one which could not have been intended to apply to farms. It never could have been the design of the legislature to require that in all future time, whenever a land holder should choose to unite two tracts of land, lying on opposite sides of the canal, into one farm, the company should build and maintain a bridge for his accommodation. If the language of the act will not bear this construction in regard to farms, neither can it in regard to highways. The

same construction must, of necessity, be adopted in regard to both."

In *Morris & Essex Railroad* v. *Orange, supra,* the charter provided:

> "It shall be the duty of the said company to construct and keep in repair good and sufficient bridges or passages over or under the said railroad or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby, and also where the said road shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagonways over or under said road, so that he may pass the same."

Two of the judges of the Court of Errors and Appeals construed this section to include highways laid across the railroad at any time and for that reason affirmed the judgment of the Supreme Court. Three of the judges affirmed on other grounds, one on still another ground, and eight on the grounds stated in the opinion of Mr. Justice Depue.

In *Marino* v. *Central Railroad, supra,* the section of the railroad charter in question had the same provision as in the Morris and Essex charter under consideration in the Orange case. The same construction was given to a similar charter provision by this court in *Delaware, etc., R. R.* v. *East Orange,* 41 N. J. L., 127, where the court said:

> "It is true that in the construction of their road the corporation could only be required to make such bridges, passages and crossings as were needed and suitable at the time the railroad was built, to accommodate the public in the use of highways then existing. The effect of this provision in their charter and in others, as applied to highways, is simply to enforce a common law obligation, and guard

against any nuisance by the company in the construction of their road. Morris Canal and Banking Co. *v.* State, 4 Zab. 62."

It will be seen that the provisions in the several charters involved in these cases are substantially the same as those in the charters of the Paterson & Hudson River R. R. and Paterson & Ramapo R. R.—with the single exception that instead of the word "impeded" as used in the Morris and Essex charter and the Central R. R. charter, and the word "obstructed" as used in the West Jersey charter, the provisions in the charters of Paterson & Hudson River R. R. and Paterson & Ramapo R. R. contain the word "prevented." This difference may have some significance from another viewpoint, but at present it is sufficient to say that the charters under consideration are all alike in that none of them requires the construction of bridges or passages "over and under" the railroad where the public streets *hereafter laid out* shall cross the same.

In the Supreme Court counsel for defendants cited four cases from Minnesota and one from Indiana for the proposition that at common law there is a duty upon a railroad to maintain crossings in condition for safe and convenient use, and that this duty applies both to highways which were in existence when the railroad was laid out and to those which were constructed later. Some of the Minnesota cases sustain these propositions, but in the cases wherein the common law duty was considered it appears there was no question of statutory construction involved (*State ex rel. City of St. Paul* v. *Minesota Transfer Railway Co.,* 80 Minn. 108, 83 N. W. 32; *State ex rel. City of St. Paul* v. *Chicago, etc., Ry. Co.,* 122 Minn. 280, 142 N. W. 312; *State ex rel. Village of Clara City* v. *Great Northern Ry Co.,* 153 N. W. 879). But the

rule, we submit, is different when the charter of a railroad or a general statute *specifies* the duty of the railroad with respect to highway crossings. The question for consideration then is, not what is the duty of the railroad at common law, but how shall the statute be construed?

Thus, we find that in another case cited by defendants' counsel, namely, *State ex rel. City of Minneapolis* v. *St. Paul, etc., Ry. Co.,* 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, affirmed 214, U. S. 497, the question of the duty of the railroad to construct and maintain a bridge over the railroad tracks was referred, not to any common law obligation, but solely to the terms of the charter of the railroad company, which provided as follows:

> "The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under, or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use."

It was held that this provision applied to streets laid out after the construction of the railroad. The Minnesota court included the State of New Jersey in a list of several States, the decisions of which the Minnesota court says sustain the proposition that the State may compel a railroad to construct and maintain crossings at streets extended over the right of way subsequent to the construction of the railroad. But no case in New Jersey is cited in support of this statement. A contrary rule has been declared by the courts of New Jersey in the West Jersey and other cases cited, *supra.*

The Minnesota courts apparently put the incidental annoyances resulting from the movement of railroad trains in the same class with private nuisances. In the very nature of things there is an important distinction between them.

Such a rule has no application to the case of a railroad company which is not only authorized by its charter to run railroad trains, but is required by law to do so. Whatever incidental annoyance follows from the exercise of its authority and the performance of this duty is *damnum absque injuria*. See *State* v. *Erie Railroad Co.*, 84 N. J. L. 661.

If the railroad is to run trains at all, it necessarily follows that there are times while trains are passing when the highway cannot be used by the public, nor be in proper condition for travel.

It will be observed that the charter in the West Jersey case, *supra,* involved the duty of the railroad to construct and maintain an overhead highway bridge. In the present case the only street in which literally the same condition exists is Madison Avenue—at which point the prosecutor is required to construct an overhead highway bridge, leaving the railroad tracks at practically the present grade. There is, however, no difference in principle between the duty to construct a bridge for the purpose of carrying a highway over and above the railroad tracks and the duty to readjust and raise the grade of the railroad tracks for the purpose of carrying a highway under the tracks when thus raised.

This, of course, does not involve the question of what duty may be imposed upon a railroad at common law to take reasonable care to enable the public to use highways whether laid out before or after the construction of the railroad tracks. Sec-

tion 26 of the Railroad Act of 1903 expressly provides that said section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before April 2, 1873. This section does not apply to the present case, as the evidence hereinafter cited shows that the railroad in question here was constructed many years before the date specified in that section. But the point for which we are now contending does not necessarily lead to the conclusion that there is no duty on the railroad to provide reasonably sufficient passages for the use of the public at grade crossings, even though the particular highway may have been laid out and opened subsequent to the construction of the railroad. The argument in the present case involves only the duty to erect and maintain an overhead highway bridge with the railroad tracks underneath and an undergrade highway crossing with railroad tracks above. As was pointed out in the Morris and Essex case, *supra,* there is an important difference between the damages caused by *structural* changes, such as the removal of buildings or changes in the tracks, due to the opening of a street across a railroad, and *incidental* expenses arising by reason of the erection and maintenance of crossing gates, sign board, etc. In the latter case the company is not entitled to compensation, but in the former case it is; in the latter case the imposition of the cost upon the railroad was justified on the ground that it is a regulation adopted for public safety under the police power—in the former case it is held that the railroad cannot be taken without making just compensation; in the latter case the railroad must bear the expense of reasonable protection; in the former it is entitled to be paid for whatever damage it sustains.

See *Morris and Essex R. R.* v. *Orange,* 63 N. J. L. at p. 259, *et seq.* To the same effect see:

Central R. R. v. *Bayonne,* 51 N. J. L. 428, (cited and approved in the Morris & Essex case at p. 257);

Paterson, etc., R. Co. v. *Nutley,* 72 N. J. L. 123;

Freeholders v. *New York Bay R. R. Co.,* 84 N. J. L. 354.

Under the present order and the statute upon which the same is based the railroad is not only compelled to submit to the structural changes required by the order without receiving any compensation therefor, but it is required *at its own expense to make these changes.*

If we are right in our contention that the legal rules applicable to the present case are as above stated, then the next inquiry is whether there is evidence to show that any of the several streets involved were laid out and opened before the railroad tracks were constructed.

William Mc Gill testified as follows:

I have lived in Paterson 57 years. Among my father's papers I find a time table left by my grandfather. (Time table offered as Exhibit R. 43, pp. 325-6.)

This time table is dated June 15, 1835, and provides for what is called a "summer arrangement" Paterson and New York Railroad line. Then follows schedule of the trains. Certain trains leave "by steam", others leaving "by horses" (p. 326, ll. 10-30). It was admitted that this was a time table of the Paterson & Hudson River R. R. at that time (p. 326, 35.)

William H. Levi. I have lived in Paterson since about 1841, except the four years during the Civil War. In 1841 I was 3½ to 4 years old, having been born in 1837. When I came to Paterson

there was a railroad running from Paterson to New York. In 1847 or 48, at the age of 10 or 11, I went to New York with my parents, starting from the Main Street Depot (p. 327). The depot where we started was located on Main Street. The railroad ran with an "S" curve with a junction in the vicinity of Straight Street (p. 328, 11. 1-30).

I recall the construction of the Paterson & Ramapo R. R. When I was a boy I went on the locomotive with the fireman as far as Suffern. This was a short time either before or after the trip to New York. I think it was after, but about the same time (p. 328, ll. 30-40; p. 329, ll. 1-10).

Before I made my trip to New York in '47 or '48 I knew of the railroad to New York. We used to play there after school. If we went on "that section" we would be apt to be chased out of the yard by old Doddy Claxton who was the general yardmaster. If we got thirsty we would go to the railroad spring and get a drink of water (p. 329, ll. 10-20).

I don't remember the building of the Market Street station and railroad, but I remember after it was there. It was a common place for young men 14 to 16 years old to go and see the train go through. The station at Market Street was maintained at the same time as the station on Main Street. The last I remember of using a railroad from the old station was in 1861 when 300 of the boys joined Sickle's Brigade in New York on the 5th day of May, '61 (p. 329, ll. 30-40).

When we watched the trains go through we walked around on the platform. The trains came from Suffern and went through to New York.

"I don't know what year the Erie Railroad got possession of the old Paterson & Hudson River Railroad, but previous to that the trains ran to the junction and there the passengers and baggage

would be transferred to the Paterson & Hudson River Railroad because the Paterson & Ramapo was a six foot gauge road-bed, and the Paterson & Hudson River Railroad is a four foot eight and a half. That is why the junction was built there, to transfer passengers and freight to the old line" (p. 330, ll. 20-30).

PETER DOREMUS, 85 years old, a director of the Second National Bank and has been for fifty years nearly. Have lived in Paterson since 1844. When I came to Paterson the Hudson River Railroad was there. The depot was down near the Court House.

They used to run the cars from there up to the corner of Main Street with horses. The road ran to a connection with the Pennsylvania road and took us to Jersey City.

I remember the construction of the Paterson & Ramapo Railroad. It formed a junction with the Hudson River Railroad. It ran up to Suffern where it became the Union road to connect with the old Erie. The road was building from 1847 to '49, and was running not later than 1850.

At the time the Paterson & Hudson River Railroad was running it did not cross any streets; there were no streets laid through.

At the time the Paterson & Ramapo Railroad started to run it crossed Market Street, Broadway and River Street. It did not cross any other streets because there were no streets to cross (pp. 330-332).

I am not sure whether Straight Street was laid out before the railroad as laid out on its present right of way. I am not so familiar with conditions south of Market Street. It was all a "wilderness." So far as I know it is possible that Straight Street or some other street may have been laid out over the railroad before the railroad started to operate. I am not positive about that (p. 333, ll.1-40).

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To the north, beside Market Street, Broadway and River Street, I think Godwin street was laid out. Van Houten Street was not open. Ellison Street was open from Main Street. It did not cross the railroad. It was open only from Main Street to Church street (p. 334).

The above testimony shows that at least as early as 1835 railroad trains were running, some by steam and some by horses, from Main Street, Paterson, to Jersey City, and that at least as early as 1850 trains were running from Paterson to Suffern. Of the streets involved in the present proceeding the only ones that were open, up to 1850 were Market Street, Broadway and River Street, although there is a possibility that Straight Street may have been opened over the railroad tracks.

The dates of the deeds and condemnation proceedings for the right of way are also some evidence as to the date of construction. Abstracts of these are included in Exhibit R. 15 (pp. 1036-1056) as follows:

Powleson to P. & H. R. R.....July 25, 1831
S. U. M. to P. & H. R. R.....Sept. 9, 1856
S. U. M. to P. & R. R. R.....June 14, 1850
Van Houten to P. & R. R. R.....Nov. 26, 1847
Van Houten, *et al,* Receivers, to
P. & R. R. R.....May 1, 1848
Colt to P. & R. R. R.....June 14, 1850
Scudder to P. & R. R. R.....Sept. 12, 1848
P. & R. R. R. *vs.* Cooke.....Dec. 30, 1847
Forbes to P. & R. R. R.....Oct. 7, 1847
P. & R. R. R. *vs.* Cummings.....Nov. 30, 1847
Donnelly to P. & R. R. R.....Nov. 27, 1847
Moncrief to P. & R. R. R.....Aug. 30, 1848
Hastings to P. & R. R. R.....July —, 1848
Cass to P. & R. R. R.....Oct. 7, 1847
Danforth to P. & R. R. R.....Nov. 27, 1847

Jackson to P. & R. R. R.....Sept. 16, 1847
Sweet to P. & R. R. R.....Feb. 11, 1848
Mason to P. & R. R. R.....Jan. 3, 1848
P. & R. R. R. *vs.* Blackwell.....Dec. 30, 1847
Van Houten, *et als,* to P. & R. R. R..Sept. 27, 1847
Van Blarcom to P. & R. R. R.....Sept. 13, 1847

The above deeds, together with a number of others, are listed in the property map prepared by Mr. Palmer showing all lands owned or controlled by the prosecutor in the City of Paterson. This shows the original right of way of the Paterson & Hudson River R. R. and Paterson & Ramapo R. R. Most of the main line tracks lie wholly within the original width of the right of way. See pages 246-8, Exhibit R. 16. Map entitled "Lands owned or controlled by Erie Railroad Company, Main Line, City of Paterson, N. J."

On this map is indicated in detail the source of the title of the prosecutor and its predecessors to all of the lands within the city limits including not only the land at and near the crossings in question, but other lands within the city limits. On the several sheets comprising this map is an index showing the dates of the deeds or condemnation award, the name of the grantor or owner from whom the property was acquired and the date and place of record. These maps show a number of ancient deeds in addition to those above listed. Thus, on sheet numbered 5 are listed five deeds to the P. & H. all dated in June or July, 1831.

On sheet numbered six are listed four deeds to P. & H. all dated June or July, 1831.

On sheet numbered 7 are listed three deeds to P. & H. dated in July, 1831, and one deed to P. & H. dated in November, 1833.

On sheet numbered 8 are listed two deeds dated respectively May, 1848, and June, 1850, to P. & R.,

and two deeds dated Sept. 1856, to P. & H., one deed dated May, 1864, to Erie Railway Company.

On sheet numbered 9 are listed four deeds to P. & H. dated from 1847 to 1850, and four deeds to Erie Railway Co. dated in 1864 and 5.

On sheet numbered 10 are listed fifteen deeds to P. & R., all dated in 1847, and 8, and one deed to same company dated in 1849, besides three deeds dated in 1864 to Erie Railway Company, and one dated in 1864 to New York & Erie Railroad Company.

On sheet numbered 11 are listed one deed to P. & R. dated in 1849, two deeds to the same company dated in 1847, three deeds to Erie Railway Company dated 1864 and one deed to New York and Erie dated 1864.

There was no evidence offered by the City to show the dates of the opening of any of the streets, but the prosecutor undertook to present to the Board all the evidence it had been able to gather on that subject. Thus, Mr. Dawley testified as to certain maps and Mr. Achenbach as to certain ordinances and street "Returns." Mr. Dawley identified two old maps known respectively as the Map of 1850 (Exhibit R. 76) and the Map of 1852 (Exhibit R.77).

The Map of 1850 purports to show the City of Paterson as it was at that time "from actual surveys by J. C. Sidney" (p. 457, l. 10).

On this map the present line tracks appear under the name of "Paterson and Hudson River Railroad." At the intersection of this line of railroad with the streets designated on said map as Straight Street and Washington Street there is a branch leading to "Paterson Railroad Depot." The location of this depot is apparently that described by Mr. Levi and Mr. Doremus, as "near the court house" and "at the corner of Main

Street." After passing the junction point the main line, according to this map, continued in a northerly direction. So far as this map indicates the only streets (of those involved in the present proceeding) actually opened across the railroad were Straight Street, Market Street and Willis Street (one crossing)—the location of the latter street apparently being the same as that of the present Park Avenue; Broadway and Lafayette Street. There is also a street on said map called "Williamson Street," which apparently crosses the railroad tracks. From its location this street is probably the same street that afterward was known as Van Houten Street. Mr D.oremus, however says that at the time the railroad was built Van Houten Street was not open.

Of the other streets involved in the present proceeding, Madison Avenue on the south and Keen Street, Warren Street, River Street and Putnam Streets on the north are apparently beyond the limits of the map of 1850.

There is no street on the map under the name of Clay Street; Cedar Street is indicated on the map in dotted lines, indicating that it was not open across the railroad tracks; Ellison Street appears as running between Prospect Street on the west and Church Street on the east, but not as crossing the tracks; Fair Street is on the map in dotted lines; Hamilton Avenue does not appear under that name, but its location is the same as "Division Street" which is on the map in dotted lines. Franklin Street appears on the map in dotted lines.

The map of 1852 purports to have been surveyed by order of the Council (p. 459, l. 30). The date of the map is October 20, 1852, and on it appears the following legend: "Date of Ordinance, March 30, 1853." Map purports to show the courses of the several streets indicated thereon, but the only reference to the location of the railroad is two

lines, one starting at "Township Line" and running in a general northerly direction marked "Paterson and Hudson River now Union R. R."; the other branching from the first named at its intersection with Straight Street and running northeasterly, indicated on the map as "Paterson & Ramapo now Union Railroad."

Following is a statement as to the streets involved in this proceeding so far as the same are referred to on said map:

(A) Madison Avenue does not appear.

(B) Clay Street does not appear.

(B) Straight Street indicated on map under that name.

(C) Cedar Street does not appear.

(D) Market indicated under that name.

(D) Park Avenue indicated on map under name of Willis Street.

(E) Ellison Street indicated under that name.

(F) Van Houten Street indicated under name of East Van Houten Street.

(G) Broadway indicated under that name.

(H) Fair Street indicated under that name.

(I) Hamilton Avenue does not appear, but probably street indicated as "Division Street."

(J) Lafayette Street indicated under that name.

(K) Franklin Street does not appear.

(L) Keen Street does not appear.

(M) Warren Street does not appear.

(N) River Street indicated under that name.

(N) Putnam Street does not appear.

The ordinance referred to by this map was discovered by Mr. Achenbach among the miscellaneous records of the Passaic County Register's Office. Certified copy was offered in evidence and marked Exhibit R-78 (p. 463, l. 30 to p. 464, l. 5). This ordinance *vacated* all the then existing streets in Paterson which are included in the present pro-

ceeding and then relocated and relaid out the streets according to the map. A detailed statement as to the history of each of the streets in question was then received in evidence. This refers to the 1850 map under that description and refers to the map of 1852 as the Allen map (pp. 464, 5). The official returns of the several streets were also offered (pp. 466, 469—Exhibits R-81 to R-100 inclusive).

By reference to Exhibit R-78, as printed at length in Vol. II, p. 1208, *et seq.*, it will be seen that all of the streets included in this proceeding were by Section I ordered to be vacated.

Exhibit R-80 (Vol. II, p. 1276, *et seq.*), is a detailed history of each of the several streets based upon the maps of 1850 and 1852 as well as upon other maps on file and upon the official records of the City of Paterson and the County of Passaic. By reference to this exhibit the following information appears as to the streets in question:

(A)

MADISON AVENUE.

Earliest evidence of intention to open was filing of "Return" March 27, 1871; earliest map showing located is dated 1869.

(B)

CLAY STREET.

Earliest evidence of intention to open was filing of "Return" dated January 14, 1856—which did not show the street crossing the railroad tracks; earliest map showing this street across the tracks is dated November, 1873.

(B)

STRAIGHT STREET.

Is shown on map of 1850, but earliest evidence of intention to open same across the railroad appears in the road records and the survey of Allen, dated October 20, 1852.

(C)

CEDAR STREET.

Did not exist across the tracks in 1850. Vacated by Section 1 of ordinance of 1853 and by Section 21 opened in accordance with map of 1852.

(D)

MARKET STREET.

Appears on the 1850 map; vacated by Section 1 of said ordinance; by Section 13 of same ordinance laid out across the tracks in accordance with the Allen map.

(D)

PARK AVENUE.

Formerly Willis Street. Also appears on the 1850 map; vacated by Section 1 of said ordinance and by Section 14 was laid out across the tracks.

(E)

ELLISON STREET.

Did not extend across the railroad tracks at the time the 1850 map was made; vacated by Section 1 of said ordinance and by Section 9 as laid out across the tracks.

(F)

VAN HOUTEN STREET.

Was originally known as Williamson Street. Appears on the 1850 map; vacated by Section 1 of said ordinance; laid out across the tracks by Section 4 thereof.

(G)

BROADWAY.

Existed at the time the 1850 map was made; vacated by Section 1 of said ordinance; laid out across the tracks by Section 6 thereof.

(H)

FAIR STREET.

Did not exist across the tracks at the time of the 1850 map. On the west side of the railroad was open between certain points by Return dated July 2, 1839; is shown on the 1850 map as a *proposed* street; on the Allen map of 1852 did not extend across the tracks; earliest evidence of intention to open it across the tracks is in Return of March 7, 1864.

(I)

HAMILTON AVENUE.

Formerly known as Division Street, appears on maps of 1850 and 1852 between certain points but not across the railroad tracks. Earliest evidence of intention to open it across the tracks in Return of December 19, 1859.

(J)

LAFAYETTE STREET.

Existed when 1850 map was made; was vacated by Section 1 of said ordinance; by Section 56

thereof was opened across the railroad in accordance with the Allen map.

(K)

FRANKLIN STREET.

Appears on the 1850 map across the railroad as a proposed street; on the Allen map of 1852 does not appear. Earliest evidence of intention to open it is in Return of February 11, 1870.

(L)

KEEN STREET.

Earliest evidence of intention to open is found in Book B of Road records, but the map therein shows the street entirely east of the railroad. It does not appear on the Allen map of 1852.

(M)

WARREN STREET.

Earliest evidence to open the street is found in Book B of Road Records, p. 436. The map therewith shows street east of the tracks. It does not appear on the map of 1852.

(N)

RIVER STREET.

Appears on the 1850 map; vacated by Section 1 of said ordinance and by Section 17 opened across the railroad tracks.

(N)

PUTNAM STREET.

Earliest evidence of intention to open street is February 11, 1870.

The foregoing statement of the evidence shows that the Paterson & Hudson River R. R. Co.

was constructed and in operation at least as early as 1835; and that the Paterson & Ramapo was constructed and in operation at least as early as 1850. Both dates are prior to the ordinance of 1852, whereby *all* of the then existing streets in Paterson were *vacated*. The legal effect of this, we submit, was to close (even though only temporarily) all of the streets in question in this proceeding that were then laid out, and to open them again as from the date of the several returns of courses—all of which were subsequent to the ordinance. It therefore follows that not one of the said highways was legally laid out and opened *before* the construction and operation of either of the two early railroads.

The majority of the streets involved in this proceeding were not actually in use until long after the railroads were in operation. Mr. Doremus says that the Paterson & Hudson River R. R. did not cross any streets and that the Paterson & Ramapo R. R. crossed only Market Street, Broadway and River Street (pp. 330-2). So far as concerns all of the other streets in question (outside of Market Street, Broadway and River Street), the prosecutor's claim that they were not laid out and opened until after the railroads were in operation does not depend upon the legal effect of the vacation of the Paterson streets by the ordinance of 1852. With the exception of these three none of the other streets are actually in use at and across the railroad tracks; and even as to those three streets the ordinance of 1852 operates to close them and thus brings them within the class of streets that were *legally* laid out and opened *after* the railroad tracks had been constructed and the railroads were in operation. Hence, the principle laid down in the Woodbury and the other cases, *supra,* we submit, applies with equal force to all of the streets in question; and it follows that there is no legal

duty on the part of either the Paterson & Hudson River R. R. Co. or the Paterson & Ramapo R. R. Co., or on the part of the Erie R. R. Co. as the successor of these two companies, to construct the bridges required by the order under review.

In the Supreme Court counsel for defendants said on this point: "From the evidence it is certain that some of the streets were opened before the railroad was laid out, and there is much uncertainty about the others." They took the position that the burden of proof was upon the railroad to show that the tracks were constructed before any particular street was laid out and opened rather than upon the City to show that the street was laid out and opened before the tracks were constructed. This, we submit, is erroneous; under the cases cited under this point it is necessary for the party alleging the duty on the part of a railroad to construct a bridge over a highway to prove the fact that the highway was constructed before the railroad. No reason has been suggested why the ordinary rule that the burden of proof of any particular fact rests upon the party alleging it should be modified in a case of this kind. It is true that the prosecutor undertook to put in evidence its abstract of title and all the information that it was able to secure relative to the dates of the opening of the various streets and of the construction and operation of the railroad at and across the streets. But it did this only because the Board of Public Utility Commissioners ordered it to specify which of the several crossings were constructed subsequent to the construction and operation of the railroad (pp. 132-4 of Vol. I). If there is "uncertainty" about the date of the opening of the several streets or some of them, it is not the fault of the prosecutor, which produced all the evidence it found available. Ample opportunity was afforded the City to produce fur-

ther evidence on this point, if it had any; and none was produced.

We do not concede, however, that there is "uncertainty' on this question. All available maps and records were examined in great detail by a representative of the prosecutor, and, at the instance of the prosecutor, and without objection on the part of the City, an "abstract" was offered giving the history of the several streets so far as the same could be determined by an examination of the maps and records (see Vol, I, p. 465, Ex. R. 80; Vol. II, pp. 1276 and following).

Counsel also argued in the Supreme Court that on the vacation of the old streets by the ordinance of 1852 (Ex. R. 78, pp. 1208 and following) these streets were then "immediately declared opened according to the lines of the Allen Map by the succeeding sections." We submit that this is not an accurate statement of the legal effect of said ordinance. The succeeding sections thereof did not "open" the streets that had been vacated by the first section thereof. All the latter sections did was to provide that each street (mentioning each by name) "be relaid and that the location of such relaid street be according to the map, survey and return made by J. W. Allen, City Surveyor, dated the twentieth day of October, eighteen hundred and fifty-two." According to the records in the County Clerk's office, the "returns of the courses and distances" of several of the streets in question were not filed until some time after the ordinance of 1852. Following is a statement of the dates of the filing of these returns:

(Date of Vacating Ordinance, October 20, 1852.)

Street.	*Date of Filing Return.*	*Exhibit*
Madison Avenue	March 27, 1871	R. 81
Straight Street	Oct. 20, 1852	R. 82
Clay Street	Feb. 11, 1870	R. 83

Clay Street	July 14, 1856	R. 84
Cedar Street	Oct. 20, 1852	R. 85
Market Street	Oct. 20, 1852	R. 86
Willis Street	Oct. 20, 1852	R. 87
(Later known as Park Avenue)		
Ellison Street	Oct. 20, 1852	R. 88
East Van Houten Street	Oct. 20, 1852	R. 89
Broadway	Oct. 20, 1852	R. 90
Fair Street	Oct. 20, 1852	R. 91
Fair Street	March 7, 1864	R. 92
Division Street	Dec. 19, 1859	R. 93
(Later known as Hamilton Avenue)		
Division Street	Oct. 20, 1852	R. 94
Lafayette Street	Oct. 20, 1852	R. 95
Franklin Street	Feb. 11, 1870	R. 96
Keene Street	Feb. 11, 1870	R. 97
Warren Street	Feb. 11, 1870	R. 98
River Street	Oct. 20, 1852	R. 99
Putnam Street	Feb. 11, 1870	R. 100

(See Vol. II, pp. 1282-1305.)

It may be urged that under the decision in the case of *Central Railroad* v. *State,* 32 N. J. L. 220, "the duty prescribed is, to keep at all times, and under all circumstances, the public highways, at the point where they cross the railroad, in a condition fit for safe and convenient use." It should be observed, in the first place, that it is at least doubtful whether this language correctly expresses the law of this State.

We presume that if a railroad were prevented from performing its duty by act of God or the public enemy, it would be excused. Secondly, a railroad crossing cannot be kept safe. The approach of a train must and does make it a place of danger. That it is a place of danger is charged in every crossing accident case and is the foundation of great numbers of judgments of non-suit. Thirdly, a level railroad crossing is never con-

venient. To stop, look and listen is and must be inconvenient. Even if the crossing is not at a grade it must often be inconvenient by making travelers go up or down a hill.

The statement of the law in *Central R. R.* v. *State supra* is a mere dictum. The point at issue was, whether the railroad in digging up a street to depress it under the tracks was guilty beyond a reasonable doubt of committing a public nuisance. The Court answers that there is such a doubt. That is all the case decides. And it should be noted that the case says that any change of grade of the highway by the railroad is done at its peril; "if such act has been done unreasonably and without any proper cause, the result would be different."

The same judge who in 1866 delivered the opinion that "at all times and under all circumstances" crossings should be "safe and convenient," in 1873 wrote the opinion in the Matthews case, which holds that the obligation upon the railroad to place a flagman at a crossing only arises when the railroad itself so constructs its road as to make the crossings unnecessarily dangerous, as by building through a cut. *Penna. R. R.* v. *Matthews,* 36 N. J. L., 531. If other parties by placing buildings alongside the railroad make the crossing unnecessarily dangerous, the obligation is not incurred. (See cases cited in Point VIII.) So as respects private persons there are some circumstances that do not demand of the railroad that they should keep the crossing "safe." Again, on a foggy day when the view of a train is prevented, one would think that if the railroad's duty was at all times and under all circumstances to keep a crossing "safe and convenient," the fog was a circumstance that might require especial audible signals. But when this was charged, at Circuit, Chief Justice Beasley concurred in the opinion of the Court of Errors

and upset the verdict. *N. Y., etc., R. R. Co.* v. *Leaman,* 54 N. J. L., 202.

The rule that the railroad, unless it created obstructions to view making the crossings dangerous, is not obliged to take measures to make it safe, is the same as respects the public and as respects private persons. The point came up in *Philadelphia & Reading R. R.* v. *State,* 61 N. J. L., 71. This was an indictment against a railroad for maintaining a grade crossing more than ordinarily dangerous to the public on account of the surroundings of the crossing itself and the manner in which the defendant operated its trains. The company requested the Court at the trial to declare the law as laid down in the Matthews and Leaman cases. This was refused and writ of error taken. The Supreme Court held that the trial judge should have substantially charged without qualification that the railroad was only required to give the statutory signals unless the crossing had some peculiarly dangerous feature occasioned by act of the company itself in constructing its road and buildings.

This case cannot be reconciled with *Central R. R.* v. *State,* and as a later opinion must be taken to overrule it, if *Central R. R.* v. *State,* is held to mean that railroads must eliminate crossings *because of circumstances beyond their control.*

So also in *McCullough* v. *Franklin,* 59 N. J. L., 106, an ordinance for the establishment of flagmen at highway crossings was, on the facts, set aside as unreasonable. The Court held that two of the crossings were more than usually dangerous, and that as to a third, its dangerous character was demonstrated. Yet because of the infrequent passage of trains and travelers at night, the ordinance, so far as it required flagmen at that time, was set aside. But night increases danger. There was some travel at that time. Yet here again an ex-

ception was made to the rule as laid down in the Central R. R. case, that the company must keep "at all times and under all circumstances the highway in a condition fit for safe and convenient use."

We have shown that by the decisions of this State the courts have overruled and disregarded the Central R. R. case; nothing remains of it except that if a railroad crossing *by the action of the railroad* in running frequent trains, etc., becomes "almost impassable," the *railroad* is justified in eliminating the grade crossing, and if such elimination is not done unreasonably, the public cannot complain. The case does not say, nor can it be inferred, except from general statements in the opinion, that because of circumstances arising from other causes than the railroad's construction or operation (such as increase of population, new buildings close to the railroad, etc.), the public can *compel* the elimination of the crossing; and under the Philadelphia and Reading case that claim is denied.

The case of *Metuchen* v. *Penna. R. R.,* 73 N. J. Eq. 359, approves *Central R. R.* v. *State,* so far as to say that the imposition of the duty to maintain and keep in repair "carries with it the power to perform that duty in exact accordance with the prescription. This, as we understand its opinion, was the view expressed by the Supreme Court in *State* v. *Central R. R.*"

This Court has said that a railroad in bridging a highway must from time to time as traffic grows, enlarge the width of the bridge until it shall reach the full capacity of the highway. See *State* v. *Lackawanna R. R. Co.,* 84 N. J. L. 289. But this is quite another matter from attempting to *define the duty* prescribed by the statute. This

Court has never adopted the definition of the duty laid down in *Central R. R.* v. *State.*

It should further be observed that in the *Metuchen* case the *existing* highway crossing was *under* the railroad tracks, and the question was whether the *company* under its charter had the right to substitute such undergrade passageway in the place of a grade crossing, and if so, whether the undergrade passage should be constructed the full width of the highway. A holding that the railroad has the *right* to make such a change is very different from a holding that it is charged with the legal *duty* of so doing.

In *Reed* v. *Camden,* 53 N. J. L., 322, the Court said: "The duty is continuous and changing, as travel and traffic increase and vary in their demands for public accommodation" and quotes the Central R. R. case as authority. In the Court of Errors opinion reversing the case below the case of *Central R. R.* v. *State* is not referred to. 54 N. J. L., 347.

In *Clark* v. *Elizabeth,* the Central R. R. case is cited by the majority opinion of the Court, 61 N. J. L., 575, as authority for the proposition that the railroad has the *power* to change grade. The obnoxious definition of the railroad's duty is only quoted in the dissenting opinion, p. 538, and then on the point of the authority of the railroad to make the change.

The case of *Palmyra* v. *Pennsylvania R. R. Co.,* 62 N. J. Eq., 601, quotes the words of Chief Justice Beasley above referred to, but states that the ruling was challenged, and argues the question at some length. The Vice Chancellor, p. 615, evidently doubts that the decision can be reconciled with other decisions, notably the Leaman case and finally bases his decision, not on the Central R. R. case, but on the Matthews and

Leaman cases, that hold that when the railroad increases the danger it must increase the warnings. The Court of Errors adopted this opinion as its own (63 N. J. Eq., 699), and in so doing based their judgment, as the Vice Chancellor did, on the Matthews and Leaman cases and not on *Central R. R.* v. *State.*

It will be seen that the Central Railroad case sustained the right of the *railroad company* to alter the grade of a highway so as to pass under the track, provided the change is necessary for the convenience or safety of the public; but it does not discuss the question of under what circumstances the company can be *compelled* to make such a change. From 32 N. J. L., 225, we quote (italics ours):

> "In order to accomplish this end, the power to alter the grade of the road as public emergencies require, so as to pass it, if necessary, under the track, *must reside in the corporation.*"

Moreover the railroad charter under consideration in that case was passed in 1847 (see page 133 of the laws of that year); this was subsequent to the passage of the statute of 1846, which enacted that:

> "The charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

In the present case the charter of the Paterson and Ramapo Railroad Company expressly provides that it shall be lawful for the Legislature at any time hereafter to alter, amend or modify the act whenever in their opinion the public good may require it (see p. 1018); but the charter of the Paterson and Hudson River Railroad Company—passed in 1831—has no such re-

served right to alter, amend or modify, and hence there may be a distinction between the duty imposed by the charter of the Paterson and Hudson River Railroad Company and the duty imposed by the charter under consideration in the Central Railroad case.

So, also, in the case of *Metuchen* v. *Pennsylvania R. Co.*, 73 N. J. Eq., 363, the Court decided, among other things, that the *right of the company* to construct an undergrade crossing was clear; citing Central Railroad case, *supra.*

There is a great difference between the *right* of a railroad company to construct an undergrade crossing and its *duty* so to do. In the one case the company may do so, if in the judgment of its officers and directors it is advisable, and in the other case it must do so when and if required by proper authority.

Granting that there is what has sometimes been called a "continuing duty" on the part of the railroad to perform the charter obligations with respect to highway crossings, this does not mean that the grades of the railroad and of the highway must be separated, but only that in a proper case the existing facilities for a crossing may be required to be enlarged by widening the highway crossing. It is well known that in nearly all of the existing grade crossings in this State the planking is not the full width of the highway. This is illustrated by several of the cases cited hereinbefore. In the event that the highway traffic increases it may become the duty of the railroad to widen the planking, but it by no means follows that because of such increased highway traffic it becomes its duty to separate the grades. The "continuing" duty relates to the capacity of the crossing and not to the form thereof. Moreover, even if the duty may be said to be "continuing" in the sense that a railroad, as

long as it exercises its franchise, cannot at any time lawfully avoid the performance thereof (except, of course, on the vacation of the street or some similar proceeding), it by no means follows that the duty is continuously enlarging as to capacity or changing as to form.

XII.

THE EVIDENCE DOES NOT SHOW, NOR DOES THE BOARD FIND, THAT THE WIDTH AND CHARACTER OF THE BRIDGES AND PASSAGES ORDERED TO BE CONSTRUCTED AT THE SEVERAL HIGHWAYS ARE SUCH AS ARE SUITABLE TO THE LOCALITY IN WHICH THE SAME ARE SITUATED.

(Reasons 53, 54 and 55, including Amendments.)

The evidence does not show that the width and character of the bridges and passages at the several crossings in question are such as are "suitable to the locality" in which the same are situated.

In the case of Straight Street, Clay Street, Taylor Street, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Governor Street, Montgomery Street, Lafayette Street, Keen Street and Warren Street (Taylor Street, Governor Street and Montgomery Street not being mentioned in the petition of the City) the proposed subway at each crossing, according to the plan and profile forming a part of the order, must be constructed the entire width of the street, as it now exists.

In the case of Fulton Street where (as in the case of Governor Street) the existing abutments on which the tracks are at present carried are reconstructed, the subway is also required to be the full width of the existing street. The map

shows that at the point where Straight Street intersects Fulton Street on the southerly side of the railroad tracks, a strip of land of the railroad company, ten feet in width and approximately 110 feet in length and extending from the westerly line of Fulton Street westerly and parallel to the southerly right of way line, is to be taken for the purpose of a sidewalk on the northerly side of Straight Street (compass points taken according to railroad usage, Jersey City being east).

In the case of Essex Street the present undergrade crossing (as above stated) is widened from 32 feet to 50 feet.

In the case of Madison Avenue the street is relocated on a strip of land 65 feet wide, adjacent to the westerly line of the present street, extending on the north side of the tracks from the railroad right of way about 210 feet north to the present street line, and extending on the southerly side of the right of way about 510 feet south from the right of way. The proposed viaduct, on which the street is to be carried, is indicated on the map as 52 feet in width—the roadway being 32 feet, with a sidewalk 10 feet wide on each side, together with a stairway leading down from same on the southerly side of the right of way.

In the case of Market Street and Park Avenue the present street is widened on the westerly side; a triangular strip of property is taken for highway purposes, commencing at the intersection of the northerly right of way line of the railroad and the westerly line of Market Street; thence westerly on the said right of way line eight feet more or less; thence southerly at right angles to the said right of way line 26 feet more or less to the westerly line of Market Street at or about the center of the present eastbound track. The bridge on which the tracks are carried extends the

entire width of the stret, a total length of about 94 feet feet at the southerly girder, and 100 feet at the northerly girder, supported by columns placed in the sidewalk lines and at the center of the highway.

In the case of River and Putnam Streets the street is widened on the westerly side by taking a strip of land approximately 26 feet wide between Waite Street and River Street, the easterly line of said strip being in line with the westerly line of Putnam Street north of River Street. The plan also contemplates the use of a strip of land 10 feet wide adjacent to the southerly right of way line, for a sidewalk. The railroad bridge is to be the full width of the street as relocated, the length of the girders being 110 feet on the south, 82 feet in the center, and 113 feet on the north, with columns at the curbs and in the center of the highway.

Under Section 26 of the General Railroad Law, the duty of the railroad company is to construct and keep in repair good and sufficient bridges, passages, etc., and "said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated." In *State* v. *Lackawanna R. Co.*, 84 N. J. L., 289, 86 Atl. 356, it was held that an overhead railroad bridge constructed across a public highway need not be the entire width of the highway, but all that was required was a bridge that was "suitable to the locality." If, therefore, any order was justified at all in the present proceedings, the Board should at least have considered the question of whether the railroad bridges which it ordered to be constructed should each be the full width of the highway. It is common knowledge that in New Jersey at least (and probably in every other State) railroad bridges over streets are not the

full width of the highway; and in New Jersey there is no law which requires them to be thus constructed. The Board has made no finding on this point and apparently did not consider the matter at all; but entirely without reference to what kind of a bridge would be "suitable to the locality" it has arbitrarily made an order which in every case directs the railroad bridges to be the full width. In the absence of evidence to show that such kind of construction is necessary in order to comply with Section 26, we submit that the order as to all of the existing grade crossings and as to all of the existing undergrade crossings which are required to be changed, should at least be modified in order that the further question of the width of the streets should be considered. There is nothing in the statute of 1913 which modifies or repeals the provisions of Section 26, unless it be said that the expression in Section 1 giving the Board power to alter such crossings "according to plans to be approved by said Board," gives the Board authority to approve whatever plans it sees fit regardless of whether the bridges are or are not suitable to the locality as required by Section 26 of the General Railroad Law.

In *South Amboy* v. *Pennsylvania R. R. Co.*, 76 N. J. Eq., 57 (reversed on other grounds in 77 N. J. Eq. 242) it was expressly held that Section 26 did not enlarge the duties of a railroad company with respect to highway crossings when it appeared that the railroad was constructed before April 2, 1873, and that the question of whether any change should be made in the crossing depended upon whether the existing crossing was "suitable to the locality."

We therefore insist that the petitioner should have submitted to the Board evidence to show

what kind of bridges or passages would be suitable to the locality, and that the Board should have made some finding on this point. Jurisdiction in such a case must affirmatively appear on the face of the record.

Kent v. *Village of Enosburg Falls,* 71 Vt. 255; 44 Atl. 343;

Blanchard v. *City of Barre,* 77 Vt. 420; 60 Atl. 970;

Bessette v. *Goddard,* 88 Atl. 1 (Vt.)

In the absence of any such evidence or finding, the order clearly imposed upon the railroad a burden more onerous than that required by section 26 and should for that reason be set aside.

In this respect we submit that the Board's order disregards the effect of said section 26, the proviso of which reads:

> "This section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before the second day of April, eighteen hundred and seventy-three." (P. L. 1903, p. 659.)

Moreover, in this respect the order of the Board operates as a repeal of said Section 26. The statute upon which the order is based, if construed to justify such an order, therefore delegates legislative power to the Board. The case differs in this respect from *American Malting Co.* v. *Board,* 86 N. J. L. 668, where an order of the Board refusing to approve a proposed merger of corporations under Chapter 19 of the Laws of 1913 was sustained as against an attack made upon the ground that Chapter 19 delegated legislative power to the Board, this conclusion being reached because there was no statute "which becomes a law or ceases to be a law," as a result of any act of the Board.

In the Supreme Court the prosecutor argued the foregoing point in connection with present Point IV. That Court held that the changes in the grade, width and structure of existing highways were incidental to and rendered necessary by the separation of the grades, and that in this respect the order was therefore valid. But the Court seems to have overlooked the present argument, possibly because it was not clearly distinguished from the argument directed to the changes in certain specific crossings and the substitutions of one crossing for another.

Unless it be held that the Grade Crossing Act of 1913 has operated to amend all of the old railroad charters granted by this State before the General Railroad Law of 1873, and has likewise operated to amend Sec. 26 of the General Railroad Law of 1903, we submit that it must appear somewhere in the record that the bridges or passages ordered by the Board are "suitable to the locality" within the meaning of Sec. 26. While this argument applies to all of the crossings in question, it has particular force with reference to the new crossings ordered to be constructed at Taylor street and at Montgomery street, and to the widening of the existing undergrade crossing at Essex street.

XIII.

THERE WAS NO EVIDENCE BEFORE THE BOARD OF PUBLIC UTILITY COMMISSIONERS TO JUSTIFY OR SUPPORT THE CONCLUSION THAT THE RAILROAD WHICH CROSSES AT THE SAME LEVEL THE SEVERAL HIGHWAYS ORDERED TO BE ALTERED IS THE RAILROAD OF THE PROSECUTOR; OR TO JUSTIFY OR SUPPORT THE CONCLUSION THAT THE PROSECUTOR IS THE COMPANY OPERATING SUCH RAILROAD. ON THE CONTRARY, THE UNDISPUTED EVIDENCE SHOWS THAT THE SAID RAILROAD IS IN PART OWNED BY THE PATERSON & HUDSON RIVER RAILROAD COMPANY AND IN PART BY PATERSON & RAMAPO RAILROAD COMPANY; AND FURTHER SHOWS THAT THE SAID RAILROAD IS IN LAW OPERATED BY SAID PATERSON & HUDSON RIVER RAILROAD COMPANY AT AND ACROSS SOME OF SAID HIGHWAYS AND BY PATERSON & RAMAPO RAILROAD AT AND ACROSS THE OTHER OF SAID HIGHWAYS. AS TO THE PUBLIC, SAID COMPANIES ARE CHARGED WITH THE DUTY OF CONSTRUCTING AND MAINTAINING GOOD AND SUFFICIENT BRIDGES OR PASSAGES AT HIGHWAY CROSSINGS. THE ORDER OF THE BOARD, IF MADE AT ALL, SHOULD, THEREFORE, HAVE DIRECTED THAT THE EXPENSE OF ALTERING SAID CROSSINGS BE PAID BY SAID PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY, RESPECTIVELY; AND IF THERE WAS DOUBT AS TO THE LEGAL RIGHTS AND DUTIES OF THE PROSECUTOR AND THE SAID PATERSON & HUDSON RIVER

RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY AS TO EACH OTHER, THEN THE ORDER SHOULD HAVE DIRECTED THAT THE EXPENSE OF ALTERING SAID CROSSINGS BE PAID JOINTLY BY THE PROSECUTOR AND SAID TWO OTHER COMPANIES, SO THAT THE COST THEREOF MIGHT BE APPORTIONED BETWEEN AND AMONG THE THREE RAILROAD COMPANIES BY APPROPRIATE PROCEEDINGS IN ACCORDANCE WITH THEIR SEVERAL INTERESTS.

(Reasons 13 to 30, 38, 76, 77 (a), 77 (b).

In the order under review it is recited that the several highways are each a public highway and that the said public highways and each of them "and the railroad of the Erie Railroad Company" cross each other at the same level, and that * * * the said Erie Railroad Company is operating said railroad" (Vol. IV, p. 1789, l. 15).

We submit that on the undisputed evidence the railroad in question, as matter of *law,* was not "operated" by the prosecutor within the meaning of Chapter 57, Laws of 1913. Section 1 of that statute, so far as it relates to the present inquiry, reads as follows:

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

We submit that this section must be construed to mean the company *which in law is charged with the*

duty of operating. It is admitted that the prosecutor runs some trains through the City of Paterson over the railroad which crosses the several highways involved in the proceeding, but it appears that the prosecutor is not the owner of said railroad nor is it in law charged with the duty of operating the same. It runs trains only as the agent and lessee of two railroad corporations organized by special charter under the laws of the State of New Jersey, known respectively as "The President and Board of Directors of The Paterson and Hudson River Railroad Company" and "Paterson and Ramapo Railroad Company."

The land upon which the main line tracks are built and over which prosecutor runs trains through the City of Paterson is owned in part by one of said companies and in part by the other of said companies. The title to this land was acquired by them in part by deed and in part by condemnation proceedings. (See Exhibit R-15, pp. 1036-1056); and is still owned by them.

The portion of the right of way owned respectively by said companies is shown in detail on the property map (Exhibit R-16), consisting of seven blue prints with the general title "Lands owned or controlled by the Erie Railroad Co., Main Line, City of Paterson, N. J." This is based upon the company's property map and the several sheets are numbered 5 to 11 inclusive.

Sheet No. 5 shows that the right of way, beginning at the City line in the centre of Crooks Avenue and extending northerly to Michigan Avenue, is owned by Paterson & Hudson River R. R. Co.

Sheet No. 6 shows the right of way from Michigan Avenue northerly to Madison Avenue is owned by Paterson & Hudson River R. R. Co.

Sheet No. 7, from Madison Avenue northerly to Clay Street, shows the right of way is owned by

Paterson & Hudson River R. R. Co., except that a short distance southerly from Clay Street the title to a portion of the right of way (designated in red) is in Paterson & Ramapo R. R. Co. The title to the freight yard adjoining the right of way on the easterly side is in the Erie Land & Improvement Co.

Sheet No. 8, from Clay Street northerly to Market Street, shows that the title to one-half of the right of way is in Paterson & Hudson River R. R. Co. and the title to the other half is in Paterson & Ramapo R. R. Co. The Paterson & Hudson River R. R. Co. also has title to the Market Street depot and various side tracks in the vicinity thereof. The prosecutor has title to certain lands adjoining the right of way on which are constructed various freight tracks and a freight house (designated in purple.)

Sheet No. 9, from Market Street northerly to Fulton Street, shows title to the right of way is in Paterson & Ramapo R. R. Co. The prosecutor has title to a tract of land adjoining the right of way (designated in purple.)

Sheet No. 10, from Fulton Street northerly to Lowe Street, shows title is in Paterson & Ramapo R. R. Co. The prosecutor has title to some lands on either side of the right of way (designated in purple.)

Sheet No. 11, from Lowe Street northerly to the Passaic River (which marks the city limits) shows title is in the Paterson & Ramapo R. R. Co. The prosecutor has title to some lands on either side of the right of way (designated in purple.)

This abstract of title and the property map were described in detail by the Assistant General Tax Agent of the prosecutor (Vol. I, pp. 244-8.) Beginning at the south they show that the title is as fol-

lows at the several streets involved in this proceeding:

Name of Street.	*Title in*
"A"—Madison Avenue..	Paterson & Hudson River
"B"—Clay & Straight Sts.	Pat'son & Hudson River Paterson & Ramapo
"C"—Cedar St...	Paterson & Hudson River Paterson & Ramapo, Erie R. R.
"D"—Market St. & Park Ave.	Paterson & Ramapo
"E"—Ellison Street.....	Paterson & Ramapo Erie R. R.
"F"Van Houten Street.....	Paterson & Ramapo
"G"—Broadway.....	"
"H"Fair Street.....	"
"I"—Hamilton Avenue.....	"
"J"—Lafayette Street.....	"
"K"—Franklin Street.....	"
"L"—Keen Street.....	"
"M"—Warren Street.....	"
"N"—River & Putnam Sts..	Paterson & Ramapo Erie R. R.

Exhibit R-15 also contains copies of the charters and other laws affecting the Paterson & Hudson River R. R. Co. and the Paterson & Ramapo R. R. Co.; also the leases, agreements, etc., by virtue of which the prosecutor now runs trains over the railroads of these two companies.

The Paterson & Hudson River R. R. Co. was organized by act of January 21, 1831 (P. L. 1831, p. 24.) For copy of charter, see Volume II, pp. 958-971.

The Paterson & Ramapo R. R. Co. was organized by act of 1841, (P. L. 1841, p. 97.) For copy of charter, see Vol. II, pp. 1005-1018.

Under these charters the respective companies were authorized and invested with all the rights and powers necessary and expedient to survey, lay-out

and construct railroads between certain points named in each charter.

They were also given power to condemn lands and to place on the railroad "all machines, engines, wagons, carriages and vehicles for transportation of persons or any species of property therein that they may deem reasonable, expedient and right."

These two railroads by two separate leases, each dated September 9, 1852, were leased to a company known as "Union Railroad Company." The last named company in turn assigned the leases to a company called New York & Erie Railroad Co.; thereafter by various assignments, foreclosure proceedings and sales the Erie Railroad Company on November 14, 1895, acquired title to all the properties, rights, etc., of its several predecessors including a leasehold interest in the property of the Paterson & Hudson River Railroad Co. and Paterson & Ramapo Railroad Co. (p. 957.)

The New York & Erie Railroad Co. was a corporation organized in the year 1832 under the laws of the State of New York. The assignment of Union Railroad Co. to New York & Erie Railroad Co. was ratified by an Act of Legislature of the State of New Jersey approved March 14, 1853 (pp. 977-9.)

This statute recites that the New York & Erie R. R. Co. is in possession of the Paterson & Hudson River R. R. Co. and the Paterson & Ramapo R. R. Co. under certain leases and contracts and is carrying on the business of said roads under said leases and contracts, and that the New York & Erie R. R. Co. "being a foreign corporation," and any other corporation or individual using said roads or either of them, and transacting the business of the same, ought to be liable for damages done in operating said roads as fully as the said companies are by their charters now liable, and to effect "that pur-

pose" all doubts as to authority of said companies to make such leases and contracts ought to be removed; and whereas all persons having claims ought to be enabled to prosecute said foreign corporation in the courts of this State: therefore,

Be it enacted, etc.

Then follows a section declaring the New York & Erie R. R. Co. and any other corporation or individuals using the aforesaid roads or either of them to be liable for all claims for debts, etc., arising from the running or operating of said railroads, and carrying freight and passengers on the same as fully as the said Paterson & Hudson River R. R. Co. and Paterson & Ramapo R. R. Co. are now liable by the laws of this State.

Sections II and III provide for the service and the return of process.

Section IV enacts as follows:

> "That the power and authority of the said Paterson and Hudson River Railroad Company and the Paterson & Ramapo Railroad Company, to make such leases and contracts is hereby declared and affirmed, and the said leases and contracts are hereby declared legal and valid; provided, that said leases and contracts shall not be held to grant any power, privilege or right, not granted to said companies respectively by their charters, and the supplements thereto."

Section V enacts that the Legislature may at any time alter, amend or repeal this act. (See pages 977-9.)

Each of the two charters of these companies above referred to requires the company to construct and keep in repair good and sufficient bridges or passages over and under the said railroad where any public or other road shall cross the same, etc.

It will be observed that the avowed purposes of the act of 1853 were: First, to make the New York

& Erie R. R. Co. liable for claims for debts, etc., as fully as the two original companies; Second, to ratify the leases and contracts made by the two original companies to the New York & Erie R. R. Co. There is nothing in the statute which either expressly or impliedly relieves the original companies of their duty to the public imposed upon each of them by their respective charters.

It is well settled that in order to relieve a railroad company of the performance of the public duties imposed upon it by charter and in order to throw the burden thereof upon a lessee company, there must be a statute authorizing or ratifying the lease, *and the statute must expressly provide that the lessor company is discharged from such public duties.* See *Ryerson* v. *Morris Canal Company,* 71 N. J. L. 381. We quote from the opinion in that case, as follows:

> "The maintenance of bridges at parts of the highway is a different duty from operating a canal for the purpose of transporting persons and goods, and when the legislature authorizes a transfer by lease of the works and franchise necessary for the latter, it thereby necessarily imposes upon the lessee the obligations arising from the use of the works but does not inferentially transfer, by the act of leasing, the duty of maintaining the bridges which form part of the highways crossed; that duty still continues as part of the price given by the lessor for the privilege of being and continuing to exist as a corporation, and this public duty cannot be escaped except by express legislative authority."

The rule is thus stated in *Hayes* v. *Northern Pacific Railroad Co.,* 74 Fed. Rep. 279.

> "Unquestionably a railroad company cannot without legislative authority lawfully lease its line of railway, and in such case cannot, by in fact so doing, relieve itself of any liability flow-

ing from the manner of its operation; and this because the leasing was without authority of law, and the lessee stands in the relation of agent of the lessor, acting for the lessor, and binding the lessor by every act done in the management of the road. Where there is due authority of law for the leasing of a railway, the company cannot, by leasing its line, discharge itself of those responsibilities which are imposed upon it by the law of its incorporation, and cannot relieve itself from liability in the discharge of those positive duties which it owes to the public, and have been specially imposed by its charter."

The same principle was applied by this Court to a contract of exemption from taxation in the charter of the Morris Canal Company. It was held that such exemption did not enure to the benefit of the Lehigh Valley Railroad Co. under the lease from the Canal Company to the Railroad Company for the reason that the statute authorizing the lease did not expressly transfer this right of exemption. See *Morris Canal Company* v. *State Board,* 76 N. J. L. 627. This case was affirmed by the U. S. Supreme Court on the authority of *Rochester Railway Co.* v. *City of Rochester,* 205 U. S. 236. (See 239 U. S. 126.)

Other cases to the same effect are as follows:

Braslin v. *Somerville Railroad* Co., 145 Mass. 64;

Driscoll v. *Norwich,* 65 Conn. 230;

Singleton v. *Southwestern Railroad Co.,* 70 Ga. 464;

Balsly v. *St. Louis Railroad Co.,* 119 Ill. 68;

Whitney v. *Ataantic & St. Lawrence R. Co.,* 44 Me. 362;

Wabash, St. Louis & Pacific Railroad Co. v. *Paton,* 106 Ill. 534;

Central Railway v. *Morris,* 68 Texas 49;

Chollette v. *Omaha & R. Valley Railroad Co.*, 26 Neb. 159;

Fisher v. *Baltimore & O. C. O. R. Co.*, 3 Ohio N. P. 283.

It follows from these authorities that whatever may be the duty of Erie Railroad Co. with respect to the construction and maintenance of the several crossings, *the two original companies are not discharged from the duties imposed upon them by their respective charters.* The question therefore arises as to what the Legislature meant when in the Act of 1913 it used the expression "the company operating such railroad." If it meant any company that by virtue of a lease happens to run trains upon railroad tracks that are owned by another company, then the statute violates the constitution because it requires such lessee company at its expense to perform the public duties imposed upon the lessor company, and in effect amends the charter of the lessor, as well as impairs the contract made between the lessor and the lessee. It also, in such case, takes the property of the lessee for public use without compensation, and takes its property for the private benefit of the lessor.

If the statute is unconstitutional for any of these reasons, that is the end of the present case. But the Court under well-settled rules will endeavor to so construe the statute as to sustain it. We therefore urge that the only way in which the statute can be sustained is to construe the provision, "the company operating such railroad" to mean *the company which is charged with the legal duty of operating.* There is nothing in the original charters of the Paterson & Hudson River Railroad Co. or the Paterson & Ramapo Railroad Co., or in any of the supplements thereto, which relieves those companies from the duty of operating. The State was not a party to the agreement between the companies.

So far as the State is concerned the *duty* to operate still rests upon the two original companies. Under these statutes, and the several leases, the Erie Railroad Co. does not *operate the railroad* of the two original companies except in the sense that it runs trains over tracks owned by those railroads, as their agent or lessee. On this point we quote from a recent decision of the U. S. Supreme Court in *North Carolina Railroad Co.* v. *Zachary,* 232 U. S. 248, as follows (italics ours):

> "The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad,—its tracks and property lying wholly within the State,—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distriubting them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as estabIsihed by the same court in Logan v. North Carolina R. Co. 116 N. C. 941, 21 S. E. 959, was recognized—indeed, reasserted. 'But,' it was said, 'that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.' (156 N. C. 500, 72 S. E. 858.)
>
> "It is plain enough, however, that the effect of the rule thus laid down, especially in view of the ground upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that *relates to the performance of the public duties* assumed by the lessor under its charter,

> such a lease—certainly so far as concerns the rights of third parties, including employes as well as patrons—*constitutes the lessee the lessor's substitute or agent,* so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible."

The mere fact that a railroad company by virtue of a lease or some other arrangement runs trains over tracks owned by another company does not make the former the "operating" company. See

Slaughter v. *Canadian Pacific Ry. Co.,* 119 N. W. 398, 106 Minn. 263;

Topham v. *Interurban Street R. Co.,* 86 N. Y. Supp. 295;

Ingersoll v. *Nassau Electric R. Co.,* 52 N. E. 545, 157 N. Y. 453, 43 L. R. A. 236.

In their brief in the Supreme Court counsel for defendants argued that the powers, privileges and rights confirmed by the Act of the Legislature of this State of 1853 (See Vol. II., pp. 1021-3) were subject to the duty imposed by the Acts of Incorporation; and on this point they cited the case of *Buffalo Stone Co.* v. *Delaware R. R. Co.,* 130 N. Y. 152 (29 N. E. 121) to the effect that a railroad company when it leases its property to another company and by a covenant in the lease the latter agrees to perform all things which the former might be bound by law to perform, the lessee must maintain farm crossings, as required by the statute. We do not find such a provision in the original lease of the Paterson & Hudson River R. R. Company or of the Paterson & Ramapo R. R. Company to the Union Railroad Company, although both leases provide that the lessee agrees to "keep and maintain and run said railroad and other premises hereby demised, in such manner, order and condition" as the lessor is bound "to keep

and maintain and run the same by the charter * * * and the statutes supplementary thereto," and agrees to "indemnify and save harmless" the lessor "from all damages to which they may be subject by reason of said road and premises not being so kept, maintained and run" (see Vol. II, pp. 992 and 1030.) This provision might permit the lessor companies to recover from the respective lessees or their assigns whatever damages they may have suffered by reason of the failure of the lessees or assigns to "keep, maintain and run" the railroad and other premises in the manner required by the original charter and the supplementary statutes; but that is quite different from an undertaking on the part of the lessees to separate the grades of the railroad tracks and of highway crossings. The fundamental question is, what do the original charter and the supplementary statutes require of the lessors, with respect to keeping, maintaining and running the railroad? Such a provision is quite different from that in the lease quoted in the *Buffalo Stone Company* case, *supra,* which expressly provided that the lessee should do and perform all things "which the party of the first part, as owner of the property and franchises hereby demised, would be bound by law to do and perform had this indenture not been made."

But whatever may be the rights and duties as between the *parties* to the leases, or their assigns, it will be noted that the confirmatory statute of 1853 does not purport to impose upon the lessees the obligations of the lessors, so far as the public is concerned; nor does it provide that the lessors are relieved from such obligation.

Counsel also cited on this point the case of *Thayer* v. *Flint, etc., R. Co.,* 93 Mich. 150; 53 N. W. 216, and *St. Louis, etc., R. Co.* v. *Hale,* 100 S. W. 1148. In both of these cases there were *express* statutory provisions imposing upon the lessee com-

pany the obligations prescribed by the general railroad laws of the State and making the lessee subject to the regulations of such laws. No such provision is found in the New Jersey statute of 1853.

So far as the State is concerned we submit that the Paterson & Hudson River R. R. Co. and Paterson & Ramapo R. R. Co. are still charged with the duty of constructing and maintaining bridges or passages at the several highways, in accordance with the obligation imposed upon each of them by their respective charters; and if the Legislature has any right to change such duty in the manner and to the extent prescribed by Ch. 57, Laws of 1913, that the duty to make such changes rests upon said two companies, and has not been transferred to the prosecutor as the lessee of said companies.

In the petition for further hearing, which the prosecutor presented to the Board of Public Utility Commissioners, after the Board had filed its report, but before any order had been made thereon, the prosecutor called the attention of the Board to these matters but the Board declined to give any consideration thereto.

We submit that the order, if under the facts any order is justified, should have been directed to these two companies; or at least the order should have been directed to the prosecutor and the said two companies jointly, so that the expense of changing the grades might be apportioned among all the companies in accordance with their several interests.

In the Supreme Court counsel for defendants also argued that the "dangerous" conditions at the crossings are the result of the operation of the railroad, and that, therefore, it is not unreasonable to impose upon the company operating the railroad the duty of eliminating these conditions. If by this argument counsel means that whatever danger

there may be at a railroad grade crossing results from the fact that trains are run over the railroad tracks then their argument is *pro tanto* sound. No one has yet been able to devise a method of operating a railroad train without running it on railroad tracks, but it is inaccurate to say that the alleged dangerous conditions result *solely* from the running of trains. Assume, for the purpose of argument, that there is some "danger" at every railroad grade crossing, resulting from the mere running of trains, the fact remains that the nature and extent of the danger in any particular case depend, to a large extent, upon other facts, such as the rate of speed of the trains and the extent of view thereof as they approach the crossing, and the nature of the protection existing at the crossing. In the City of Paterson the speed of trains is limited to a maximum of fifteen miles per hour, and every one of the crossings in question is now adequately protected. So far as the extent of the view is concerned, it is settled by the decisions that a railroad is responsible for "extra" dangers at a grade crossing only when this results from some act of the company. Moreover, it is the duty of the railroad to run trains, and the question of the kind and number of such trains depands upon the demands of the public for adequate service—indeed, if the railroad did not run sufficient trains it might in a proper case be ordered to increase the number of trains so that the service might be "adequate," as required by the act concerning public utilities. The running of trains is inseparable from the exercise of the company's franchise. That was the purpose of its organization. It has both the right and the duty to run as many trains as the exigencies of its business and the requirements of the public may demand. If danger results from the fact of running a con-

siderable number of trains, that is the fault of the companies by whom the crossings were originally constructed *at grade* (which companies respectively still own the fee of the land at the several crossings), and not the fault of the company which is undertaking by agreement with the original companies to perform, as the agent of the former, their public duty of running trains.

In discussing this point the Supreme Court in its opinion said:

> "The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad by the Erie Railroad Company." (Vol. IV, p. 2275, ll. 35-40.)

This is true only in a limited sense. While, of course, there would be no "danger" at all at these crossings if no trains were run over them, it is equally true there would be no danger if the crossings had originally been constructed by the lessor companies in some manner other than at grade; and it is equally true that there would be no danger at these crossings if people did not use them. Of course, the fact of the matter is whatever "danger" there may be at these crossings, or any of them, is due in part to the running of trains, in part to the method of the original construction, in part to the erection of buildings by other parties near the right of way, and in part to the use of the crossings by highway travellers. It is inequitable to charge upon the prosecutor the sole responsibility for creating whatever danger may be found to exist at these crossings.

The real question in this connection is what is the proper construction of the expression in the statute, "operating such railroad." As stated above, we submit that it means the company which is charged with the legal duty of such operation.

A strong reason in favor of this construction is suggested by the wording of section 5 of the Grade Crossing Act, which provides *inter alia* for the filing of a petition for relief under the statute, by "any railroad company whose tracks cross or are crossed at grade." This, we submit, must mean the railroad company which actually *owns* the tracks rather than a company which is merely the lessee or the tenant of the owner.

Another reason in favor of our construction is the practical difficulty that results from the order under review which charges the entire expense upon the prosecutor (less the amount to be paid by the street railway company and by the city) merely because it happens to be running trains over the railroads of *two* underlying companies, both of which have leased their railroads to the prosecutor or its predecessor. The two railroads are entirely distinct from each other, and yet the Board has not attempted to separate the expense of elimination with reference to the crossings owned by each of the respective companies.

But it may be said that under the terms of the lease the prosecutor at the termination of the leases may call upon the lessor companies to pay for "erections or improvements." As we have previously pointed out, that provision is a very slender reed so far as the prosecutor is concerned, as the lessor companies would have to go into bankruptcy if called upon to repay to the prosecutor the sum of $3,000,000 and upwards required for the elimination of the crossings in question. The total value of all the property of the Paterson & Hudson River R. R. in the entire State of New Jersey is only about $2,880,000; and the total value of all the property of the Paterson & Ramapo R. R. Co. is only about $1,830,000. (see Exhibits R-18 and R-19, pp. 1057-1060.) The assessed valuations are a little less than these fig-

ures (Ex. R-20, p. 1061). There is no conceivable way by which these companies or either of them could repay to the prosecutor the expense of making the changes required by this order. But however that may be, the order under review, even if not directed to the two lessor companies solely, as the "operating" companies within the meaning of the statute, should at least have included such companies jointly with the prosecutor.

In this connection counsel for defendants cited two cases arising under factory acts which hold that the word "owner" as used in such acts does not apply to the "owner" of the fee when he is not in actual possession and control of the building, but refers to the tenant in possession (*Lee* v. *Smith,* 42 Ohio St., 458; 51 Am. Rep. 839; *Schott* v. *Harvey,* 105 Pa. St., 222). Both of these cases were suits for damages for personal injuries resulting by reason of failure to comply with a statute requiring the construction of fire escapes. The ground of both of these decisions was that it was the manner of the use of the building which made a fire escape necessary and that it was reasonable to require the persons who had the beneficial use of the premises to pay the cost of complying with the statute. This, we submit, is a very different case from that of a railroad company which, although organized in the hope of private gain, is charged with certain public duties, which duties cannot be delegated without express legislative consent.

It may be observed, so far as this point is concerned, that a rule contrary to that adopted by the courts of Ohio and Pennsylvania seems to have been adopted in the State of New York under a similar statute. See *McLaughlin* v. *Armfield,* 58 Hun. 376; *Abrayan* v. *Manufacturers' National Bank,* 16 N. Y. St. R. 750. Moreover, it is obvious that the necessity for fire escapes upon the build-

ings depends upon the character of the use of the building, and not upon the mere fact of the existence of the building. If the condition under which the construction of fire escapes is required by the statute ceases to exist, then the fire escapes are no longer required, even though the building itself may stand just at it did before. If the building is used for some other purpose than that which is specified in the statute, then the fire escapes are not required. But, in the case of a railroad, as long as it continues to be a railroad at all, it can be used only for one purpose, namely, to run trains. Furthermore, the conditions under which fire escapes are required are limited to certain specific matters which are set forth in the statute, such as the number of stories in the building, or the number of employees, etc. But there are no such definite conditions specified in the Grade Crossing Act.

In the State of New Jersey the duty of constructing fire escapes on factories is imposed upon the "owner of the building." See Chapter 214, Laws of 1911, p. 448; Sec. 13., at p. 454. In the case of tenement houses the "owner" is responsible for a violation of the statute, with the further provision that every "lessee of a whole tenement house, or of the building or structure erected on the same lot with a tenement house, shall be jointly and severally liable with the owner or owners of the fee of such tenement house, building, structure and lot." Vol. IV, Comp. Stat. of 1910, p. 5351, Secs. 190, 191.

See *Gottuso* v. *Baker,* 80 N. J. L. 520;
Cittadino v. *Schackter,* 83 N. J. L. 593;
Evers v. *Davis,* 86 N. J. L. 196.

There is, of course, an obvious distinction between the owner of a factory building and a railroad company. If the former finds that it will

be unprofitable to go to the expense of providing fire escapes he can abandon his business, but the latter owes certain duties to the public and cannot abandon those duties. It must continue to run its railroad—possibly even at a loss—otherwise its franchise may be forfeited and the company itself thrown into the hands of a receiver.

Counsel also cited the cases of *Baltimore & Ohio R. R.* v. *Walker,* 45 Ohio St. 577, and *Buffalo Stone and Cement Co.* v. *Delaware, etc., R. R. Co.,* 130 N. Y. 152. In the former case the lessee of a railroad was held to come within the description of an expression "owning the tracks," as used in a statute requiring a division of the cost of constructing and protecting a grade crossing of one railroad by another—in other words, the company operating was held to be the company "owning," within the meaning of that particular statute. This does not throw any light upon what is meant by a statute which uses the expression "operating such railroad." The question on this phase of the present case is not what company is the "owner;" there is no dispute on that subject, but what company is in the legal sense "operating" the railroad.

In the *Buffalo Stone* case, *supra,* the report shows that there was an *express* covenant in the lease whereby the lessee agreed to do and perform all things which the lessee "would be bound by law to do and perform."

Another objection to the proceeding resulting in the order under review is that there has been included *in the same proceeding and order two separate and distinct railroads with separate corporate organizations and separate railroad tracks.* The railroads of these two underlying companies come together so as to make a continuous line, generally speaking, although for a part of the distance in

the City of Paterson the two rights of way are parallel. See property map, Exhibit R-16. Section 1 of the Grade Crossing Act of 1913 clearly refers to a chartered railroad, and not to a physical entity no matter how the same may be owned. Suppose these two railroad companies were each running trains over its own railroad and that of the other company under some traffic arrangement between them; it could not be that the abolition of a grade crossing affecting both railroads could be included in one proceeding and order. The mere circumstance that the underlying railroad companies had each leased its railroad to the same company could not give jurisdiction which otherwise would not exist. Suppose the railroads were parallel throughout the entire City of Paterson and affected by the same grade crossings. The Board would not have jurisdiction to include them in one proceeding, nor can the circumstance that they are leased to a third company give such jurisdiction. To illustrate: In Paterson there are the New York, Susquehanna and Western Railroad Company, owned and operated by an independent company, and the Delaware, Lackawanna and Western Railroad Company, owned and operated by an independent company. Suppose these two railroads should be leased to the Northern Pacific Railroad Company; could it be successfully argued that because in eliminating a grade crossing of one at a street that also crossed the other, where like elimination would be desirable, or even necessary, the circumstance that the Northern Pacific Railroad Company was lessee of the two railroads would give the Board jurisdiction to treat the two railroads together in one proceeding and order on the theory that the word "railroad" in section 1 meant a system of railroads operated by one lessee. In the present case the question of apportioning the cost of eliminating the crossings be-

tween the two underlying companies is very difficult of solution. We submit that the only way to proceed under the Grade Crossing Act of 1913 is to take each railroad by itself. We do not say that if two proceedings are brought, one for each railroad, and for convenience, consolidated for purpose of consideration, that such a course would be improper, but we do say there must be separate proceedings and a separate order as to each railroad. In this connection section 5 of the Grade Crossing Act should be considered as interpretative of section 1. That section provides that jurisdiction may be taken by the Board "upon the petition of any *railroad company* whose tracks cross or are crossed at grade." This language indicates that where the railroad company instituted proceedings for elimination it must be the underlying railroad company who should be the petitioner.

Under this heading reference should also be made to the brief filed in the Supreme Court by Mr. Lewis in behalf of the Paterson & Hudson River R. R. Co. and Paterson & Ramapo R. R. Co. —which companies by order of the Supreme Court allowed at the November term, 1915, were permitted to intervene. There is, of course, no question as to the fact that these companies do not actually run railroad trains over the railroad tracks at which the several crossings in question are located, neither is there any question as to the fact that this prosecutor does run some of its railroad trains over said tracks. But the question of what is meant by the word "operating" as used in the Grade Crossing Act is another matter.

In said brief counsel referred to chapter 11 laws of 1898 and argued that by reason thereof the *duty* to operate and therefore the duty to eliminate highway crossings when ordered by the Board of Public Utility Commissioners has passed to the

prosecutor. It is no doubt true that the *right* to operate the railroads of the Paterson & Hudson River R. R. Co. and of the Paterson & Ramapo R. R. Co., has vested in this prosecutor by virtue of the statute of 1898, but that statute does not impose upon the prosecutor "the duties and obligations" which rested primarily upon said two underlying companies. The duties and obligations that were imposed upon the prosecutor under such statute are those and only those which are "attached to the rights, powers, privileges and franchises theretofore possessed in this State by the company executing the mortgage"—meaning of course, the predecessor company of the prosecutor, viz., the company known as New York, Lake Erie & Western Railroad Co. (See Ex. R. 15, pars. 14 to 18, Vol. 2, pp. 954-7.)

The question of what were these "duties and obligations," *so far as the public is concerned,* depends upon the confirmatory statute of 1853. It may be that so far as the lessor companies are concerned the Erie Railroad Company, as the successor of the original lessee is bound to "operate" the railroads of the lessors but *that is different from the obligation to the State.* There is nothing in the statute of 1853 or in any subsequent statute which relieves the lessor companies from their duty of operating. So long as that duty is in fact performed, whether by the original companies or by some other company as their lessee or agent, the State need not concern itself. But in order to *discharge* the original company from their duty to continue operation either by themselves or by their lessees or agents the statute authorizing or confirming the leases must *expressly* relieve the lessors. See cases hereinbefore cited.

Thus far we have discussed the question of whether the duty to operate, so far as the State

is concerned, has been transferred to the prosecutor and whether the lessor companies have been relieved thereof. The same principles we submit apply to the question of whether the performance of the legal duties imposed by the original charters with respect to the construction and maintenance of highway crossings has been transferred to the prosecutor and whether the lessor companies have been relieved therefrom.

Counsel for the lessor companies further argued that the duty to change the grade of the railroads springs, not from the charter, but from the order of the Board of Public Utility Commissioners, and that under the charter there is no duty to change the grade. In this respect his argument is at variance with the argument of the counsel for the City of Paterson and for the Board of Public Utility Commissioners, who insist that the Grade Crossing Statute merely provides a method of enforcing the duty imposed by the charter and by the General Railroad Act, and that this duty includes, as a necessary element thereof, the separation of the grades of the railroad and of the highway when an existing crossing becomes unsafe or insufficient.

We agree, however, that the charters of the lessor companies do not impose a duty *upon anybody* to separate the grades; and we say further that if the Grade Crossing Statute is to be considered as an amendment of these charters it is unconstitutional for the reasons urged elsewhere in this brief.

XIV.

THE EVIDENCE SHOWS THAT THE BOARD IN MAKING THE ORDER UNDER REVIEW HAS GROSSLY ABUSED WHATEVER DISCRETIONARY POWER IT MAY HAVE UNDER THE STATUTE, BECAUSE IT APPEARS THAT THE PROSECUTOR DID NOT HAVE AND IN ALL REASONABLE PROBABILITY WILL NOT HAVE SUFFICIENT FUNDS OR ANY MEANS OF PROCURING SAME FOR THE PURPOSE OF MEETING THE ENORMOUS COST OF COMPLYING WITH SAID ORDER.

(Reasons 39, 70, 77 (c).)

We submit that the order in the present case should be set aside, for the reason that the evidence shows, *without dispute,* that the prosecutor is not, and in all reasonable probability will not have sufficient funds for the purpose of meeting the enormous cost of complying with the order; but if the prosecutor does not obey, then, under the Act concerning public utilities, it is subject to a penalty of $100 per day for every day during which the default continues and may also be proceeded against by mandamus or injunction; or by suit in equity; and thereby, if it still refuses, put itself in contempt of court; and any person who knowingly and willfully does or causes others to do, or advises or instructs the officers of any public utility to do any act forbidden or prohibited by the act, is guilty of a misdemeanor; and likewise any person who knowingly and willfully neglects, or fails to do, or causes others to neglect or fail, or advises any officer of any public utility to neglect or fail to do, is guilty of a misdemeanor; and the public utility itself which neglects or fails to do any act required to be done by the statute is also guilty

of a misdemeanor. (See sec. 33 to 36, Chapt. 195 P. L. 1911.) The prosecutor and its officers must therefore choose between the jail and the poor-house, as the evidence shows that it is impossible for the prosecutor to obey the order.

The situation is analogous to those cases in which the penalties for disobedience to an order are so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation. Of course, in the present case the prosecutor succeeded in obtaining a stay of the order pending the hearing of the writ of certiorari; but if this stay should be vacated or if this court should sustain the order and the prosecutor should then desire to test the decision by appeal to the United States Supreme Court, a serious question would arise as to the validity of the Act concerning public utilities, to which the Grade Crossing Act is a supplement. There is nothing in the statute which gives the prosecutor a stay of the enforcement of such an order *as a matter of right*—in fact, the statute expressly provides that the allowance of a writ of certiorari or the institution of any proceeding to review any order of the Board by the Supreme Court shall in no case supersede or stay the order *unless* the Supreme Court or a Justice thereof shall so direct (section 39.) Such a statute, we submit, is unconstitutional as in effect prohibiting the company "from seeking judicial construction of laws which deeply affect its rights." It deprives the company of the equal protection of the laws and deprives it of its property without due process of law.

Ex parte Young, 209 U. S. 123, 147;

Missouri etc. Ry. v. *Nebraska,* 217 U. S. 196.

Wadley-Southern Ry. Co. v. *Georgia,* 235 U. S. 651;

Kern Trading & Oil Co. v. *Associated Pipe Line Co.*, 217 Fed. 273.

Van Dyke v. *Geary*, 218 Fed. 111.

The Board, in the report of January 11th, 1915, said on the subject of the company's finances:

> "In considering this matter the board has been mindful of the claim of the Erie Railroad Company that it is not now financially able to make the expenditure necessary to do the work. The testimony discloses that the company contemplates spending larger sums than would be required for this purpose, in doing work that in the judgment of the board, is not so immediately necessary. It seems to the board that some of the money intended to be used for other purposes might more appropriately be used in this work, should it be found necessary to divert it. Nor does the testimony satisfy us that the company will not be able to secure the neceessary funds." (p. 1756, line 30; and p. 1757, line 3.)

It would appear from this that the view of the Board was, that the company had under consideration and *was intending to expend for other purposes* larger sums than would be required to carry out the Board's order; and it would also appear that the Board was of the opinion that it had the right to usurp the functions of the company's directors, by determining for them which of several improvements was most *immediately necessary,* and in what manner the little money that the company had for use on its entire line might be most *appropriately* used. It is very easy for an administrative body of this kind to express an opinion as to the best way of spending other people's money, but the Legislature, we submit, has not yet abolished the method of control of a railroad corporation prescribed by the general railroad law and by other general

laws, namely, honest management by directors acting according to their best judgment.

The suggestion in the Board's report that the company *contemplated* spending larger sums in some other work was so serious a misunderstanding of the company's attitude that immediately on the filing of this report, and before the making of any order thereon, the company considered it its duty to file a petition for a further hearing, in which it called attention (*inter alia*) to the fact that the Board had apparently mistaken its *desire* to make needed improvements for its ability to secure or expend the sums required therefor; and, as a matter of fact, the company did not, at the time of the filing of the petition nor at the time of the giving of the testimony, contemplate the spending of larger sums than would be required for the elimination of the crossings, nor indeed any considerable sums in making other improvements, for the reason that it did not have, nor could it obtain, the necessary funds, or any considerable part thereof, beyond what it actually required for the continuation of safe operation on its railroad; that, as shown by the evidence, its net income available for improvements during the fiscal year ending June 30th, 1914, was $662,295.87, being the entire *net* income, less such amounts as were required by the terms of the mortgages and other obligations to be devoted to sinking and other funds. The petition then showed that during the six months ending December 31st, 1914, the company had already been required to expend, principally in the interest of safe operation, over $600,000, that it was under legal obligation to spend large sums for improvements under existing contracts or orders of the courts, that certain expenditures were also required immediately in order to maintain safe operation, that it had no

capital funds outside of its income to devote to these purposes, except the proceeds of an obligation heretofore issued, amounting to $300,000, all of which was already required to be devoted to a particular work in the course of construction under order of the public authorities, and that it had no additional capital obligations available over and above what was required for the payment of obligations that were about to mature.

The petition then set forth in considerable detail the financial situation of the prosecutor (See pp. 1777 to 1783.) Various schedules attached to the petition gave a list of the various sums which the company was obliged to expend; schedule "A" (p. 1784) gave a list of the work required to be done, either under existing contracts, statutes or orders of the courts; the total cost of this work was the sum of $4,042,700. If that work were not performed then the company would lay itself open to suits for breach of contract and to proceedings by way of indictment or contempt for failure to comply with the provisions of the statutes of other states or the orders of administrative bodies in other states, particularly in New York and Pennsylvania.

Schedule "B" (p. 1785) gave a list of the work which was absolutely necessary for the purpose of operating safety, covering a period of one year only, from February 4th, 1915; these items total $1,094,825. They cover repairs and renewals of bridges and were put in the list as *absolutely necessary* for the obvious reason that if the work was not performed there would be danger of serious catastrophies, any one of which might cause more injury to life and limb than all the grade crossings in Paterson since the railroad was first built.

Schedule "C" (p. 1785) gave a list of a large number of improvements, aggregating a total of

$12,091,200, all of which needed to be expended *at once* for the purpose of enabling the prosecutor to render proper service.

If the Board had had any lingering doubts before the filing of this petition as to the needs of the company and its purpose to spend money in doing work that, in the judgment of the Board, was not so *immediately* necessary, it would seem that the facts set forth in this petition would have removed them. This petition was read before the Board on February 5th, 1915 (p. 796 *et seq.*), and on April 20, 1915, the Board filed its report denying the prayer to submit further testimony on this and certain other points specified in the petition (p. 1795, lines 10 to 15.) It is hard to imagine what further or stronger testimony the Board could expect in order to be *satisfied* that the company would not be able to secure the necessary funds. There were items amounting to over $4,000,000 which had to be done under previous contracts or orders; items aggregating over $1,000,000 which had to be done in order to make the operation safe, and items aggregating over $12,000,000, the expenditure of which was necessary at once in order to perform proper service; yet the Board calmly brushes aside these representations as of no importance compared with the *immediate necessary* of eliminating grade crossings, some of which have been in existence for at least sixty years, and some of them for probably eighty years. The Board did not even consider these representations of sufficient importance to justify a few days or a few weeks delay in the presentation of testimony in support thereof—although at the time the petition was read before the Board counsel for the company stated that the company was prepared on the very day the petition was read to offer testimony in support thereof, and that if there was any matter in the petition on which the Board de-

sired testimony the company was prepared to go ahead at any time, or place (p. 840, line 25; p. 842, line 35.)

Let us now examine some of the testimony which failed to "satisfy" the Board that the company was not financially able to make the necessary expenditure, and could not secure the necessary funds.

We will first look at the company's annual report to its stockholders for the fiscal year ending June 30th, 1914.

The net income of the prosecutor for that year was		$1,422,975.20
From that amount the following appropriations were made:		
To sinking and other reserve funds required by the terms of its mortgage	$760,709.33	
Additions and betterments.	502,742.77	
		1,263,452.10
Balance credited to Profit and Loss Account (pp. 1369 to 1370.)		$ 159,523.10
There were direct entries to the Profit and Loss account which resulted in a net debit of		$ 229,806.49
(Page 1371) so that the company's surplus was actually reduced during the year by the sum of		$ 70,283.39

(See page 27, Annual Report, 1914, Appendix IX.)

The net income of $1,422,975.20 for the year ending June 30th, 1914, compares with the net income for the year ending June 30th, 1913, of $8,105,675.23, or a decrease of $6,682,700.00 in 1914 as compared with 1913. (See Exhibit R-113, p. 1337.)

Exhibit R-113 further shows that the appropriations of income for additions and betterments for 1913 and 1914, were as follows:

1913	$ 657,587.93
1914	502,742.77
Excess of 1913 over 1914	$ 154,845.16

But even in 1913 the amount appropriated for additions and betterments was not above the average. (p. 638.)

It is, therefore, evident that if the company had maintained the same appropriations for additions and betterments in 1914 as in 1913 (which the officers testified was a desirable thing to do, if possible,) the surplus in 1914 would have been the practically negligible amount of $4,677.94 (p. 637.)

The credit balance $159,523.10, transferred from Income Account to Profit and Loss in 1914, compares with $6,682,568.31 in 1913. It should be stated that in 1913 the railroad company received as dividend from the Pennsylvania Coal Company the sum of $2,450,000.00, as against $500,000.00 (Exhibit R-126, p. 1377), in 1914, but even after allowing for the difference in the dividends received from that company, the decrease in the net income of 1914 was over $4,500,000.

The principal cause of decline in net income in 1914 appears as follows:

Operating revenue decreased	$1,663,784.22
Operating expenses and taxes increased	2,077,247.00
Operating income decreased	$3,741,031.22

The income statement for the two months ending August 31st, 1914 and 1913, shows that the surplus carried to Profit and Loss account was $140,021.03 in 1914, whereas for the corresponding period in 1913 it was $312,968.76; the decrease,

however, is largely accounted for by appropriations for needed improvements in property investments. The net income shows a very slight increase for these two months in 1914, as compared with 1913.

Operating Income (which is usually the best test of a carriers' prosperity or adversity,) decreased in 1914 $46,231.41, as compared with the very poor showing of 1913. (Exhibit R-114, p. 1338 to 1341.)

It is true that during the two months ending August 31st, 1914, the company's statement shows a surplus of $140,021.03 (p. 1341), but the testimony of Mr. Lincoln shows that this is due to the fact that the maintenance and operating expenses were cut to the lowest limit, and that it represented merely what was held back from repairs and improvements that were absolutely essential, but that were necessarily postponed because of the financial conditions (pp. 724, 725).

The testimony of Mr. Lincoln further shows that the average annual increase of expenses for right of way and structural expenses, in order to keep up with demands for heavier rails, stronger bridges, better ballast and other improvements necessary for convenience and safety, was the sum of not less than $500,000 (p. 724). The mere fact that this amount of money may not have been spent for this purpose in any one year, therefore, does not show that it was not necessary to spend it, but it was merely a postponement of and damming up of expenses that must be met some time, somehow, somewhere, if the company is to continue to carry on its functions as a carrier of freight and passengers.

On the basis of the surplus account for the year 1914 the elimbination of these crossings would take the company's total surplus for a period of 25 years, and in the meantime nothing could be spent for improvements beyond the bare necessities of maintenance of present conditions, and even that would be problematical.

The matter of safety at grade crossings depends not upon the railroad but upon the highway travel; it is so unreasonable as to be almost ridiculous to require the company to expend for the protection of travelers who can protect themselves immense amounts of money that should be devoted to the protection of the passengers travelling on the railroad and whose safety depends absolutely upon the management and operation of the railroad. The report of 1914 (Exhibit R. 123, p. 1352) shows that during that year the total number of passengers carried was 27,628,242. If, under such a showing as is presented in this report, any board of directors had voluntarily undertaken to do what the Board of Public Utility Commissioners has ordered the company to do, such directors would deserve to be indicted for conspiracy against the travelling public.

The further suggestion is made in the Board's report that the company might in some way be able to borrow the funds, as they say the testimony does not satisfy them that the company will not be able to *secure* them. We can hardly believe that the Board is serious in entertaining this view, in the face of the undisputed evidence as to the existing and presently maturing obligations of the company. We start with a capital stock on which no dividends have been paid for many years, and the bonded indebtedness, interest on

which must be paid or the company becomes bankrupt, as follows:

CAPITAL STOCK.

Description	Authorized	Issued
1st Preferred 4%	$48,000,000	$47,892,400
2d Preferred 4%	16,000,000	16,000,000
Common	153,000,000	112,378,900
Totals	$217,000,000	$176,271,300

MORTGAGES, BONDED AND SECURED DEBT.

Mortgage Bonds	$166,110,900.00
Collateral Trust Bonds	65,749,500.00
Equipment Trust Obligations	17,217,457.45
Miscellaneous Funded Obligations	1,103,065.63
Total	$250,180,923.08

(See annual report, Exhibit R. 123, also Appendix IX.)

While, of course, the company is under no obligation to pay dividends on its stock, the interest on these bonds and other obligations must be maintained or disaster follows. The principal of a large part of these obligations, fortunately, does not fall due for a considerable time.

(Exhibits R. 118, 119 and 120, vol. III.)

MORTGAGE BONDS.

	Issued	Maturing
Prior Lien Bonds	$35,000,000.00	1996
General Lien Bonds	51,724,000.00	1996
Convertible Bonds	32,000,000.00	1953
Miscellaneous Bonds	47,386,900.00*	
Collateral Trust Bonds	65,749,500.00	1914-1951
Equipment Trust Obligations	17,217,457.45**	

Miscellaneous Funded
Obligations ..... 1,103,065,63†

*Varying Dates from 1916-1982.

**Semi-annual payments from 1914-1924.

†Part each year.

(See Exhibit R. 123, pp. 1372 and 1373 for details of Mortgage Bonds and part of Collateral Trust Bonds.)

But the most important considerations, from the standpoint of the company's immediate financial necessities, are the obligations which the company is bound to meet within the next three years; these are shown in detail on certain exhibits as follows:

Exhibit R. 115 (p. 1342)—
Obligations Oct. 14, 1914, to
June 30, 1915.....$18,831,939

Exhibit R. 116 (p. 1343)—
Obligations during year ending
June 30, 1916..... 11,241.483

Exhibit R. 117 (p. 1344)—
Obligations during year ending
June 30, 1917..... 16,079,491

Total $45,155,913

A majority of these items are for Equipment Trusts which are not subject to renewal (p. 651). Some of the other items might be renewed if the credit of the company is maintained. The difficulty in renewing a few million dollars in the month of October, 1914, is shown by the testimony of Mr. Crawford. These obligations must be met or renewed in some way. The company at this time has under consideration the question of a new general refunding mortgage, as explained by Mr. Crawford (p. 675), the purpose of which is "To refund all of these underlying securities as they come due,

including these equipment trust obligations or a percentage of them."

If the Board of Public Utility Commissioners deems it such a comparatively simple matter for a railroad company to borrow fresh money, or even to renew old obligations, we respectfully invite the attention of the Court to Exhibit Erie 15, printed in volume 4, from pages 1947 to 2042, containing a summary of 29 equipment trust leases, agreements, conditional sales, collateral trust notes, etc.—all of which have required the most careful and exacting negotiations and attention on the part of the officers and directors of the company.

It is obvious that the duty of the officers and directors is to look to the future as well as to the present; it was in the fulfillment of this duty that they prepared a list of expenditures which they deemed necessary for the company to make within the next five years. This is shown in detail in Exhibit R. 129, p. 1379. It is explained in memorandum prepared by the company's engineer. Exhibit R. 130 and R. 131, pp. 1383 to 1393.

Mr. Falconer, Superintendent of Construction, with the duties of chief engineer of the prosecutor (p. 747), testified that from 1906 to 1914 inclusive the railroad company had spent for the general improvement of its road amounts aggregating $55,727,039.00 and that it had a list of improvements which had been approved by the board of directors that the company hoped to carry out during the next five years (Exhibit R. 129, p. 1379, introduced at p. 752), to which he referred as follows:

> "A We have spent a great deal of mony to secure a double track railroad. The double tracking is not completed. We have spent a great deal of money to reduce grades; the grade reduction is not complete. When the double tracking and grade reduction are com-

pleted they will enable the railroad to handle a much heavier volume of traffic than it has in the past or than it does now, and will necessitate large improvements to our terminal facilities, not only division terminals, intermediate points on the road, but to our terminals at the ends of the railroad. The most important things aside from safety seem to be the completion of the double tracking and the completion of the grade reduction and the increase in the capacity of the terminals. The order in which—

Q Just let me ask right there—is there in your judgment, an element of safety in those things you have mentioned, terminal improvements and grade reductions and double tracking?

A Yes. There is a very large element of safety in double tracking and in grade revision. In terminal improvements, such of the terminal improvements as have to do with the handling of passenger business is an element of safety." (p. 52.)

After this he testified to the detailed items of this list and described them in the order of the importance attached to these items by the board of directors of the railroad company. (p. 752 *et seq.*)

This program calls for an expenditure during the next five years of $47,808,158—in which is included an estimate of $3,000,000 for the grade crossings in this case. The order of importance in which these expeditures should be made is fully explained by Mr. Falconer (pp. 762 and 763). There may, of course, be a room for a difference of opinion as to the comparative importance of some of the items on these exhibits, but there is no room for debate as to the items for double tracking, grade reduction and necessary terminal improvements; these two items alone amount to over $20,000,000. (See pp. 1379, 1380.) The improve-

ment of terminal facilities amounting to $1,293,000, is also an important item; and all who have used the Erie station at Jersey City will agree that the improvement of that terminal is equally important; this is included in a list of "necessary terminal improvements" amounting to $14,866,000.

The items for bridges and buildings, for automatic signals and interlocking, aggregate over $4,000,000, and are certainly of great importance to the safety of the travelling public, far more so than the elimination of grade crossings (pp. 787, 788).

It may be said that many of these important improvements have been or are to be made outside of the State of New Jersey, but that is beside the point. The question is not what the company can afford to spend in New Jersey, but what it can afford to spend in New Jersey when consideration is given to the demands of the railroad system as a whole. The total mileage of the system is 2,257 miles, one-half of which is double-tracked. (See report of 1914, p. 1348.) It passes through the States of New Jersey, New York, Pennsylvania, Ohio, Indiana and Illinois. It is impossible to divide up one part of the road as belonging exclusively to New Jersey, another to New York, and another to some other state; the entire system must be treated as a whole; not only by its officers and directors, but also by the commissions of the states through which it operates. No one would undertake to say that the Erie system should be divided up according to where the tracks happen to cross the state lines, and each separate piece operated with reference to the interests peculiar and local to any one particular state. Yet it sometimes seems as if there was a rivalry between the various state commissions as to which one could compel the company to pay the most within the borders of its particular state.

We have endeavored to summarize the important financial considerations which we submit justify the company in taking the position that it would be bad business judgment, if indeed it were possible, to spend the money required by the order under review, for the purpose of eliminating the crossings in Paterson. We submit the evidence shows (and there was no dispute whatever on this point) that the company has not the money on hand to meet the expenditure demanded by this order, or any considerable part thereof. It is equally clear that under present financial conditions such money could not be borrowed. No one can prophecy what the future may bring forth, but we assume that it is the duty of the Board of Public Utility Commissioners to decide cases on the evidence that is presented to it, and not on their own ideas of possibility or probability; and under the evidence in this regard we urge upon the court the consideration that the Board has grossly abused whatever discretionary power it may have under the statute to order the elimination of grade crossings because it appears that the prosecutor has not the financial ability at this time either to pay for the expense of the change of grade or to borrow the money necessary therefor—if indeed it is the duty of a railroad to *borrow* money for the purpose of complying with such an order.

In the case of *Erie Railroad Company* v. *Board of Public Utility Commissioners* (not reported), involving the Board's order for improvements in station facilities at Little Falls, argued November 4th, 1914, and decided in April of 1915, in regard to the Board's duty to consider the financial conditions of the prosecutor, Mr. Justice Swayze, speaking for the Supreme Court, said (italics ours):

> "The important argument urged upon the court at the hearing of this cause was that on

account of general and fundamental changes in economical and financial conditions, the company was in no condiction at the present time to go to the expense of building this new station, and that it had been compelled to withhold improvements projected all along its line amounting to many millions of dollars. *This argument might and probably would have had much force if it had been made prior to the determination of the Board of Utilities that a new station should be erected or even with reasonable promptness after that determination.* In such case the board, no doubt, would have given the matter due consideration, but when it is considered that the decision requiring the erection of a new station was made on September 29, 1913, that the plans were submitted on October 28, and that the company then gave no intimation of any inability to carry out the improvements but merely set June 30, 1914, as the time required to complete the work and had done nothing when in March the commission asked for a report of progress, the argument now made seems to us, and probably seemed to the commission when it was offered, as one that ought not to be considered in view of the circumstances of the case."

In the present case testimony showing the financial condition of the company was not only offered in the main case, but when it seemed to the prosecutor that the Board had either misunderstood or disregarded this testimony the matter was brought to their attention again, but with stronger emphasis in the prosecutor's petition for further hearing which, as has been above stated, the Board declined.

The undisputed evidence shows that from the financial standpoint it was impossible for the company to comply with the Board's order; and yet notwithstanding the absence of any evidence to the

contrary, the Board refused to put its conclusion upon the evidence, but arbitrarily decided that in *its* "judgment" any work other than the elimination of the grade crossings in Paterson was not "so immediately necessary." The company has therefore been driven to this Court in order that this highly important factor may receive due consideration.

The financial conditions shown by the foregoing testimony are not conditions that have developed within the last two or three years, but are only the culmination of a depression that has been steadily growing worse for several years past. This is shown in striking form by Exhibit R. 44, which is a table showing the operating income expressed in mills per traffic unit for a period of ten years from 1903 to 1913, as follows:

	1903	2.77
	1910	2.30
	1913	2.03
average	1903-1907	2.33
"	1908-1912	2.04

(See Volume II, p. 1105.)

It will be seen that the operating income as expressed in this unit has decreased from 2.77 in 1903 to 2.03 in 1913; and in the latter year the income was less than the average for either of the preceding five year periods.

The operating income, as expressed in mills per traffic unit, is usually considered as the best test of financial conditions. Another exhibit gives the result of the company's operations based upon the percentage of return on the property devoted to railroad purposes. (See Exhibit R. 1, p. 931, 3). By referring to same it will be seen that the percentage of such return decreased from 2.22 in the year 1903 to 1.13 in 1913, and the latter percentage was the lowest of any year for the last ten years

except that in the year 1908 there was a deficit; in 1905 the percentage was 1.12; in 1909, .78; in 1912, .64.

If 6 per cent. be considered as a fair average return on property devoted to public use, what shall be said of a return of but little more than one per cent.?

In the case of *Willcox* v. *Consolidated Gas Company,* 212 U. S. 19, the United States Supreme Court said, at p. 49:

> "The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.
>
> Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to the public use."

The conditions as to the net income are, in a large part, the result of the many unusual and unnecessary expenses required by reason of recent State and federal legislation. Thus, the extra cost to the prosecutor by reason of the so-called "full crew laws" in the States of Indiana, Ohio, Pennsylvania, New Jersey and New York, from the time when each of these laws went into effect to December 1, 1913, was the sum of $281,049.68. (See Exhibit R. 5, p. 937).

This expense will continue indefinitely and will increase when, and if, business increases, as there

is no present prospect that this unreasonable law will be repealed in any of the states where it was passed and where the Erie R. R. Co. operates. The *annual* expenses of this law in the States of New Jersey and New York amounts to over $200,000. (See Exhibit R. 4, p. 936; R. 125, p. 1376.)

By referring to Exhibit R. 5 and R. 125 it will be seen that the average annual expenses in the states where the Erie R. R. Co. operates is as follows:

N. J. & N. Y.	$213,700
Indiana	10,828
Ohio	9,605
Pennsylvania	73,031

This makes a total annual expense of over $300,000.

Another very important item of increased expense is the increase in wages as the result of the awards of arbitrators. The summary of these increases is given in Exhibit R. 14, p. 95. This shows that the *annual* increase amounts to the sum of $692,194.53.

Another item which has not yet become a reality, but which must be considered in planning the finances for the future is the cost of steel passenger cars. This is a matter which requires and is receiving the serious consideration of railroads at the present time. There has been some agitation and numerous bills have been introduced in Federal and State legislatures for the passage of a law compelling the use of steel passenger cars, but whether such a law is passed or not, the management of railroads are providing such cars as rapidly as financial conditions will permit. There is, however, a law already in effect which requires that all railway post-office cars, used after July 1st, 1917, must be constructed of steel (see Exhibit R. 11, p. 947). Considerable money is being and must be spent for these.

In addition to the foregoing expenses the requirements for improvements in travelling and terminal facilities and the increases in the cost of supplies have added greatly to the operating expenses. The following are illustrations:

Betterment of Conditions and Safety, 1910-1913, $52,944,628.94
(Exhibit R-2, p. 934)

Station improvements ordered by Commissions to October 31, 1913:

Improvement:	Expended:	To be expended:
$62,483.93	$59,644.64	$2,838.29

(Exhibit R-3, p. 935)

Principal capital expenditures made in New Jersey for 1911-1913, $5,919,461.00
(Exhibit R-6, p. 938)

Statement of Additions and Betterments authorized to October 31, 1913, and Unexpended Balances to September 30, 1913:

Amount Authorized, $35,899,102.59

Chargeable to:

Additions & Betterments	Expenses	Individuals & Companies.
$31,550,492.60	$3,550,061.55	$798,548.54

Unexpended Balances:

Additions & Betterments	Expenses	Individuals & Companies.
$13,849,700.81	2,585,086.04	653,443.39

Appropriations Exceeded, $544,144.23
(Exhibit R-7, p. 939)

The fact that the railroad has not been financially able to live up to its improvement program (as shown in Exhibit R-7) is illustrated by the fact that some of these improvements were authorized as long ago as February 20, 1896; one since August 3, 1910, and on more than half of the divisions some authorizations are as old as

1911 (Ex. R-8, p. 940), and the same may be said of the authorizations for general improvements.

The increase in the cost of fuel and ties alone showed an increase in 1913 over 1910 of $545,591. (Exhibit R-10, p. 946.)

An approximate estimate of cost of construction expenditures which should be made within the next five years amounts to $47,808,158 (Exhibit R-129, p. 1379).

It may be urged that the prosecutor had a prospect of some increase in income by reason of a recent decision of the Interstate Commerce Commission in the so-called five per cent. rate case, referred to in the present record. An estimate of the amount of the increased revenue by reason thereof was made by the Auditor of Freight Accounts, under date of Oct. 30, 1914, from which it appears that the best guess that could be made on that subject showed a probable increase in revenue of $71,393.81 per year, based on the company's freight traffic in the territory known as the central freight association territory, to which the increase applied, for the year 1914 (see p. 679, ll. 20-40; Ex. R-121, p. 1345).

It will also be urged that the prosecutor had a prospect of an increase in revenue on account of an advance in the price of mileage books. The best guess on that subject is that the increase would amount to $48,842.64 based on the number of books issued for the year ended June 30, 1914. This estimate, however, was based on the assumption that the same number of books would be sold as in that year and leaves out of consideration the probability that because of the increase in price a number of people might change the form of transportation used by them. See p. 702, ll. 1-40; Ex. R-127, p. 1378.

If the hope of the prosecutor as to the increased revenue from these two sources should be realized, and if the guesses should prove to be true, the result would be an additional revenue of about $120,000 per year, which is $60,000 per year less than the legal interest on the cost (exclusive of prpoerty damage) of complying with the Board's order.

The indifference of the Board of Public Utility Commissioners of the State of New Jersey to the question of the financial feasibility of obeying the Board's order is in striking contrast with the attitude of the commissioners of other states.

Thus, the Public Service Commission of the State of New York on December 2, 1914, entered an order in the matter of the complaint of the Cattaraugus Board of Trade against the Erie Railroad Company, asking for a new passenger and freight station. The amount involved was less than $15,000. The Commission concluded that:

> "Better station facilities for both passenger and freight are imperatively demanded; but it does not seem to be the opportune time to make an order which will require the expenditure of a large sum of money on the part of the Erie Railroad Company, for it is a matter of common knowledge that at the present time the financial and business conditions of the country require the practice on the part of the railroads of the utmost conservatism and economy, and in all proper cases it is the duty of this commission to assist."

The case of *Selectmen of St. Johnsbury* against *Boston and Maine Railroad Company,* before the Vermont Public Service Commission, was a petition for the elimination of two grade crossings; the commisson expressed the opinion that the crossings in question were dangerous and should at *some time* be eliminated. We quote:

"At the hearing it was represented, and generally by the Boston and Maine Railroad, that because of the financial condition of said corporation, and the pending plans for the reorganization of said corporation, it would be an excessive financial burden to undertake to eliminate these crossings at the present time. This was not controverted or sustained by the petitioners. * * In view of the financial situation of the Boston & Maine Railroad as above indicated we believe that the work of elimination should be postponed until said company is in better financial circumstances."

(See Public Utilities Reports, 1915 A, p. 462.)

In a grade crossing case before the Public Service Commission of Maryland, decided December 16, 1912, the Commission directed the installation of an electric bell at a railroad crossing, saying:

"The broad policy of the state, acquiesced in, we believe by railroad companies generally, is that where it is practicable and does not lay upon the company an unreasonable burden of expense, grade crossings ought to be eliminated, and when overhead or undergrade crossings cannot be had, as in this case, we conceive it to be the duty of the commission to see that such protection be given to the public as is reasonably practicable."

Public Service Comm. of Md. Reports, 1912.

In a dispute between the City of Danbury, Conn., the N. Y. N. H. & H. R. R. Company and the Danbury & Bethel Street Railway Company as to the type and size of a bridge to be built, the Public Utilities Commission ordered the Railroad to pay 11/24ths, the City 8/24ths, and the street railroad 5/24th of the cost of the bridge carrying White street over the railroad tracks.

"In view of the existing law requiring railroad companies to maintain whatever type

> and construction of bridge may be authorized, some consideration should be given in the apportionment of expense to the increasing use of said bridge by the City and Electric Railway Co."

Report of the Public Utility Commrs. of Connecticut, 1912, p. XLVII.

Counsel for the defendants will no doubt urge that in a matter which, as they claim, affects the public safety, the question of expense should not be considered either by the Board in making its order or by the Court in reviewing such order. The same argument was made before the Board of Railroad Commissioners of the State of Iowa in a proceeding wherein the City of Des Moines undertook to compel the construction of a viaduct at a certain street. The evidence showed that the total cost of the work would be $139,000, of which $89,000 was chargeable to a railroad company. It appeared that 6% interest on such amount would be greater than the entire gross earnings per year of the railroad company from all the freight hauled over the line of railroad on which the crossing was located. The Iowa Board held that under the claim made by the City it would be necessary to order the alteration of a grade crossing in every application that might be made to it. They said:

> "We cannot accept this as the intention of the legislature. There must be some reasonable, legitimate relation between the expense and the danger removed by a proposed viaduct. We must give consideration to the subject of expense. The commission must consider the whole situation in the State, and use its judgment, bearing in mind all of the important factors, in determining the necessity for viaducts, from time to time."

The Commission continues:

> "The expense of a proposed overhead crossing, or public improvements of that character, in its relation to the benefit resulting therefrom has been unquestionably, one important factor considered by the courts in determining the necessity for such an improvement."

After referring to the cost of the work and the comparison thereof with the amount of traffic, the Commission continues:

> "As a transportation company, pure and simple aside from other investments of the parties in interest, it would pay the Des Moines Terminal Company to tear up their tracks, rather than build the proposed viaduct. Property has some rights as well as the public."
>
> * * * * *
>
> "We find, in view of all the evidence adduced before the board, that the said viaduct, proposed by the city, is at an expense entirely out of proportion with the hazard sought to be removed; and that there is no necessity for the said viaduct, as proposed. If this expense can be very largely reduced, a different situation will present itself."
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> (See Report of Board for 1913, p. 43.)

The foregoing decision of the Board of Railroad Commissioners of the State of Iowa is of particular interest because that Board considered it part of its duty to consider questions of law as well as questions of fact; and one of the questions of law decided by the commissioners was whether or not they had the right to take into consideration the large expense of the proposed improvement as one of the important factors in deciding whether or not the improvement was necessary for public safety.

There are several reported cases in which the courts have given consideration to the question

or whether or not a public utility has the financial ability to carry out a desired public improvement.

In *Houston etc. Ry. Co.* v. *City of Dallas,* 98 Tex. 396, 84 S. W. 648, the question involved was the validity of an ordinance requiring railroad companies to make their tracks conform to the grade of streets. Apparently this was an attempt on the part of the city to change an overhead crossing to a crossing at grade. We quote as follows from the opinion (italics ours):

> "The proper construction of the crossing and grading of the street thereat would, in a manner specified, throw the surface water collecting in the streets, and heretofore passing along the gutters in other directions upon the roadbed, making it a channel or sluiceway for the rain and storm waters, and rendering it unstable, insecure and dangerous to life and property; the only means of preventing which would be the construction by respondent of a sewer, of the character designated in the answer, 2 miles in length, at a cost of $60,000."
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> "Much less can we know that the difference in the advantages of the two characters of crossings will be so great in favor of those contended for by plaintiff as to justify the imposition of such a burden upon respondent as the allegations show will result from the making of the change. If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared with the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as is averred? The petition itself so couples together its allegations of danger with those of mere convenience as to leave it doubtful how far the consideration of each has weighed in determining the city's action. While the con-

venience of the public in the use of the streets is generally to be considered and promoted, it may well be that in particular instances it should not be allowed to outweigh in the adoption of such measures as that under consideration, *a great and disproportionate injury to be inflicted on private interests in advancing it.* When it is found that a proposed action is to be fraught with such consequences as those averred in the answer, *a public exigency correspondingly great and urgent should be required in its support.* In considering this phase of the case at present, we can only treat all of the relevant facts well pleaded as true, and announce our opinion that they are sufficient to show the ordinance relied on to be unreasonable and arbitrary in its operation against respondent, and to entitle it to a hearing on the evidence."

In *Northern Central Railway Company's Appeal,* 103 Pa. 621, one railroad company attempted to enjoin another from crossing the former's tracks at grade. The question involved was whether under the facts an overhead crossing was "reasonably practicable." It appeared that an overhead crossing would cost from $300,000 to $600,000 more than a grade crossing. The court approved the finding of the Master before whom the testimony was taken as follows:

"In view of the greatly increased cost of an overhead crossing, the damages to private property, the destruction, to some extent, of an entire street, the increase of the distance of a twenty-eight feet to the mile grade, the difficulty of having freight and passenger depots, the impossibility of making switches or sidings for the accommodation of factories or other business within the borough limits, except the southeasterly part, and there only by a spur siding, all these, taken together with other facts already found, I am of the opinion,

and so find, that an overhead crossing is not reasonably practicable."

It will be seen that in this case the court gave consideration to the question of the differences in expense as a factor to be considered in determining the method of making a public improvement, involving public safety.

In *Pennsylvania Schuylkill Valley R. Co.* v. *Philadelphia & Reading R. Co.*, 160 Pa. 227, a similar question arose as to the crossing of one railroad track by that of another company. The decision of the lower court, permitting the grade crossing, was affirmed. The decision had been put on the ground of the heavy cost of construction of a crossing then at grade. We quote as follows:

> "It is safe to conclude that for a permanent overhead crossing, good and substantial, of sufficient length to permit additional trackage for both roads, with gradual approaches and easy curves, so as to be safely and conveniently used with ordinary engines, including incidental damages to be paid to third parties, an outlay of at least $60,000 would be rendered necessary. The superintendent of the Pennsylvania Schuylkill Valley Railroad Company testifies that, if compelled to cross overhead, in view of the expense and the uncertainty of an adequate return from the enterprise, the company would abandon it, and in this he is sustained by a number of other witnesses. Under all the facts and circumstances of the case it would not be reasonably practicable to avoid a grade crossing in this case."

In *Cleveland etc. Ry. Co.* v. *Street Public Utilities Commission*, 273 Ill. 210, 112 N. E. 689, an order of the Commission requiring the separation of the grades of a street and of a railroad track was sustained when it appeared that the entire

cost of making the change amounted to only about $46,000. The court said, however (italics ours):

> "While the financial condition of the railway company is a matter which *should be also considered* in this class of cases, the showing made by the railway company upon this question falls far short of convincing us that the imposition of this expense upon the railway company will result in any *hardship* to the company."

The clear inference from this opinion is that if the imposition of such expense did result in hardship, then the court would set aside an order of the Commission whereby such expense was imposed upon the company.

In the Supreme Court counsel for defendants cited as their principal authority on this point the case of *Health Department of the City of New York* v. *Rector, etc., of Trinity Church,* 145 N. Y. 32; 27 L. R. A. 710; 39 N. E. 833. This case is strong authority for the prosecutor, as will appear from the following quotations from the opinion:

> "If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this, the courts must, within proper limits, be the judges."
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> * * * * *
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> "These exactions must be regarded as legal so long as they bear equally upon all members of the same class, and their cost does not exceed what may be termed one of the conditions on which individual property is held. It must not be an unreasonable exaction, either with reference to its nature or its cost."

In their brief in the Supreme Court counsel for defendants criticized the foregoing argument in certain respects and it may therefore be wise to anticipate such criticism.

Counsel pointed out an apparent discrepancy between certain statements which were offered in evidence by the prosecutor for the purpose of showing its operating revenue and operating income, saying that the figures for operating revenue as given in Exhibit R-1 do not correspond to the figures in Exhibit R-123. This difference is easily explained. The figures in Exhibit R-1 were testified to by Mr. Sorensen, who said that they include "outside or auxiliary operation" (p. 179, ll. 1-20). The figures in Exhibit R-123 include only the Erie system proper, omitting certain auxiliary companies, the stock whereof is owned by the Erie Railroad, but which are separately operated. This is made clear by the testimony of Mr. Crawford, who, in referring to Exhibit R-113 (the figures whereof are the same as the corresponding items for R-123) includes the Erie Railroad Company and a company known as the Chicago & Erie R. R., but does not include the New York, Susquehanna & Western R. R., Wilkesbarre & Eastern R. R., New Jersey & New York R. R., and the Bath & Hammondsport R. R. Company (pp. 636, 7). See Exhibit R-113, at pp. 1335-7, and Exhibit R-123, pp. 1349-50. This also explains the difference in the figures of operating income for the year 1913 as they are given in Exhibit R-1 as compared with the figures in Exhibit R-123.

Counsel also criticized the testimony showing the percentage of return on the property owned by the railroad company, saying that it assumes without proof that the property of the company is worth a certain amount. The valuations in question are based upon the figures of the reor-

ganized company at the time of the formation of the present Erie Company in 1895, plus the amounts expended from year to year for additions and betterments. It is true that there has been no "physical valuation" of the company, if by that is meant an estimate by experts of the present value of each specific item of property. But the figures upon which the return was estimated have been recognized as substantially accurate in all of the company's operations, in the issuing of stocks and bonds, in the presentation of evidence before the Interstate Commerce Commission and other commissions for the purpose of determining reasonable rates. There was no attempt on the part of the City to prove that the total valuation or any part thereof was inaccurate.

Counsel also criticized the evidence as to the percentum of return. This criticism results from confounding bondholders with stockholders. The real owners of the company are the stockholders; the bondholders are merely creditors. The "return" of an investment in any particular business is the amount which the real owners thereof receive when the books are balanced at the end of the year. If an individual or a company borrows money for the purpose of carrying on a business and is able to earn from the business only enough to pay interest on the money borrowed he would not claim that there was any "return" from that business. If a company earns only enough to pay interest on its bonds, it is of very little value as a going concern, and under such circumstances there is in fact no "return" at all. Even if it were true, as asserted by counsel, that in the year 1913 the "capital stock" earned very nearly 3 per cent., that would still be less than half of what the United States Supreme Court has said is a reasonable return. But, of course, the truth of the fact of the matter is that the "capital stock" did not earn "nearly 3 per cent.;" it in fact earned only the percentage which is stated on Exhibit

R-1. The fallacy of defendants' argument on this point may be illustrated by supposing the case of a company with a very small capital stock, say $1,000, and with a very large bonded indebtedness, say $1,000,000. According to this argument, if that company earned enough to pay its bonded indebtedness (say at 5 per cent.) then it would be receiving a "return" of $50,000 on a capital stock of $1,000. That would be at the rate of 5,000 per cent. on its capital stock, although as a matter of fact the stockholders in such case would not receive a single penny.

Counsel also argued that the net income for the year 1913 was greater than the sum of $5,112,707 as appears under the item "Net Income from Railroad Operating Investments" in Exhibit R-1 at p. 933; and that in fact for that year prosecutor had "other income," and in that connection they call attention to Exhibit R-113, which shows a net income of $8,105,675.23. The difference in these figures is accounted for in the same way as the difference between the total operating revenue. The smaller figure is the net income (after paying interest) for the entire system, including the four auxiliary companies above named, which are separately operated, while the latter figure is limited to the Erie Railroad and the Chicago & Erie Railroad only.

Counsel also said that the "greatest stress" is laid upon the result of operations during the year 1914. What other year would counsel have the company select? The petition was not filed until late in the year 1913; the prosecutor had nothing to do with filing it, and if the City was unwise enough to attempt to compel this enormous expenditure at a time when the finances of the company were not able to bear it, the result may be unfortunate for the City, but it does not change the fact as to the financial conditions. The evidence

of the company covered its latest operations up to the time of the conclusion of the hearing. The Board of Directors of the company cannot anticipate the result of future operations, and in considering a work of this magnitude they must of necessity recognize existing conditions, and are not justified in discounting the future

Counsel also said that even in the bad conditions of 1914 the company made additions and betterments to its property and equipment, aggregating $14,475,703.33. This is true, but only a small part of this expenditure was made from *income* received during that year; the same exhibit (R-123) shows that during the same year the total amount of equipment trusts created that year was the sum of $6,238,948.94 (see p. 1359). This is included in the $14,475,703.33.

Exhibit R-123 also shows that various notes and securities were issued during the year ending June 30, 1914. See pages 1360-1365. Exhibit R-115 shows some of the equipment trusts above mentioned, and also shows that in April, 1912, "collateral notes" were issued maturing in April, 1915, to the amount of $10,000,000. A large portion of the proceeds of these notes were used for additions and betterments (see pp. 659, 660). It does not appear just how much of the proceeds of these notes was spent for additions and betterments for the year 1915, but the annual report (Exhibit R-123) shows that during that year the amount appropriated from *income* was the sum of only $502,742.77 (p. 1357).

Counsel also said that it "may be" there should be some deductions from the item of "other income" in Exhibit R-112 (p. 1336). The evidence shows that a large proportion of this item is in the form of dividends from Pennsylvania Coal Company, and of course there must be deducted the interest on the collateral bonds of that company as

well as the appropriations made to the sinking fund for the purpose of paying off those bonds.

In their argument, counsel for defendants assumed that the income may *all* be used for additions and betterments, overlooking entirely the claims of patient stockholders. But even if this assumption is correct, the City is demanding, and the Board of Public Utility Commissioners has ordered, that the company must disregard the requirements of all the other parts of its system between New York and Chicago, aggregating about 2,300 miles, for the purpose of improving a short stretch of track of less than two miles in a single city—and that, too, without regard to the requirements of other public authorities, and without consideration to the pressing needs for other improvements, and without reference to the constantly increasing exactions of both state and federal laws and regulations, and without reference to the company's obligations to carry on its operations as an interstate carrier of freight and passengers.

Counsel also said that it seems to be the practice of the company to pay for improvements out of current cash, charge the same to capital account, which increases the surplus until such time as the company is reimbursed from the sale of bonds. It is true in one sense that it has been the practice of the company to pay for improvements out of current cash—the reason for so doing being that it had no other source from which to pay for the improvements. The evidence shows that for several years past it has not been able to dispose of its bonds; therefore if the improvements were to be made they had to be paid for out of current income. The evidence further shows, however, that a considerable part of the improvements has been paid for out of the proceeds of notes which have been issued from time to time; and so far as equipment is concerned the cost

of that has been met by the creation of equipment trusts. For details of these, see Exhibit Erie-15, pp.2042-2246.

Counsel also said that the payment for improvements out of current cash "increases the surplus." It is not quite clear what counsel meant by this expression. It is obvious that the company has no more surplus after it has paid for improvements than it had when the money so used was in its treasury. To pay for improvements out of current income does not increase the company's surplus; it merely changes the form of the asset from cash to fixed property.

In discussing this point the Supreme Court said that the determination thereof is one of fact and that after a reading of the testimony on this point "we are unable to say that the Board's determination is without sufficient facts to support its conclusion" (p. 2277, l. 40). The testimony on this subject is *without dispute,* and we therefore submit it is a question of law which this Court must pass upon. The evidence demonstrates that the prosecutor has not sufficient funds to carry out this order and has no reasonable prospect of obtaining same.

The Supreme Court further says on this subject that "the expense is not a reason against its legality" (p. 2278, l. 8). As we have pointed out hereinbefore, the very case cited by the Supreme Court to sustain this statement, namely, *Health Department* v. *Rector, etc. of Trinity Church,* 145 N. Y. 32; 39 N. E. 833; 27 L. R. A. 710, says that if the expense is "unreasonable", that fact is material in deciding whether the method or means adopted for the attainment of the object were or were not an unreasonable demand. *"Of this the court must, within proper limits, be the judges." Idem.*

XV.

SAID ORDER IS UNREASONABLE IN THAT IT REQUIRES THE PROSECUTOR TO ALTER THE SEVERAL HIGHWAY GRADE CROSSINGS ACCORDING TO A PLAN WHICH IS MORE EXPENSIVE TO THE PROSECUTOR THAN IS NECESSARY FOR THE PURPOSE OF REMOVING THE DANGER TO PUBLIC SAFETY OR THE IMPEDIMENT TO PUBLIC TRAVEL AT SAID CROSSINGS, IN THE FOLLOWING PARTICULARS:

(*a*) *Said order failed to adopt the suggested proposal of the prosecutor for the elimination of the grade crossings at Keen, Warren and River Streets.*

(*b*) *Said order failed to adopt the suggestion of the prosecutor for the consolidation of the crossings at Straight and Clay Streets.*

(Reasons 65, 66 & 67.)

(*a*) *Company's suggestion for Keen, Warren and River Streets.*

The engineers of the company suggested to the Board a modification of the City's plan for the elimination of the crossings at Keen, Warren and River Streets. Under this plan there would be an undergrade crossing at Keen Street which would be accomplished by depressing that street somewhat more than the City's plan; a pedestrian subway at Warren Street and a twenty foot driveway for vehicles from Warren Street to River Street and from Warren Street to Keen Street. The crossing at River Street would be eliminated by divertaing that street, running it parallel to the railroad on the southerly side and go across the railroad on a viaduct near the west end of the River Street freight house (p. 545, l. 20 to p. 546, l. 20).

A further description of this plan appears in the cross examination of the engineer who testified thereto. The proposed driveway would be entirely on the right of way (p. 550, l. 32). The River Street station remains at its present location, but stairways and a pedestrian subway are provided. The station platforms would be over 700 feet (p. 547 to 553). The adoption of this scheme would save the railroad the sum of $151,566 (p. 546, l. 28, Ex. R-106, pp. 1328-1330).

The Board refused to adopt this proposal, saying that it did not "commend itself." The objection to it, as stated by the Board, was that the highway grades on the approaches to the Keen Street bridge and that the approach to the viaduct crossing at River Street are excessive and that the right angled turn on the viaduct at River Street is dangerous; also that the platforms provided in the plan are shorter than they should be, according to the claim of the railroad company. "The objections more than balance the possible saving in cost" (see Report of Board, Vol. IV, p. 1763, ll. 10-20).

It will be seen that the Board had no hesitation in approving schemes for extra and entirely unnecessary expense to the railroad company, such as a *new* undergrade crossing at Montgomery Street at a cost of $38,451.97; a *new* undergrade crossing at Taylor Street at a cost of $71,878.20; the widening of an existing undergrade crossing at Essex Street at a cost of $80,225.72, and the destruction at that street of abutments and other structures, valued at $27,535; the relocation of the Market Street station at a cost of $116,680; the relocation of River Street station at a cost of $24,265 (besides the value of the present station buildings, which will be destroyed); the construction of a new building for Morris & Company at a cost of $40,000; the construction of a new build-

ing for Fullers Express Company at a cost of $12,000, and the relocation and reconstruction of side tracks and bridges on which to carry same at a cost of $249,393.92—many of which items the company is under no legal duty to perform, and none of which is necessary for the general plan of the elimination of the crossings. But when the company makes a suggestion, whereby it would be saved the trifling sum of $151,566, it is promptly rejected because some of the highway crossings are not quite as convenient as they might be under the more expensive plan proposed by the City.

Two of the three streets involved in the company's plan, namely, Keen and Warren Streets, are of comparatively small importance and might well be closed up entirely without seriously affecting the public interests of the City of Paterson, but the company's plan provides for Keen Street to remain open—the crossing to be undergrade, and provides for a pedestrian subway at Warren Street, while at River Street the "turn" on the viaduct is entirely practicable.

We submit that in considering a plan of this magnitude it was the duty of the Board to adopt any reasonable plan that might be suggested which would result in a substantial saving to the company that was ordered to pay the cost, especially in a case like the present where the evidence shows the great importance to the company of saving every penny that could be saved without affecting the general plan of elimination. The action of the Board in refusing to adopt this proposal was unreasonable, and even if the order be sustained in other respects, the Board should be instructed to modify its order so that the company might effect this saving of about $150,000.

(*b*) *Company's suggestion for the consolidation of the crossings at Straight and Clay Streets.*

It was suggested by the company's engineer that it would be less expensive and entirely practicable to combine the two existing grade crossings at Straight and Clay Streets (p. 516, ll. 30-40). The maps show that these two crossings are very close to each other. The Board refused to adopt this suggestion on the theory that the "general lay-out" of the ground was such that both streets should be maintained at their present location (see Report of Board, Vol. IV., p. 1763, l. 40). Here again we have a case where the Board was unwilling to consider a reasonable suggestion which would substantially decrease the cost without in any way affecting the general plan for the elimination of the crossings.

In the affidavits taken by order of the Court this suggestion was further developed by the company's engineer, Mr. Brameld. He produced a plan showing the alteration of the street lines in certain respects but providing for a driveway of 36 feet and two sidewalks each of 12 feet. The proposed grades of the streets on the new locations would be 4%—the same as in the plan ordered by the Board. This plan does not affect the general scheme of elimination. It effects a saving of $58,-951.14 as compared with the plan ordered by the Board (Ex. Erie-20, Vol. IV., 2247-8; testimony, p. 1959).

Mr. Brameld also prepared another scheme for the elimination of the crossings at Straight, Clay and Cedar Streets. This proposed a combination of Clay and Straight Streets into one crossing and made it unnecessary to raise the tracks as high as in the plan ordered by the Board. It preserves a crossing at Cedar Street, making it undergrade, substantially on the present lines of that street.

The plan covers the same crossings as were involved in the section described as Section "C" on the Board's plan. It would not in any way affect the other crossings. It also has the advantage that the facilities of the railroad company at its freight yard and freight house would be preserved as they are at the present time—a much better scheme than the operation required by the Board's plan, which is what is termed a "switch-back movement" into the freight house (Ex. Erie-25, Vol. IV., p. 2250; testimony pp. 1964-5).

The saving to the railroad company effected by this plan is the sum of $360,381.20 (Vol. IV., p. 1965, l. 28).

This latter suggestion was not presented to the Board, as at the time of the several hearings it had not been fully developed. It is, however, a striking illustration of the failure on the part both of the Board and its engineers and of the City and its engineers, to give full consideration and proper detailed study to the problem of eliminating the crossings. It is so easy to spend the money of other people that those who have the alleged power to do so are not solicitous to discover a reasonable means of saving money. In this instance the cost of this part of the plan as ordered by the Board is $652,979.70—more than double the cost of the new plan. Whatever becomes of the rest of the order, we submit that the Board should be directed by the Court to give further consideration to the general plan for elimination for the purpose of making whatever saving is reasonably practicable, and especially this saving of $360,000.

In discussing this point the Supreme Court said:

> "We think that the propriety of the plan adopted by the Board is amply supported by evidence. This court will not disturb such a finding, unless it be unreasonable, or based

upon some illegal principle, or lacks evidential support."
(p. 2286, ll. 25-30.)

One of the company's suggestions would result in a saving of $150,000; the other in a saving of $360,000. We submit that the evidence shows that the purpose of the elimination of the grade crossings could be accomplished just as effectively under the company's plan as to the crossings now under consideration as it could be under the much more expensive plan approved by the Board. Under the company's suggestions there would be a saving of over half a million dollars. Is it not "unreasonable" on the part of the Board to require this additional and unnecessary expenditure—especially in view of the other testimony showing the extraordinary financial hardship which results to the company by reason of the order?

XVI.

SAID ORDER IS UNREASONABLE IN THE FOLLOWING RESPECTS:

(a) It arbitrarily limits the dates of the beginning and of the completion of the work of construction required in the execution thereof.

(b) It arbitrarily requires the work of construction in the execution thereof to be done according to certain designated divisions and in the sequence of said divisions.

(c) It arbitrarily requires the alteration of the several crossings according to a certain specified plan without any provision for such changes or modifications of the details of said plan as may become necessary during the work of construction.

(Reasons 68, 69, 74.)

(a) *Limitation of dates of beginning and completing work.*

The order directs that the prosecutor begin the actual work of construction on or before August 1, 1916, and continuously carry on the same thereafter and perform and fully comply with the order and complete all of the work within 8 years from the date of the order (April 20, 1915), and that in the continuous prosecution of the work it take up in the order named the divisions thereof designated in the profile as "A," "B," "C" and "D"; "the work required in connection with Section 'A' thereof to be begun on or before August 1st, 1916, and to be completed within four years and three months from the date hereof; the work required in connection with Section 'B' to be begun within four years and three months from the date hereof and completed within five years and six months of the date hereof; the work required in

connection with Section 'C' to be begun within five years and six months from the date hereof and completed within seven years and three months from the date hereof, and the work in connection with Section 'D' to be begun within seven years and three months and completed within eight years from the date hereof."

The various sections and the cost thereof are shown on Schedule "D," attached to the Board's report, as follows:

SECTION A.	
Market to Lafayette. 1% Grade Essex to Market. 1% Grade Hamilton to Keen. Closing of Franklin and Keen temporarily.....	$1,666,037.03
SECTION B.	
Eliminating Keen, Warren and River streets	491,366.96
SECTION C.	
Straight to Market street.....	652,979.70
SECTION D.	
Eliminating Madison avenue.....	319,608.67

(Vol. IV, p. 1771.)

The cost of Section "D" for the elimination of Madison avenue will be $127,474.75, as the Board adopted the railroad's plan for that crossing in lieu of the more expensive plan proposed by the City.

Under the testimony of the company's engineer the time required for the doing of the work would be as follows:

Section "A".....3 years,
Section "B".....1 year 3 months,
Section "C".....1 year 8½ months,
Section "D".....9 to 10 months.

So far as the time limit of eight years is concerned, the prosecutor does not complain, but the difficulty with fixing a hard and fast date for the beginning or the completion of the work on certain sections thereof is that the estimates for each section are necessarily more or less uncertain, and in the very nature of things may have to be changed or modified as the work progresses, due either to unexpected difficulties that may arise or to unforseen financial complications or to other causes that may make it impracticable, and perhaps impossible to comply with the Board's order in this respect. Under the statute the Board may order the company operating such railroad, "within such time as said Board may fix," to alter such crossings, etc. This might justify the Board in fixing a time *limit* within which the work is to be completed, but it does not justify the Board in fixing the date within which the work is to be begun, nor does it justify the Board in fixing dates on or before which certain sections are to be begun and to be completed.

(b) *Designation of divisions of work and sequence thereof.*

It will be observed that that part of the order quoted under (b) not only requires the various sections to be begun and completed on certain dates, but also requires that the work be done according to the divisions there designated and in the sequence of said divisions; that is, Section "A" is to be done first, then Section "B," then "C" and then "D." We submit that this part of the order is unreasonable, first, because any designations whatever are specified. The Board itself says in its report, that *all* of the work must be considered in any plan of elimination. For convenience, engineers in preparing their estimates divided the work into various sections, but who

shall say at what particular rail length or at what particular stone in the highway one section shall begin and the other section shall end? It may well be that as the work progresses it may be more convenient or more economical to carry on more than one section at the same time, or to combine parts of sections, but under this order the prosecutor is unable to make any such changes while doing the work except at the risk of suffering the pains and penalties prescribed by the act concerning public utilities for a violation of the Board's order.

This part of the order is further objectionable because of the sequence on which the work on the designated divisions must be done. It will be observed that Section "A," which must be done first, is the most expensive of all the sections, and the cost thereof will be more than half of the total cost. The company engineer, Mr. Falconer, said that the work of Section "D" should be done first; that this would not be affected by work on any of the other sections; and that the expense thereof would be the slightest (p. 835, l. 30). The next section, he said, should be either Section "B" or Section "C" and which ever of those two sections is done first the other should follow as the third, and that Section "A" should be the last (p. 836). This arrangement, he said, was entirely practicable from an engineering standpoint (p. 836, l. 30).

Notwithstanding this testimony, the Board arbitrarily selected the most expensive and the most difficult work to be done first.

We submit that in this respect the order is unreasonable, and if sustained at all it should at least be modified by providing that the work be done in the order proposed by the company.

Counsel for defendants claimed in the argument before the Supreme Court that the division of

the work as stated in the order was made into sections "as suggested by the railroad company." By way of anticipation of any like argument that may be made in this court, it should be stated that while it is true the engineers of the railroad suggested the feasibility of dividing the work into such sections, they did *not* recommend that the work upon the respective sections should be done in the sequence specified by the Board's order. The sequence recommended by the railroad company was that Section D should be done first and next either Section B or Section C, and whichever of these two were first done, the other should follow as the third, and that Section A should be the last.

It is true that the periods of time for the work of the respective sections correspond substantially to that recommended by the railroad, but there was no suggestion or undertaking on its part that the several sections could positively be completed within the respective time limits.

In the Supreme Court counsel for defendants argued that the "natural method" of doing the work was is to take the central portion, Section A, and complete that, and then take the sections on either side thereof known as B and C; and it was further argued that to complete B and C before A would cause the trains to run up and down in the manner of a "roller-coaster." Such argument is more vivid than accurate. We submit that the "natural method" of doing a large engineering job of this kind is to begin at the beginning—which in this case would be Madison avenue; and then to proceed with one or the other of the two smaller sections, B or C, and to do Section A last. If Section A is done first, as ordered by the Board, the result would be a hump in the railroad tracks at or near Market street, with a gradual descent on either side thereof to

reach Section B on the north, and Section C on the south. The trains under such method of construction would run up the hill and down again; and the Market street station would be at the apex, with part of each train that stops there on one side and the rest on the other. But whatever may be the "natural method," the *evidence* shows that the work should be done in the sequence of Section D, then of either Sections B or C, and finally of Section A. We do not claim that it would be an engineering impossibility to do the work on the several sections in the sequence thereof, which is directed by the Board's order, but we do say that there is no evidence to justify the Board in directing the work to be done in such sequence and that that part of the Board's order is therefore arbitrary and unreasonable. This is a very serious matter from the standpoint of the railroad, because the difference in the cost of the construction of the respective sections is so substantial that the company's ability or inability, on the financial side, to comply with the order may depend upon which section is done first. If the elimination of these crossings must be accomplished, regardless of financial considerations, the company, we submit, should at least have the option of deciding which of the several sections should be first completed. It is true that section one of the statute purports to empower the Board to order the railroad to eliminate a crossing "within such time as said Board may fix"; but that, we submit, does not permit the Board to order that the work on any one or more of a series of crossings comprising, what for convenience have been called in this proceeding, "Sections," should be begun and completed within a certain limited time. If the Board has authority under this statute (which we do not admit) to make an order affecting more than one crossing in the same proceeding, we submit that

the time to be fixed by the Board should relate to the *entire* work and not to any particular subdivision or subdivisions thereof. Thus, in the present case, if any order at all is to be made, it should provide that the entire work be completed, within eight years, but the sequence of the construction should be left to the discretion of the company. It must be assumed that if this order is finally affirmed, the company will proceed to comply therewith in good faith; and it should therefore at least have the privilege of proceeding with the work in the sequence recommended by its own engineers, and not objected to by the City engineers.

(c) *No provisions for changes in details.*

It is quite inevitable that in construction work of this magnitude unforeseen engineering difficulties will arise. The order under review makes no provision for any change in the plan attached to the order. Said plan does not furnish the prosecutor with the details, without which it is impossible to carry out the plan. It is also practically certain that as the detailed plans for the work are developed and as the work proceeds it will be desirable, if not necessary, to make various changes. For example, it was shown that under Point XV a change in the Board's plan involving Section "C" would effect a saving of $360,000 without affecting the general scheme of elimination. The order makes no provision for any such changes nor, indeed, for any changes whatever. There should at least have been a reservation in the order giving the interested parties leave to apply for permission to modify the details of the plan as the work progressed.

In this connection, we may call attention to the fact that the plan itself is insufficient and uncer-

tain and does not definitely describe the work which the prosecutor was required to do. In the case of *Missouri Pacific R. R. Co.* v. *Omaha,* 235 U. S. 121, one of the questions was whether the ordinance was void for uncertainty, and this involved the further question of whether the plans for the work required to be done thereunder were so definite that the work could be carried out. The U. S. Supreme Court refused to set aside the ordinance on this ground, holding that the question of uncertainty was one of fact which the court below had passed upon. This is a plain intimation that if the plans were so indefinite and uncertain that they could not be carried out, the ordinance would be bad. We submit that this rule applies to the facts of the present case. Section 1 of the Grade Crossing statute provides that the crossings are to be eliminated "according to plans" to be approved by the Board. As pointed out in the oral argument, the word "plans" does not mean merely a picture, merely a sketch and profile of a surveyor. In the present case there are many necessary construction details which cannot be determined by reference to the order and the plan and profile forming part thereof.

The plan and profile are so incomplete and indefinite that it is obviously impossible to determine numerous details which are essential in order to know what is required. Thus, the profile apparently contemplates bridges at the streets where the railroad tracks are elevated above the respective highways, but the location of the abutments is not shown, and, indeed, so far as is indicated on the plan and profile there are no abutments at all. Further, there is nothing to indicate the type of bridge nor the dimensions thereof, except as the same may be inferred by scaling the apparent width of the highways—but even that gives no

information as to the depth of the girders nor other details which are essential before it can be determined what kind of bridge is required.

Furthermore, there are no details as to the retaining walls which must be constructed on that part of the railroad tracks which lies between the several highways—indeed, even the location of the retaining walls is not indicated, unless such location is to be inferred by reference to certain unmarked lines which run parallel with and near to the apparent location of the railroad tracks.

The order requires changes in the grades of certain streets, but there is no information as to the type of pavement nor to the size or location of the curbing or sidewalks—not even the width of the sidewalks is indicated. The new construction will require numerous changes in water pipes, sewers, manholes, telegraph wires, telephone conduits, etc., but not one of these changes is shown on the plan or profile.

Neither the plan nor profile shows any cross sections, nor gives any information as to the materials to be used for the walls, bridges, girders, etc.

When the plan is so incomplete and uncertain it should be set aside. See *Boston & L. Corp.* v. *Middlesex County Comrs.*, 198 Mass., 584, 85 N. E. 108; *Housatonic R. R.* v. *Lee & Hudson R. R.*, 118 Mass. 391.

These are a few examples of the uncertainty of the "plans," and the impossibility of complying therewith. A striking illustration of the uncertainty of the plans is the station at River street. According to the interpretation of the prosecutor, the station is required to be moved to the opposite side of the tracks, as indicated by the word "depot" on the surveyor's sketch, but according to counsel for defendants, the station is to remain in its present location.

It may be said by counsel for the defendants that if there is any uncertainty in the order the Board has power to modify it. This does not meet the present objection; there must be a valid order to start with.

It may also be said that the railroad engineers have made certain estimates of the cost of the work based upon certain quantities of concrete, of excavation, of filling, etc. This is true, but these estimates were based in large part upon the corresponding estimates of the city's engineers, and there is nothing in the *order or in the plan or profile* which specifies the kind of materials that are to be used.

It may also be said that the plan was sufficiently specific to permit an estimate of the cost to be made. That is true, with the modification that in preparing the estimates the engineers had to and did *assume* that certain material would be used, but there is nothing in the order which specifies such material, and therefore the company cannot tell whether it is or will be required to use that or some other kind of material. The uncertainty in the "plans" and the difficulty of determining what was to be done thereunder is illustrated by the difference in the estimates of cost prepared by the city engineers and by the company's engineers.

CHAPTER THIRD.

Reasons attacking said order on the ground that the order violates certain provisions of the State and of the Federal Constitution.

XVII.

THE ORDER UNDER REVIEW IS UNCONSTITUTIONAL BECAUSE IT TAKES THE PROPERTY OF THE PROSECUTOR AS THE LESSEE OF THE RAILROADS OF THE PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY FOR THE PRIVATE USE AND BENEFIT OF SAID TWO COMPANIES, THE RESPECTIVE OWNERS OF SAID RAILROADS.

(Reasons 38, 35, 36, 37.)

The charter of the Paterson & Hudson River Railroad Company has no limit for the period of the corporate existence of the company, but Section 17 provides that at any time after the expiration of 50 years from the completion of the road the Legislature may cause an appraisement to be made; and the value thereof is to be reported to the Legislature in one year after the appointment of appraisers and thereupon "The State shall have the privilege for three years of taking said road upon the payment to the company of the amount of the said report within one year after electing to take said road * * * and the whole property and interest of said road, and the appendages thereof, shall be vested in the State of New Jersey upon payment of the amount so reported to the said company." It is further provided that it shall be the duty of the president of the company to lay before the Legislature under oath on request a full and

fair statement of the costs of the road and of the receipts and disbursements of the company, "provided always that the aforesaid valuation shall be made without reference to the receipts or disbursements of the company, or advance of the stock, and the said valuation shall in no case exceed the *first* costs of the said railroad with the lands and appendages thereof" (pp. 969, 970).

A supplement to the charter passed February 27, 1835, repeals so much of the 17th section as authorized the Legislature to cause an appraisement to be made at any time after the expiration of fifty years from the completion of said road; and enacts that the Legislature may cause such appraisement to be made at any time after the expiration of fifty years from the 4th day of July, 1836 (pp. 973, 974).

An Act approved February 21, 1856, authorized the New York & Erie Railroad Company to purchase and hold lands and to complete and finish the railroad of the Paterson & Hudson River Railroad Company. This gives the New York & Erie Railroad Company power to proceed in their own name to construct the railroad from any point in the railroad of the Paterson & Hudson River Railroad to any point on the Hudson river opposite the City of New York, according to the provisions of the act incorporating said Paterson & Hudson River Railroad and the several supplements thereto. Section 3 of this Act provides that for the purpose of enabling the State to take the said railroad upon an appraisement of its value at any time after July 4, 1886, "the continuation of said railroad and its depots and appendages, constructed, purchased and acquired by virtue of the provisions of this act, shall be considered part of the road of the Paterson & Hudson River Railroad Company, and may and shall be taken by the State at the same time and in

the same manner as the State may take the road of said company," except that the lands and appendages acquired or purchased by the New York & Erie Railroad Company shall be appraised separately from the residue and the value thereof paid to New York & Erie Railroad Company (p. 982).

The lease from the Paterson & Hudson River Railroad Company to the Union Railroad provides for a yearly rental of $45,600. The lessee also agrees that they and their successors or assigns "will bear and pay to the State of New Jersey for taxes that may be laid by the authority of the said State on the parties of the first part or their property such amount of money annually as shall be equivalent to one-half of one per cent. on the capital stock of six hundred thousand dollars of the parties of the first part."

The charter of the Paterson & Ramapo Railroad Company is also without limit as to the period of the corporate existence. Section 19 thereof has a provision similar to that in the charter of the Paterson & Hudson River Railroad Company providing that at any time after the expiration of fifty years from the completion of the road the Legislature may cause an appraisement to be made, and shall then have the privilege for three years of taking the road upon payment of the amount of the report, and the whole property and interest shall then be vested in the State, "and the said valuation shall in no case exceed the first cost of the said railroad with the lands and appendages thereof" (pp. 1015-16.)

By lease dated September 9, 1852, the Paterson & Hudson River Railroad Company leased all the railroad and appurtenances to Union Railroad Company, to have and to hold "from and including the fifteenth day of September, one thousand eight hundred and fifty-two, for and during the

existence and continuance of the charter of the parties of the first part, and the legal existence of the said The President and Directors of the Paterson & Hudson River Railroad Company, by virtue and in pursuance of the Act of incorporation of the Legislature of the State of New Jersey, passed January 21, 1831, and all other acts of said Legislature relating thereto" (p. 988). The parties of the second part agreed to keep and maintain the railroad in as good repair as it was at the date of the demise; and further agreed to keep and maintain and run the railroad and other premises in such manner, order and condition as the said parties of the first part are bound to keep and maintain and run the same by the charter and supplements thereto (p. 992).

It was further agreed that if at the termination of the demise and on the "cessation of the interest of the parties of the second part" it should appear that there was any depreciation of the premises by the use or neglect thereof that the same should be appraised by three arbitrators and the value or amount of such depreciation should be paid and discharged by the parties of the second part. It was further agreed that if "any erections or improvements" should, during the sad term, be made on the premises or pertaining thereto the same should at the termination of the term and the "cessation of the interest" of the parties of the second part be valued by arbitrators, and the parties of the first part should pay and discharge the amount so valued to the parties of the second part or their assigns.

The Paterson & Ramapo Railroad Company also leased its railroad to the Union Railroad Company September 9, 1852. The terms thereof were substantially the same as in the lease of the Paterson & Hudson River Railroad Company of the same

date. The lessee agreed to pay a yearly rent of $26,500; and further agreed "to bear and discharge all the taxes that may be imposed on them, the parties of the first part, or on their property and estate by the Legislature of New Jersey, during the continuance of the demise or demises in this instrument made or agreed to be made." It was further agreed "that if during the existence of the lease or leases, made or to be made, to the parties of the second part, they the said last named parties shall make or construct any buildings or additions to the road herein mentioned, whereby additional taxes shall be charged or levied on said road, then the parties of the second part shall bear and discharge the additional taxes" (p. 1030).

On September 10, 1852, these two leases were assigned by the Union Railroad Company to New York & Erie Railroad Company (p. 1031 and following). The assignment was from and including September 15, 1852, for and during the existence and continuance of the charter of the Union Railroad Company and the legal existence of said company (p. 1033). By sundry conveyances, foreclosures and assignments as set forth in detail in Exhibit R. 15, Abstract of Title—(p. 950 and following) all the rights, property and franchises of the above named companies on November 14, 1895, became vested in the Erie Railroad Company.

It will be seen from the foregoing summary of the various statutes and leases by virtue of which the prosecutor runs trains through Paterson over the tracks of the Paterson & Hudson River Railroad Company and the Paterson & Ramapo Railroad Company that the legal title to the railroad property over which these trains pass remains in the original companies. If the prosecutor, the assignee or successor in interest of the leases made

originally to Union Railroad Company by the two original companies is obliged to expend the sum of three million dollars and upwards in the improvement of the properties of said two companies, the question at once arises whether such a forced expenditure does not take the property of the prosecutor for the private benefit of said two companies. These companies under their respective leases (which have been duly authorized or ratified by the Legislature) may be relieved from the obligation of running trains during the term of the lease (although, as we have shown under Point XIII, they are still charged with the duty of constructing and maintaining crossings). Under the present order of the Board they are relieved from the burden of altering the crossings or even from making any financial contribution for that purpose; they are not even included as joint obligees, although the prosecutor requested that if any order were made it be made against these two companies and the prosecutor jointly, so that the question of the apportionment of the cost of eliminating the crossings might be determined by appropriate proceedings. As the landlord of the prosecutor, and as the owner of the real estate upon which the improvements required by the Board's order are to be made they may sit back and receive the full benefit thereof in the vastly increased value of their property without the expenditure of one penny. Such a state of affairs is a legal absurdity, and yet it is the necessary result of the Board's order.

Suppose that the existing leases should in some way be terminated. There are several references therein to the possible termination thereof, and hence such a contingency was evidently in the contemplation of the parties thereto at the time the leases were executed. To mention some of the

ways in which the leases might be terminated, suppose the lessee refused to pay the rent thereunder; or suppose the lessee, either under some existing or if not existing then some future law, should obtain permission to abandon the running of its trains on the ground that the income derived therefrom was not sufficient to give it a reasonable return upon the amount of the investment required to be made by this order. Suppose the prosecutor refused to pay the taxes as required by the terms of the lease. Under the provisions of sections 14 and 15 of the Railroad Tax Act of 1884, as amended in 1888 (Comp. State. p. 5271, secs. 458-9), where any tax remains unpaid for ten days, judgment for the amount thereof shall be entered in the Supreme Court after due notice and the Attorney General must then apply for an order to issue execution to a Master in Chancery, and the latter is required to sell the franchise, real estate, rolling stock and property of the company and the estate and interest of any mortgagees for the purpose of making the amount due on such judgment. Such a sale would pass title to the franchises and property thus sold and would effectively operate to end the leases.

It is true that under one of the sections of the respective leases of the original railroads to the Union Railroad, there is a provision that if "any erections or improvements" shall be made during the term of the lease the same shall be valued by arbitrators and the railroad shall pay and discharge the amount so valued. It is at least doubtful whether this provision would apply to a change in the grade of the tracks resulting from the alteration of grade crossings, but whether it would or not it would be ridiculous to expect that either railroad would be financially able to pay to the prosecutor the amount expended by the prosecutor on its property. If we assume that the

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expression "erections or improvements" in the two leases is applicable to the reconstruction of railroad grades, made under compulsion, pursuant to an order of an administrative Board, the fact still remains that the theoretical right of the prosecutor to recover from the original companies on the termination of the leases is of little practical importance for the obvious reason that neither of the underlying companies has resources sufficient to meet the cost of the construction required by the order under review. Suppose that by operation of law or by some action on the part of the State, or on the part of either or both of the parties to the respective leases the term thereof should be terminated. Under the suggested construction of the leases the prosecutor then looks to the original companies for reimbursement. But in such a case how would it be paid? The only income of the Paterson & Hudson River R. R. is a yearly rental of $45,600 specified in the lease from that company to Union Railroad Company (see Exhibit R. 15, p. 988). The only income of the Paterson & Ramapo R. R. is a yearly rental of $26,500 specified in the lease from that company to Union Railroad Company (see Exhibit R. 15, p. 1026). It is quite obvious that an attempt on the part of the prosecutor to collect from the two original companies the cost of the work required by the order under review would bankrupt said companies; and hence the prosecutor has no practicable method of obtaining reimbursement from these companies, on the expiration of leases, for the amount required to be expended by it for the reconstruction of the tracks, even if under the terms of the leases it would be entitled to a judgment therefor.

It is quite apparent that the improvements required to be made by the prosecutor would add immensely to the value of the property both of the Paterson & Hudson River Railroad and the Pater-

son & Ramapo Railroad without any advantage of return to the prosecutor. This is the taking of property from one person for the benefit of another on a gigantic scale.

But if it be claimed that under this order the prosecutor is required to make this vast expenditure for the public use rather than for the private benefit of the two original companies, still the order is objectionable because it takes the property of the prosecutor without just compensation. It will be seen by reference to the above charters and leases that the State of New Jersey has the right to take over the properties of both of the old companies—in the case of the Paterson & Hudson River Railroad at any time after July 4, 1886, and in the case of the Paterson & Ramapo Railroa dat any time after the expiration of 50 years from the completion of the road—which time has long since elapsed. But both of these charters further provide that if the State takes over the property the valuation to be paid by the State shall in no case exceed the first cost of the railroad with the lands and appendages thereof. The State would therefore have the right to take over the properties of the two old companies with all the interest of the prosecutor therein without reimbursement to the prosecutor for the great sum required to be spent by it under this order. The order therefore not only deprives the prosecutor of its property without *just* compensation, but deprives it without *any* compensation. If it be said that the prosecutor would be entitled to receive the value of the "first cost," the point still remains that the first cost of the entire railroad of each of the two original companies—in the one case extending to the Hudson River and the other to Suffern—could not by any possibility equal the amount required to be spent by the prosecutor in Paterson; and the first cost in Paterson as dis-

tinguished from the other sections of the railroad of the original companies would be comparatively small. This is indicated by the fact that under the orginal charter of the Paterson & Hudson River Railroad the total capital stock was only $250,000, with permission to increase the same to $500,000 (pp. 988-9). By Act of March 3, 1837, that company was given permission to increase its capital stock the further sum of $200,000. There is no provision for a bond issue except under the Act of January 18, 1844, which permits bonds to be issued in the sum of $100,000. It is safe to say that the first cost did not exceed the total amount of the issue of bonds and stocks.

As to the Paterson & Ramapo Railroad Company the original charter provides for a capital stock of $400,000 (p. 1006). By Act of February 9, 1858, it was allowed to issue bonds in the sum of $100,000. This act recites that the company has heretofore issued bonds amounting in the aggregate to $100,000. The total bond and stock issue of this company therefore does not exceed $600,000, and all the stock and all the bonds of both companies together covering all of their respective railroads amount to less than half of the amount required to be spent by the prosecutor

In this point the Supreme Court said:

> "Such permanent erections or improvements and the moneys thereon expended are not, therefore, taken for the private use of the lessors in the sense contemplated by the Constitution; upon the contrary, such improvements are to be used and enjoyed by the lessee during its term, and if taken at all by the lessor are to be paid for at their value, which may be greatly in excess of their cost."
>
> (p. 2288, ll. 25-30.)

This assumes that the lessors have the means whereby to pay the value of these improvements in

the event of a termination of the respective leases. As shown above, such an assumption is without any foundation in fact, as the actual cost of doing the work required by this order not only exceeds the value of the property of the respective lessors in Paterson but nearly equals the *total* value of their property. (See Ex. R-17, p. 1056; Ex. R-18, p. 1057; R-19, p. 1059.) The argument of the Supreme Court might be sound if there was any reasonable relation whatever between the actual cost of the improvements and the capacity of the original lessors to pay for same. But when the difference is so vast as to make it obvious that by no possibility could the lessors make such payment, then we submit the reasoning fails.

XVIII.

THE ORDER UNDER REVIEW VIOLATES THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION IN THAT IT CONFISCATES THE PROPERTY OF THE PROSECUTOR BECAUSE THE COST OF COMPLYING THEREWITH WILL GREATLY EXCEED THE VALUE OF THE PROSECUTOR'S INTEREST IN THE PROPERTY OF THE PATERSON & HUDSON RIVER RAILROAD COMPANY AND PATERSON & RAMAPO RAILROAD COMPANY WITHOUT ANY COMPENSATING ADVANTAGE TO THE PROSECUTOR, AND WILL MAKE THE INVESTMENT OF THE PROSECUTOR IN SAID PROPERTIES INCAPABLE OF EARNING A FAIR AND REASONABLE RETURN UPON THE AMOUNT OF ITS INVESTMENT THEREIN.

(Reasons 38, 35, 36, 37.)

The order under review confiscates the property of the prosecutor, because the cost of complying

therewith will greatly exceed the value of its interest in the property of the Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company without any compensating advantage to the prosecutor, and will make the investment of the prosecutor in said properties incapable of earning a fair and reasonable return upon the investment thereon. The Board in its report calls attention to the testimony offered by the prosecutor, that at the present time it expends $14,736.87 for the wages of employees and $2,-101.59 for the cost of maintenance of the several grade crossings each year. (Vol. 4, p. 1754, lines 1 to 10; Schedule "A" attached to Board's Report, pp. 1766-7); the Board then says that this sum is the interest at five per cent. upon approximately $350,000 (p. 1754, line 8). Apparently the inference that the Board desires to draw from this statement is that the elimination of the crossings amounts to a saving to the prosecutor of the sum of $350,000, but the trouble with any such inference is that the prosecutor does not get the $350,000, on the contrary, it is obliged to expend the sum of $3,000,000 and upwards, which, at five per cent. amounts to the sum of $150,000 a year, or nearly ten times the present annual cost of protecting and maintaining the crossings. This suggestion of the Board also overlooks the fact that even if the grade crossings are eliminated there will be an annual charge against the railroad for repairs and maintenance of the bridges and abutments at the several crossings. There will also be an annual charge for the proper maintenance of the roadway and sidewalks within the limits of the right of way. These items will probably considerably exceed the sum now expended for the wages of employes and for the maintenance of the several crossings at grade. There might be some force in this suggestion of the Board if any compensating advantage

would be obtained by the prosecutor in the way of an increased income by reason of the changes of grade, but there is not a particle of evidence to suggest that there will be any such increase; on the contrary, the evidence indicates that there will probably be a very decided decrease in operating income due to the destruction of a large number of sidetracks and the consequent disability to handle freight to and from such sidetracks. A construction of the kind required by the order is very different from original construction, and in the very nature of things, cannot be expected to result in any compensating advantage to the prosecutor except the comparatively trifling saving of the cost of present protection and maintenance.

Not only is there no compensating advantage to the prosecutor by reason of the execution of this order but the great cost thereof so greatly exceeds the value of the prosecutor's interest in the Paterson & Hudson River Railroad and Paterson & Ramapo Railroad that it amounts to confiscation. Of course the ordinary increased expenses, due to the necessity of providing protection at crossings as traffic increases, are incidental to the right of the prosecutor to cross at grade; but we do not claim that the imposition of such ordinary expenses in any sense deprives the prosecutor of its property without due process or amounts to a confiscation of its property; but the present case is entirely different. According to the terms of the lease of the Paterson & Hudson River Railroad, the annual value of that lease is $45,600 (p. 988), which at five per cent. would be $930,000; the annual value of the lease of the Paterson & Ramapo Railroad is $26,500 (p. 1026), which at five per cent. would be $530,000, or the two together would be, $1,460,000. But that represents the total value of both railroads and not merely the small portions thereof located within the limits of the cross-

ings included in this proceeding. The cost to the prosecutor of carrying out this order, it will therefore be seen, is more than double the capitalized value of leases covering the entire railroads of the two original companies.

The assessed valuation of the properties of the Paterson & Hudson River Railroad, for the year 1912, between the city line and the terminus of that road near Market street, a distance of 1.978 miles, is $593,290, of the Paterson & Ramapo Railroad from the northerly terminus of the Paterson & Hudson River Railroad near Market street to the city line, a distance of 1.647 miles, is $495,474—a total of $1,088,764—which is only a little more than one-third of the cost (exclusive of property damage) to the prosecutor of complying with the order (See Ex. R-17, p. 1056). For convenience these valuations were taken within the City limits, although the particular portions of the property which are included within the limits of the crossings to be eliminated are somewhat less than the total length of the railroad line as given in those valuations.

The total valuation of the "physical elements" in New Jersey of the Paterson & Hudson River Railroad, according to the affidavit of Mr. Hansel, the expert appointed to re-value railroad property in New Jersey under Chapter 307 of the Laws of 1910, is $2,888,603, (Ex. R-18, p. 1057); and the total valuation of all the "physical elements" in the State of New Jersey of the Paterson & Ramapo Railroad, according to Mr. Hansel, is the sum of $1,836,688, (Ex. R-19, p. 1059).

The assessed valuations by the State Board of Assessors for the year 1913 are slightly less than the figures of Mr. Hansel (See Ex. R.-20, p. 1061). In this connection it is interesting to observe that the total capital stock and bonded indebtedness of the Paterson & Hudson River Railroad, as

authorized by the Legislature, is the sum of $800,000 (See pp. 958, 959, 974, 976), and the total capital stock and bonded indebtedness of the Paterson & Hudson River Railroad is $600,000 (See pp. 1006, 1025 and 1024). It will be seen that the cost to the prosecutor is approximately two-thirds the total value of all the property of both of the two original companies; if we add to the estimated cost of doing the work (which is nearly $3,000,000) the property damage, which, under the statute, the prosecutor is also required to pay, it is probable that the total amount thus imposed upon the prosecutor will equal, if not exceed, the total value of all the property of both companies in the entire State.

The case in this respect is the converse of the ordinary rate case, where the rate depends upon and is adjusted to the value of the property. In the present case the expenditure required of the prosecutor is so greatly in excess of any possible income that might be derived from an increase in the rates over that part of the prosecutor's line which is affected by the change of grade that the same principle, we submit, should apply as in a case where it is attempted to reduce a rate below what would bring a fair return upon the investment. Here the result of the order is to increase the prosecutor's investment to such an extent that it is impossible to derive any correspondingly increased revenue therefrom.

XIX.

THE ORDER UNDER REVIEW VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION BECAUSE IT IS AN UNREASONABLE EXERCISE OF THE POLICE POWER.

(Reasons 39, 40, 63.)

If we are right in the argument urged under Point XIII, in Chapter second, that the prosecutor is not the company operating the railroad within the meaning of the statute, then the order should for that reason be set aside. But even if the prosecutor is to be considered as the "operating" company, the said order, we submit, is nevertheless unconstitutional because it imposes upon the prosecutor the entire expense of altering the several grade crossings including damages to adjacent property (less such amount as is ordered to be paid by the street railway company using some of said crossings) and in this respect the order is an unreasonable exercise of the police power.

Of course, it will be urged that the order does not require the prosecutor to pay anything more than what the *statute* itself requires. This is correct, and therefore in the last analysis the question of whether the order violates the Fourteenth Amendment for the reasons above stated depends upon whether the statute itself does so. For discussion of this, see Point XXIV under Chapter fourth.

XX.

THE ORDER UNDER REVIEW IN SO FAR AS IT REQUIRES CHANGES IN OR THE REMOVAL OF THE PROPERTY OR CONSTRUCTIONS, OR CHANGES IN THE GRADE OR LOCATION THEREOF, OF PERSONS OR CORPORATIONS OTHER THAN THOSE WHO ARE INCLUDED WITHIN THE DESCRIPTION OF THE TERM "PUBLIC UTILITY," AS DEFINED IN CHAPTER 195 OF THE LAWS OF 1911, TO BE MADE AT THE EXPENSE OF SAID PERSONS OR CORPORATIONS; AND IN SO FAR AS IT REQUIRES THAT THE EXPENSE OF CHANGING MUNICIPAL UTILITIES, AND THAT THE EXPENSE OF PAVING, CURBING AND FLAGGING HIGHWAYS CONSTRUCTED AS THE RESULT OF CHANGES OF GRADE, TO BE BORNE BY THE MUNICIPALITIES, IS UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT SAID PERSONS, CORPORATIONS AND MUNICIPALITIES ARE NOT INCLUDED WITHIN THE DEFINITION OF "PUBLIC UTILITY" IN SAID CHAPTER 195 OF THE LAWS OF 1911.

(Reasons 41, 44, 42, 31 (e.))

Private Companies.

Section 4 of the statute reads, as follows:

> "Where the order of said board shall require changes in, or the removal of the property or construction of any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, they shall, at their own expense, move or change the grade or location of their property or 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 order under review directs that the Erie Railroad Co. and certain other companies and "all *other* parties to this proceedings" proceed with due diligence with the execution of the order, etc.

Among the "other" parties are many owners of side tracks and switches. By order of the Board they were expressly made parties. There are about sixty such owners of side tracks and many of them, as is shown under Points V. and XXII., will be affected by the order of the Board; in order to comply with the order they must relocate and reconstruct their side tracks; and in the case of the two of them, to wit: Morris & Co. and Fuller's Express Co., they must destroy the buildings which they now occupy and must erect other buildings indicated on the plan attached to the order. It may be that the order is invalid as to any of these owners of side tracks for the reason that they are not mentioned by name in the order, nor in the petition filed by the city (see *Del. etc. R. R. Co.* vs. *Board,* 84 N. J. L. 619). However that may be, this part of the order is clearly beyond the power of the Board for the reason that none of said owners come within the description of the term "public utility" as defined in section 15 of the act concerning public utilities (Chap. 195, laws of 1911).

If section 4 is construed to apply to these side track owners, that part of the statute at least is unconstitutional for the reason that the power of the Legislature does not extend to the regulation of the affairs of private companies or individuals that are not affected with a public interest, but if this part of the statute is invalid then we submit the entire statute must fall. (See cases cited under Point XXXIII.)

On the other hand if Section 4 is construed not to include private companies or individuals then

the *order* of the Board so far as it is directed to such parties is invalid; and for this reason the order must be set aside.

In this connection, attention may also be called to the fact that part of the property affected by the order under review is owned by a private corporation, which was not made a party to the proceeding, and has had no notice whatever thereof. We refer to the corporation known as Erie Land & Improvement Company, which is the owner of practically all of the freight yard. See Erie Railroad property map, Exhibit R-16, Sheet No. 7, property enclosed in green. So far as the order requires changes in the property of that company it is clearly invalid.

Municipal Corporations.

Section 3 of the statute upon which the order is based reads as follows:

> "The expense of removing, relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expense of paving, curbing and flagging the highway constructed as the result of the change of grade."

The order directs that the "City of Paterson" proceed with due diligence to the execution of the order. It is difficult to understand on what theory the Board of Public Utility Commissioners can undertake to order a municipal corporation to obey the laws of the State, but however that may be such a corporation is not within the definition of the term "Public Utility" as defined in Chap. 195 in laws of 1911. This part of the statute is therefore, clearly invalid.

In order to give the Board of Public Utility Commissioners any jurisdiction over the municipality the municipality must be included within the list

of "public utilities" as defined in statute under which the Board is organized. This was recognized by the Legislature in two recent statutes providing for the construction and operation of municipal railroads (see Ch. 350, p. 647, Sec. 20, at p. 655, Laws of 1915; and Ch. 412, p. 860, Sec. 15, at p. 866, Laws of 1915)—in both of which statutes it is expressly provided that the city constructing or operating such a railroad is "hereby declared to be a public utility in relation to its railroad."

But it may be said that the "City of Paterson" does not object to the order and that therefore the statute cannot be declared invalid in the present case where the point is raised by the Erie Railroad Co. The railroad company, however, is directly affected by a finding that Section 3 is beyond the power of Board, under Section 2 "the entire expense" must be paid by the railroad, but if Section 3, which requires certain expenses to be paid by the municipal corporation is invalid, then it follows that such expense must *also* be paid by the railroad under Section 2; if such expense is not to be paid, then the Board's order would be impossible of enforcement.

If this part of the statute is held to be unconstitutional then the whole act must fail, for the reasons above stated.

XXI.

THE ORDER UNDER REVIEW IN SO FAR AS IT REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES IN THE PROPERTIES OF PUBLIC SERVICE RAILWAY COMPANY, AND IN SO FAR AS IT LIMITS THE PROPORTION OF THE EXPENSE OF THE ALTERATIONS IN CERTAIN OF THE GRADE CROSSINGS, TO BE PAID BY THE STREET RAILWAY USING THE SAME, IS UNCONSTITUTONAL AND INVALID FOR THE FOLLOWING REASONS:

(a) *The Board of Public Utility Commissioners has no authority to require the prosecutor to make said changes; and even if it had, the prosecutor has no power and is under no legal obligation so to do.*

(b) *The proportion of expense to be paid by the street railway is not a fair or reasonable amount of the expense of such alterations in comparison with the danger to public safety and the impediment to public travel created by and chargeable to said street railway.*

(Reasons 52, except (h); 64 (a), 64 (b), 77 (e.))

At three of the crossings involved in the proceeding, namely, (1) Park avenue and Market street, (2) Broadway, and (3) River and Putnam streets, a street railway company known as Public Service Railway Company passes over the railroad tracks. The order under review, after reciting that the railway company uses these three crossings, continues as follows:

> "The board, in accordance with the power and authority vested in it by said act, further orders the Public Service Railway Company 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" (p. 1792, l. 10).

The order further directs that the prosecutor and the said railway company keep specific and complete records of the expense directly chargeable to those crossings, and leave was given to apply to the Board for further order in the event they could not agree upon the amount of such expenses. This part of the order was based upon section 2 of the statute of 1913, which provided that the entire expense be paid by the railroad unless a street railway uses the crossing, in which event the Board may order not exceeding ten per centum of the expenses "directly chargeable to the crossing used by the street railway" to be paid by the company operating the same.

Another paragraph of the order directs that any telegraph * * * or other company or corporation, co-partnership or individual whose property or construction it may be necessary to change or remove, to change or remove the same according to the said plan. A further paragraph orders that the Public Service Railway Company (together with the prosecutor and certain other companies specifically named) "proceed with due diligence to the execution of this order," (p. 1791, ll. 1-18).

We submit that the order is invalid in this respect for several reasons:

(a) *If the order be construed to require the prosecutor to perform the work of making the changes in the tracks, poles and wires of the Public Service Railway Company as indicated on the plan and profile, then the order is invalid because*

the Board of Public Utility Commissioners has no authority to require the prosecutor to make said changes; and even if it had, the prosecutor has no power and is under no legal obligation so to do.

In view of the fact that the prosecutor is ordered to perform "all other work" required according to and as shown on the plan and profile (p. 1790, l. 35), the order is open to the construction that the work of making the necessary changes in the properties of the Railroad Company must be done by the prosecutor. The plan shows that at the crossing at Market street and Park avenue a double line of trolley tracks approaches the railroad tracks from the southerly side of the right of way (Compass points according to railroad usage—Jersey City being east). A third track leads off from one of the trolley tracks at a point about 100 feet from the railroad tracks, and extends across the railroad tracks in a northerly direction, and thence as a single track through Market street, while the double line of trolley tracks, after crossing the railroad tracks, continues northerly as a double track along Park avenue. At the crossing of the railroad tracks there are three trolley tracks. The plan shows that the grade of Market street on the southerly side is to be lowered, beginning at a point 90 feet from the present railroad tracks—the grade being one per cent.; on the northerly side of the railroad tracks the grades of Market street and Park avenue are lowered, beginning at a point about 200 feet northerly from the railroad tracks, on Market street, and at a point 250 feet northerly on Park avenue—the grade on Market street being four per cent, and on Park avenue 4.5 per cent.

At Broadway there is a double line of trolley tracks. The plan shows that the grade of the street is to be changed on the southerly side of the

railroad tracks beginning at a point about 90 feet from the railroad tracks and passing thereunder on a 0.5 per cent. grade. On the northerly side the grade of street is to be changed beginning about 325 feet from railroad tracks, and passing under on a 5.0 per cent. grade.

At the crossing of River and Putnam streets there is a single line of trolley tracks passing over the railroad tracks at an acute angle. The plan and profile show that the grade of River street on the southerly side of the tracks is changed from the existing one and one-half per cent. grade to a level grade, beginning about 200 feet from nearest rail on present center line of street. On the northerly side of River street the grade is changed to a five per cent. grade, beginning at a point about 340 feet from the tracks. The plan calls for a change in the alignment of the trolley tracks as they pass over the crossing. By reason of these changes it will, of course, become necessary to reconstruct and relay the trolley tracks to correspond to the new grades. A summary of the necessary changes at these three crossings is given in Exhibit P. S. R. 1 (Vol. 2, pp. 1394-5), as follows:

1. Park avenue and Market street: Railroad tracks to be elevated 15 feet; street to be depressed 3 feet; total cost of changing trolley tracks (1895 feet) $18,816.12.

2. Broadway: Railroad tracks to be elevated the same as at Park avenue and Market street, and street to be depressed the same; total cost of changing trolly tracks (1379) feet), $14,830.80.

3. River and Putnam streets: Railroad tracks to be elevated 14 feet; street depressed about 3 feet; total cost of changing trolley tracks (940 feet) $8,659.

The details of these estimates are shown in Exhibit P. S. R., 2 (pp. 1403 to 1411). This exhibit shows that changes are required in the wires, rods, ballast, poles, feeders, derails and various other properties of the trolley company as specified in the estimate.

The question arises as to whose duty it is to make these changes and who is to pay the expense thereof. Of course the railroad takes the position that under section 4 of the statute of 1913 this work must be done, and this expense must be borne by the trolley company; but *the order does not say so*—or at least the order in this respect is ambiguous, because in one part thereof it directs the prosecutor to do all the work required as shown on the plan, and in another part thereof it directs the trolley company to proceed to the execution of the order and comply with all the requirements thereof. If the order means that the railroad must do this work and pay the expense thereof, then we submit it is invalid because it is not according to the terms of the statute—which, by virtue of section 4 imposes such burden upon the trolley company, *in addition* to the amount to be paid by the trolley company under section 2.

If, however, the order imposes on the railroad the burden of doing this work at its own expense, and if the statute be construed to authorize the Board to require such order, then both the statute and the order are invalid for several reasons:

1. The Board has no power to order the prosecutor to interfere with or in any manner change the location or use of the properties of the trolley company. The power of the Board respecting the crossing of a railroad track by trolley tracks is limited by section 22 of the act concerning public utilities. This gives the Board power to order the erection of gates or the adoption of some other

reasonable provision for the protection of the travelling public at such a grade crossing. There is nothing in that section or elsewhere in the staute which gives the Board any power to compel the railroad company to relay or reconstruct the tracks of the trolley company in a public street when the grade of the street is changed for the purpose of effecting a crossing not at grade.

2. Most of the work of changing the location of the trolley tracks in order to conform to the new grade of the street must be done outside the right of way line of the railroad. The railroad company cannot be compelled to perform such work outside of its right of way lines—and, we further submit, cannot be required to perform any of the work of reconstructing the trolley tracks even within the railroad right of way lines.

3. The proposed locations of the trolley tracks at Market street and at Broadway do not change the alignment of the tracks, but at River street there is a change in the alignment as well as in the grade. The reconstruction and relaying of the trolley tracks at all three of these crossings, so far as the same are relocated and reconstructed on the right of way of the prosecutor will operate to take the property of the railroad for the private benefit of the trolley company, and will also take for the use of the trolley company property which is already devoted to another public purpose.

4. The evidence does not show that the relocation and reconstruction of the properties of the trolley company as indicated in the plan are reasonably appropriate or necessary for the elimination of the highway crossings. If the grades of these streets are to be changed, it follows that the trolley tracks will have to be changed to conform to the new grades, but so far as the elimination of the crossings is concerned, that can be accom-

plished just as effectively (and perhaps more so) without making any change of grade in the streets. So far as concerns the realignment of the tracks at River and Putnam streets, there is nothing to show that this is essential to the elimination of the grade crossing at that point—on the contrary, the evidence of the street railway company shows that the proposed curve in the trolley tracks and the partial closing of River street are inadvisable from an operating standpoint (see p. 1395).

5. The prosecutor has no legal *right* to relocate and reconstruct the properties of the trolley company. The prosecutor has no franchise from the City of Paterson or otherwise to construct trolley tracks in public streets. Even if it had, it does not own or control the properties which it is ordered to change; and if it undertook to obey this part of the order it would soon find itself a defendant in actions of trespass or in indictments for interfering with public streets. The legal right as well as the legal duty to reconstruct the trolley tracks, either within or without the right of way, rests upon the trolley company. Under its franchises from the City of Paterson and under general law it is the duty of that company to reconstruct its tracks to conform to a change of grade of the streets, (*Jersey City* v. *City of Hudson,* 13 N. J. Eq., 420; *West Chicago R. R.* v. *Chicago,* 201 U. S. 506)—at any rate, the prosecutor certainly has no such duty and possesses no such right. Even the street railway company could only reconstruct its tracks under the provisions of, and in accordance with the limitations imposed by the general laws of the State of New Jersey (P. L. 1893; p. 302; P. L. 1896, p. 329; 4 Comp. St. p. 5020 *et seq.*)

(b) *The proportion of expense to be paid by the street railway company is not a fair or reasonable amount of the expense of the alterations ordered by the Board.*

In the Board's report of January 11, 1915, no reference was made to the percentum of expense to be paid by the trolley company. In its petition for further hearing presented after the filing of this report and before the making of the order under review, the prosecutor called attention to this omission and asked that a hearing be granted for the purpose of considering (*inter alia*):

> "(e) Whether in any order made in this proceeding the Public Service Railway Company should not be chargeable with ten per cent. of the *total cost* of eliminating *all* of the crossings involved in said plan or scheme adopted by the Board, in addition to all cost and expense legally chargeable to said Public Service Railway Company under section 4 of said statute."

No hearing was given to the prosecutor on this point, but on the date of the making of the order under review the Board filed a "report" denying this petition.

The order requires the railway to pay 10 per centum of the expenses "directly chargeable" to only three of the 15 crossings ordered to be eliminated; and yet in its report of January 11, 1915, the Board said: "From the beginning to the conclusion of the hearings there was no intimation from any one that a change at a particular crossing only should be considered. We will therefore deal with the proceeding as involving the adoption of one comprehensive plan or scheme covering all of the crossings," (Vol. 4, p. 1756).

If the Board is correct in its conclusion that *all* of the crossings must be considered in any general plan for the elimination of any of them, then we

submit that the trolley company should be chargeable with 10 per cent. of the entire cost rather than 10 per cent. of such part of the cost (to be ascertained by some method not suggested by the Board nor by any party to this proceeding) as is directly chargeable to the three particular crossings. How is it possible to determine what proportion, if any, of the expense of eliminating the crossing, for example, at Ellison street, the next street north of Market street, is "chargeable" to the expense of eliminating Market street; and yet according to the Board one crossing cannot be elminated without at the same time eliminating the other. How is it possible to make similar determinations at the various other crossings, every one of which the Board claims are involved in the elimination of the crossings at Market street, Broadway and River street. Where shall the dividing line be drawn? If it is not possible to draw any dividing line, then why should not the petitioner's request have been granted that the street railway company be ordered to pay 10 per cent. of the entire cost—at the very least the Board should have given the prosecutor a hearing on this subject when its attention was called to the matter in the petition above mentioned. We submit that the refusal to grant such petition was arbitrary and unreasonable, and that the order of the Board limiting the amount to be paid by the trolley company to the expense directly chargeable to three crossings only, when according to the Board's own report all of the crossings must be considered together, was equally arbitrary and unreasonable.

It will be observed that the three crossings, to wit, Park avenue and Market street, Broadway, and River and Putnam streets, where the trolley tracks intersect the railroad tracks happen to be those where there is the largest amount of highway

traffic. As we have shown under Point I, the order of the Board, if sustainable at all on the facts, can be sustained only as to these three streets. So far as the other streets are concerned, the Board's order can be sustained only because the other twelve streets may be found to be necessarily involved in the elimination of the crossings at said three streets—in other words, the elimination of the crossings at the other streets can be justified only by reason of the elimination of the crossings at said three streets. The street railway company should, therefore, pay ten per cent. of the cost of eliminating all of the crossings instead of the cost of eliminating the said three crossings only.

The case in this respect is somewhat similar to *Railroad and Warehouse Commission* v. *Litchfield, etc. Ry. Co.,* 108 N. E. 347, where an order of the Commission, changing the terms under which the street railway was permitted to cross the tracks of a steam railroad, was set aside as unlawful and unreasonable on the ground that the order did not provide for a fair apportionment of the cost of protection.

In discussing this feature of the order, the Supreme Court said (italics ours):

> "The contention that the order is invalid in that it requires the prosecutor to do the physical work of removing and changing the property of the Public Service Railway Company is not well founded in fact. The order does not require the prosecutor to do that. It requires the Public Service Railway Company to change and remove such of its property and construction as is necessary to carry into effect the order, and further directs that both the prosecutor and the Public Service Railway Company keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by such street railway company. The order directs the Public

> Service Railway Company to pay 10 per centum of the expenses of the changes required by the order directly chargeable to the crossings used by it. This was the maximum amount allowed by the statute, and, of course, the prosecutor cannot complain that it was so *limited*'' (p. 2283, ll. 10-30).

The obvious answer to this conclusion of the Supreme Court is that, so far as affects the payment to be made by the trolley company, the order by its terms was limited to the expenses "directly chargeable to the crossings, and each of them, so used by the said street railway company operated by it " (p. 1792, l. 15). The reference was to the three crossings, known as (1) Park avenue and Market street, (2) Broadway, and (3) River street. But, according to the views of the Board and the opinion of the Supreme Court, *all* of the crossings were properly considered in one proceeding because they were so related to one another that the consideration of the one "necessarily" involved the consideration of the other" as a practical engineering problem (p. 2270, l. 30). If, therefore, all of the crossings are thus related one to the other, it follows that the percentage to be paid by the Public Service Railway Company should not be limited to three specific crossings, but should be a per centum of the entire cost.

The further answer to this conclusion of the Supreme Court is that the prosecutor does not complain that the Board fixed the *maximum* rate of the per centum named in the statute, but that the statute itself fixed the maximum rate of 10 per centum, whereas if anything was to be paid by the Public Service Railway Company the statute should not have limited the amount to a certain fixed percentage but should have left it to the discretion of the Board to determine the percentage in accordance with the relative degree of danger created

by the use of the crossings by the trolley company as compared with the use thereof by the railroad company. For further discussion of the invalidity of the *statute* in this respect, see Point XXVIII.

XXII.

SAID ORDER IS IN VIOLATION OF THE CONSTITUTIONS OF THE STATE OF NEW JERSEY AND OF THE UNITED STATES, IN SO FAR AS IT DEPRIVES THE PROSECUTOR OF THE RIGHTS, BENEFITS, ADVANTAGES, PRIVILEGES AND CONTRACTS NOW POSSESSED BY IT WITH REFERENCE TO THE SEVERAL LEADS, SWITCHES AND SIDETRACKS WHICH UNDER SAID ORDER ARE REQUIRED TO BE DESTROYED OR RELOCATED AND RECONSTRUCTED FOR THE FOLLOWING REASONS:

(a) *The destruction of or changes in said sidings deprive the prosecutor of its property without just compensation and without due process of law; and deprive the prosecutor of its right and guaranty of enjoying, defending, acquiring, possessing and protecting its said property; and deny to the prosecutor the equal protection of the laws and impair the obligation of the prosecutor's contracts with the owners of said sidings.* (Reasons 63 (d); 72; 73 (a) (b), 75.)

(b) *Said changes take the private property of the prosecutor for a private use; and if said changes be construed to be the taking of property for public use the property of the prosecutor is taken for such public use without just compensation.* (Reason 72.)

(c) *The prosecutor has no legal right to make said changes.* (Reasons 73 (a), (b), (e).)

(d) *There is no power in said Board of Public Utility Commissioners in this proceeding to order the prosecutor to make said changes; and even if there were any such power in said Board, no hearing has been given to the prosecutor as to whether these said changes should be made.* (Reason 73 (c), (f).)

(e) *Said changes would constitute a violation of the Interstate Commerce Act.* (Reason 73 (h).)

The order under review directs the prosecutor to alter the crossings "according to the plan therefor annexed to and made part hereof entitled * * * and profile of same also annexed to and made part hereof entitled * * * which said plan and profile are hereby approved." The order further directs the prosecutor to alter the crossings "by reconstructing said railroad and highways and by performing all other work required according to and as shown on said plan and profile."

The order then proceeds as follows:

> "Any telegraph, telephone, gas, electric, lighting, water, oil, pipe line or other company, or corporation, co-partnership or individual whose property or construction it may be necessary to change or remove to carry said plan and this order into effect shall change or remove the same, according to said plan.
>
> "It is further ordered that the said Erie Railroad Company * * * and all other parties to this proceeding, and each and every of them, proceed with due diligence to the execution of this order, and comply with all the requirements thereof and the duties imposed upon them thereby, and by the said act under which this order is made, and the laws of this State."

Among the "other parties" to the proceedings were numerous persons or companies not coming within the definition of "public utilities" that had some interest either as owner or lessee of various

private sidetracks and other industrial facilities. If this order requires such private individuals or corporations to move or change the grade or location of their sidetracks and other facilities, then, as we heretofore have shown, the order is invalid in this respect because said private persons and corporations are not public utilities, and therefore are not subject to the jurisdiction of the Board of Public Utility Commissioners; on the other hand if the *statute* be construed to include such private persons or corporations the statute itself is invalid because the Legislature has no power to direct such private persons or corporations to make such changes, at their own expense, and *a fortiori,* it has no power to delegate such power to an administrative board; and furthermore, the statute under consideration would be unconstitutional because the object thereof is not expressed in the title. See Point XXVII.

But if the statute be construed to empower the Board to make an order directing the railroad company, at *its* expense, to make these changes in private sidetracks and other facilities, and if the order be interpreted as an attempt on the part of the Board to exercise such power, then we submit that both the statute and the order are unconstitutional and invalid, on a number of grounds.

(a) *The changes in the sidings deprive the prosecutor of its property without just compensation and without due process of law; and deprive the prosecutor of its right and guaranty of enjoying, defending, acquiring, possessing and protecting its said property, and deny to the prosecutor the equal protection of the laws and impair the obligation of the prosecutor's contracts with the owners of said sidings.*

So far as concerns the impairment of contracts, that subject is dealt with under Point XXX. The

present discussion will be limited to the alleged violation of the State and Federal Constitution in certain respects.

The original petition of the city had no reference to any sidetracks and did not make any of the owners thereof parties to the proceedings. It was not until after the railroad had filed its answer that counsel for the City seemed to be aware of the fact that there were any sidetracks or that the owners of same had any rights to be considered (p. 126, l. 20). The answer of the railroad in Par. 21 set up that the order if made would require changes of grade or location of a large number of persons and corporations whose names were given. Forty-six sidetrack owners were named in answer (p. 1669).

It was not until the third hearing before the Board that any suggestion was made by the City that these owners should receive notice of proceedings; and even then the Board ruled that it was not necessary to serve a copy of the petition upon these owners and that all that was necessary to do was to serve a notice directing them to answer the City's petition within a certain fixed time (p. 130, l. 20-30). A number of these owners appeared for the first time at the hearing of December 4, 1913 (pp. 161-162).

The railroad then undertook to show in detail the location and ownership of the several side tracks (p. 258-265); maps Exhibit R-23 offered at (p. 265, l. 20) and R23-A offered at (p. 397).

A list of the various sidings was also offered in evidence in Exhibit R-49 (see p. 348, l. 40, p. 448, l. 15). This exhibit is printed in full at p. 1115-6, and gives the names of owners of side tracks, the commodities in which they deal, the length of each track, the dates of agreement with the railroad company (so far as the same were located) and the average numbers of cars per month. This

exhibit shows there are 61 sidings. All of these are indicated on maps Exhibit R-23 and R-23A on which is given a number corresponding to R-49. The number of cars handled per month varies from 1 as in the case of Paterson Vehicle Company (No. 19) to 88 as in the case of Cooke Locomotive Works, No. 2, 135 as in the case of James Wilson & Son No. 14, 160 as in the case of Public Service Gas Company No. 36, 260 as in the case of John Agnew & Company No. 11, and 420 as in the case of Fullers Express Company, No. 60, the total number of cars handled per month on all of sidings averages nearly 2,000.

The use of these several sidings was described by Mr. Wheeler, Division Freight Agent. He produced a number of written agreements between the railroad company and the several siding owners and they are offered in evidence as Exhibit R-50 to R-73 (pp. 449-450).

Some of the siding owners advised in detail as the effect of the proposed order upon their respective tracks (See pp. 350-394; 399-444; 560-574; 581-3) under the plan as finally ordered by the Board. Some of the sidings are not affected and of course those owners have no further interest in the proceedings. Some of the switch owners whose business will be ruined or seriously affected by the order have sought out separate writs of certiorari, namely D. Fullerton & Co., Meyer & De Vogel, Fuller's Express Co. and Morris & Co. So far as the rights of these owners may be affected they are represented by their own counsel and as the rights of these owners may be affected they are represented by their own counsel and will present separate briefs (except Fuller's Express Co.) But so far as the railroad company is concerned, it insists that its rights are seriously impaired not only as to those sidings whose owners have joined in the

review of the order, but also as to many other owners who have not joined. As a result of the proposed order several of the sidings will be entirely destroyed, and many others will have to be relocated and reconstructed for the purpose of conforming to the change of grade of the main line tracks, if the sidings are to be continued in use after the change of grade has been made. An examination of the plan and profile and a comparison of same with the other maps indicating the present condition of the main line tracks and their relation to the several leads and side tracks will show that under this order the railroad is required to perform an enormous amount of work in the relocation and reconstruction of these leads and side tracks, and of bridges whereon to carry some of them; and that, too, notwithstanding the fact that it is the rule of the company and has been the custom for many years to have the expense of the construction and maintenance of side tracks paid by the owners of same and not by the railroad (pp. 452-453).

Even if the Board under this statute had the power to order the railroad to relocate and reconstruct side tracks as incidental to the general plan for elimination of grade crossings on the main line, the present order has a number of extraordinary requirements which are so peculiar as to suggest that the Board must have inadvertently overlooked the effect thereof. Thus we find that in some cases the prosecutor is ordered to construct sidings on property which it does not own or control, in other cases it is required to construct sidings for the use of various persons or corporations who have expressly agreed with the prosetor that *they* will construct and *maintain* such sidings. Again, the prosecutor in other cases is ordered to construct sidings in or along public streets, and that, too, without any right on its

part so to do, and without any municipal action authorizing or permitting such construction; and, again, the prosecutor in construction of these sidings is ordered to make unjust discriminations, preferences and advantages in violation of the provisions of the Interstate Commerce Act—and, indeed, for that matter, in violation of other parts of the statute under which the Board that gives the order was organized.

The details of the effect of order on side tracks are given in Reason 72 (Vol. IV, pages 1847 and following). The statement in this Reason as to the effect of the order is based in the first instance upon a comparison of the plan and profile attached to the order with the maps showing present conditions, but in order to make these points clear, additional testimony was taken from Mr. Brameld, wherein he described the effect of order on each of side tracks named in Reason 72. The cost of doing this work was included in estimates of Mr. Brameld and of the city engineer, but neither estimate gave the details thereof. Mr. Brameld accordingly prepared another estimate (Exhibit Erie 28, p. 2254). On this estimate he has made a division of cost with reference to the work to be done on the property of railroad as compared with the work to be done off this property. Included in estimate is the cost of constructing certain new railroad bridges which are required to be built in order to conform to the order. It should be noted that all of these several bridges are off the main line and are not necessary for the purpose of carrying the main line tracks over the streets after the grades are changed. They are included in the Board's plan simply for the purpose of carrying leads and side tracks. The cost of doing this work is about $250,000.

So far as relates to these leads, side tracks, switch connections and bridges no hearing has been

given to the prosecutor on the point as to whether or not they should be constructed. Probably the Board has no power to order the construction of such leads and side tracks even after a hearing. This power is defined in section (16 (k)) of act concerning public utilities as follows: "The Board shall have power; ..... after hearing upon notice by order in writing ..... to direct any railroad, street railway or traction company engaged in carrying merchandise to construct, maintain and operate upon reasonable terms, a switch connection with any private side track, which may be construed by any shipper to connect with the railroad or street railway, wherein the judgment of the Board, such connection is reasonable and practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same."

It will be observed that this section is limited to the construction of switch *connections* with private side tracks to be constructed by the *shipper*. There is nothing herein which gives the Board power to order (even after a hearing—which was not given in this case on this point) the railroad to construct *side tracks* either for the use of public or for private shippers. It is probable that such power could not be given to the Board. In some states will be found provisions in public utility or railroad commission statutes which give the commission power to order the construction of side tracks. But even under those statutes in which such power is expressly given to the commission it has been held that an order which requires the railroad at its own expense to construct side tracks violates the constitution in that it deprives the railroad of its property without due process of law and takes such property for public use without just compensation.

We submit that this part of the order is in violation of both the State and the Federal Constitutions. So far as the State Constitution is concerned it has been held that under Article I, Section 1, the business of a person is property and as such is entitled to protection from unlawful interference. *Barr* v. *Council* 53 N. J. Eq., 101; *Brennan* v. *United Hatters,* 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254.

In *Coster* v. *Tide Water Co.,* 18 N. J. Eq. 54 (affirmed 18 *Id* 518), it was held that the grant to one person of the power to manage and improve the property of another, without his consent, and contrary to his judgment, even though for his benefit, violates this article of the Constitution.

In *Vreeland* v. *Forest Park Commission,* 82 N. J. Eq. 349, the Court of Errors and Appeals declared unconstitutional the act of April 12, 1909, entitled "An act for the protection of woodlands" on the ground that it took private property for public use without compensation .This was the statute commonly known as the "fire lines law." It permitted a railroad company to enter upon the lands of an adjoining land owner and to clear a strip of his land not less than ten feet wide of trees, brush, etc., in order to protect it against fire that might be caused by sparks from locomotives. It was held that the statute did not come within the police power.

So in the present case, whether the order be construed to require the switch owners, at their own expense, to reconstruct and relocate their sidings, for the benefit of the railroad, or on the other hand, it be construed to require the railroad to do this work for the benefit of the switch owners, in either event the property of one party or the other is improved without his consent.

This part of the order is also in violation of the Federal Constitution, as shown by the following authorities:

In *American Malleables Co.* v. *Bloomfield,* 83 N. J. L. 728, 85 Atl. 167, the company owned the land upon which its plant was located, abutting on a certain street which ran between the railroad and the company's property, and enjoyed the use of a switch or industrial siding from the main line of the railroad across the street at grade to its lands. The town passed a resolution to make a supplementary agreement with certain railroads for the elimination of grade crossings, pursuant to certain statutes. The plan for the elevation required the vacation of the street and the substitution in lieu of the former switch of an elevated siding to leave the main line at an elevation and thence to be carried on abutments to the company lands. The resolution was set aside on the ground that it affected the property rights of the company and that it had received no notice of the proposed modifications of the contracts with the railroads. The Court of Errors and Appeals said:

> "To permit the blotting out of the rights of the prosecutor, in this summary way, would be equivalent to appropriating property without compensation and without due process of law."

It will be seen that under this opinion the owner of a private siding is held to have certain property rights which cannot be taken from him without notice and without compensation. The same principle applies to the prosecutor in the present case, where it appears that it is either the actual owner of or has a property right in a large number of industrial sidings which, under the order of the Board, are destroyed or materially changed to the disadvantage of the prosecutor.

It is also pointed out in the Bloomfield case that the proposed abandonment of the siding and its reconstruction upon private property was not within the objects of the legislation in question, the security of life and property, effected by change of grade in railroad tracks.

It is also pointed out in the opinion, *arguendo,* that the scheme of elimination required the opening of a new street, but for aught that appears the street might never be opened (pp. 731-2).

The case of *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196, 54 L. Ed. 727, involved the constitutionality of a statute of the State of Nebraska requiring railroads to make switch connections with grain elevators under certain conditions, and providing for a fine in case of refusal so to do. Two suits were brought under the statute, the first to recover a fine for failure to obey the statute, the second by the owner of the elevator to compel obedience to the statute by mandamus. The judgment of the State court imposing the fine and ordering the writ of mandamus was reversed.

Headnotes read as follows:

> "There are constitutional limits to what can be required of the owners of railroads under the police power.
>
> "Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay.
>
> "It is beyond the police power of a State to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified time. It amounts to deprivation of property without due process of law; and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections.

"*Quaere* whether even if the statute requiring railroad companies to make such switch connections at their own expense be construed as confined to such demands as are reasonable, does it not deprive the railroad company of its property without due process of law if it does not allow the company a hearing as to the reasonableness of the demand prior to compliance therewith, where, as in this case, failure to comply involves heavy and continuing penalties.

"81 Nebraska, 15, reversed."

The Court said:

"This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs and, possibly, without regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances and expressed the opinion that the demand was reasonable and that building the side track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands. On the face of it the statute seems to require the railroad to pay for side tracks, whether reasonable or not—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

"But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court,

still it requires too much. Why should the railroad pay for what, after all, are private connections? We see no reason. And, moreover, even on this strained construction, they refrain from paying, at the peril of a fine, if they turn out wrong in their guess that in the particular case the Court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act. Sometimes when summary action is necessary the property owner's rights are preserved by leaving all questions open in a subsequent suit. North American Storage Co. *v.* Chicago, 211 U. S., 306. But in such cases the risk is thrown on the destroyer of property. In this case there is no emergency, yet at the best, the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least five hundred dollars for its offense in awaiting the result of a hearing. See Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S., 418. An earlier statute authorizing the State Board of Transportation after hearing to require the railroad to permit the erection of an elevator upon its roadbed already has been held bad. Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403. See also Hartford Fire Ins. Co. *v.* Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S., 91, 99. We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have

said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907 (see Laws of 1907, c. 89, p. 309)."

In *Oregon R. R., etc., Co.* v. *Fairchild,* 224 U. S. 510, 56 L. Ed. 863, a statute of the State of Washington authorized the Railroad Commission, after a hearing, "to order that additional trackage or sidings be constructed * * * and that additional connections be made." A complaint was filed by the Attorney General against the Oregon Company and two other companies, praying for an order requiring them to connect their tracks at certain points. The Commission ordered that the connection be made at some of the points in question.

The State Court held that the statute was valid. The judgment was reversed.

Headnotes 1, 2 and 3 read as follows:

"An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary.

"The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; but a state statute which gives the privilege of introducing such evidence, affords compulsory process, and gives the right of cross-examination, does not deny due process by not affording sufficient opportunity to be heard.

"The hearing is sufficient if the person whose property is to be taken is put on notice as to the order to be made, and given oppor-

tunity to show that it is unjust or unreasonable."

The Court said:

"1. The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' Chicago, &c., Ry. *v.* Chicago, 166 U. S. 226, 236; Missouri Pacific Ry. *v.* Nebraska, 164 U. S. 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. Chicago, &c., R. R. *v.* Minnesota, 134 U. S. 418; Smyth *v.* Ames, 169 U. S. 466; Chicago, &c., R. R. *v.* Tompkins, 176 U. S. 167, 173."

"6. Since the decision in Wisconsin, &c., R. R. *v.* Jacobson, 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require

railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For, while the question of expense must always be considered (Chicago, &c., R. R. *v.* Tompkins, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' Atlantic Coast Line R. R. *v.* North Carolina Commission, 206 U. S. 1, 27; Missouri Pacific Ry. *v.* Kansas, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected the saving in time and expense to the shipper, as against the cost and loss

> to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined. This was done in Wisconsin R. R. *v.* Jacobson, in which for the first time, it was decided that a state commission might compel two competing interstate roads to connect their tracks."

In the case of *McInnis* v. *New Orleans, etc., R. Co.,* 68 Southern, 481 (Supreme Court of Mississippi, May, 1915) plaintiffs brought suit to recover the amount expended by them for the construction of spur tracks which it was claimed the railroad company was required to construct, by virtue of Chapter 88, Laws of 1908, of the State of Mississippi, and an order of the Railroad Commission made pursuant to said statute.

The statute *inter alia* provided as follows:

> "That upon application to it for that purpose the Railroad Commission may order side tracks, spur tracks, hoop or switch tracks to be constructed by railroad companies so as to connect their main line with manufacturing or other industrial plants, if they can be constructed without causing undue hazard to the property or train of the railroad company; but all expenses for the right of way, grading, cross-ties, rails, spikes, fastenings and switches required shall be defrayed, unless otherwise agreed on, by the person, company or corporation applying for their construction."

The order of the Commission directed the railroad company to construct a track connecting the plant of the plaintiffs with the main line of the railroad.

The defendant demurred to the declaration on the ground that under such statute and order it was under no legal duty to construct the said track, without due compensation being first made to it, and that the said statute was in violation

of the Fourteenth Amendment of the U. S. Constitution in that it deprived the defendant of its property without due process of law and denied to the defendant the equal protection of the law. The action of the trial court in sustaining the demurrer and dismissing the action was sustained. The Court said:

> "We think that statutes of this character are condemned as unconstitutional by the Supreme Court of the United States in Missouri P. R. Co. *v.* Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989.
>
> "In this case, as in the case decided by the Supreme Court of the United States, 'this statute has no reference to special circumstances. It is universal in its terms.' Any person or corporation engaged in the business of manufacturing, or in any other industrial pursuit, may secure, at the hands of the Railroad Commission, an order compelling any railroad company to construct a spur to serve his or its plant, whether it be reasonable to do so or not, if the Railroad Commission is of opinion that the spur track will not endanger the property or trains of the railroad company.
>
> "In Missouri Pac. R. R. Co. *v.* Nebraska, *supra,* the reason for the condemnation of the state law under consideration is expressed thus:
>
> "'We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires.'
>
> "We think that the law in question is also condemned in Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489.
>
> "The statutes of Nebraska, so far as the principles involved in this case are concerned, are, in all essentials, the same character of

legislation as our statute under review. Our statute puts it in the power of a commission to require railroad companies to spend money for the purpose of giving special facilities to certain named industries without requiring any indemnity for the money expended, and without regard to the circumstances, if, in the opinion of the commission, the property or trains of the railroad will not be endangered thereby. No matter what may be the special circumstances or necessities of the case, the Railroad Commission is given the power to order the construction of a side track to any or all industrial plants. What the commission may or may not do in each case is immaterial, inasmuch as their statutory power is unlimited except as above noted. It may be that the commission will, as suggested, consider each application for a spur track upon its merits, and with due regard for the public welfare, but such are not the requirements of the statute. The statute is the thing to be considered, and it is under the authority of the statute. The statute is the thing to be property of railroads without requiring due compensation, and this statutory power is just what the Supreme Court of the United States has declared to be in contravention of the Constitution of the United States. An unconstitutional grant of power cannot be exercised in a constitutional manner.

Other cases to the same effect are:

Detroit v. *Michigan C. R. Co.*, 156 Mich. 121, 120 N. W., 592;

People ex rel, Spruance v. *Chicago & N. W. R. Co.*, 57 Ill., 436;

Jones v. *Newport News & M. Valley Co.*, 13 C. C. A, 95, 31 U. S. App. 92, 65 Fed. 736;

Mercantile Trust Co. v. *Columbus, S. & H. R. Co.*, 90 Fed. 148;

Durden v. *Southern R. Co.*, 2 Ga. App. 66, 58 S. E., 299;

Harp v. *Choctaw, O. & G. R. Co.*, 118 Fed. 169, affirmed in 61 C. C. A., 405, 125 Fed., 445.

In their brief in the Supreme Court counsel for defendants argued that the contracts between the railroad and other parties for switch connections and services were subject to the police power of the State. We grant that they are subject to the *reasonable* exercise of such power, but the cases cited by counsel in this argument do not deal at all with the question which we now present; such cases turn upon the point as to whether a siding owner has *the right to continue to maintain* side tracks when, by order of the proper authority or by contract between the railroad and the municipality, the main line tracks are elevated, but these cases do not touch the present question, which is whether the siding owners or the railroad company can be ordered *to reconstruct the side tracks* for the purpose of having them conform to the new proposed grades of the main line tracks. We submit that the Board has no power to make any such order, either as to private owners, because they are not public utilities, nor as to the railroad company, because there is no legal duty on the part of the railroad company (at least in the present proceedings) to make any such changes.

The Supreme Court said that the contracts of the railroad with others for switch connections and services were subject to the police power, citing *Swift* v. *Delaware, etc., R. R. Co.*, 66 N. J. Eq., 34, and other cases (p. 2294, l. 35). But these cases are beside the point. It may be that private parties owning or using switch connections cannot complain of the removal thereof when the grade of the main line tracks is changed. But that principle has nothing to do with the question of whether a railroad company can be required, *at its own expense,*

to make the necessary changes in the switch connections for the use and benefit of such private parties, for the purpose of having such connections conform to the change of grade of the main line tracks.

The point now under consideration was directly passed on in the case of *People ex rel Long Island R. R. Co.* v. *Public Service Commission,* 170 App. Div. 429, wherein it was held that when the railroad has been directed to elevate its tracks over streets, shippers who have sidings on their own property, and desire to continue switch connections, must elevate their sidings to the lines of the railroad *at their own expense;* and that the railroad company can be required to do nothing more than to furnish the necessary switch connections.

(b) *Said changes take the private property of the prosecutor for a private use; and if said changes be construed to be the taking of property for public use, then the property of the prosecutor is taken for such public use without just compensation.*

It will be noted that the side tracks and the leads thereto, which the prosecutor is ordered to construct, are not for the general use of the public and are not even incidental to the use of the public freight yard, but are for the exclusive benefit of certain owners of industries adjoining or near to the main line tracks. To require the prosecutor to reconstruct these side tracks or any of them, for the private benefit of the owners thereof or any of them, is nothing more nor less than the taking of prosecutor's property for their private benefit.

But if it be said that the construction of side tracks for private shipments is a form of public

use because the shippers are a part of the public which the railroad, as a common carrier, is bound to serve, then the property of the prosecutor is taken for such public use without compensation for the reasons and under the authorities given in sub-head (*a*).

(*c*) *The prosecutor has no legal right to make said changes.*

So far as the reconstruction of the side tracks, leads, etc., is on the property of the prosecutor, perhaps it would have the *right* to do such work—although it might not be under any legal obligation so to do. But many of the reconstructions must be done off of the prosecutor's property and in some cases even *on* and *along* public streets.

Counsel for defendants may say that it does not appear by what right such sidings are maintained in public streets. In all of such cases the fact is that the sidings are in and on the streets without any objection on the part of the City, and in some cases the evidence shows that they have been in these locations for many years. If, in fact, they had no right to occupy the public streets it would be an easy matter for the City to show it. There being no proof on that subject, it may be presumed that the owners have the right to continue the sidings in their present locations. But, even if these owners have no right to maintain the sidings, the question still remains by what authority the Board orders the railroad company to reconstruct these sidings in the public streets. If these sidings are now unlawfully occupying public streets how can such occupation be made lawful by the fiat of the Board of Public Utility Commissioners without any proper action on the part of the municipality? Such argument seems to be based on the idea that if the railroad company

pays the expense of the sidings, that fact makes their construction legal, whether they be on or off the public streets, and whether they be on or off the right of way, and removes any legal objection that there might otherwise be to the reconstruction of the sidings.

We have yet to discover any law which would give the prosecutor any *right* to go on another person's property or on public streets and build side tracks thereon; and we do not believe that the Grade Crossing Act of 1913 gives the prosecutor any such right. So startling a change in legal principles should at least be clearly expressed in a statute purporting to give any such right—if, indeed, such right could be constitutionally given to a railroad even though acting pursuant to the order of an administrative board.

(d) *There is no power in the Board in this proceeding to order the prosecutor to make said changes; no hearing has been given as to whether said changes should be made.*

The present proceeding is in the form of a petition to eliminate certain grade crossings. There was no claim in the petition, and it does not appear in evidence, that the changes in the side tracks which the Board has ordered, were reasonable incidents or necessarily involved in the elimination of the crossings. The case does not come under 16 (k) of the act concerning public utilities, as the order requires much more than the construction of switch *connections* with private side tracks—which is the only subject covered by said section. If there is any power in the Board to require the prosecutor to construct such side tracks on the theory that it is necessary to do so to furnsh "safe, adequate and proper service" (under Section 17 (b),) then the prosecutor is at

least entitled to a hearing on that question. No such hearing has been given in the present case.

(e) *The changes, if made as required by the order, would constitute a violation of the Interstate Commerce Act.*

If the railroad company undertakes *at its own expense* to reconstruct the several side tracks and leads thereto, and other facilities for the use and benefit of switch owners, as required by the terms of the order under review, such action on its part would be a violation of the provisions of Interstate Commerce Act.

Section 3 of that act provides, as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This section has been construed to cover the entire carriage and services in connection with the receipt and delivery of property transported. *Pennsylvania Co.* v. *U. S.*, 236 U. S., 351, at p. 363.

A railroad is required to furnish *equal* facilities for all shippers. *Minds v. Pennsylvania R. Co.*, 77 Atl. 909 (Pa.)

In *U. S.* v. *Union Stock Yard & H. Co.*, 57 L. Ed., 226, 226 U. S. 286, a packing house firm and a stock yard company made a contract by which the stock yard company agreed to pay a bonus of $50,000 to the packers, if the latter would erect their new plant in Chicago, adjacent to the stock yard, instead

of in Kansas City, as was proposed, and would maintain and operate the plant for fifteen years and buy and use in their business such live stock only as moved through the stock yard, paying the regular charges on live stock not so bought. The stock yard company operated through its lessee, a railway system carrying on interstate commerce.

The Court held that an unlawful discrimination, contrary to the Interstate Commerce Act, Paragraph 2, and the Elkins Act, paragraph 2, was accomplished by the contract.

The Court dealt with this particular point at the end of its opinion, saying:

> "It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever, and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms."

See further, *Armour Packing Co.* 1. U. S., 209 U. S., p. 56; 52 L. Ed. 681; *Fitzgerald* v. *Grand Trunk R. Co.*, 63 Vt., 169; 13 L. R. A. 70.

The question here presented is a very serious one from the standpoint of the railroad. If it does not comply with the order of the Board of Public Utility Commissioners, it makes itself subject to the penalties prescribed by the statute of the State of New Jersey. On the other hand, if it does comply with such order it probably violates the Interstate Commerce Act, and subjects itself to the penalties prescribed by that act. Such act might also be held to be a violation of Chap. 14, Laws of 1913.

It will hardly be claimed that a statute of New Jersey and orders that may be made thereunder are superior to the provisions of the Interstate Commerce Act; and hence that part of the present order which conflicts with and compels the prosecutor to commit a violation, of the Interstate Commerce Act, is for that reason clearly invalid.

XXIII.

SAID ORDER IMPOSES A BURDEN UPON THE INTERSTATE TRAFFIC OF THE PROSECUTOR AND INTERFERES WITH AND IMPAIRS ITS OPERATION TO PERFORM ITS DUTY AS AN INTERSTATE CARRIER OF FREIGHT AND PASSENGERS BECAUSE:

(a) *It requires changes in the location or grade of switches, sidetracks, leads, bridges, yards, structures and other facilities and properties of the prosecutor which are used by the prosecutor in the furtherance of its interstate business.*

(b) *It compels the prosecutor to raise and expend moneys for the purpose of complying with said order, which said moneys would otherwise be available for and would be used by the prosecutor in the making of changes and improvements which are essential for the purpose of enabling the prosecutor to carry on its interstate business.*

Reasons 46 (g); 71; 72; 73 (g); 77 (d).

The police power which is resident in the States may be exercised upon interstate railroads, but not in such a way as to unlawfully interfere with interstate commerce (Vol. 2, Elliott on Railroads, Section 667). In the present case we submit that the order under review is invalid because,

(*a*) The changes in the location of grade of side tracks, leads, etc., interfere with the prosecutor's interstate business, and

(*b*) It deprives the prosecutor of the use of moneys which are essential for the purpose of enabling the prosecutor to carry on its interestate business.

(*a*) The changes required in the several leads, switches and side tracks, which under the order

must be destroyed or relocated and reconstructed, are set forth in detail in Point XXII, where the subject is discussed as to whether this part of the order is in violation of the State and Federal Constitutions, for certain specific reasons therein discussed. The present point is limited to the argument that this part of the order violates the Federal Constitution, by reason of the fact that the necessary effect thereof is to regulate interstate commerce. The total cost of making these changes in the side tracks, as required by the order, is about $250,000 (see Exhibit Erie 28, Vol. IV, p. 2254; testimony, p. 1980). The effect of the order upon the side tracks is described in detail in the testimony of Mr. Brameld (pp. 1966-1981). A convenient summary thereof will be found in prosecutor's Reasons No. 72 (p. 1847, l. 30 to p. 1851, l. 40).

So far as relates to these side tracks the execution of the Board's order requires the entire destruction of several of them without any provision for the reconstruction or relocation thereof, and in the case of other sidings the Board's order likewise requires the destruction of the sidings and also requires the reconstruction thereof at different grades and locations. The order is ambiguous as to whether the cost of such reconstruction is to be paid by the prosecutor or by the side track owners. If the order be construed to require such cost to be paid by the owners, it is of course invalid, as these owners are not public utilities; on the other hand, if it requires the cost to be pad by the prosecutor the order is equally invalid because the prosecutor is not legally bound to pay such expense, and an order requiring it so to do takes its property without due process and without just compensation, under the authorities cited in Point XXII. It therefore follows that nether the railroad nor the siding

owners can be compelled to reconstruct and relocate the several sidings, even though the plan of the Board requires that this work be done. The necessary result is that the sidings are destroyed and no one can be compelled to restore them. The destruction of these sidings interferes with the interstate commerce of the prosecutor, and for that reason we submit is in violation of the Federal Constitution.

In *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, held that an order of the Commission of the State of North Carolina requiring a railroad company to deliver cars from another State to the consignee on a private siding beyond its own right of way, was a burden upon interstate commerce, and for that reason was void. The Court said:

> "Without at all questioning the right of the State of North Carolina in the exercise of its police authority to confer upon an administrative agency the power to make any reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States. Houston & Texas Central Ry. Co. *v.* Mayes, 201 U. S. 321; American Steel & Wire Co. *v.* Speed, 192 U. S. 500."

Referring to the case of *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 118 Fed. 113, the Court further said:

> "The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for

the Sixth Circuit in Central Stock Yards Co. *v.* Louisville & Nashville R. R. Co., 118 Fed. Rep. 113. The Court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company. In pointing out that if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 120):

"'It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.'"

If an order of an administrative body which requires a railroad to deliver cars on a private siding is an interference with interstate commerce, *a fortiori* is there such an interference when the order of the Board requires the physical destruction of the sidings (some on and some off of the right of way) upon which interstate traffic is delivered and received.

(*b*) The order also operates as a regulation of interstate commerce because the great cost of carrying out the same impairs the ability of the prosecutor to perform its public convenience as a common carrier of interstate traffic. While it is probably true that ordinary expenses that are incidental to the exercise of the State's police power cannot be said to interfere with interstate commerce, yet in the present case the expense is so great and the conditions are so unusual that we submit that the orders, if obeyed, will cripple the financial resources of the prosecutor to such an extent as to seriously impair its function as an interstate carrier by preventing it from making improvements that are essential to its continued operation as such carrier.

The prosecutor's railroad system covers a total mileage of 2,257. (See annual report, Ex. R. 123, p. 1348.) The tracks run through the States of New York, New Jersey, Pennsylvania, Ohio, Indiana and Illinois. By far the larger proportion of the company's operations is of an interstate character.

On the filing of the Board's report of January 11, 1915, from which it appeared that Board had decided to make an order requiring the prosecutor to eliminate these crossings at an expense of approximately $3,000,000, the prosecutor immediately filed a petition for further hearing, in which it asked the Board, among other things, to consider whether the proposed order would impose a burden upon the interstate traffic of the prosecutor and interfere with its ability to perform its duty as an interstate carrier.

In this petition (dated Feb., 1915) it called attention to the following facts:

1. That during the next twelve months it was absolutely necessary for safety in the operation

of the railroad to expend the sum of $1,094,825, the estimated cost for repairs to bridges. (See Par. 9 of Petition, p. 1779; Schedule B thereto attached, p. 1785.) That it would be impossible to divert funds from such work for the purpose of carrying out the proposed order, and the failure to do this work might result in serious accident and loss of life.

2. That the sum of upwards of $12,000,000 should be expended at once upon improvements of its railroad property for the purpose of enabling it to render safe, adequate and proper service in the transportation of interstate commerce and that the proposed order would impose a burden upon such interstate traffic and impair its ability to perform its duty as an interstate carrier, for the reason that moneys which would otherwise be available for the purpose of making these necessary improvements would have to be diverted from such purposes to the extent of the cost of eliminating the crossings, and would to that extent prevent the prosecutor from making such necessary changes and improvements. (See par. 10, p. 1780; Schedule C, p. 1785.)

The Board declined to give any further hearing on this point. (See *report* of April 20, 1915, pp. 1793-5.)

Prior to the filing of the Board's report of January 11, 1915, and the presentation of the said petition for further hearing, some testimony was submitted to the Board showing the financial condition of the prosecutor and the effect upon its interstate commerce of the making of any such order as was demanded by the City of Paterson.

Mr. Lincoln, General Superintendent of the company, testified that he had made an investigation of the necessary improvements from the standpoint of safety. He pointed out that the first

consideration was the construction of a double track and that the largest share of available funds that could be secured had been devoted to that purpose for a number of years, and that the prosecutor had "under way or authorized" double track construction which would require a further expenditure of $7,000,000 (p. 712). The witness pointed out that there were two important reasons for the necessity of double track construction; the first was the protection of the traveling public, the second was the increased earning capacity (p. 712, l. 30 to p. 713, l. 20).

Next to the construction of double track he said the next important large item is the construction of additional tracks between Jersey City and Suffern, as there is a very dense passenger traffic handled over the same tracks on which freight is moved. Additional tracks should be constructed in the commuting territory so that the freight service can be taken off the passenger tracks. The cost of this construction between Jersey City and Suffern amounts to $3,500,000, a total expenditure for track work of $10,500,000 (p. 713, l. 30 to p. 714, l. 20). This money is not available at the present time, as the company has not the income which would justify such a loan (p. 714, l. 30).

The next important item is for automatic block signals. The amount now required for such improvement is $500,000 (p. 715, ll. 10-30).

The next item of safety, which has to be made in order to comply with the law, is the application of safety appliances to operating equipment. The time limit thereon is July 1, 1916 (since extended to July 1, 1917). The original amount for that work was $1,750,000. The company still has to spend $1,354,741 for the purpose before July 1, 1917, or the equipment cannot be used. This work is proceeding all the time (pp. 715, 716).

The next item of large importance is the construction of a passenger terminal at Jersey City. At the present time an average of 55,000 people per day is handled at Jersey City. That terminal serves a population of from 750,000 to 1,000,000 within forty miles of Jersey City, and as an element of safety and convenience there must be a new terminal. This involves an expenditure of $7,000.000. It also involves very large other expense by reason of the necessity of removing the shops and engine terminals from Jersey Citsy, and the rebuilding thereof at a point west of the Bergen Tunnel, at what is called Croxton Yard. The estimate for such shop and yard facilities at that point calls for an expenditure of $3,500,000 (p. 717, l. 20 to p. 718, l. 20). In other words, the total cost of making the necessary changes in the terminal facilities at Jersey City will be not less than $10,500,000 (p. 719, l. 25).

The next important item is the installation of steel underframes on passenger cars to take the place of the present wooden cars. This work has been started and the estimated cost to complete it is $741,000 (p. 719, ll. 30-40).

Other items that have to be met in order to comply with the law are the extra cost of the full crew law, amounting to about $275,000 a year (p. 720, l. 10), and the increased cost of payroll due to the arbitration awards, amounting to $2,744,688 per year (p. 721, ll. 20-30). These last two items, of course, do not deal with the question of improvements in the physical properties, but nevertheless have to be considered because the payments are compulsory.

There was a further increase in another award, amounting to $400,000 a year (p. 722, l. 10).

Another item of increase on payroll is under the hours of service law, which averages about $140,000 a year (p. 723, l. 10).

Taxes have increased from $900,000 in 1904 to $1,800,000 in 1914 (p. 723, l. 15).

The average increase in the cost of the maintenance of way is $500,000 a year, that is, the cost of such maintenance, if the property were kept at a certain average level of efficiency, would be $7,000,000 a year, but in order to raise the standard by increasing the weight of rails, improvements of bridges, providing better ballasts, etc., this average increases at the rate of $500,000 per year (p. 723 l. 30 to p. 724, l. 10).

This item, averaging $7,000,000 for maintenance of way, has recently been postponed to a large extent because of lack of funds—although this work cannot be put off indefinitely and much of it will have to be done within a year (p. 724, l. 5).

The next item is the maintenance of equipment. The normal charge for this is $11,000,000 a year. This charge is increasing on account of the safety appliance act and steel underframes. Much of the repair work has had to be deferred for lack of funds, with the result that about 10½% of the total equipment was in bad order on August 1st. After that date, it was absolutely necessary to make repairs and the shop forces were therefore increased and the percentage of bad order cars reduced to 4½% (p. 726).

The expenditures for freight equipment will average $2,500,000 a year for the next ten years (pp. 728, 729).

As compared with an expenditure of $3,000,000 for the elimination of grade crossings in Paterson, the foregoing expenses are "of far more importance both as safety measures and from the standpoint of affording better facilities for operation and increased earnings" (p. 730, ll. 30-40).

During the last five years the company has spent about $35,000,000 for construction of double track, renewals of bridges and new equipment. The sum

of $22,000,000 additional has been authorized and $8,000,000 of that has been spent (p. 732, ll. 1-40).

The testimony of Mr. Falconer, Chief engineer, shows in detail the amount expended by the company for the past ten years, in the making of necessary improvements and the estimate of the cost of expenditures, which are required to be made within five years. The total amount spent from 1906 to 1914 for "additions and betterments" is $55,727,039 (p. 750; Exhibit R-128, p. 1379). The estimate of expenditures for the next five years is given in detail in the testimony of Mr. Falconer and is summarized in Exhibit R-129 at pp. 1380-2, and Exhibit R-130 at pp. 1383-8; Exhibit R-131 at pp. 1388-1393.

Mr. Falconer described in detail the order of importance of these several items. His first series of items is the completion of the double track and grade reduction; and of this the most important single item is the completion of the double track from Lomax to Griffith, which will cost $2,051,000 (p. 753-4).

Mr. Falconer then described the necessity and the advantage of certain other double track work and reduction of grades (pp. 755-762). The total cost of these items is $7,806,000 (p. 762, l. 15, Exhibit R-129, p. 1379).

On the question of the necessity and importance of making these improvements, so far as it affects the handling of interstate business, the witness said:

> "Q What is your view of their importance with regard to the ability of the railroad company to adequately handle its interstate business?
>
> "A They are of prime importance to enable the railroad company to handle its interstate business. The business of the railroad company is very largely interstate and all of

these improvements, every single one of them, and the terminal improvements, are all necessary to aid in handling interstate business.

"Q In your judgment, if the railroad company was required at this time to spend three millions or more for the elimination of grade crossings in Paterson, would its ability to handle the improvement, its duty with regard to interstate business be impaired?

"A In my opinion it would. In my opinion that three million or whatever it is, should be expended in making some improvement that would enable the railroad to earn a greater income and it might thereby be enabled to set aside sums to carry out work which is not non-income producing. The elimination of grade crossings in Paterson or any other city produces no income, adequate, when compared to the expenditure. The saving in expenses is a very small fraction of one per cent. of the cost of the elimination, as a rule, and it will be so in Paterson. In other words, if the Paterson elimination is undertaken, the company will be burdened by fixed charges equal to the interest on the cost of construction and will save practically nothing in operating expenses, whereas if this same amount of money is expended at a point where operating expenses are reduced, such as grade reduction or additional tracks where they are necessary, the saving in operating expenses will help to pay for such improvements at a later time. The credit of the company is impaired by expenditures which do not improve, which do not increase its revenue. The credit of the company is improved by expenditures which do increase its revenue and the company, as I see it, cannot make expenditures of such magnitude as the Paterson grade crossing elimination without borrowing money."

The next series of items is for "necessary terminal improvements" (pp. 764-8). The cost of these amount to $14,866.00. (See p. 1380.)

Other items are for additional tracks and grade reductions amounting to $12,632,000, and improvements at division points amounting to $1,293,000. (See p. 1380; also p. 772.)

In addition to the foregoing items, the witness stated that the renewal of or the repairs to certain bridges as shown on Exhibit R-129 was "absolutely necessary." This item amounts to $3,457,458. (p. 1381.)

The witness also gave the details of the expenditures required for automatic signals. This amounts to $669,700. (p. 775, ll. 20-40; Exhibit R-129, p. 1381.)

The witness also prepared a list showing the cost of the elimination of grade crossings; either ordered or pending; the former amounts to the sum of $3,317,000, the latter to $3,767,000, including an allowance of $3,000,000 for the Paterson crossing (pp. 1381-2).

The witness testified that all of the items on these lists, with the exception of the two groups for elimination of grade crossings, either directly or indirectly, facilitate the handling of interstate business. (p. 781, l. 30). He further said:

> "I wish to say, however, that this list contains in the main, items which are very important to the handling of interstate business and most of them have a direct bearing on the handling of such business and not an indirect or a far-fetched one. For instance, our grade reduction, our double tracking, strengthening our bridges, increase of our intermediate terminals, increase of the terminals at the ends of the railroads, terminal facilities, are very important to interstate business."

The foregoing testimony was not disputed. It shows conclusively that the order under review will interfere with interstate commerce by diverting from other improvements a large sum of money, which would probably otherwise be used to make or to complete such improvements.

Since the foregoing testimony was given other laws have added substantial burdens upon the prosecutor. Thus, under the Federal Act of March 4, 1915, inspection is required to be made of all parts of the locomotives, such as driving wheels, etc., in addition to the inspection required by the Act of 1911, which was limited to inspection of boilers. Pursuant to this new law the Interstate Commerce Commission has promulgated an order, under date of June 6, 1916, and effective January 1, 1917, requiring certain kinds of headlights to be installed and maintained—at largely increased expense; and also requiring changes in the kinds and number of lights on switch engines—also at increased expense.

The so-called Eight Hour Law recently passed by Congress will also, if found constitutional, add very materially to the operating expenses of the prosecutor.

We submit that the principle should apply as laid down in the case of *Kansas Southern R. W.* v. *Kaw Valley District,* 233 U. S. 75. In that case the district sought to compel two railroad companies to raise to a higher level certain bridges across the Kansas River. The defendants claimed that this work would require a change of the grades of the streets for the approaches to the bridges, that the City of Kansas City had not given any consent to raise them, that the work as ordered would interfere with interstate commerce, that the district had made no provisions to compensate the owners of private property, who would be damaged by the change of grade of the

streets, that the damage to the defendants would exceed large sums, and that the plan had not been approved by the Secretary of War. The Supreme Court of Kansas issued peremptory writs of Mandamus. This judgment was reversed by U. S. Supreme Court, which said:

> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' Illinois Central R. R. Co. *v.* Illinois, 163 U. S. 142, 154. Austin *v.* Tennessee, 179 U. S. 343, 349. Atlantic Coast Line R. R. Co. *v.* Wharton, 207 U. S. 328, 334. To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarine, or the export of natural gas. Hannibal & St. Joseph R. R. Co. *v.* Husen, 95 U. S. 465. Schollenberger *v.* Pennsylvania, 171 U. S. 1. West *v.* Kansas Natural Gas Co., 221 U. S. 229, 262. Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

The evidence in the present case shows beyond reasonable controversy that obedience to the order under review will seriously "impair the usefulness

of the prosecutor's facilities for interstate traffic." The destruction of the means by which such traffic may be facilitiated is an interference therewith to the same extent as if the property used for that purpose were physically destroyed—in fact, in the present case a very considerable portion of the property of the prosecutor used for commerce. However that may be, we submit that the *order* made thereunder, under the circumstances of the present case, has that effect. leads must be actually destroyed in order to comply with the Board's order.

In the Supreme Court counsel for defendants argued that the Grade Crossing *statute* did not create a burden upon the prosecutor's interstate commerce. However that may be, we submit that the *order* made thereunder, under the circumstances of the present case, has that effect.

The Supreme Court in the opinion pointed out that the question of whether or not police regulations constitute an unlawful interference with interstate commerce is for the "ultimate" decision of the highest Federal court. This, no doubt, is correct, but when it clearly appears that there is such unlawful interference, then we submit it is the duty of the first court which finds such interference to so declare. In the present case it may be, that there is no interference by virtue of the statute itself; Congress has not as yet legislated upon the general subject of the elimination of grade crossings on the lines of interstate carriers. If it ever does so legislate, of course its action in that regard is necessarily exclusive. But in the present case, we submit that the order operates as a burden upon and an interference with

interstate commerce; and if it does, then under the authorities hereinbefore cited, the *order* must be declared to be invalid even if the statute deals with a subject which has not as yet been directly touched by congressional legislation.

CHAPTER FOURTH.

Reasons attacking the statute by authority of which said order purports to have been made, on the ground that it violates certain provisions of the State and of the Federal Constitutions.

XXIV.

IF THE PROSECUTOR IS THE OPERATING COMPANY UNDER THE STATUTE OF 1913, THEN THE SAID STATUTE IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE PROSECUTOR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW FOR THE REASON THAT SAID STATUTE REQUIRES THAT THE ENTIRE EXPENSE OF ALTERING THE SEVERAL GRADE CROSSINGS, INCLUDING DAMAGES TO ADJACENT PROPERTY (LESS SUCH AMOUNT AS IS ORDERED TO BE PAID BY THE STREET RAILWAY COMPANY USING SOME OF SAID CROSSINGS) BE PAID BY THE PROSECUTOR; AND IN THIS AND OTHER RESPECTS THE SAID STATUTE IS AN UNREASONABLE EXERCISE OF THE POLICE POWER.

(Reasons 39, 40, 63.)

The statute of 1913 and the order under review impose upon the prosecutor the "entire expense" of the alterations, changes, relocation or opening of the public highways, including damages to adjacent property, less 10 per cent. of the expense

directly chargeable to certain crossings used by a street railway company. Conceding that the Legislature in the exercise of the police power may have the right to require protection at, or the elimination of grade crossings, the question still remains in any such case whether such power has been exercised in a reasonable manner. This question must be determined by the courts. We quote from the case of *Sanitary District of Chicago* v. *Chicago & Alton R. R. Co.*, 108 N. E., 312 (Supreme Court of Illinois) as follows:

> "The legislature may determine when the exigency exists for the exercise of the police power, but it is for the courts to determine what are the subjects of the police power and what are reasonable regulations thereunder, and whether there is any real or substantial relation between the avowed objects of the law and the means devised therein for attaining those ends. People *v.* Steele, 231 Ill., 340, 83 N. E., 236, 14 L. R. A. (N. S.), 361, 121 Am. St. Rep. 321; City of Belleville *v.* Turnpike Co., 234 Ill., 428, 84 N. E., 1049, 17 L. R. A. (N. S.), 1071."

In that case the Court further said:

> "Counsel for applicant argues that the appellee railroad company accepted its franchise from the state to acquire its right of way and build and operate its railroad subject to the exercise, at any and all times, by the state, of this police power for the public health, safety, morals, and welfare; that the exercise of this power by the state and the observance of such duty by the railroad company ever exists and continues, and cannot be contracted away. Beyond question, this is the general rule. Counsel argue, further, that at common law the railroad company must at its own expense conform its road and the operation thereof to the conditions made necessary by the construction and use of works

by the city or the municipality, such as public highways or canals; that this duty rests upon the railroad company regardless of statute, and applies not only to the conditions at the time the railroad was built, but also to those existing thereafter. With this we cannot agree. In this and other jurisdictions it has been held that questions of this kind are frequently regulated by statute. In Illinois Central Railroad Co. *v.* City of Bloomington, 76 Ill., 447, this court held that where a city had laid out a street within its corporate limits across the right of way of a railroad company prior to the passage of section 8 of the present Railroad Fencing Act (the statute at that time not requiring railroads to construct and maintain crossings outside of villages), such city could not, by ordinance, direct the railroad to construct a crossing and approaches thereto. The doctrine of that decision, under the law as it then existed, has been quoted with approval in People *v.* Illinois Central Railroad Co., 235 Ill., 374, 85 N. E., 606, 18 L. R. A. (N. S.), 915, and City of Bloomington *v.* Illinois Central Railroad Co., 154 Ill., 539, 543, 39 N. E., 478, 479; it being stated in this last case that:

> " 'If either a natural person or corporation has a right of way across lands, and the public or municipal authorities afterward locate and open a highway or street across such right of way, then there is no rule or principle of common law that would compel such person or corporation to construct and maintain the crossing of the highway or street over the right of way, or the approaches thereto, at his or its own expense.'
>
> "We know of no decisions in this state that construe the rules of the common law on that question in any different way than as just stated."

In that case the District sought to condemn the right-of-way for a canal across the railroad property. The trial court allowed damages of $100 for the property actually taken and made a further allowance of about $50,000 for certain items for the cost of the construction of a bridge on which to carry the railroad tracks and for the maintenance thereof; also for the expense of diverting traffic during the construction of the bridge. The District claimed that the only damage that should be allowed was the item of $100. The action of the trial court was affirmed, and thus in effect the court held that there was no legal duty on the part of the railroad to construct or maintain the bridge *at its own expense.*

So far as railroad grade crossings are concerned, the defendants will no doubt cite the case of *New York & New England R. R. Co.* v. *Bristol,* 151 U. S., 556, 38 L. Ed. 269, where the Court said that the imposition upon a railroad corporation of the entire expense of the change of grade at a highway crossing did not violate the Constitution of the United States, "*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." In that case the statute under consideration did not impose the entire expense upon the railroad company, and hence what was said on that subject was *obiter.* But even under that decision it is implied that if the mode of ascertaining the method of distributing the expense was "merely arbitrary or capricious" then it would deprive the company of its property without due process and without just compensation.

In *Dobbins* v. *Los Angeles.* 195 U. S., 223, 236, the U. S. Supreme Court said:

> "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enact-

ments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In *Lawton* v. *Steelé*, 152 U. S. 133, 137, the Court said (italics ours):

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, requires such interference and, second, that the means are reasonably necessary for the accomplishment of the purposes, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.*"

In *Holden* v. *Hardy*, 169 U. S., 366, 398, the Court said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558, the Court said:

"The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying

that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore reserved to the states when the constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In *Otis Elevator Co.* v. *City of Chicago,* 263 Ill., 419, 105 N. E. 338; 52 L. R. A. (N. S.), 192, 198, the Illinois Supreme Court said (italics ours):

> "In the exercise of the police power the city had a right, *within reasonable limits,* to require the railroad to elevate its track so as to avoid grade crossings upon streets, and protect the lives and property of its citizens."

In *Vreeland* v. *Forest Park Commission,* 82 N. J. Eq., 349, the Court of Errors and Appeals held that the act of April 12, 1909, commonly known as the "fire line act," was unconstitutional as a taking of

lands without compensation—which could not be justified "as a proper exercise of police power." In coming to this conclusion the Court said:

> "There is nothing in the nature of the land, or its use, that creates a nuisance to be abated." (p. 351).

In the case of grade crossings which are authorized by the Legislature, it cannot be claimed that they are a nuisance, no matter how great the railroad traffic may be.

Incidental annoyances due to the operations of trains were contemplated when the charters were given and cannot be made the subject of claims for damages. In the legal sense, such inconvenience is not a nuisance either public or private. *Pennsylvania R. R.* v. *Jersey City,* 84 N. J. L., 716, 87 Atl. 465, 49 L. R. A. (N. S.), 715; *Jersey City* v. *Erie R. R.,* 84 N. J. L., 761, 87 Atl., 467; *Kelly* v. *Erie R. R.,* 86 N. J. L., 379, 92 Atl. 89. Hence a statute of this kind cannot be sustained on the theory of abating a nuisance.

Under the principles laid down by the U. S. Supreme Court in the *Bristol* case we submit that the statute of 1913 is unconstitutional. If ever there was (in the language of that case) an "arbitrary and capricious" statute, the one now under consideration comes within such description. It is, we submit, subject to this criticism for several reasons:

First. Because it throws the entire expense of eliminating grade crossings upon the railroad company (regardless of whether the proceedings are instituted by the railroad or by the municipality, or by the Board itself—see sec. 5)—except in certain cases specified in section 2 of the statute, wherein the street railway is to contribute not exceeding 10%.

Second. Because it limits the amount to be paid by the street railroad to not exceeding 10% of the expense "directly chargeable to the crossing used by the street railroad company" regardless of any existing contracts between the street railway and the steam railroad company, and regardless of whether or not this percentage is a fair proportion of the danger to public safety and the impediment to public travel, which in any particular case may be reasonably chargeable to the use of such crossing by a street railway company. (For further discussion of this subject, see Points XXI and XXVIII.)

Third. Because it does not even *require* that the street railway company pay ten per cent. of such expense. It simply fixes that proportion as the maximum amount to be paid and leaves it to the Board of Public Utility Commissioners to decide arbitrarily whether in any particular case the maximum shall be paid by the street railway or whether nothing at all shall be required of it; and does not fix any standard by reference to which the Board is to decide whether, or what part of, the ten per cent. is to be paid in any particular case.

Fourth. Because it imposes upon the railroad the cost of damages to adjacent property, without providing for any proportion thereof to be paid by the municipality and without establishing any standard by which such damages are to be determined, and without making any provision for assessment of any *benefits* that may accrue to adjacent property by reason of the elimination of the crossings, and without providing any method for determining the amount of such damages.

Fifth. Because it imposes upon the municipality *no* expense whatever, except the expense of removing, relaying or relocating municipal water or

sewer pipes or other municipal pipes, conduits or subways; and except, also, the expense of *paving, curbing and flagging* the highway constructed as the result of the change of grade. A large proportion of the expense resulting from the change of grade of highways is the cost of *fill* and *excavation.* In this case the cost thereof is $56,849.72 (figures compiled from city's estimate, pp. 919-931). No logical reason can be suggested why the municipality should be relieved from the burden of the cost of fill and excavation, due to change of grade of streets. This obnoxious feature of the statute is particularly oppressive in the present case where the Board has directed that the grades of every one of the fifteen highways be changed—in one case, that of Madison Avenue, by elevating the street across the railroad tracks, and in all the other cases by a partial depression of the street and a partial elevation of the tracks.

Sixth. Because the statute as originally drawn (without the supplement of 1914 providing for notice) makes no provisions for giving notice to interested property owners. The value of such properties that may be affected in this case, as we have shown elsewhere, is nearly $10,000,000.

Seventh. Because it directs the Board of Public Utility Commissioners "of its own motion" to take proceedings for the elimination of a grade crossing —even without, or in some cases perhaps, even against, the wish of the municipality in which the crossing may be located, thereby imposing certain expenses upon such municipality against its protest, or at least without its consent. Further, in such a case, it constitutes the Board the prosecutor to bring the proceeding, the judge to determine the law, the jury to decide the facts, the witness to prove the facts; and, in the event of a decision

against the railroad, the hangman to execute the sentence.

Eighth. Because it gives to said Board an unlimited and arbitrary power, even after it finds the existence of the jurisdictional facts prescribed in section 1, to order or not to order the elimination of crossings without fixing any standard of reasonableness or necessity or financial practicability, or indeed, any standard whatever—thus vesting in the Board power to decide questions of vast importance both to the railroad companies and to the public without limit upon their discretion, and without affording any reasonable standard whereby the same must be guided.

Ninth. Because, if section 4 of the statute of 1913 is construed to apply to companies, corporations, copartnerships or individuals other than those coming within the description or definition of public utilities, then such private companies, etc., are required, "at their own expense," to move or change the grade or location of their property or constructions.

Tenth. Because, if section 1 of the statute be construed in such a way as to sustain the present order with regard to the vacation or opening of streets and changes in the lines, locations or grades thereof, then the Board of Public Utility Commissioners has practically unlimited power to change a public highway or to change a series of such highways that may happen to intersect railroad tracks in disregard of the restrictions and limitations imposed by municipal charters or other laws and without notice or hearing to property owners who may be affected thereby.

Eleventh. Because, if construed in such a way as to sustain the present order whereby fifteen

crossings are eliminated in one proceeding, there is no limit upon the number of crossings which may be thus considered at one and the same time, if any municipality sees fit to institute proceedings for the elimination of all crossings within its limits, or if the Board, of its own motion, sees fit to institute proceedings for the elimination of all the crossings in the entire State in one and the same proceeding—which, according to the Board's construction of the statute in the present case, could be done, notwithstanding that each crossing presents its own individual problem. If proceedings were instituted for the elimination of all, or a large number of crossings, on any one railroad within the State (and under the construction of the statute adopted by the Supreme Court, there is no limit to the number of crossings that may be considered in any one proceeding), the Board by instituting same of its own motion might cause substantial interference with the operations of the railroad—even to the extent of making it necessary for the railroad to cease operations entirely, pending the fulfilment of the Board's order for the elimination of crossings.

Twelfth. Because, it gives the Board of Public Utility Commissioners practically unlimited power to enlarge the duties imposed upon railroad companies by their charters, and in effect repeals section 26 of the General Railroad Law, which required "bridges and passages" at public highways to be "of such width and character as shall be suitable to the locality in which the same are situated."

Thirteenth. Because it confiscates the property of the railroad by compelling the expenditure of enormous sums against the protest of the company and contrary to the judgment of the board of directors without any compensating advantages,

and without any prospect of receiving a reasonable return upon such an investment.

Fourteenth. Because it takes the property of a lessee company as the company operating the railroad, for the benefit of the lessor company, which has title to the land upon which the railroad is constructed, and which owns the franchise by which the railroad has the right to do business, without making provision for a reasonable or for any apportionment between the lessor company and the lessee company; and without making any provision for reimbursement to the lessee company of the amount thus expended for the benefit of the lessor company, and without giving the lessee any further interest or estate in the lessors' property.

Fifteenth. Because it makes no provision for eliminating the danger to public safety and the impediment to public travel by reducing the number of train movements or by abandoning the operation of trains when, and if it appears that the cost of eliminating the crossings is so great as to make it unprofitable to continue the operation of trains over the railroad or that part thereof where the crossings are ordered to be eliminated.

Sixteenth. Because it makes no provision whereby the discretion of the Board of Public Utility Commissioners is required to be reasonably dependent upon the financial possibility or feasibility of complying with an order requiring the elimination of crossings.

Seventeenth. Because it gives the said Board of Public Utility Commissioners arbitrary power to require changes in or the removal of the property or constructions of other companies, corporations, co-partnerships or individuals without requiring that said changes be found to be reasonably neces-

sary or appropriate for the elimination of any crossing or crossings.

Eighteenth. Because it does not permit the said Board to eliminate highway crossings by depressing or elevating the public highway in part and by depressing or elevating the railroad tracks in part, but limits the power of the Board to alter the crossing either by carrying the highway under or over the railroad (leaving the tracks at the same level) or by reconstructing the railroad under or over the highway (leaving the highway at the same grade).

All of these objections to the statute are discussed in other parts of the brief but they are here summarized for the purpose of showing that the statute is "arbitrary and capricious," and is not a reasonable exercise of the police power. In order that a statute may be sustained as "reasonable" exercise of the police power, it must also appear that the provisions of the statute are *appropriate* to the purpose intended to be carried out by the statute. Assuming that the elimination of grade crossings may be held to come within the classification of "reasonable" it does not follow that the present statute, *as construed* by the Board of Public Utility Commissioners and by the Supreme Court is an *appropriate* exercise of such power. Thus the changes in the locations of the stations of the prosecutor, the removal of various sidetracks and the reconstruction thereof in other locations and the changes in the freight yard, and the leads and approaches, the removal and relocation of buildings and facilities used by private companies, have no relation whatever to the general purpose of the elimination of grade crossings, and are not appropriate to such purpose.

Further, the question of whether a statute is a reasonable or an unreasonable exercise of the po-

lice power depends, to a certain extent, upon the course of legislation, as well as upon general public opinion.

In the case of *Muller* v. *Oregon,* 208 U. S., 412, 419, the question arose as to the right of a State to regulate the working hours of women; the law under consideration limited the employment of females, in laundries, to not more than 10 hours during any one day; the statute was attacked on the ground that it was in violation of the Fourteenth Amendment. In coming to the conclusion that the statute was valid, the United States Supreme Court said:

> "In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandies, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.
>
> "While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: Commonwealth v. Hamilton Mfg. Co., 120 Massachusetts, 383; Wenham *v.* State, 65 Nebraska, 394, 400, 406; State *v.* Buchanan, 29 Washington, 602; Commonwealth *v.* Beatty, 15 Pa. Sup. Ct., 5, 17; against them is the case of Ritchie *v.* People, 155 Illinois, 98.
>
> "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the condi-

> tions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a concensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

The same principle was applied in the case of *People* v. *Charles Schweinler Press,* 214 N. Y., 395, in which the New York labor law prohibiting night work for women was sustained. In the course of the opinion the Court said (italics ours):

> "In the decision by the legislature whether determination by us whether the legislature was justified in adopting it, it was and we are entitled to take into account the report made by the commission, such facts tending to *support it as were matters of common knowledge, and the widespread and long-continued belief evidenced by statutes and in other manners* that night work by women in such a place as a factory is so injurious that grave dangers therefrom are to be apprehended."

In referring to and distinguishing the case of *People* v. *Williams,* 189 N. Y. 131, the Court said (italics ours):

> "While theoretically we may have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and

opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential.

"Especially and necessarily was there lacking evidence of the extent to which during the intervening years the opinion and belief have spread and strengthened that such night work is injurious to women; of the laws, as indicating such belief, since adopted by several of our own states and by large European countries, and the *report made to the legislature by its own agency,* the factory investigating commission, based on investigation of actual conditions and study of scientific and medical opinion that night work by women in factories is generally injurious and ought to be prohibited."

Following the suggestion in the above cases let us examine "the course of legislation and expressions of opinion" upon this subject. Beginning with the State of New Jersey we find that the statute of 1913 is a complete reversal of the policy of this State ever since the question of the elimination of grade crossings first came under consideration. As we have shown by the citations under Point VIII., it was the original contemplation of all parties to the construction of railroads that crossings should be at grade; as the number of trains and the rapidity of their movement increased and as highway traffic developed the question naturally suggested itself as to whether it was practicable to eliminate grade crossings either in whole or in part. The course of legislation in New Jersey since the year 1874 has been to provide for such elimination *by contract* between the municipality and the railroad company. In Appendix No. V. will be found a summary of the various

statutes of this State (other than Chapter 57, Laws of 1913) providing for the conditions under which grade crossings may be altered. From the first of such statutes (Chapter 281, p. 45, Laws of 1874) to the most recent (Chapter 58, p. 180, Laws of 1915) there is none which provides that the entire expense must be borne by the railroad. On the contrary, they all provide either that certain of the expense be paid by the municipality or that the municipality may make contracts with the company. As it takes two to make a bargain the necessary implication from the contract statutes is that the municipality is expected to pay a reasonable part of the cost—and that, in fact, in many cases has been the result of the elimination of crossings under such statutes. See, for example, the case of *Morris & Essex R. R.* v. *City of Newark*, 76 N. J. L. 555, where a contract was made between the city and the railroad for the elimination of tracks in that city, pursuant to the provisions of the Act of 1901, p. 116. Several of these statutes are still in effect and operations thereunder are now in progress in various municipalities, such as Morristown, Summit, Madison, Chatham, South Orange, Orange, East Orange, Ridgewood and Rahway.

So far as concerns public opinion in the State of New Jersey, it is difficult to get a fair statement thereof from any of the municipalities who may be interested in having the crossings eliminated. Of course, if they can, they want to force the railroad to assume the entire burden, but if we take the Board of Public Utility Commissioners (and its predecessor, the Board of Railroad Commissioners) as representing the concensus of opinion, then it is significant that both of these boards in their official reports to the Legislature have repeatedly committed themselves to the view that in considering the problem of grade crossings the

fact must be recognized that the elimination thereof is a benefit to the general public as well as to the railroads, and that, therefore, a reasonable division of the cost should be made between the railroads, the municipalities and the State. In Appendix VI we have quoted the various reports of these boards on this subject.

The same general policy which the Board of Public Utility Commissioners has repeatedly recommended was approved by Governor Wilson in his veto message relative to Ch. 412, Laws of 1912, as printed in Laws of 1912 at p. 918, where he quotes from the Board's report of 1911 and suggests "the law could easily establish a principle by which it might be determined when it was equitable that the several communities affected should participate in the expense and to what extent, if any, they should participate." (See Appendix VI.)

Let us go one step further: If under the principle laid down by the U. S. Supreme Court and by the New York Court of Appeals, *supra,* the courts have the right to consider the "course of legislation" in order to sustain the constitutionality of a law passed in the exercise of the police power, can not the same principle be applied in considering whether a particular law is *un*constitutional?

An examination has been made of the statute laws of all of the States of the Union for the purpose of ascertaining what is the course of legislation on this subject. A summary of the several statutes will be found in Appendix VII.

There are seventeen States in which there is no law providing for the compulsory elimination of grade crossings.

In Oklahoma there is a provision in the Constitution (Section 18, Article 9) providing that the Corporation Commission shall have the duty of supervising, regulating and controlling the transportation companies. This section of the constitu-

tion might be broad enough to include the elimination of present grade crossing, but as yet, there has been no decision on this point.

In Arkansas there is a special act which requires two certain named railroads to raise their tracks to the maximum grade of the cross levee at a point where the tracks cross the same. This is the only legislation in this State upon the subject.

In Mississippi there is a provision that where a railroad is constructed so as to cross a highway, and it becomes necessary to raise or lower the highway, the railroads shall make proper and easy grades in the same, so that the railroad may conveniently cross it. This is not broad enough to include the compulsory elimination of grade crossings.

In Nevada there is a provision that the railroad commission shall have full power to order repairs, re-enforcements or reconstruction of property, including buildings, tracks and equipments. This does not, in terms, include the compulsory elimination of grade crossings.

In Delaware there is no general act providing for the compulsory elimination of grade crossings, but there is a special statute relating to City of Wilmington, and an act providing for the assessing of damages whenever a grade crossing is to be eliminated. This does not require compulsory elimination.

In Wyoming, the Public Service Commission has the power to apportion the costs between various utility companies and the city, town or county in the case of a highway crossing. It is apparently applicable only to future crossings, and does not require compulsory elimination.

In six states it is provided that the Commission, having jurisdiction of the subject of the elimination of grade crossings, shall prescribe the terms upon which the separation shall be made, and the

proportions in which the expense of such elimination shall be divided between the railroad or street railway, or between such corporation and the state, county, municipality or other public authority in interest.

In three states in which there are provisions for the elimination of grade crossings, there is no provision for the division of costs between the railroad or public authority in interest. Of these three states, the Alabama statute provides only for cities of more than 30,000. In Maryland, the jurisdiction is given to the Commissioners of the county in which the grade crossing is situated. In New Hampshire the Board of Railroad Commissioners has jurisdiction only upon petition of the proprietors of a railroad, or where there is an application upon the part of the railroad to the Commission for determination of the vote of a town requiring said railroad to abolish a grade crossing. In this State there was one case where an appeal was taken to the Commission, and upon a hearing an agreement was made whereby the railroad was to pay 65%, the state 23% and the town 12% of the cost of elimination.

In Connecticut, if a petition is brought by the directors of the railroad, the entire expense is to be paid by that company. If brought by a municipality, it is to pay not more than one-quarter of the expense and the railroad the remainder, provided the highway was in existence when the railroad was constructed, or its layout changed for the benefit of the railroad. If the highway was constructed since the railroad, the Commission may order the town, city or borough to pay not more than one-half of the costs. In this State, the directors of every railroad are required to apply for the removal or to remove at least one grade crossing every year for every fifty miles. If they fail to do so, the Commission

shall, if, in its opinion, the *financial condition of the company will warrant,* order such removal. If the Public Utility Commission upon its own motion orders any alterations, it shall determine and direct by whom such alteration shall be made, and at whose expense and in such cases one-quarter of the entire expense is to be paid by the State, and the remainder by the railroad.

In Kansas, cities of first and second class may require any railroad to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon, or over, or tunnels under, streets. There is no provision for the division of costs and expenses.

In South Carolina it is provided that the County Supervisors shall indicate how and in what manner crossings considered by them to be unsafe, shall be constructed, and may require such construction within sixty days. The railroads may apply to the County Commissioners to alter the highway crossing, other than a street in any incorporated municipality. There is a special act requiring the Southern Railway to construct an overhead bridge at a certain crossing, but there is no provision for the apportionment of costs.

In Utah the city council has the power to provide for, or exchange, the location, grade or crossing of any railroad. There is no provision for the apportionment of costs.

In New York when the crossing is eliminated upon petition of the mayor and common council of any city, or the president and trustee of any village, or the town board of any town, or any railroad, the railroad pays 50% of the entire expense, and the State and municipality pay the remaining 50%. Where the highway is a state highway, the railroad pays 50% and the state 50%. Where there is a county highway the costs shall be borne jointly by the state, county

and town in the proportion in which the cost or construction of such county highway is paid.

In Iowa the Railroad Commissioners may order the altering, changing, relocating or vacating of an established highway where it crosses a railroad. There is no provision for the payment of costs, other than that the proportion to be borne by the city, town, county, state or public body shall be considered as forever held in trust by the railroad. Cities of 7,000 or more may require the railroad to erect, construct, reconstruct, complete and maintain viaducts, provided the railroad commissioners deem it necessary. Damages accruing to property owners are to be paid by the city. The costs of the construction, etc., are by implication to be borne by the railroad. The city and the railroad share equally the expense of maintenance.

In Indiana, cities of more than 100,000 may require elimination of grade crossings. In such case the railroad pays 75% of the costs, the trolley company, if there be one, 5%, the city 14% and the county in which the city is located 6% of the entire cost. Where there is no trolley at the crossings, the city pays 17% and the county 8% of the costs. Cities of between 43,000 and 49,000 may also require the abolition of grade crossings, in which case the railroad pays 75%, the trolley company, if there be one, 15% and the city the remainder of the cost. The amount required from the trolley company is not to exceed $10,000 at a crossing where the right-of-way and tracks of two or more steam railroads join and are contiguous, or more than $5,000 at any other crossing. If the amount required from the trolley company exceeds such maximum amount, the additional expense is to be paid by the city, or the railroad as the case may be. If the railroad commission orders the elimination,

one-quarter of the entire expense is to be apportioned between the county or counties in which the grade crossing exists, and three-quarters by the railroad. This, however, does not apply to cities of more than 20,000 nor to cities or incorporated towns.

In Rhode Island the town council may require a railroad to eliminate grade crossings. If the company refuses the council may apply to the railroad commission from whose decision an appeal lies to the Appellate Division of the Supreme Court, which decides the proportion of expense to be borne by the railroad and the town. Chapter 931, Laws 1901, requires the New York, New Haven & Hartford Railroad to abolish a crossing in the City of Providence, and permits the city and the railroad to agree on the amount of proportion of what items shall be paid by each respectively. Chapter 896, Laws 1912, provides for the elimination of crossings in two certain cities. 65% of the expense is to be paid by the railroad and 17½% by each city.

In Vermont the state is to pay not more than 25% of the total expense of eliminating grade crossings, the town not more than 10% and the remainder by the railroad. If the highway was constructed since the railroad, the state's proportion is the same. The town is to pay not more than 15%, and the remainder by the railroad. Where there is a trolley company occupying any part of the crossing, it may be assessed such percent of the total cost as is according to the benefits conferred. Railroads are required to eliminate one crossing for every eighty miles. Should they not do so, the Board shall, if in its opinion the *financial condition of the corporation will warrant,* order the elimination thereof. In such case the State pays 20% of the entire costs.

In South Dakota the mayor and council or board of commissioners may declare by ordinance when any viaduct is necessary. The damage caused to any property is to be paid by the city. The cost of construction is evidently to be borne by the railroad, as there is no provision for the apportionment thereof.

In Massachusetts, the commission apportions the work to be done by the railroads, and the city or town. The railroad is to pay 65% of the total expense. If there is a street railway at the point, it pays 15% and the remainder is divided between the commonwealth and city or town, but not more than 10% is assessed to the city or town. If the amount assessed to the city or town is less than 10%, the difference between the assessment and 10% of the total cost is to be paid by the railroad. If the crossing was established after June 21, 1890, no part of the expense shall be charged to the commonwealth, and such unapportionable part shall be apportioned by the commission between the railroad, street railway, the city or town. There is a provision for the division of the costs of maintenance between all parties in interest.

In Michigan, the railroad commission and the state highway commissioner, shall apportion the expense between the railroad, state, county, goodroads district or town. The state's portion is not to exceed 25%. Cities, towns, counties and other political subdivision of the state may agree with railroad companies for the elimination of crossings. If no agreement can be reached, then the Board of Railroad and Street Crossings, may determine the portion to be paid by the railroads, city, county, or township. There is a provision for the maintenance of such crossings to be paid by all parties in interest, according to the special circumstances.

In Maine the public utilities commission apportions the expenses and damages incidental to elimination of crossings between the state, the town in which the crossing is located and the railroad, and shall order 25% to be paid by the state, 10% by the town and the remainder by the railroad. It is provided that the commission shall not make any order upon any petition until they are satisfied by investigation, or otherwise, that the *financial condition of the corporation owning or operating the railroad will enable said corporation to comply with such order,* and that the probable benefit to the public will warrant said order and the probable expense resulting therefrom, and that the order can be complied with, without exceeding the state appropriation, which is limited to $15,000 in any one year. Where the street railway has a right-of-way at such crossing, the commission shall apportion to it an equitable share of the damage and expense of alteration and the balance shall be apportioned as provided above.

In Ohio a municipality or county may contract with a railroad to abolish grade crossings, and apportion the costs between them. The costs including that of land or property purchased or appropriated and the payment of the damages to abutting property shall be apportioned so that the railroad shall pay not less than 65% and the municipality or county not more than 35%; the apportionment is subject to this limitation only. A municipal corporation may require a railroad to raise or lower its tracks. The costs thereof shall be borne 35% by the municipality and 65% by the railroad. A street railway, where its tracks are at any such crossing, may be required to bear a reasonable portion of the costs assumed by the municipality, but not more than one-half thereof.

In Pennsylvania boroughs may enter into contracts with railroad companies, street railways and other companies for the building, construction and maintenance of viaducts or bridges, and for the payment of damages caused thereby. When such viaduct or bridge merely crosses railroads, or railroads and private property, the county commissioners may, subject to the approval of the Court of Quarter Sessions of the proper county, contract to pay not more than 30%. The railroads, except in cities of the first and second class, and such cities may alter their tracks, or highways, so as to eliminate grade crossings, except on highways constructed at grade by permission of the Court of Common Pleas. Such highways shall not be altered without permission of the said court, unless by agreement with the municipality in which the crossing is situated, or with the railroad whose tracks cross the highway, as the case may be. Townships may contract with railroads for the construction of bridges. The Public Service Company Law, Act 384, Laws of 1913, leaves the apportionment of the expense to the discretion of the commission.

The result of the foregoing summary shows that including Arkansas, Mississippi, Nevada, Delaware and Wyoming, there are twenty-two states in which there is no law compelling railroads to eliminate grade crossings.

There is no express legislation in the State of Oklahoma, and the construction of the constitution may, or may not, be held to include the elimination of grade crossings.

There are eight states, including Iowa (in which latter state the statute is somewhat ambiguous) in which the commission, or body having jurisdiction of the elimination of grade crossings, apportions the expenses of such elimination between

the railroads and public bodies, or municipalities interested.

There are seven states, namely: Alabama, Maryland, New Hampshire, Kansas, South Carolina, Utah and South Dakota, in which there is no provision for the apportionment of costs. In one of these (Alabama) the right to order the elimination of grade crossings is limited to cities of more than 30,000. In another (Maryland) elimination can be ordered only by the County Commissioners, and in a third (New Hampshire) there is no provision for the apportionment of costs. The state in one case paid 23%, the town 12% and the railroad 65% of the total costs by agreement between all of the parties concerned.

There are nine states, in which the amount to be paid by the state, city or other municipality, or county and the railroad is expressly set forth either by providing that under certain cases each of these states, it is provided that under certain percentage of the entire costs, or an amount not to exceed a certain percentage. In one or two of these States, it is provided that under certain circumstances, such as where a petition for the elimination of a grade crossing is brought by the railroad, it shall pay the entire cost.

In this same connection we may also call attention to the reports of public service commission of other states. In Appendix VI is given a summary of the reports of the Commissions of Indiana, California and Massachusetts. The California report is especially pertinent to the present case, as it calls attention to the point of acting "within the limits of commercial feasibility."

The report of a special commission appointed by the Legislature of Massachusetts is likewise important. In that state a law had been in effect for many years providing for a division of the

costs on a certain basis, namely: 65% to be paid by the railroad and the balance to be divided between the state and the municipality—with the proviso that no more than 10% should be charged to the municipality. This commission reports that it made a careful examination of the experience and laws of other states. It came to the conclusion that the present law has proved as "satisfactory," as the law of any other state; and the members of the commission, therefore, refused to recommend any change in the law except in minor details as to the percentage of 10% to be paid by the municipality.

No doubt the most representative body of officials that have to do with the consideration of the relations between the railroads and the general public is the National Association of Railway Commissioners. This is composed of the railroad and public service commissioners of all the states where such commissions have been provided. At the twenty-third annual convention of this Association, held at Washington in October, 1911, the committee on grade crossings presented a full report on the subject (see p. 57), which after an elaborate discussion, was adopted (see p. 60) with an amendment on a minor point which does not affect the matter now under consideration. In this report the committee said (italics ours):

> "We fear that we would prove unworthy of the confidence reposed and justify your questioning the sincerity of our effort if as the result of all our investigations we have nothing to offer looking to a solution of the problems under consideration, and though it may be in part a repetition of what has previously been recommended, we believe that as to grade separation we should renew our efforts to have the legislatures of our respective States pass a law requiring that each railroad

> operating therein should be required to eliminate a given number of grade crossings each year, and at such points as the commission having authority in such States shall direct, *the expense to be apportioned between the State and county, township, or village, as the case may be, and the railroad company, as the commission shall determine, believing that the varying conditions under which grades are separated do not make it advisable that any inflexible rule or statute shall govern as to the manner of division of expense;* that the commission of the State in which such crossings are separated, making an inspection of the premises and being thoroughly conversant with the conditions is in a better condition to determine the reasonableness of the apportionment of expense than any other body, legislative or otherwise."

Of course, these statutes and reports are not binding upon the legislature, but they do show that the State of New Jersey has either taken a very long step in advance (as will no doubt be claimed by the City of Paterson) or else it has taken a very long step backward—as compared with the trend of the legislation and opinion throughout the country.

There are also other elements which the Court should consider in determining whether the police power has been exercised in a reasonable manner; thus attention must be paid to the element of cost and the practical effect of the statute under consideration—although, as stated in the case of *Erie Railroad Co.* v. *Williams,* 233 U. S. 685, 700, "cost and inconvenience would have to be very great before they could become an element in the consideration of the right of a State to exert its reserve power or its police power."

In *Wisconsin R. R. Co.* v. *Jacobson,* 179 U. S. 287, an order made under the laws of Minnesota

directing two railroad companies to establish certain track connections was sustained as a valid exercise of the police power. In the course of the opinion the Court said (italics ours):

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling factor, upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases *questions of degree* are the controlling ones by which to determine the validity, or the reverse, of legislative action.
>
> We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, *unduly, unfairly or improperly* affect the *pecuniary* rights or interests of the plaintiff in error" (p. 301).

We have heretofore shown that the cost to the prosecutor of complying with the order under review will be not less than $3,000,000, and will probably be considerably more than that sum. We

have also shown that if all grade crossings within the State be held to come within the class of "dangerous" the expense to the prosecutor of complying with orders made under this statute will be over $15,000,000. We have also discussed the details of the financial circumstances of the prosecutor, as presented to the Board on the hearing of the city's petition and on the application for a further hearing. Without referring further to this testimony we urge that the conditions are so extraordinary that in the language of the United States Supreme Court, in the Jacobson case, *supra,* "regard being had to the facts" this order "unduly, unfairly and improperly affects the pecuniary rights and interests" of the prosecutor. Under the Williams case, *supra,* it is stated that the cost and inconvenience must be very great in order to justify the conclusion that the regulation under review is an unreasonable exercise of the police power. If ever there was a case to which that principle applies, this is it. Not only does the evidence show that the cost to the prosecutor will be very great, but it goes even further, and shows that it will be *so* great that it is impossible for the prosecutor to obey the order.

In examining the question of whether a statute which imposes the entire burden of the elimination of the grade crossings is a reasonable exercise of the police power, let us also consider the practical effect of such a statute. Under Point I we have already called attention to the fact that there are not less than 2,500 grade crossings in the State of New Jersey, and that the cost to the railroad companies if all were paid by them, would be $137,500,000; and the cost to the prosecutor in the State of New Jersey to eliminate its 256 crossings would be over $15,-

000,000. But let us go one step further, and see what the cost would be over the entire Erie System, covering the states of New Jersey, New York, Pennsylvania, Ohio and Indiana—providing that in every state the Legislature saw fit to exercise its "police power" in the same manner that New Jersey has attempted to do. The total number of grade crossings subject to elimination on the Erie System on May 1st, 1913, was 2,410; the number in each State was as follows:

New York	931
New Jersey	256
Pennsylvania	417
Ohio	589
Indiana	189
	2,382

(p. 281, line 40; p. 282; line 49). The total as given in the foregoing table varies slightly from the total number of grade crossings, as in Indiana there are certain crossings which are not subject to elimination under the present law (pp. 282, 283).

If a law imposing the entire expense on the railroad company is valid in New Jersey, such a law is equally valid in every other state. Taking the total number of crossings as 2,410, and the average cost of eliminating each at the sum of $55,000 (p. 289, line 30), it will be seen that the total cost to this one company would be $132,550,000 (exclusive of property damage)—or about one-third of its present total capital stock and bonded indebtedness, of approximately $493,000,000 (p. 1359). It may be said that there is no likelihood of the railroad company being called upon to meet this enormous burden for many years to come, if ever, but that does not affect the general proposition that if a statute

like the one under consideration is valid in one state, it is equally valid everywhere. If the present statute is sustained, what is more probable than that other states will modify existing statutes to accomplish the same result. If it be said that the statute applies only to those crossings that are dangerous to public safety or that impede public travel, that does not relieve the situation, because the question of danger, as we have pointed out elsewhere, is largely a matter of degree, and under the opinion of the Supreme Court, the mere passage of trains over a grade crossing constitutes an "impediment" thereto.

If the administrative body is given power to determine as a matter of fact what constitutes danger or impediment, and if its conclusion in that respect is binding on the reviewing court, except in a case where there is *no* evidence whatever to sustain it, then there is no limit to what might be ordered under such a statute, other than the sound discretion of the administrative body to whom is committed this vast power—a discretion which, if the present case be taken as an illustration, may be grossly abused to the serious financial detriment, and even bankruptcy, of the company that is unfortunate enough to have a large number of grade crossings on its railroad.

Indeed, under the opinion of the Supreme Court an order requiring the elimination of grade crossings is not even a matter of *discretion* on the part of the Board. The Court says that the word "may", as used in the statute, means "must". If this is correct, it follows that whenever the jurisdictional facts appear the Board is *required* to order the elimination of the crossing. But whether the view of the Supreme Court on this point is correct or not, the real question is not what *would* be done, but what *could* be done thereunder, as indicated by the following authorities.

In *Ex parte Christensen,* 43 Fed. 243, Sawyer, *J.,* speaking for the U. S. Circuit Court, held:

> "The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is in fact administered. Its capability of being abused is the test."

In *Grainger* v. *Douglas Park Jockey Club,* 148 Fed. 513, 521, the U. S. Circuit Court of Appeals for the Sixth Circuit, held (headnote):

> "The constitutionality of a statute must be determined by its provisions, and not by the manner in which it is in fact administered."

In *Sargent* v. *Rutland R. Co.,* 85 Atl. 654; held "the constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done." Citing *Montana Co.* v. *St. Louis Mining & Milling Co.,* 152 U. S. 160, 38 L. Ed. 398.

The constitutionality of a statute is to be determined not according to the grace or favor of the officials who act under it, but according to the terms of the statute itself. *Security Trust Company* v. *Lexington,* 203 U. S. 323, 333; *Georgia Ry.* v. *Wright,* 207 U. S. 127, 138.

In *Security Trust Company* v. *Lexington, supra,* it was said:

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute."

It will probably be urged by the defendants that the present statute can be sustained under the decision of the U. S. Supreme Court in the Bristol case, *supra,* as against the claim of the prosecutor that the statute is an unreasonable exercise of the police power. It is true that in that case the Connecticut statute requiring the alteration of grade crossings under certain conditions was sustained. That statute, however, differed in several very important respects from the one now under consideration. It is quoted at length in the opinion of the U. S. Supreme Court. It will be observed that under that statute, if the petition for the abolition of the crossing is filed by the railroad company, the expense is to be paid by the railroad company "owning or operating the railroad"; and in case the petition is filed by the municipality, then an amount not exceeding one-quarter of the expense is to be paid by the municipality and the remainder by the railroad company owning or operating the railroad; if the highway affected by such last-mentioned order (that is, in a case where the municipality files the petition) has been constructed since the *railroad,* the commissioners may order an amount not exceeding one-half of the whole expense to be paid by the municipality and the remainder by the railroad company. It is further provided (italics ours):

> "The *directors* of every railroad company which operates a railroad in this state shall remove or apply for the removal of at least one grade crossing each year for *every sixty miles* of road operated by it in this state, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, *if in their opinion the financial condition of the company*

will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

The important distinctions in this statute, as compared with the New Jersey statute, are the following:

1. When the municipality petitions for the abolition of a grade crossing it must pay not exceeding one-quarter of the whole expense, the railroad paying the balance; whereas under the New Jersey statute the railroad pays it all (regardless of whether the railroad or the muncipality files the petition), except certain trifling expenses for paving, curbing and flagging and for changes in municipal water or sewer pipes.

2. If the highway has been constructed since the railroad (in a case where the municipality files the petition), then the municipality may be required to pay not exceeding one-half of the expense; whereas the New Jersey statute makes no distinction whatever between highways constructed before and after the construction of the railroad.

3. One grade crossing is required to be removed each year for every sixty miles of road; whereas under the New Jersey statute (as construed by the Board in the present case) any one or more, or indeed all, of the grade crossings of any particular road, may be ordered to be removed just as quickly and rapidly as the Board can approve the plans therefor.

4. The directors have the option of deciding which of the grade crossings are among the most dangerous ones; whereas in the New Jersey stat-

ute the directors have no discretion whatever on the subject.

5. *Compulsory* elimination may be ordered only in the event that the directors of the railroad fail to remove one crossing for each sixty miles; and it is only in the event, first, that the directors fail so to do, and in the *further* event that the railroad commissioners come to the conclusion that *the financial condition of the company will warrant,* that then the commissioners may order the removal of the crossings; whereas in the New Jersey statute the Board of Public Utility Commissioners is given, or at least claims to have, power to order the elimination of crossings *regardless of financial conditions of the company, and even in the face of positive and uncontradicted testimony to the effect that it would be impossible for the company to comply with the Board's order.*

The decision in the Bristol case is further distinguishable from the present case in that the charter of the railroad company in that case was subject to the legislative power to amend, alter or repeal the same. This fact is mentioned in the opinion as one of the elements that justified the Court in concluding that the Connecticut statute did not violate the Constitution. In the present case no such reserved power is found in the charter of the Paterson & Hudson River R. R. Co., and therefore so far as concerns the crossings on the line of that company this part of the reasoning of the Bristol case does not apply. For further discussion of the impairment of the contract between that company and the State of New Jersey as expressed in this charter see Point XXX.

It should also be observed that another important consideration emphasized by the U. S. Supreme Court in the Bristol case was that the statute then under consideration had already been ad-

judicated to be valid by the highest court of the State wherein the statute was passed. The present statute has not yet been before this Court, and the question of whether it is a reasonable exercise of the police power is therefore open to determination.

On the question of whether the railroad commissioners of Connecticut were justified in concluding that the financial condition of the railroad company would warrant the elimination of the crossing under consideration, the U. S. Supreme Court in the *Bristol* case held that that was a question of fact which it would not review unless it appeared that the error was so "gross" as to the amount *in law* to a denial by the State of the rights secured under the Constitution of the United States.

In the present case we insist that this court has the right to consider and decide whether as a matter of law the Board of Public Utility Commissioners has properly exercised the discretion given it by the statute of 1913.

The defendants may also cite the case of *Missouri Pacific Ry. Co.* v. *City of Omaha,* 235 U. S. 121. This was an injunction suit brought by the railroad to enjoin the city from enforcing an ordinance whereby the railroad was required at its own expense to construct a viaduct across its line of railroad at a certain street. The cost of the construction was $80,000. It does not appear from the opinion whether the street was laid out and opened before or after the construction of the railroad tracks. The Supreme Court affirmed a decree of the Circuit Court dismissing the bill. In the course of the opinion the Court, referring to the police power, said (italics ours):

> "So long as the means have a substantial relation to the purpose to be accomplished, and there is no *arbitrary interference with*

> *private* rights, the courts cannot interfere with the exercise of the power by *enjoining* regulations made in the interest of public safety which the legislature has duly enacted."

In *Chicago etc., Ry. Co.* v. *Minneapolis,* 232 U. S. 430, the city acquired for park purposes the shores of certain lakes and lands in the vicinity. It undertook the construction of canals to connect the lakes. Along the strip of land where one of the canals was to be opened was the right of way of the railroad company. The city undertook to condemn an easement across the right of way. The proposed improvement of the city required the construction of a bridge to carry the railroad tracks across the canal. The value of the land, without the cost of the bridge, was $10,000. The estimated cost of building the bridge was $18,513. The controversy was as to the amount which the company should receive. It was held that the company was not entitled to receive compensation for the cost of the bridge, except as to a certain part thereof, due to "ornamental features," which it was held the city should pay in any event. In coming to this conclusion the U. S. Supreme Court said (italics ours):

> "It is well settled that railroad corporations may be required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, *newly laid out* over their tracks or to carry their tracks over such highways. N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S. 556, 567; C. B. & O. R. R. Co. *v.* Chicago, 166 U. S. 226, 252, 255; C. B. & Q. R. R. Co. *v.* Nebraska, 170 U. S. 57; Northern Pacific Ry. Co. *v.* Duluth, 208 U. S. 583, 597; St. P., Minn. & Man. Ry. Co. *v.* Minnesota, 214 U. S. 497; C. I. & W. Ry. Co. *v.* Connersville, 218 U. S. 336, 343, 344."

So far as the Minneapolis case is concerned the principle adopted by the Supreme Court is different from that declared to be the law of this State in *West Jersey, etc., R. Co.* v. *Woodbury,* 80 N. J. Eq. 412; 84 Atl. 1047; *Morris & Essex R. R.* v. *Orange,* 63 N. J. L., 252; *Marino* v. *Central R. R.,* 69 N. J. L., 628; *Morris Canal Co.* v. *State,* 24 N. J. L., 62.

These hold that the canal company or the railroad company is not obliged to construct bridges over highways laid out subsequent to the construction of the railroad or the canal.

Moreover, the decisions cited in the Minneapolis case are readily distinguishable from the present case.

In *Chicago, etc., R. Co.,* v. *City of Chicago,* 166 U. S. 226, the question was as to what amount should be awarded to the railroad company as compensation for opening a public street across its right of way. It was held that nominal compensation only should be allowed. The case has nothing to do with the question of the abolition of grade crossings and it is at least doubtful whether it is in accord with the principles adopted by this court in *Morris & Essex R. R.* v. *Orange,* 63 N. J. L. 252.

According to the rule prescribed in that case a railroad company is entitled to receive compensation for *structural* changes, as distinguished from incidental expenses, arising by reason of the erection and maintenance of crossing gates, etc. To the same effect, see *Central R. Co.* v. *Bayonne,* 51 N. J. L. 428; *Paterson etc. R. Co.* v. *Nutley,* 72 N. J. L. 123; *Freeholders* v. *New York Bay R. Co.* 84 N. J. L. 354.

In *Chicago, etc., R. R.* v. *Nebraska,* 170 U. S. 57, an ordinance of the City requiring the railroad to *repair* a viaduct over the railroad tracks

at a street crossing was held to be invalid. The question of original construction of such viaduct, or of the abolition of the grade crossing over which the same was constructed, was not involved.

In *Northern Pacific Ry. Co.* v. *Duluth,* 208 U. S. 583, an ordinance requiring the railroad to repair a viaduct which had been constructed after the opening of the railroad was held to be valid. This conclusion seems to have been reached because the U. S. Supreme Court did not agree with the contention of the railroad company that the State Court had decided that as to highways which were constructed after the railroad was built there was no obligation to construct overhead bridges or crossings. The U. S. Supreme Court cited cases in the State Court of Minnesota (where the case orginated) to show that such was not the rule adopted by that State. It by no means follows that the same conclusion would be reached by the U. S. Supreme Court in a case originating in a state where it has been decided that the railroad is not bound to build bridges or passages at highways laid out and opened *after* the railroad was constructed.

The question seems to depend upon the policy of the particular state with regard to the subject. The policy of New Jersey, as shown by the cases cited under Point XI, is not to require the construction of bridges by the railroad at highways laid out after the railroad was built.

The decision in *St. Paul, etc., Ry. Co.* v. *Minnesota,* 214 U. S. 497, was rested upon the opinion in the Duluth case.

In *Cincinnati, etc., Ry.* v. *Connersville,* 218 U. S. 336, the same question was involved, namely, the amount of compensation to be paid to a railroad company by reason of the opening of a street across its tracks, as in the case of *Chicago, etc., R. Co.* v. *Chicago, supra.*

The only case in the U. S. Supreme Court in which the question of the validity of a State law providing for the abolition of grade crossings has been directly involved, is the Bristol case, *supra.* As we have already shown that case is distinguishable both on the facts and on the statute then under consideration.

The injustice and unreasonableness of compeling the railroad company to assume the entire burden of expense of eliminating grade crossings is shown in a striking manner in the present case. The "danger" upon which the Board relies as the justification for making the order under the statute is due in large part to the city's own acts. At the three crossings where the highway traffic is heaviest, the city has given a street railway company the right to use the streets. The railroad company had nothing to say about that and could not reasonably be held responsible for any dangers resulting therefrom, and to the extent that the existence of the street railway tracks and the operation of its cars thereon contribute to or constitute "danger," that cannot be attributed to the railway company.

So far as the pedestrian and vehicular traffic is concerned, that is a matter which is the natural result of the development of the City and is not in any sense chargeable to the railroad company. So far as the "danger" may be said to arise by reason of obstructions to view, the summary of the facts under Point VIII shows that in nearly every case these obstructions are located off of the railroad property. The railroad company is not responsible for them and has no control over them.

The company has done all that it could to meet the "dangers to be encountered" (see 95 Atl. p. 177) from the operation of trains by providing

gates and watchmen at every one of the crossings in question.

Assuming for the purpose of argument that the conditions at all of the crossings in question are such as to justify the conclusion that they are "dangerous to public safety" and that public travel is "impeded" thereby, the fact remains that the railroad is not the only agency responsible for such conditions. They are the result not merely of the running of trains, but also of the growth of the city and of the increased use of the crossings by reason thereof for vehicular, pedestrian and trolley traffic. They are also the result in part of the construction of factories and other structures near the right of way. It is highly inequitable to require the railroad company to pay the sole expense of removing dangers and impediments of which only a part can be ascribed to it. This argument is illustrated by the decision in the case of *City of Milwaukee* v. *Railroad Commission of Wisconsin,* 155 N. W. 948. There the court had under consideration a statute which authorized the railroad commission upon the petition of a municipality to order alterations in railroad crossings and to fix the proportion of the cost to be paid by the railroad company and the municipality. The commission ordered that the city pay 25% of the cost, the railroad 70% and a street railway 5%. The city brought proceedings to set aside that part of the order which assessed 25% of the cost against it. The court sustained the order, saying (italics ours):

> "Milwaukee has during the last half century become a great and prosperous city. Its greatness and prosperity must have come because of its commerce, and its commerce has come largely because of its railroads. Without them Milwaukee as we know it today would not exist. The growth of the city and of the rail-

roads has been coincident, inter-dependent, inseparable, and from this growth has arisen the great danger of the grade crossing. *Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?*"

We therefore submit that the present statute comes within the classification of "arbitrary and capricious;" that it is not a reasonable exercise of the police power and that this question is not concluded against the prosecutor by previous decisions either in the U. S. Supreme Court or elsewhere.

The Supreme Court in its opinion cited the case of *Morris & Essex R. R. Co.* v. *City of Orange,* 63 N. J. L. 252, as establishing the principle that a regulation for public safety under a police power of the state is not a taking of private property without just compensation, although conformity to such regulation involves expense (p. 2289, ll. 10-20).

In that case this court held that a railroad is not entitled to compensation for the use of its tracks for a highway crossing at grade and that it was not entitled to receive an allowance for the erection and maintenance of gates, signboards, cattle-guards, etc. But it was also held that for an injury occasioned by *structural changes,* such as the removal of buildings or changes in the tracks, adequate compensation should be made (see page 270). The latter principle, we submit, is the one that applies to a case like the one now under consideration, where the purpose of the statute cannot be carried out without making many and expensive "structural changes."

Furthermore, in any event the question still remains whether the police power has been exercised in a reasonable manner; and upon that

question the item of expense must be taken into consideration. See Points XIV, XVII, XVIII and XIX.

In the *Morris & Essex* case, *supra,* the amount of the damages claimed by the railroad, as the result of opening the street across its track at grade, aggregated the sum of about $18,000, which was based upon a capitalization of the items for the value of the land and of the cost of construction of planking and gates and the maintenance of gates and flagmen (see page 254).

If we select from these items those which were occasioned by "necessary structural changes," we find that they amounted to only about $600, namely, the cost of re-constructing a switch and the cost of constructing a culvert, the capitalized value of which, at 5%, would be only about $12,000. It is difficult to see how any precedent that is worth while can be obtained from a case of this kind where the expense is so trifling as compared with the enormous expenditure of $3,000,000 and upwards, practically all of which is for structural changes. The present statute not only makes no allowance to the railroad for these changes, but it compels the railroad itself to pay for them.

XXV.

THE STATUTE UPON WHICH THE ORDER UNDER REVIEW IS BASED, IF CONSTRUED TO PERMIT OR REQUIRE THE BOARD OF PUBLIC UTILITY COMMISSIONERS TO ORDER THE PROSECUTOR AS THE COMPANY OPERATING THE RAILROAD AT THE SEVERAL CROSSINGS ORDERED TO BE ALTERED, AT THE SOLE EXPENSE OF THE PROSECUTOR (LESS SUCH AMOUNT AS MAY BE ORDERED TO BE PAID BY THE STREET RAILWAY COMPANY USING SOME OF THE CROSSINGS), IS UNCONSTITUTIONAL BECAUSE:

(*a*) *It takes the property of the prosecutor for private use;*

(*b*) *It takes the property of the prosecutor for public use without just compensation;*

(*c*) *It confiscates the property of the prosecutor in violation of the Fourteenth Amendment to the Federal Constitution.*

(Reasons 38, 35, 36, 37.)

We have shown under Points XV and XVIII that the *order* operates to take the property of the prosecutor for private use, and for public use without just compensation, in violation of the State Constitution; and that it confiscates the property of the prosecutor, in violation of the Federal Constitution. If it be said that the order necessarily follows the provisions of the *statute*, and is therefore justified by the statute, then we further submit that the statute itself is unconstitutional for the reasons stated in the argument under Points XVII and XVIII.

New Jersey State Library

XXVI.

THE STATUTE OF 1913 IN SO FAR AS IT REQUIRES CHANGES IN OR THE REMOVAL OF THE PROPERTY OR CONSTRUCTIONS, OR CHANGES IN THE GRADE OR LOCATION THEREOF, OF PERSONS OR CORPORATIONS OTHER THAN THOSE WHO ARE INCLUDED WITHIN THE DESCRIPTION OF THE TERM "PUBLIC UTILITY," AS DEFINED IN CHAPTER 195 OF THE LAWS OF 1911, TO BE MADE AT THE EXPENSE OF SAID PERSONS OR CORPORATIONS; AND IN SO FAR AS IT REQUIRES THAT THE EXPENSE OF CHANGING MUNICIPAL UTILITIES, AND THAT THE EXPENSE OF PAVING, CURBING AND FLAGGING HIGHWAYS, CONSTRUCTED AS THE RESULT OF CHANGES OF GRADE, TO BE BORNE BY THE MUNICIPALITIES, ARE UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT SAID PERSONS, CORPORATIONS AND MUNICIPALITIES ARE NOT INCLUDED WITHIN THE DEFINITION OF "PUBLIC UTILITY" IN SAID CHAPTER 195 OF THE LAWS OF 1911.

(Reasons 41, 42, 44.)

We have shown under Point XIX that the *order* is invalid for the reasons stated in this heading. But if it be said that the order does nothing more than follow the statute, then we further claim that the statute itself is invalid for the same reasons.

XXVII.

THE STATUTE OF 1913 IS INVALID BECAUSE THE OBJECT THEREOF IS NOT EXPRESSED IN ITS TITLE AND THE SAID STATUTE EMBRACES MORE THAN ONE OBJECT.

(Reasons 31 and 43).

The title of statute upon which this order is based is as follows:

> "A SUPPLEMENT to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty-first, one thousand nine hundred and eleven."

Under this title the statute undertakes to give the Board of Public Utility Commissioners power to exercise control over municipalities and companies or individuals none of whom come within the description of the term "public utility." It undertakes to direct that certain expenses be paid by the municipality and that certain other expenses be paid by private companies or individuals. Neither of these objects is within the title.

See *Jonas Glass Co.* v. *Ross,* 69 N. J. L., 157; *Griffith* v. *Newton,* 76 N. J. L., 23.

If section 4 of the grade crossing statute of 1913 is construed to be applicable to private companies or individuals or to municipal corporations (as the Board has assumed in making the order under review), then it is clear that such matters are not within the scope of the title. Moreover, such private corporations or individuals and such municipal corporations are not "public utilities" at all; even if the regulation thereof was within the scope of the title of the statute (which it is not) the statute would still be invalid because the

legislature has no power to regulate the affairs of such private companies or individuals when they are not affected with a public interest—certainly it has no power to regulate such affairs under the name of a statute which purports to be "An act concerning public utilities."

In the Supreme Court counsel for the defendants attempted to sustain that part of the order which was directed to the City of Paterson on the theory that the city was willing to do whatever was necessary on its part to carry the order into effect, or if not willing, that it could be compelled so to do, and in support of this argument they cited the case of *Fair Haven & W. R. Co.* v. *City of New Haven,* 77 Conn., 494, as holding that "the city was *compelled* to do its part of the work whether its officers and agents voted to do so or not." That case was in the form of an application of the Fair Haven R. R. Company to set aside an order of the Common Council of the city assessing benefits against it. The assessment was affirmed. The opinion shows that the city did *not* refuse to perform the work which was required by it in connection with the elimination of a grade crossing. The case is therefore not helpful on the question as to what power the city had under the statute providing for the elimination of grade crossings. Apparently, the work that the city did was not done under the grade crossing statute at all, but, as the opinion says, "through the ordinary agencies provided for in its charter."

So, also, in the New Jersey cases cited by counsel in the Supreme Court, the municipality voluntarily undertook to vacate or change public streets in accordance with the charter provisions.

Assuming, for the purpose of argument, that the City of Paterson may have the power under its charter or other laws to make whatever changes

may be necessary in order to have the public streets conform to the changes required by the order under review, the question still remains who is to *compel* the exercise of that power? Does the Board of Public Utility Commissioners claim that it has the power under the Grade Crossing Act to mandamus the city or by other proceedings to compel the specific performance of municipal powers and duties? To state the question is to answer it.

If by the Grade Crossing Act of 1913 municipal corporations are given power to carry into effect the requirements of that act or of any order made pursuant thereto (as specified by counsel for defendants in the Supreme Court), it is obvious that that object of the statute of 1913, as well as of the original Public Utility Act of 1911, has not been expressed in the title. The act of 1913 is the form of a supplement to the original act of 1911. Nothing can be found in the title to either statute which relates to changes in public streets or which relates at all to municipal corporations.

The defective nature of the title is illustrated by comparison of same with other statutes of the State of New Jersey which provide for the elimination of grade crossings under various conditions therein specified. Thus, the title of the statute permitting contracts for the elimination of grade crossings and under which many such crossings have been eliminated in this State, is, "An Act to authorize any town or city of this State to enter into contracts with railroad companies whose roads enter their corporate limits, to change or elevate their railroads, and, when necessary for that purpose, to vacate, change the grade of, or alter the lines of any streets or highways therein" (P. L. 1901, p. 116; 3 Comp. Stat. 4266). The title of this act was held sufficient in *Morris and Essex R. R. Co.* v. *Newark,* 76 N. J. L., 555.

So likewise the statute of 1874 (p. 45), which was in question in the case of *Clark* v. *Elizabeth,* 61 N. J. L., 565; the city was expressly authorized, when necessary, "to vacate, change the grade of or alter the lines of any streets or highways."

Another illustration is the Grade Crossing Act of 1904 (Chap. 209, p. 372), the title of which is as follows:

> "An Act to provide funds to enable any city or other municipality in this state to meet its obligations under any contract heretofore or hereafter made with railroad companies whose roads enter its corporate limits, for the change or elevation of their railroads, and when necessary for that purpose, for vacating, changing the grade, or altering the lines, of any street or highway therein."

Another illustration is the statute of 1915 (Chap. 58, p. 100), the title of which is as follows:

> "An Act to enable any municipality in this State to provide funds to meet its obligations under any contract made with any railroad company whose road may lie wholly or partially within the municipality, to secure greater safety to persons or property, or to facilitate the construction therein or maintenance of other than grade crossings of any street or streets, highway or highways or other railroads, or to improve the surroundings of or make more convenient access to a station or stations of such railroad within such municipality, and to provide funds to construct sidewalks on, pave, repave, curb, gutter, lay out, open, vacate, or alter the lines and change the grade of any street or streets, highway or highways, and to lay out and improve public park or parks, as a part of such improvement."

Even if the Supreme Court was correct in its conclusion that the *statute* had a single object, that does not answer the argument that the title

must fairly state the object of the statute. Of course it does not have to "express the means and methods of attaining that object," but how can it fairly be said that the title, "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers" conveys to anyone the idea that under such statute the lines and grades of streets may be changed, existing streets may be vacated and new streets opened? How does such a title indicate that one of the objects of the statute is to give the Board of Public Utility Commissioners power to compel all the municipalities of the State to obey the orders of the Board so far as it may be necessary to change, open or vacate streets? The Supreme Court said: "Of course, in carrying out its part of the order, the City of Paterson must act in conformity with its charter and the laws amending the same." But the Grade Crossing Act of 1913 in effect amends or enlarges the charter of the City of Paterson (as well as of all the other municipalities in the State) by giving them power to change, vacate and open streets under conditions and circumstances not specified at all in the original municipal charters or in any of the existing laws relating to same.

The foregoing argument applies with even greater force to changes required to be made by private companies and individuals in conformity with section 4 of the Statute of 1913.

We submit that it is no answer to this argument to say that "the inclusion of such inter-related matters is not the inter-mixing of things that have no proper relation to each other" (p. 2292, l. 30). The point is not whether "inter-related matters" have or have not been included in the statute, *but whether the title itself is broad enough to include all such matters.* The Supreme Court cites the case of *Newark* v. *Mt. Pleasant Cemetery Co.*, 58

N. J. L., 168. In that case this court pointed out that the constitutional provision justifies and permits legislation by one statute, looking toward a single general object, although it contains and enacts various and multiform matters, if those matters are properly related to each other and tend to effectuate the general object. Conceding this to be a correct statement of the law, the question still remains whether the "general object" of the Grade Crossing Act of 1913 is sufficiently expressed in its title, which is nothing more or less than a supplement to the act concerning public utilities.

XXVIII.

THE STATUTE IN SO FAR AS IT PERMITS OR REQUIRES THE PROSECUTOR TO MAKE CERTAIN CHANGES IN THE PROPERTIES OF PUBLIC SERVICE RAILWAY COMPANY, AND IN SO FAR AS IT LIMITS THE PROPORTION OF THE EXPENSE OF THE ALTERATIONS IN CERTAIN OF THE GRADE CROSSINGS, TO BE PAID BY THE STREET RAILWAY USING THE SAME, IS UNCONSTITUTIONAL AND INVALID FOR THE REASON THAT IT DELEGATES ARBITRARY POWER TO THE BOARD TO FIX A MAXIMUM PROPORTION TO BE PAID BY THE STREET RAILWAY WITHOUT FIXING ANY STANDARD WHEREBY THE AMOUNT TO BE THUS PAID MAY BE DETERMINED.

(Reasons 33, 52 except (h); 64 (a), 64 (b), 77 (e).)

(1) The statute arbitrarily limits the proportion of the expense to be paid by a street railway using a grade crossing to not exceeding ten per cent. It may be that this provision of the statute is invalid in any event for the reasons submitted by

the Public Service Railway Company in the brief filed by it on its writ of *certiorari*—which is to be heard at the same time with the present writ—and in that event the entire statute must fall, as the provision for the payment of 10 per cent. is an integral and essential part of the statute.

It cannot be presumed that the legislature would have passed the rest of the statute without including therein the provision for the payment of a certain proportion of the cost by the street railway company. If the legislature had undertaken to impose the *entire* cost upon the steam railroad, even at those crossings where street railway tracks cross, such a statute would be unconstitutional as a taking of the property of the steam railroad company for the benefit of the street railway. The elimination of grade crossings where street railways are constructed necessarily benefits the street railway itself. It therefore follows that the provision for the payment of a certain proportion by the street railroad is such a necessary part of the statute that if such provision fails the entire statute must be held invalid.

But however that may be, if any proportion at all is to be chargeable to the street railway company, why limit it to 10 per cent. or any other specified amount? The jurisdictional facts upon which the elimination of a particular grade crossing is supposed to be ordered are, danger to public safety, or impediment to public travel. It may well be that in many cases the proportion of danger and impediment directly attributable to the use of the crossing by a street railway company largely exceeds 10 per cent. In the case of Market Street the record shows an average of 580 to 590 trolley cars for the period between 5 a. m. and 11 p. m., or 18 hours, which is an average of about 32 trolley cars each hour, or one every two minutes. According to this count there were nearly

half as many trolley cars as there were automobiles or horse-drawn vehicles passing over this crossing. At Broadway there was an average of 600 trolley cars per day of 18 hours—which was considerably in excess of the number of automobiles or horse-drawn vehicles. At River Street there was an average of 190 to 230 trolleys cars per day of 18 hours, or considerably over half of the number of automobiles or horse-drawn vehicles. When we consider that the average trolley car carries a large number of passengers as compared with an automobile or a horse-drawn vehicle, it is equally obvious that a very large proportion—much in excess of 10 per cent.—of the travel at these three crossings is by trolley. For example, if we estimate the average number of passengers at 50 for each car, the result would be at Market Street (580x50) 29,000 trolley passengers; at Broadway about 30,000; at River Street about 10,000. In the case of Market Street the trolley passengers on this basis would be practically equal to the number of pedestrians; at Broadway the trolley passengers would be 3 or 4 times the number of pedestrians, and at River Street the trolley passengers would equal, and according to two of the counts, would considerably exceed, the number of pedestrians.

It is also a matter of common knowledge that a trolley car obstructs the use of a crossing to a considerably greater extent as it passes over the same than an automobile or a horse-drawn vehicle, as it generally takes longer to pass over, due to the larger size and comparatively slower movements of the trolley cars.

The unreasonableness of fixing a limit of 10% as the maximum amount to be paid by a street railway company is illustrated by the decrees that have been made by the Court of Chancery in cases where that court has been called upon to

exercise its jurisdiction to determine the method of the use of conflicting easements and the apportionment of the cost thereof by and between steam railroad companies and street railway companies. That court has exercised such jurisdiction both under its common law power to regulate easements and under the provisions of Chapter 241, p. 462, Laws of 1895, and the supplement thereto known as Chapter 111, p. 248, Laws of 1899 (repealed by Chapter 176, Laws of 1904), and now incorporated in sections 32 and 33 of the General Railroad Law of 1903.

In Appendix VIII we have summarized the several cases which may be found in the reports or which may be found in the form of the final decrees of the Court of Chancery wherein that court has determined the proportion of expenses to be paid by a street railway company when its tracks cross the tracks of a steam railroad company. By reference to same it will be seen that there is no fixed rule to determine this proportion; in some cases the Court of Chancery directed that the entire expense both of construction and maintenance be paid by the street railway company. In other cases that two-thirds of the cost be paid by the street railway; in other cases that one-half be paid by the street railway; in other cases one-third. In no case has there been found any decree which requires the street railway company to pay as small a proportion as 10%.

Furthermore, when the question of a division of expense has been left to the railroad company and the street railway company to determine by contract between themselves, no such proportion as 10% has been fixed as the share of the street railway company. This is illustrated by the contract between the prosecutor and the Pubic Service Railway Company involving the crossings in question in this very case, whereby the street railway

company agreed to construct the trolley tracks across the crossings at their own expense and to keep and maintain same in good and safe condition; and to pay one-third of the expense of flagmen or gatemen—and if gates should be erected, to pay one-third of the cost of construction and maintenance of some. See Exhibits Erie 13 and 14, pp. 2034-9.

We therefore submit that the limitation of ten per centum in the statute is unreasonable, and that the limitation of such per centum in the order, to three crossings only, is likewise unreasonable. The statute is therefore invalid, but if not, then at least the present order is invalid.

(2) The limitation of 10% of the expense directly chargeable to the crossing used by a street railway company is also invalid because it gives the Board of Public Utility Commissioners arbitrary power to decide in any case whether the amount to be paid by the street railway company shall be 10% of the expense or any less amount down to zero. The expression in section 2 of the statute is "the Board *may* order not exceeding ten percentum of such expense," etc. In the present case, for example, if the total expense chargeable to the crossings used by the street railway turns out to be the sum of $3,000,000, then the Board may order the street railway company to pay $300,000, or any less amount, or nothing at all. There is no standard prescribed by the statute by which the amount of expense to be paid by the street railway company is to be determined. If the statute had provided that the Board should order 10% of the expense directly chargeable to the crossings to be paid by the street railway company, the statutes would not be open to the present criticism—as in that event the amount of such expense would be ascertainable. But under this

statute the Board is not *required* to order 10% of such expense but *may* order *not exceeding* ten per centum. This delegates to the Board an arbitrary power to determine according to its own discretion, and even according to its own caprice, what amount the street railway company is to contribute, without any regard whatever to the nature and the extent of the danger to public safety and the impediment to public travel created by and chargeable to the street railway company. The delegation of such power, without fixing any standard upon which the exercise of the power depends, is illegal.

The legislature cannot give to an administrative body, such as the Board of Public Utility Commissioners, arbitrary power to order or to refuse to order the street railway company to participate in the cost of eliminating the crossings. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220.

While the courts will not ordinarily pass upon the question of whether a statute enacted pursuant to the police power is wise or unwise, nevertheless the states cannot exercise that power in an arbitrary and unreasonable manner. *Chicago, etc., Ry. Co.* v. *Arkansas,* 219 U. S. 453; *Pennsylvania R. Co.* v. *Ewing,* 88 Atl. 775.

In the Supreme Court counsel for defendants argued that the danger which the statute sought to eliminate was not attributable to the railroad alone nor to the street railway alone, but to both of them. But admitting this to be true, it does not follow that the legislature can impose some part of the cost of changing the crossing upon the street railway—still less does it follow that the legislature has the power to impose an arbitrary *limit* upon the proportion of the cost to be paid by the street railway company.

So far as concerns the question of whether the legislature can impose *any* proportion of such expense upon a street railway, we need only to refer

to the brief filed in behalf of Public Service Railway Company and to say that if for the reasons advanced by that company this part of the statute is unconstitutional, then the entire statute must fall, as this provision of the statute is inseparable from the remainder thereof. (See Point XXXIII.)

But the prosecutor urges that this provision of the statute is unconstitutional—not because it requires a payment of not exceeding 10 per cent., but because it limits the payment on the part of the street railway to 10 per cent. of the expense.

We agree with defendants' counsel that whatever danger there may be at a railroad grade crossing where a street railway also crosses is due in part to the street railway, and that therefore the street railway should be required to contribute a substantial proportion of the cost of the elimination—such proportion to be an "equitable" amount, commensurate with the proportionate use of the highway by the street railway, as illustrated by several of the cases cited by defendants' counsel under this point. For many years past it has been the policy of this state, and is now, to require street railways to pay a substantial proportion of the cost of protection at highways where they cross steam railroad tracks. See illustrations cited in Appendix VIII. In the case of the very crossings in question in this case the street railway company has agreed to pay a certain proportion of the cost of protection. (See Point XXVIII (c).)

There would be no practical difficulty in establishing a standard whereby the proportion of expense to be paid by the street railway company and the steam railroad company at a trolley crossing could be determined. For example, the cost might be apportioned according to the *use* of the crossing for trolley traffic as compared with its

use for the railroad traffic. No such standard is attempted to be made in the present statute. This statute merely fixes an arbitrary limit of 10% regardless of whether the proportionate use of the crossing by the street railway company equals or exceeds such proportion.

XXIX.

THE STATUTE IS INVALID BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE BOARD OF PUBLIC UTILITY COMMISSIONERS AND CONFERS UPON SAID BOARD ARBITRARY POWER TO MAKE OR TO REFUSE TO MAKE AN ORDER FOR THE ALTERATION OF GRADE CROSSINGS WITHOUT PRESCRIBING ANY STANDARD WHEREBY THE ACTION OF SAID BOARD IS TO BE GOVERNED.

(Reasons 33 and 34.)

The Legislature may, of course, prescribe a standard, by which the action of an administrative board is to be governed, but when it undertakes to commit to such Board certain powers which are dependent upon the existence of certain facts, the statute must itself prescribe some standard upon which the action of such Board is made to depend. In the absence of such a prescription in the statute such a Board cannot undertake to make its action dependent upon the existence of a standard selected by itself. The present case is not like some of the rate cases that may be cited by counsel for defendants, where the question was whether certain rates were "reasonable." There is a standard by which that question can be determined, namely, common usage, as illustrated by the interest laws, the ordinary experience of mankind, as illustrated by the aver-

age return of investments, and the decisions of the courts determining what is or should be a reasonable return on such investments.

According to the argument of defendants' counsel in the Supreme Court, it is "impossible" to lay down any hard and fast rule or set of rules by which it may be determined whether or not a crossing is "dangerous." If that is so, then what becomes of the "standard" upon which the action of the Board in any particular case must be based? We submit that it is equally impossible to lay down any rule by which the question of whether public travel is "impeded" may be determined—unless the word "impeded" receives the construction for which we have heretofore contended, to wit: that it is applicable only to permanent obstructions and not merely to delays or hindrances to public travel caused by the passage of trains.

Moreover, even if it is possible to spell out from the statute a standard upon which the action of the Board is based, the fact still remains that the Board is not *required* to take action, but in such event *may* order the elimination of the crossing.

The statute provides, in Section 1, that

> "Whenever a public highway and a railway cross each other at the same level and it shall appear to the Board that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby, the Board *may* order the company operating such railroad to alter the crossing," etc.

We submit that the statute is invalid, because it confers on the Board arbitrary power to order or to refuse to order the alteration of the grade crossing, even though it may find the jurisdictional facts on which the right to make such order under the statute depends. It might well be that the Board could constitutionally be delegated power

to determine whether or not certain facts exist, but when such facts have been found, this statute leaves it to the Board to decide arbitrarily whether or not it will or will not make an order for the alteration of the crossing.

There is no provision in the statute under consideration which requires that the orders of the Commission must be lawful and reasonable, as there are in many other similar statutes. See, for example, the case of *Commission* v. *Toledo etc. R. Co.*, 107 N. E. 774, Pub. Util. Reports 1915-B, p. 879, dealing with the question of the power of the Public Service Commission of Illinois to enforce a statute requiring the erection and maintenance of depots. Under the New Jersey statute the Board of Public Utility Commissioners *after* a finding of the existence of the jurisdictional facts as to danger to public safety and impediment to public travel, has arbitrary power in one case to order a company to spend millions, and in another case where the crossings may be equally dangerous, to refuse to order the alteration of the crossings. An illustration of this principle is found in the case of *State* v. *Great Northern R. Co.*, 111 N. W. 289 (Minn.), where it was held that a statute was unconstitutional as a delegation of legislative power which authorized a railroad commission in its judgment to allow an increase of capital stock for such purposes and on such terms as it might deem advisable, or in its discretion to refuse it.

Furthermore, there is no standard fixed with regard to the proportion of the expense to be borne by a street railway company. The Board *may* order not exceeding 10 per cent. to be paid by the street railway company. See Point XXVIII.

XXX.

THE STATUTE AND ORDER VIOLATE THE CONSTITUTION OF THE UNITED STATES IN THAT THEY IMPAIR THE OBLIGATION OF THE PROSECUTOR'S CONTRACTS AS FOLLOWS:

(a) *Contracts with the holders of the prosecutor's stocks, bonds, notes and other obligations.*

(b) *Contracts between the State of New Jersey and the prosecutor or its predecessors in interest.*

(c) *Contracts between the prosecutor or its predecessors and the Public Service Railway Company or its predecessors.*

(d) *Contracts between the prosecutor and the various switch owners.*

(e) *Contracts made by Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company with the prosecutor or its predecessors.*

(Reasons 52 (h); 63; 72.)

In the following discussion reference will be made to the effect of the order as well as to the statute. If the order as made by the Board is said to follow necessarily from the terms of the statute, then the statute is invalid for the reasons hereinafter stated, but for the purpose of this discussion it will be convenient to consider the order as well as the statute.

An order of an administrative body, such as a public service commission, is of the same force as if made by the Legislature, and is therefore a law of the State within the meaning of the contract clause of the Federal Constitution. *Grand Trunk Ry. Co.* v. *Railroad Commission of Indiana,* 221 U. S. 400, at p. 403, and cases there cited.

The state has the right to reserve the power to alter or amend the charter of a corporation or to alter or amend or repeal the laws under which the corporation is organized. *Berea College* v. *Commonwealth,* 211 U. S. 45.

Where the right is reserved, either by the constitution or by statute, the provision of the law to this effect becomes automatically a part of the charter of corporations thereafter organized.

In re College Hill Land Association, 157 Cal. 596, 108 Pac. 681.

Shiloh Turnpike Co. v. *Bates,* 80 N. J. L. 171, 76 Atl. 448.

But this reserved right does not authorize the confiscation or destruction of property of corporations, or the taking of such property without compensation. The reserved right must be construed subject to the restrictions of the State and Federal constitutions forbidding the taking of property without due process of law.

Delaware, etc., R. Co. v. *Bd. of Pub. Util. Comm.,* 85 N. J. L. 28, 88 Atl. 849.

State v. *Bancroft,* 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526.

Berea College v. *Commonwealth,* 211 U. S. 45.

Citizens Co. v. *Clay,* 197 Fed., 435, 437.

The amendment must be reasonable and not work an injustice.

Ozan Lumber Co. v. *Biddie,* 87 Ark. 587, 113 S. W. 796.

Miss. B. & A v.. *McElveen,* 100 Miss. 16, 56 So. 187.

Shields v. *Ohio,* 95 U. S. 319, 324.

Holyoke v. *Lyman,* 15 Wall (U. S.) 500, 522.

Fair Haven R. R. Co. v. *New Haven,* 203 U. S. 379, 388.

Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201.

And what is injustice in any particular case is a judicial question.

Manheim Borough v. *Manheim Water Co.*, 229 Pa. 177, 78 Atl. 93.

A few of many other cases that may be cited to the same effect are the following:

Grand Trunk R. Co. v. *South Bend,* 227 U. S. 544, 44 L. R. A. (N. S.) 405.

Greenwood v. *Freight Co.,* 105 U. S. 13.

Des Moines City Railway Co. v. *City of Des Moines,* 151 Fed. 854.

Omaha Water Co. v. *City of Omaha,* 147 Fed. 1.

Minneapolis v. *Minn. St. R. Co.,* 215 U. S. 417.

Larabee v. *Dolley,* 175 Fed. 365.

Arkansas Stave Co. v. *State,* 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255.

Southington v. *Southington Water Co.,* 80 Conn. 646, 69 Atl. 1023.

N. Y. Central etc., R. Co. v. *Williams,* 199 N. Y. 108, 92 N. E. 404, 35 L. R. A. (N. S.) 549.

Applying these principles to the present case, we submit that the statute of 1913 as well as the order under review impair the obligations of contracts in several respects.

(a) *Contracts with the holders of the company's stocks, bonds, notes and other obligations.*

The prosecutor is a corporation of the State of New York organized by certificate filed November 14, 1895. The certificate recites that the prosecutor has acquired the property and franchise of New York, Lake Erie, and Western Railroad Company. There is a description of the property included therein, as follows:

> "all other railways belonging to the defendant railroad company, in the states of New York, Pennsylvania and New Jersey, or

any of them, together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the said company, and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured or unmanufactured materials, coal, wood and supplies of every kind, belonging or appertaining to said railroad company and all the tolls, income, issues and profits arising out of the said property, and all rights to receive or recover the same; also all the estate, right, title and interest, terms and remainder of terms, franchises, privileges and rights of action of whatsoever name or nature in law or in equity conveyed or assigned unto the New York and Erie Railroad Company, or unto the Erie Railway Company, or by the Union Railroad Company, a corporation existing under the laws of the State of New Jersey."

The capital stock was fixed at $146,000,000, divided as follows:

"Three hundred thousand shares of Non-Cumulative Four Per Cent. First Preferred Stock, of the par value of one hundred dollars each;

One hundred and sixty thousand shares of Non-Cumulative Four Per Cent. Second Preferred Stock, of the par value of one hundred dollars each; and

One million shares of Common Stock of the par value of one hundred dollars each."

The prosecutor carries on its business in New Jersey under the terms of Ch. 11, Laws of 1898, p. 23. (See Exhibit R-15 at p. 957.) Section II of the act of 1898 provides that it

"shall have and possess all the rights, powers, privileges and franchises (subject to the duties and obligations attached thereto) theretofore possessed, in this state by the corporation exe-

> cuting the mortgage resulting in such judgment or decree of sale, and also all such as now are or hereafter may be conferred upon railroad corporations organized under the general laws of this state."

The present statute interferes with the right of the stockholders to manage their own property through the directors and officers elected by them. Furthermore, the great cost of complying with the order so seriously affects and impairs the value of the property that it practically confiscates the property of the stockholders.

At the present time there are outstanding three principal mortgages, besides certain underlying mortgages as follows:

I. First Consolidated Mortgage, dated December 10, 1895. This provides for two issues of bonds, one for the sum of $35,000,000, called "Prior Lien Bonds," the other for $140,000,000, called "General Lien Bonds." (See Exhibit R-118, Vol. III, p. 1430.)

According to the annual report for the year ending June 30, 1914, all of the "Prior Lien Bonds" have been issued and the "General Lien Bonds" have been issued to the amount of $51,724,000. (p. 1360.)

This mortgage is secured by all of the company's real and personal property, including the property in New Jersey. (pp. 1440-1445.) Also the shares of stock and the bonds of certain other companies, as described in the mortgage. Each class of bonds is for 100 years from January 1, 1896. The mortgage has the usual provision for sale by the trustee in the event of the default in the payment of interest.

II. Pennsylvania Collateral Indenture, dated February 1, 1901. This provides for the issue of bonds to the amount of $36,000,000 for the purpose

of making payment for the shares of capital stocks of certain other companies. This runs for a period of 50 years from February 1, 1901. (See Exhibit R-119, Vol. III, p. 1505.) This mortgage has the usual provision for sale in the event of default in the payment of interest.

III. General mortgage, dated April 1, 1903. This provides for the issue of bonds to the amount of $50,000,000, to run for a period of 50 years from April 1, 1903, and to be convertible into common stock on certain terms. (See Exhibit R-120, Vol. III, p. 1560.) The amount of these bonds outstanding, according to the report for the year ending June 30, 1914, was $32,000,000 (p. 1360). The bonds are secured by all of the property in the railroads and the stocks and bonds of certain companies, subject to the First Consolidated Mortgage of December 10, 1895, and subject also to the Pennsylvania Collateral Mortgage of February 1, 1901. (See p. 1578.) The mortgage has the usual provision in case of default.

In addition to the foregoing mortgages, there are large obligations secured by equipment trust certificates, collateral notes or conditional bills of sale. A summary of these is as follows:

Exhibit R-115, p. 1342.	
Obligations maturing between October 14, 1914, and June 30, 1915	$18,831,939
Exhibit R-116, p. 1343.	
Obligations maturing during year ending June 30, 1916	11,241,483
Exhibit R-117, p. 1344.	
Obligations maturing during year ending June 30, 1917	$16,079,491
	$46,152,913

These obligations are secured by a variety of equipment trust agreements, conditional bills of sale, collateral trust notes, etc. A summary is given in Exhibit Erie 15, consisting of 29 such leases, agreements, etc. See Vol. IV, p. 2042-2246. It is not important at this time to call attention to the details of these numerous and voluminous documents other than to say that they have the usual provision requiring the company to surrender possession of the property given as security in the event of default in the payment of principal or interest. The collateral trust notes are secured by certain bonds specifically described therein. There are provisions that in case of default in payment of principal or interest of the notes the trustee may sell any of the securities, and that in the event of default in the payment of interest on any of the pledged bonds, the notes shall become due. Among the bonds so pledged are some of the general mortgage convertible bonds and general lien bonds above referred to.

The contracts made by the prosecutor with the holders of its stocks, bonds, notes and other obligations are impaired because the order makes it impossible for the company to pay dividends or interest thereon—or in some cases even the principal thereof on those obligations that are soon to mature—and yet continue to maintain and operate the railroad property by which the stock is represented and the obligations secured.

(b) *Contracts between the State of New Jersey and the prosecutor or its predecessors in interest.*

The charter of the Paterson & Hudson River R. R. was passed in 1831 and contains no provision for the repeal or alteration thereof. The statute of New Jersey providing for the alteration and repeal of charters was not passed until the year 1846. (See Nixon's Dig. p. 151.)

The charter of the Paterson & Ramapo R. R. was passed in 1841. Section XIII provides that it shall be lawful for the legislature to alter, amend or modify this act, whenever in their opinion the public good may require it (Vol. II, p. 1018.) Hence, the present point is applicable only to the Paterson & Hudson River R. R. That company is the owner, either in whole or in part, of the right of way at Madison Avenue, Clay Street, Straight Street and Cedar Street. We have shown under Point XI that there is no obligation on the part of the company to construct and repair bridges at streets which were laid out and opened *subsequent* to the construction of the railroad tracks. That point is equally applicable to the Paterson & Ramapo R. R. as well as to the Paterson & Hudson River R. R.; but so far as the latter company is concerned there is the further objection to the statute it enlarges the duty imposed upon the Paterson & Hudson River R. R. by its charter. Of course, if the argument under Point XIII. is correct, that the charter duty with respect to the construction and maintenance of passages at highways has not devolved upon the Erie R. R., the present argument is of no significance and the *order* must be set aside for the reasons stated in Point XIII. But in this discussion we are assuming that it may be held that such charter duty has passed to the Erie R. R. by virtue of the several leases, agreements and conveyances set forth in detail in Exhibit R-15.

On this assumption we call attention to the summary of facts as given in Point XI, whereby it appears that Madison Avenue, Clay Street, Straight Street and Cedar Street were not laid out and opened at the time of the construction of the tracks of the Paterson & Hudson River R. R.

If the statute be construed to justify such an order as is now under review, it will be seen that the result thereof is that the charter duty imposed

upon the Paterson & Hudson River R. R., and thereafter devolving upon the prosecutor, requires the prosecutor to build bridges (in the one case a highway bridge above the railroad track, in the other cases railroad bridges above the highway) at streets which were laid out and opened subsequent to the construction of the railroad tracks. But no such duty can be legally imposed upon the prosecutor as the successor of the Paterson & Hudson River R. R. To do so would change and enlarge the duty imposed by the charter of the Paterson & Hudson River R. R.

The statute further impairs the contract expressed in said charter because it permits the Board to order the elimination of a crossing that may be found to be "dangerous to public safety." There is nothing in the charter which requires the company to construct the bridges or passages at streets in such a way that they shall not be dangerous to public safety. All that is required is that they be constructed "so that the passage of carriages, horses and cattle on the said road shall not be prevented thereby" (p. 966, Section IX.).

The statute further impairs contract rights in this respect for the reason that there is nothing in the original charter which requires bridges or passages (whether at grade or other than at grade) to be constructed *the full width* of the highway. If the statute be contrued to permit the Board to order such construction, then the statute enlarges the charter duty. If there ever was any doubt on this question, it is now settled by the decision of this Court in *State of New Jersey* v. *Lackawanna R. Co.,* 84 N. J. L., 289, which disapproves the dictum in *Township of Raritan* v. *Port Reading R. R.,* 49 N. J. Eq., 11, where it was said that when the railroad is so built as to cross a highway above grade

it must bridge the entire width of the highway. The Lackawanna case holds that there was no hard and fast rule requiring the construction of a bridge the entire width of the highway, but that under Section 26 of the railroad law, the bridge must be of a width and character "suitable to the locality." While the precise point decided in the Lackawanna case was that Section 26 of the Railroad Law of 1903 did not require a construction the entire width, yet the reasoning thereof applies equally to crossings constructed under the early charters. The same principle was applied to the charter of the New Jersey Railroad & Transportation Co. of 1832 in the case of *Metuchen* v. *Pennsylvania R. R.*, 73 N. J. Eq., 359, holding that the *company* had the right to substitute an undergrade passageway in the place of a grade crossing, but that the charter did not require such undergrade passage to be constructed the full width of the highway unless that width was required for the accommodation of public travel at the place of its location.

If it be urged that Section 26 of the General Railroad Law of 1903 has changed the law in this regard by providing that the bridges and passages shall be of such width and character as shall be "suitable to the locality," the answer is, first, that this section does not enlarge the duty imposed by its charter upon any company incorporated by special act whose railroad was constructed before April 2, 1873, and second (as shown in Point XII) there was no proof before the Board and no finding by the Board that it was necessary to have the bridges constructed the full width of the highway (as required by the Board) in order that they should be suitable to the locality. Likewise, there was no proof before the Board and no finding by the Board that it was necessary to construct the subways passing under the railroad tracks the

extent of full width of the highway in order to accommodate public travel.

(c) *Contracts between the prosecutor or its predecessors and the Public Service Railway Company or its predecessors.*

By agreement dated February 26, 1892, between Paterson Railway Co., one of the predecessors of Public Service Railway Co., and the New York, Lake Erie & Western Railroad Co., the predecessor of the Erie Railroad Co., the street railway company is given the right to maintain tracks across the steam railroad at Market Street, Broadway and River Street. Under this agreement the Erie Company agreed that the Paterson Company might continue to maintain the street railway across the present tracks or any other track or tracks within the city. In the second paragraph the street railway company agrees "at their own cost and expense" to "construct said crossings at the points shown upon said diagram and in the manner agreed upon with the representatives of the Erie Company, *and will thereafter keep and maintain such crossings* and their tracks thereat in good and safe condition, satisfactory to the Erie Company, during the continuance of this agreement, and so as shall from time to time be best adapted to secure safety at such crossings under the supervision and direction of the Erie Company."

The sixth paragraph provides that the flagmen and gatemen shall be employed by the Erie Company and that the street railway company shall pay one-third of the expense thereof.

The seventh paragraph provides that if gates are erected the same are to be built at the expense of the Erie Company, and the street railway company agrees to pay one-third of the cost of erection and of repairs and renewals thereof and of maintaining the same.

This agreement was amended May 20, 1898, whereby the provision for payment by the street railway company of one-third of the expenses of flagmen and gatemen should be suspended for ten years, but should thereafter be in full force and effect (Exhibit Erie 13, pp. 2034-8).

There is a supplemental agreement dated February 6, 1912, between the prosecutor as successor of the New York, Lake Erie & Western Railroad Company, and the Public Service Railway Company (successor to the Paterson Railway Company), amending the agreement of February 26, 1892, so as to permit the construction of a single trolley track across the railroad company's tracks at Park Avenue. The third paragraph thereof specifically confirms all of the provisions of the previous agreement and extends them to the additional track "to the same extent and as fully as though said additional track were specifically referred to therein" (Ex. Erie 13 and 14, p. 2039).

Under these agreements the trolley company is required not only to construct the trolley crossings originally, but to keep and maintain the same in good and safe condition. There is nothing in this agreement which places any burden of construction or maintenance upon the railroad company; on the contrary, all such cost is to be borne by the trolley company. If under the order of the Board it becomes necessary to conform the trolley tracks to a change of grade of the streets, or if it becomes necessary to take up and relay the trolley tracks, in the course of the reconstruction of the railroad tracks and appurtenances, the duty of so doing clearly rests upon the trolley company under this agreement; and hence any such order of the Board (and any statute which permits or requires such an order) impairs this contract to the detriment of the railroad company.

(d) *Contracts between the prosecutor and the various switch owners.*

It is well settled that a railroad company cannot be compelled to build side tracks to connect its main line with the buildings of private shippers, or to maintain such side tracks when built, or to permit or maintain connections therewith when they are built by the shippers (see cases cited under Points V and XXII). This general rule is, of course, now subject to the statutory provision found in section 16 (k) of the act concerning public utilities, which requires common carriers to construct, maintain and operate upon reasonable terms *a switch connection* with private side tracks, constructed by shippers, where such connection is reasonable, etc., but this statute is limited to the construction of connections and does not impose upon the *railroad* the burden of constructing the side tracks; and under the cases cited in Points V and XXII such burden could not be constitutionally imposed upon the carrier.

The order under review compels the prosecutor to destroy certain side tracks and compels it to reconstruct certain other side tracks at grades and locations different from the existing grades and locations. Under the present point the argument is limited to the claim that this part of the order impairs the obligations of contracts between the prosecutor and certain switch owners with respect to the construction and maintenance of such side tracks.

While the state in the exercise of the police power may in some cases impair the obligation of contracts this rule is subject to the qualification that the police power must be *reasonably* exercised, and to the further qualification that it must appear that the destruction of, or changes in, the property are *necessary* in order to the proper exercise of police power.

In the present case both of these elements are lacking; it is neither reasonable nor necessary that these side tracks be destroyed or reconstructed for the purpose of eliminating grade crossings on the main line. Entirely aside from the question of whether the Board of Public Utility Commissioners under the statute of 1913 has any power to order any changes in the railroad property other than the main line tracks, the evidence in the present case shows that that part of the order, which relates to side tracks is unreasonable and unnecessary; and it, therefore, follows that the Court can and should consider the question of whether that part of the order impairs the obligations of existing contracts.

The contracts between the prosecutor and the switch owners appear in the record as Exhibits R-50 to R-73, pp. 1117-1203; also Exhibits Erie 10 and 11, pp. 2018-2026. The side tracks and connections therewith of some of these switch owners are not affected by the proposed order, and they may, therefore, be left out of consideration. Those who are affected are, as follows:

Commercial Lumber Company, Ex. R-51, (p. 1121.)

The siding leading to this company is destroyed and another siding is constructed in a different location. The order also requires the construction of a bridge across Taylor street for the purpose of carrying the new siding.

The agreement shows that the railroad company and the switch owners are each part owners of this siding; a portion of the right-of-way is owned by the switch owner. The cost of the construction is to be paid by the switch owner. The switch owner also agrees to pay the railroad the cost of all labor and material used in *repairing or maintaining* the side track and extensions.

David G. Rodgers, Exhibit R-52 (p. 1125).

This siding is destroyed and no provision is made for the reconstruction thereof. The agreement shows that it is located in part on the property of the railroad, and in part on the property of the switch owner.

P. S. Van Kirk, Exhibit R-53 (p. 1128).

The plan requires the destruction of this siding and the construction of a new one in a different location off the right-of-way of the railroad. Under the agreement the switch owner agrees to pay the cost of the construction of the siding, and also the cost of *repairing and maintaining* the same.

A. H. Smith, Exhibit R-54 (p. 1132).

The order requires that the present siding be destroyed and that the new siding be constructed at a different location and grade. The agreement provides that the switch owner shall pay the cost of the construction, and also the cost of *repairing and maintaining.*

Armstrong's Sons Company, Exhibit R-55 (p. 1135).

The present siding is destroyed and a new one constructed about 17 feet above the present grade. The order also requires the construction of a bridge across Montgomery street on which the siding is carried. The agreement provides that the switch owner shall pay the cost of the construction and of *repairing and maintaining.*

Public Service Gas Company, Exhibit R-56 (p. 1139.)

The order requires the total destruction of the two sidings and the construction of a new siding in a different location. The agreement provides that the switch owner pay the cost of the construction and of *repairing and maintaining.*

Swift & Company, Exhibit R-58 (p. 1147.)

The leads and connections by which this siding is reached are destroyed. The agreement provides that the switch owner construct at its own expense that portion of the siding track outside of the right-of-way—the railroad to construct at its expense that portion within its right-of-way. The switch owner agrees to pay the cost of *repairing and maintaining.*

Ashley & Bailey Co., Exhibit R-59 (p. 1151.)

The leads and connections by which this siding is reached are destroyed. Under the agreement the switch owner furnishes the right of way outside of the railroad property and pays the cost of construction and also the cost of *repairing and maintaining.* The switch owner also agrees to build and maintain a trestle under a portion of the side track.

National Silk Dyeing Co., Exhibit R-60 (p. 1154.)

The leads and connections are destroyed. Agreement with the switch owner has the usual provision that the switch owner will pay the cost of construction and of *repairing and maintaining.*

Hygeia Ice Co., Exhibit R-68 (p. 1185.)

The lead by which this siding is reached is destroyed and a new and longer lead is required to be constructed. Switch owner agrees to do all the grading and furnish certain material and pay for labor. The material remains the property of the railroad.

Auger & Simon Co., Exhibit R-70 (p. 1192.)

The leads and connections by which the siding is reached are destroyed. The agreement has the usual provision that the switch owner shall pay the cost of construction; the railroad company agrees to keep the siding in repair and the switch owner agrees to pay on demand the market value of the material and labor.

Paterson Consolidated Ice Co., Exhibit R-71 (p. 1195.)

The lead by which the siding is reached is destroyed. Agreement provides that the switch owner shall pay the cost of *repairing and maintaining.*

The sidings used by Fullers Express Co. and by Morris & Co. are also destroyed. The facts as to these sidings and the terms of the agreements are discussed elsewhere. See Point III.

It will be seen that the order requires in some cases the destruction of the siding; in other cases it requires the railroad to rebuild same. Such a result clearly impairs the contracts between the prosecutor and the various switch owners; it deprives the prosecutor of the benefit of having the sidings remain in use (as well as takes its property without compensation) and it compels the prosecutor to build other sidings for the benefit of switch owners contrary to the provisions of these agreements, which require the *switch owners* to "repair and maintain" the sidings, so that from either standpoint the rights of the prosecutor in these contracts are violated and impaired.

(e) *Contracts made by Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company with the prosecutor or its predecessors.*

If we are right in our argument under Point XIII. that the lessor companies are charged with the duty of constructing and maintaining the crossings and that they have not been relieved of that duty, then it follows that if the Grade Crossing Act is construed to relieve the lessor companies from such duty and to impose same upon the prosecutor, the statute operates to impair the obligation of the contracts expressed in the original leases—which when read in conjunction with the confirm-

atory act of 1853 still leave upon the lessors the duty—*so far as relates to the public*—of constructing and maintaining crossings.

XXXI.

THE STATUTE IS IN VIOLATION OF THE CONSTITUTION OF THE STATE OF NEW JERSEY BECAUSE:

(a) *It impairs the jurisdiction of the courts of equity of the State of New Jersey by depriving them of their jurisdiction over the regulation of the use of easements.*

(b) *It impairs the jurisdiction of the courts of law of the State of New Jersey by depriving them of their jurisdiction to compel the performance of the duties imposed by law upon the prosecutor or its predecessors in interest.*

(Reasons 31 (c) and (d).)

(a) Under the Constitution of the State of New Jersey the Court of Chancery has the *exclusive* jurisdiction of conflicting easements. The following are some of the cases in which this has been expressly decided:

National Docks R. Co. v. *Pennsylvania R. R.* 54 N. J. Eq., 142; 55 N. J. Eq., 569, at p. 584;

Jersey City &c. R'y Co. v. *New York &c. R. R. Co.,* 62 N. J. Eq., 390;

West Jersey R. Co. v. *Atlantic City Traction Co.,* 65 N. J. Eq., 613;

Hudson County v. *Central R. R.,* 68 N. J. Eq., 500;

City of Newark v. *Erie R. R. Co.,* 72 N. J. Eq., 447; see also 75 N. J. Eq., 20; 76 N. J. Eq., 3170;

City of Newark v. *Central R. R.,* 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 power to determine the manner of crossing (See P. L. 1895, p. 462; P. L. 1903, sec. 32, p. 662; Comp. Stats. 1910, p. 4235, sec. 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. See *Raritan River R. R.* v. *Middlesex & Somerset Traction Co.*, 70 N. J. L., 732, 739.

So far as relates to gates and flagmen at grade crossings, the Railroad Law confers upon the Court of Chancery, the power to determine what protection of the crossing is reasonable and necessary. This applies to a crossing in any township or municipality. (See P. L. 1898, p. 110; P. L. 1903, sec. 36, p. 664; Comp. Stats. 1910, p. 4237, sec. 36.)

This statute has been held to be constitutional as against a claim that the powers thereby conferred upon the Court of Chancery intruded upon those that inherently belong to the Supreme Court.

Palmyra v. *Pennsylvania R. R.*, 62 N. J. Eq., 601; affirmed 63 N. J. Eq., 799.

It has also been held constitutional as against a claim that it conferred upon the judiciary powers that belong to the legislative department of government.

Eckert v. *Perth Amboy, etc. R. R. Co.*, 65 N. J. Eq., 77; 66 N. J. Eq., 437.

It has been held by the Court of Chancery that that court has the power in the proper case to make a decree requiring the elevation of railroad tracks.

Newark v. *Central R. R.*, 73 N. J. Eq., 470;

Newark v. *Erie R. R.*, 72 N. J. Eq., 447; see also 75 N. J. Eq., 22.

The Court of Errors and Appeals declined to pass on this question when the last named case came before it for review, 76 N. J. Eq. 317.

In many of the foregoing cases it was held that not only did the Court of Chancery have the jurisdiction to regulate conflicting easements, but the Court of Chancery proceeded to exercise that jurisdiction by determining how the expense of the crossing question should be distributed among the parties entitled to use the easements. A summary of these cases will be found in Appendix VIII.

We submit that this subject comes within the class of judicial questions, which must be considered by the judicial department of the Government and not among the hybrid class of powers which might be brought within the province of any of the departments. See *Moreau* v. *Freeholders of Monmouth County*, 68 N. J. L. 480.

Counsel for defendants will cite the case of *Erie R. R. Co.* v. *Board of Public Utility Commissioners* (Re Belleville Turnpike) 95 Atl. 177, That was the case of the regulation of the use of the highway by the public and by the railroad company. It did not involve the rights of other utility companies such as the Street Railway Company, the Water Company, the Telegraph Company, the Telephone Company, the Gas Company and the Electric Light Company, etc. All of these companies have certain rights to the use of the streets at and across the railroad tracks. Their respective rights and duties are so involved that the case is pre-eminently one that is adapted to the jurisdiction of the Court of Chancery. The present case involves the *form* of the easements as well as the question of the right to use the same; it involves something more than the mere abstract right of the public to use a

highway crossing. It should also be observed that the order of the Board under review in that case was based upon sec. 22 of the act concerning public utilities. This gives the Board power to direct the railroad to make reasonable provisions for the protection of the traveling public. That is an entirely different subject from the matter of regulating the method of the use of the several different easements at one and the same crossing.

A recent decision of this court is *Public Service Electric Company* v. *City of Plainfield,* 88 N. J. L. 603, in which it is pointed out that the public utility act of 1911, which gives the Board of Public Utility Commissioners power to require every public utility to comply with the laws of the State and any municipal ordinance relating thereto, etc., does not confer upon the Board power to decree the specific performance of a contract, which is within the *exclusive* jurisdiction of the Court of Chancery, and that even if the Act had expressly given such power to the Board it would have been unconstitutional, as "an unlawful invasion of the courts' exclusive prerogative." In that case the Court said (italics ours):

> "The Legislature cannot impair the jurisdiction of a constitutional court either by preventing its exercise *or creating a co-ordinate authority.*" (citing cases.)

There is no dispute as to the fact that the regulation of conflicting easements *is vested* in the Court of Chancery, and up to the present time no one has successfully challenged that jurisdiction. As we have seen from the case of *Public Service Electric Co.* v. *Plainfield, supra,* the Legislature cannot create a "co-ordinate authority" for the regulation of this subject. Its regulation must be exclusively in the Court of Chancery; a co-ordinate jurisdiction cannot be vested in the Board of Pub-

lic Utility Commissioners. This is particularly true if the argument is sound that the Act of 1913 does not attempt to fix a new obligation upon the railroads with regard to the maintenance of crossings, but simply attempts to interpret and provide a means of enforcement of the obligations already existing and which were imposed by the charters of those companies. The result is not a new duty and a means for its enforcement, but a new means of enforcing an old duty. We submit, therefore, that any means of interpreting and enforcing an obligation of this character must be judicial. Ample provision for enforcement now exists in the judicial system of our State by means of specific performance, by injunction (mandatory or restraining), by indictment, or by mandamus, and no means of enforcement can be devised that does not encroach upon these judicial prerogatives which constitutionally inhere in the courts of law and equity.

In the Supreme Court counsel cited the statutes providing for the creation of state and local Boards of Health, and they said that such statutes gave power which involved "judicial discretion." This is true only in a limited sense. In the first place, these statutes prohibit certain definite and specific acts which are capable of unmistakable recognition, e. g., if a person has smallpox everyone recognizes that he should be prohibited from mingling with the general public as long as the disease continues. These specific acts were not therefore prohibitive or in any wise regulated. But that is not like the case of a grade crossing, where the question of whether the conditions exist, which, under the Grade Crossing Act, would permit the exercise of the Board's power, depends upon a variety of circumstances, and in the very nature of things requires the exercise of judicial func-

tions in order to determine the fact of danger *vel non.*

In the second place. the Health Acts are not self-enforcing. If those statutes are violated proceedings must still be brought, either in the civil or criminal courts, either to restrain the continuance of the prohibited acts or to impose penalties for the violation thereof. In all such cases the evidence is presented to the court, and not to the Board of Health, and the former and not the latter decides upon the question which may be presented in any particular case—the Board of Health being, in a sense, the public prosecutor.

Counsel also argued that the power delegated to the Board by the Grade Crossing Act was not "judicial," because the Board may act "upon its own initiative"—presumably referring to section 5 of the statute. We submit that the nature of the power conferred by this statute cannot be changed merely by providing that the Board to whom the power is given may itself institute proceedings to enforce the statute. It might as well be said that because a Board of Health has power to bring an action for the penalty for violation of the health statute, that that Board may also have conferred upon it the right to determine judicially the question of whether the health statute has been violated. The very nature of a judicial proceeding presupposes that the prosecutor shall not at the same time be the court.

Moreover, in the present case, the proceeding was not instituted by the Board. And hence, so far as this case at least is concerned, the Board has attempted to exercise *only* those powers which are vested exclusively in the Court of Chancery as a judicial tribunal.

The cases cited hereinbefore show that it has always been recognized by the legislature that the exclusive power to regulate the use of easements

at grade crossings rests in the Court of Chancery, and this course of legislation is a *practical construction* of the meaning of the Constitution with respect to that subject.

(b) The duty to construct and maintain good and sufficient passages at the several crossings (whether it rests upon the prosecutor or upon the two underlying companies) can also be enforced by the courts of law. This court has jurisdiction to compel the performance of such statutory duty by the use of the writ of mandamus, *N. Y. &c. R. R.* v. *Montclair,* 47 N. J. Eq., 591; *Bridegton v. Traction Company,* 62 N. J. L., 592; *Jacquelin* v. *Erie R. R.,* 69 N. J. Eq., 432; *Board of Railroad Commissioners* v. *Delaware &c. R. R. Co.,* 79 N. J. L., 219.

If the railroad refuses to conform to the duty imposed by the statute, there is a further remedy by indictment, *N. Y. &c.* v. *State,* 50 N. J. L., 303; *State* v. *Lackawanna R. R.,* 86 N. J. L., 62.

Counsel for defendants will no doubt argue (as they did in the Supreme Court) that the duty imposed by the original railroad charters and by the Railroad Act of 1903 is "general," and that all that the Grade Crossing Act of 1913 does is to provide a method to convert the general duty into a "specific" duty under the conditions mentioned in the latter statute. But that is nothing more nor less than "what the courts of law or equity do, in appropriate cases, either by virtue of the writ of mandamus, or by injunction proceedings, or by virtue of the special jurisdiction conferred by the statutes above cited, or by virtue of the general jurisdiction of the Court of Chancery to regulate conflicting easements. Assuming this to be the purpose of the statute, the question still remains whether such statute impairs the jurisdiction of the courts of equity and of the courts of

law which, before the passage of such statute these courts had to enforce statutory duties by appropriate proceedings. For the reasons above stated, we submit that the statute of 1913 does impair the jurisdiction of the courts both of equity and of law.

Conclusion.

XXXII.

IF, FOR ANY OF THE FOREGOING REASONS, ANY PART OF THE ORDER UNDER REVIEW IS INVALID, THEN THE ENTIRE ORDER MUST BE SET ASIDE.

Our contention in this respect has already been sustained by this Court in the case of *Public Service Gas Co.* v. *Board of Public Utility Commissioners,* 92 Atl., 606. In that case writs of certiorari had been prosecuted in the Supreme Court by the Cities of Paterson and Passaic to review an order of the Board of Public Utility Commissioners fixing the rate for gas at ninety cents per one thousand cubic feet, the claim of the municipalities being that the Board should have fixed a lower rate. The Supreme Court recognized its lack of power to order a modification of the order of the Board of Public Utility Commissioners and dismissed the writs prosecuted by the cities, saying: (84 N. J. L., 463 at 465.)

> "The only remedy that could give the cities the relief they seek is a writ of mandamus commanding the commission to reduce the rate to ninety cents. Under well settled principles, this writ is not available. * * * The question now involved is not whether upon an application to this court for a mandamus to compel a public service corporation to furnish gas, we might not determine for ourselves as

an original question what would be a reasonable charge, just as the Court of Chancery determined a reasonable charge for water in Long Branch Commmission v. Tintern Manor Water Co., 4 Robbins, 71. The parties do not appeal to our original jurisdiction, but very properly have resorted to the new procedure provided by the legislature in the Public Utilities Act of 1911 (P. L., p. 374.) Under that act our jurisdiction is appellate, not original, and the power given (section 38) is the power to set aside the order of the commissioners not to make or compel them to make a new order. Our original jurisdiction, as it has always existed is not and cannot be affected by the legislature, but they may provide, as they have in this case, a new method of procedure."

The Court of Errors and Appeals, upon a first hearing of an appeal by the two cities, affirmed the judgment of the Supreme Court dismissing the writs and said (92 Atl., 607:)

"It was held in effect that in certiorari the Supreme Court had simply the alternative of affirming the order of the commissioners or setting it aside; whereas the relief they sought by the cities would approximately be given by the Supreme Court, if at all, only on an application for mandamus. The Supreme Court therefore dismissed the two writs prosecuted by the cities. With this conclusion we agree and have nothing to add to the reasoning of the Supreme Court in that regard."

Upon a rehearing, however, this Court came to a different conclusion, not as to the power of the Supreme Court on certiorari, but as to the propriety of dismissing the writs without adjudicating upon the merits of the question presented. Accordingly, upon re-hearing, this Court reversed the judgments of the Supreme Court (95 Atl. 125),

and, upon the writs of certiorari prosecuted by the city, affirmed upon the merits the order of the Board of Public Utility Commissioners. The theory upon which this result was reached was that the cities were entitled to an adjudication as to whether or not the order of the Board should be affirmed or set aside. The final decision of this Court, therefore, in no way affected the force of the decision of the Supreme Court and of the first opinion by this Court so far as the same related to the lack of power upon a certiorari prosecuted under section 38 of the Public Utilities Act of 1911 to substitute the judgment of the courts for that of the peculiar statutory tribunal to whom the determination of the particular question had been entrusted by the legislature. In other words, such a writ of certiorari is not an appeal to the original jurisdiction of the Supreme Court to review all proceedings of inferior tribunals by certiorari, but is an appellate proceeding, the procedure under which is limited by the terms of the statute creating the same.

That the present writ was prosecuted under the provisions of section 38 of the Public Utilities Act of 1911 is amply evidenced by the fact that the Board returned with the writ the record and proceedings before it, together with all the testimony taken before the Board, as directed by section 38. The result is that since the writ was prosecuted under section 38 of the statute, the power of the Supreme Court was limited by the terms of the statute. Those terms are defined thus:

> "The Supreme Court is hereby given the jurisdiction to review said order of the Board, and to set aside such order when it clearly appears that there was no evidence before the Board to support reasonably such order, or that the same was without the jurisdiction of the Board."

The inevitable conclusion is that neither this Court nor the Supreme Court has power to make an order in this case setting aside a *part* of the order of the Board of Public Utility Commissioners under review, but if any part of the said order is invalid then the entire order must be set aside.

XXXIII.

IF, FOR ANY OF THE FOREGOING REASONS, ANY PART OF THE STATUTE UPON WHICH THE ORDER UNDER REVIEW IS BASED IS INVALID, THEN THE ENTIRE STATUTE MUST FALL.

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.

Johnson v. *State,* 59 N. J. L. 535, 539.
Hann v. *Bedell,* 67 N. J. L. 148, 150.
Riccio v. *Hoboken,* 69 N. J. L. 649, 661.
State v. *Davis,* 72 N. J. L. 345, 348.
Rutherford v. *Hudson River Traction Co.,* 73 N. J. L. 227, 234.
Fagan v. *Payne,* 75 N. J. L. 851.
Hutches v. *Borough of Hohokus,* 82 N. J. L. 140.
In re Van Horn, 74 N. J. Eq. 600, 603.
36 *Cyc.* 976.

In *Riccio* v. *Hoboken,* 69 N. J. L. 649, 661, *supra,* this Court held:

> "It is argued, however, that these unconstitutional features may be treated as excrescences upon the general scheme of the act, and may be totally disregarded, leaving the statute in its main features to remain. Upon this question we adhere to the declaration of Mr.

Justice Depue, afterwards Chief Justice, speaking for this court, in Johnson v. State, 30 Vroom, 535 (at page 539): 'It is undoubtedly elementary law that 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 upon 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 fall.' "

In *Hann* v. *Bedell,* 67 N. J. L. 148, 150, *supra,* this Court said:

"By the supplement of 1892 the legislature sought to extend the scope of the original act by embracing towns within its provisions, and by altering the method of selecting members of the excise board in all the municipalities affected by the legislation, except in cities of the first class. So far as the attempt to subject towns to the provisions of this statute is concerned, it is manifestly, directly in the face of the constitutional provision. And in our judgment this illegality vitiates the whole act. Where an unconstitutional feature stands by itself, and is separable as a distinct thing from the body of the act, and there is no reason to suppose that it constituted an essential motive to the enactment of the law, only the unlawful superaddition to the declared object of the statute will be held to be inoperative and void. Rader v. Township of Union, 10 Vroom, 509. But where it cannot be so separated or where it is apparent that the eliminated portion did not constitute an essential motive for leg-

islative object, the whole act must fall. The principle object of the supplement of 1892 was to include towns in the scheme for regulating the excise, and to divide the municipalities embraced in that scheme into two classes, the first class to embrace cities containing a population of more than one hundred thousand, and the second class to embrace all other cities in the state, and all towns, a different method being provided of selecting members of the board of excise in these two classes of municipalities. To declare inoperative and void only that feature of this law which renders it unconstitutional would be in violation of the principle above enunciated, and would retain upon the statute-book a law which the legislature never passed, and which very probably, it never would have enacted."

In *Rutherford* v. *Hudson River Tr. Co.*, 73 N. J. L. 227, 234, *supra,* the Court said:

"Were we to hold the requirement for paving Park avenue to be an unreasonable restriction, and therefore unjustified by section 7 of the Traction act (with the result of declaring section 9 of the ordinance *ultra vires* the municipality, then the whole of the ordinance, including its grant of privileges and franchises, must fall at the same time. For, undoubtedly, the provision of macadamizing is an essential part of the ordinance, without which it presumably would never have been adopted. The same reasoning applies here that is applicable to an act passed by the general legislature containing some unconstitutional features. As was said by the Court of Errors and Appeals, in Riccio v. Hoboken, 40 Vroom, 662: 'In the absence of any express declaration to the contrary contained in the act itself, the presumption is that the legislature intended any given enactment to be effective in its entirety. Iowa Life Insurance Co. v. Eastern Mutual Life Insurance Co., 35 Vroom, 340,

346. In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.' "

The rule is stated in 36 *Cyc.* 976, *supra,* as follows:

"It is elementary that 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 while that which is unconstitutional will be rejected. The rule is, however, subject to several important limitations, and the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and independent in subject-matter, meaning, and purpose that it cannot be presumed that the legislature would have passed the one without the other."

In the case at bar, section 42 of the Act of 1911 creating the Board of Public Utility Commissioners (P. L. 1911, Chapter 195, p. 374-389) provides "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 this act shall be affected thereby."

It will be noticed that the supplement to the act of 1911, viz. Chapter 57 of the Laws of 1913 (P. L. 1911, p. 91) does not contain any such provision. Section 42 of the Act of 1911 does nothing more or less than reiterate the rule of law laid down in the cases cited *supra.*

See *Fagan* v. *Payne,* 75 N. J. L. 851, 855.

In the case last cited, this Court said (italics ours):

> "We are of the opinion that the fifth section is a separable part of the act. It is to be observed that section 24, page 268, of the act of 1901, provides that an unconstitutional clause or section shall not affect any other section or provision. *Whether this section is more than a mere affirmation of a general legal rule of statutory construction need not be discussed, but it at least shows that the legislature had in mind the existence of this rule.*"

XXXIV.

FOR THESE REASONS THE JUDGMENT OF THE SUPREME COURT SHOULD BE REVERSED AND THE PROCEEDINGS OF THE BOARD OF PUBLIC UTILITY COMMISSIONERS UNDER REVIEW SHOULD BE SET ASIDE.

COLLINS & CORBIN,
Attorneys of Prosecutor.

GILBERT COLLINS,
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HERBERT A. TAYLOR (of N. Y.),
Of Counsel.

Appendix I.

Ch. 57, p. 91, Laws of 1913.

A Supplement to an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

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 the 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 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.

3. The expense of removing, relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expense of paving, curbing and flagging the highway constructed as the result of the change of grade.

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.

5. The board or body having charge of the finances of any municipality wherein any such crossing exists, may present to the Board of Public Utility Commissioners a petition in writing setting forth the facts upon which relief under this act is sought, or upon the petition of any railroad company whose tracks cross or are crossed at grade, or said Board of Public Utility Commissioners may, of its own motion, proceed with respect to any such crossing; whereupon said Board of Public Utility Commissioners shall fix a time and place for a hearing before it and shall give such notice thereof as it shall deem reasonable to the municipality and corporations, co-partnership or individuals interested therein and after such hearing, shall determine or order what, if any, alterations to or changes in or connected with such crossing and public highway shall be made.

6. All the powers, supervision, regulation of, jurisdiction and control over public utilities granted

by the act to which this is a supplement, are hereby vested in the Board of Public Utility Commissioners and courts of this State as may be necessary to carry the provisions of this act into effect.

7. This act shall take effect immediately.

Approved, March 12, 1913.

Appendix II.

Ch. 238, p. 491, Laws of 1914.

A Supplement to an act entitled "A supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty-first, one thousand nine hundred and eleven," which supplement was approved March twelfth, one thousand nine hundred and thirteen.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The notice of time and place of hearing required to be given by section five (5) of the act to which this act is a supplement may, except as to the municipality or municipalities and the railroad company or companies interested in the hearing, be given by publication of a notice in a newspaper or newspapers circulating in the municipality or municipalities in which the crossing or crossings to which such hearing relates may be located; such newspaper or newspapers to be designated by the Board of Public Utility Commissioners. Such publications shall be at such intervals and for such period of time as said board shall deem reasonable; and shall be directed generally "To whom it may concern," give notice of the time and place of hearing and describe generally the object of such hearing.

2. This act shall apply equally to all proceedings under the act to which this is a supplement now pending before or hereafter instituted before or by said Board of Public Utility Commissioners.

3. If, for any reason, any section or provision of this act shall be questioned in any court, and shall be held to be invalid, no other section or provision of this act shall be affected thereby.

4. This act shall take effect immediately.

Approved April 17, 1914.

Appendix III.

List of New Jersey Cases in which proceedings of the Board of Public Utility Commissioners have been under review.

Delaware, etc., R. R. Co. v. Board of Railroad Commissioners, 79 N. J. L., 154; 74 Atl. 269.

Appeal by the railroad from an order requiring the petitioner to restore station facilities at Broadway station, Warren County.

Public Service Ry Co. *v.* Board of Public Utilty Commissioners, 81 N. J. L., 363.

Certiorari to review an order directing the railroad company to restore a three-cent fare to school children.

Ocean Grove Association, *et al., v* Board and Asbury Park, 82 N. J. L., 309; 82 Atl. 306.

Certiorari to review an order requiring certain railroad companies to stop their trains on Sunday at Asbury Park.

Public Service Ry. Co. *v.* Board and Mungle, 82 N. J. L., 312; 81 Atl. 1117; (*affirmed* 84 N. J. L. 633; 83 Atl. 903.)

Certiorari to review an order requiring the street railway company to comply with an ordinance of the City of Newark, in matter of

transfer of passengers at intersecting or connecting points.

Pennsylvania R. R. and others *v.* Board, 83 N. J. L., 67; 83 Atl. 945; (*affirmed* 84 N. J. L., 619; 87 Atl. 801.)

Certiorari to review an order requiring certain railroad companies to sell commutation tickets designating the termini of the journey and to establish rates for commutation service between points within the State of New Jersey.

Delaware, etc., R. R. Co. and others *v.* Board, 83 N. J. L., 212; 84 Atl. 702.

Certiorari to review on order directing certain railroad companies to provide individual drinking cups or sanitary glasses.

Interstate Telephone Co. *v.* Board, 84 N. J. L. 184; 86 Atl. 363.

Certiorari to review the action of the Board in refusing permission to issue certain bonds, and rule to show cause why mandamus should not be allowed.

Public Service Gas Co. *v.* Board, 84 N. J. L., 463; 87 Atl. 651; (See also 87 N. J. L., 581; 92 Atl. 606; 94 Atl. 634; 95 Atl. 127.)

Certiorari to review an order fixing the rate for gas in a certain district at ninety cents per thousand cubic feet.

Delaware, etc., R. R. *v.* Board, 85 N. J. L., 28; 88 Atl. 849.

Certiorari to review an order directing the company to allow certain state officials to ride free of charge over its railroad.

Public Service Ry. Co. *v.* Board and City of Perth Amboy, 85 N. J. L., 123; 88 Atl. 818; (*affirmed* 86 N. J. L., 696; 92 Atl. 1087.)

Certiorari to review an order directing the street railway to permit policemen and firemen

on duty to ride free of charge within city limits.

Town of Phillipsburg *v.* Board and Phillipsburg Horsecar R. R. Co., 85 N. J. L., 141; 88 Atl. 1096.

Certiorari to review an order according permission to street railway company to change the gauge of its tracks.

Erie Railroad Co. *v.* Board, 85 N. J. L. 420; 89 Atl. 1001.

Certiorari to review an order requiring certain railroads to furnish drinking water on trips of one-half mile or more.

West Jersey, etc., R. R. Co. *v.* Board, 85 N J. L. 468; 89 Atl. 1017.

Application for mandamus to compel Board to approve lease to be made by West Jersey and Seashore Railroad Company and Pennsylvania Railroad Company.

Eastern Telephone Co. *v.* Board, 85 N. J. L. 511; 89 Atl. 924; (see also 93 Atl. 1084, 5.)

Application for mandamus to compel Board to approve the two franchises for the construction of telephone and telegraph lines in certain municipalities.

Public Service Ry. Co. *v.* Board and Essex and Hudson Counties, 86 N. J. L. 105; 91 Atl. 313. (*Affirmed* 87 N. J. L. 250; 93 Atl. 585.)

Certiorari to review an order fixing the compensation to be paid by the street railway company for the use of the Clay Street bridge.

American Malt Corporation *v.* Board, 86 N. J. L. 668; 92 Atl. 362.

Certiorari to review an order refusing application to approve proposed merger of corporations.

Public Service Electric Co. *v.* Board and City of Plainfield, 87 N. J. L. 128; 93 Atl. 707. (*Affirmed,* 88 N. J. L. 603; 96 Atl. 1013.)

Certiorari to review an order requiring the Electric Light Company to furnish light free of charge for certain municipal buildings.

Erie R. R. *v.* Board and Hudson County, 87 N. J. L. 438; 95 Atl. 177.

Certiorari to review order of Board prescribing certain protection at Belleville Turnpike.

Erie R. R. *v.* Board, Opinion filed April 15th, 1913.

(Not reported.)

Certiorari to review order to require the prosecutor to complete the improvement of station facilities at Little Falls.

Borough of Wildwood *v.* Board, 95 Atl. 749.

Certiorari to review an order fixing water rates.

(Order affirmed.)

Erie Railroad Co. *v.* Board of Public Utility Commissioners, 98 Atl. 13.

Paterson Grade Crossing case.

Potter *v.* Board of Public Utility Commissioners, 98 Atl. 30.

Certiorari to review an order of the Board directing the taking of private property under the Act of 1913 for the abolition of a grade crossing.

(Cranford Grade Crossing Case.)

Public Service Ry. Co. *v.* Board of Public Utility Commissioners, 98 Atl. 28.

Certiorari to review an order of the Board imposing upon a street railway company 10% of the cost incurred in abolishing grade crossings in Paterson under the Act of 1913.

Appendix IV.

ERIE RAILROAD CO.

Statement showing kind of protection.

Sts. at grade.	No. men.		Kind of protection.
Madison Avenue	1 gates	6.30 AM— 7.30 PM	Bell also
Clay & Straight	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Straight St	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Cedar St.	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Side tracks & yd.	1 "	6.00 AM— 6.00 PM	
Market St. & Park Ave.	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
	1 ground	6.00 AM— 6.00 PM	
	1 "	6.00 PM—11.30 PM	
Ellison St.	1 gates	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Van Houten St.	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Broadway	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
	1 ground	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Fair St.	1 gates	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Hamilton Ave.	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Lafayette St.	1 "	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	
Franklin St.	1 "	6.00 AM— 7.00 PM	
		Balance of day no protection	
Keen Street	1 ground	6.30 AM— 6.30 PM	
		Bell balance of time	
Warren St.	1 gates	6.00 AM— 6.00 PM	
	1 "	6.00 PM— 6.00 AM	

River & Putnam Sts.	1	"	6.00 AM— 6.00 PM
	1	"	6.00 PM— 6.00 AM
	1	"	6.00 AM— 6.00 PM
(South Side Gates)	1	"	6.00 PM— 6.00 AM

"Gates" means crossing protected by gates between the hours specified.

"Ground" means that a flagman is on the ground at the crossing between the hours specified.

Appendix V.

N. J. Statutes providing for alterations of grade crossings.

1874, p. 45.

Authorizes any city to enter into contracts with railroad companies whose roads enter corporate limits, whereby said companies may re-locate, change or elevate their railroads, and when necessary for that purpose gives power to vacate, change the grade of or alter the lines of any streets or highways therein.

Repealed by ch. 176 Laws of 1904, p. 317.

1893, p. 157.

Supplement to the above act. Amends section 1.

Repealed by ch. 176, Laws of 1904, p. 317.

186, p. 139 (3 Comp. St. p. 4262.)

An Act for the abolition of railroad grade crossings in cities of the first class.

Section 5 provides for certain expenses to be borne by the city.

1900, p. 312.

Supplement to 1874, p. 45, *supra,* providing for the issuance of bonds to pay the city's portion of the cost of a contract entered into under the provisions of said prior act.

Repealed by ch. 176, Laws of 1904, p. 317.

1901, p. 116 (3 Comp. St. p. 4266.)

Authorizes any town or city to enter into contracts with railroad companies whose roads enter their corporate limits, to change or elevate their railroads, and, when necessary for that purpose, to vacate, change the grade of, or alter the lines of any streets or highways therein.

1902, p. 402 (3 Comp. St. p. 4266.)

Amends section 2 of the act, 1901, p. 116, prescribing the method by which the town or city shall provide the necessary money.

1903, p. 645 (3 Comp. St. p. 4234.)

An Act concerning railroads (Revision of 1903), Section 30, p. 661, authorizes any "municipality or township" to enter into contracts with the railroad companies for the construction or maintenance of crossings other than at grade.

Provides that nothing herein shall repeal or in anywise effect the act of 1901, p. 116.

1903, p. 645 (3 Comp. St. p. 4234.)

An Act concerning railroads (Revision of 1903), Section 31, provides that the Board of Chosen Freeholders may make contracts for changes in the grade of county roads.

1903, p. 645 (3 Comp. St. p. 4235.)

An Act concerning railroads (Revision of 1903), Sections 32 and 33 provide for the crossing of steam railroads by trolley roads at points "not within the limits of any city" and gives power to the Chancellor to define the mode of crossing. Also gives the company power to alter grades and to take such land as may be necessary; requires it to pay the damages for the change of grade.

1904, p. 372 (3 Comp. St. p. 4258.)

An Act to provide funds to enable any city or other municipality in this State to meet its obli-

gations under any contract heretofore or hereafter made with railroad companies whose roads enter its corporate limits, for the change or elevation of their railroads, and, when necessary for that purpose, for vacating, changing the grade, or altering the lines, of any street or highway therein.

1912, p. 914.

Amendment to an Act concerning public utilities, etc., provides for division of expense in certain proportions and requires the removal of one grade crossing each year for every 30 miles.

This statute was held invalid by the Supreme Court in opinion reported 83 N. J. L., p. 303, and judgment to that effect was entered Nov. 26, 1912 (see Laws of 1913, pp. 894-6).

1915, p. 98.

Amends Section 30 of the Revision of 1903 and retains proviso as to the act of 1901, p. 116.

1915, p. 100.

Authorizes municipalities to contribute to expense of changing grade crossings, etc.

Appendix VI.

Extracts from Reports and Messages.

NEW JERSEY.

From First Annual Report of Board of Railroad Commissioners for the year 1907, pp. 12 and 13:

> "To invest the Board with direct authority on its own initiative or to make it the duty of the Board to abolish all crossings where railroad tracks traverse highways at grade under conditions which create a menace to life or an obstruction to travel might be of doubtful wisdom. It might be suggested that the power thus conferred is extraordinary if

not excessive; that its unreasonable or arbitrary exercise might create hardship and perhaps unnecessary financial embarrassment to the companies affected; and that a safer and perhaps a more judicious method would involve a plan somewhat akin to that adopted in Massachusetts and other states. How this subject of vital public interest has been dealt with elsewhere will appear from an examination of the brief summary of the statutes of a number of the states which have thus far legislated upon the matter. This summary will be found under separate heading and attached to this report. The Commission would suggest the following as a method which seems just and safe: That whenever a certain number of citizens (number to be fixed by statute) who in fact make use of a particular grade crossing, or the governing body of any municipality, shall deem such crossing a menace to life or obstruction to public travel, they may set forth the facts in a formal petition addressed to the Chancellor of the State who shall thereupon make an order directing the Commission to inquire into the allegations set forth in the petition and report in writing with promptness to the court the result of its investigation. This method would involve a full hearing before the Commission, not only of the petitioners but of the railroad affected. The report of the Commission must, of course, embody its finding of fact and upon it, after review, by the Court, the Chancellor will make his order, either ordering the crossing to be abolished or permitting its maintenance under conditions shown or such modified conditions as the Court may deem proper.

"It will be observed that this plan leaves, generally, the initiative with the communities immediately affected by the presence of the crossing; that the finding of the Commission

in every instance, must pass in review before the Court of Chancery and that thus any unreasonable or arbitrary exercise of power will be rendered impossible, and finally, that the order disposing of the matter is made by a Court, which is able promptly to enforce its commands by attachment for contempt or other methods.

"It is thought by the Commission that the problem of dealing with grade crossings can best be met by this or some kindred method.

"Furthermore it would seem that the law should provide clearly that the cost of the elimination of grade crossings should either be borne wholly by the railroads concerned, or it should ordain a consistent division of the expenditure involved between the railroads and trolley companies and the State and the benefited municipalities as is done in certain other states. If the latter plan is adopted the law should state the local cost which should be proportionate to the population, or wealth, or both, of the municipalities involved."

From same Report, p. 291:

"Believing that the Legislature will consider the enactment of additional legislation upon this subject the Board has prepared a digest of the laws of a number of states, relating to grade crossings, in which there may be found methods worthy of consideration and adoption by our own state."

(The laws of other states, referred to, are New York, Massachusetts, Connecticut, Vermont, New Hampshire, Maine, Rhode Island and Ohio—in none of which is the entire cost of eliminating grade crossings imposed upon the railroad.)

From First Annual Report of Board of Public Utility Commissioners for the year 1910, pp. 5 and 6:

"While some advance has been made in the protection of grade crossings, and the method whereby protection can be obtained has been simplified, it is a matter of regret that no comprehensive law has been enacted providing for the elimination of such crossings, and that satisfactory progress in this direction cannot be noted.

"A consideration of the laws of other states, and of the effect of these laws, convinces the Board that the most progress is made in this direction where there is a frank recognition of the fact that the elimination of grade crossings is beneficial to the general public as well as the railroads, and a provision is made, as in New York, Massachusetts and other states, for a division of the cost of elimination between the railroad companies, the state and the municipalities. It is our opinion that a law giving the Board power to order the abolishment of dangerous grade crossings and providing for an equitable division of the cost between the companies, the state and the municipalities should be enacted.

"The railroad companies being the more directly benefited, should, under such a law, bear the greater part of the cost.

"The sum to be paid by the state should be limited by law and appropriated each year from the taxes assessed on railroad properties. This sum could be apportioned among the municipalities by the Board of Public Utility Commissioners, upon application as hereafter indicated; its payment to be conditional upon the payment by the municipality of the sum fixed by law as its share.

"To prevent undue burdens falling upon municipalities, the law, while naming the proportion of the cost to be borne by them in the

event of orders being issued for the elimination of one or more crossings within their limits, should provide that the sum to be paid by any municipality in any one year must not exceed a certain percentage of its income from taxation. This sum should be so limited as to prevent any unreasonable disbursement of the municipality funds for this purpose, and the interest of the municipalities could be further protected by providing that no order of the Board of Public Utility Commissioners requiring the abolishment of a grade crossing shall be issued except after hearing on the application of the governing body of the municipality where the crossing is located, or of a certain number of citizen taxpayers thereof."

From Second Annual Report of Board of Public Utility Commissioners for the year 1911, pp. 21-23:

"The problem of eliminating grade crossings in such fashion as to minimize most rapidly the existing danger they present, cannot be successfully attacked in desultory or haphazard fashion. Not only must a census of existing grade crossings be made, but of even more importance is a classification of crossings with respect to the relative hazard which they create. A mere mechanical requirement that carriers must eliminate yearly a certain number of grade crossings might easily result in expense without a commensurate diminution of danger. If new crossings at grade were constructed at the same time, the net result of such provision might be *nil*. After a classification of crossings has been made on the basis of the relative danger they create, there arises the engineering problem of the cost of elimination. This will, of course, vary widely in different localities. It is equally true that a great difference exists in the financial ability of the different carriers to pro-

vide funds for defraying the requisite expense. This is wholly apart from the question whether the carriers, including trolley companies, are to be required to bear the whole cost or only part thereof. Moreover, many other factors enter to complicate the matter. The elimination of grade crossings may adversely affect adjacent property. If, for example, tracks are elevated in eliminating a crossing at grade so as to transform a street into a blind alley, the loss of immediate accessibility may result in depreciating the property on the street in question. Similarly the construction work might often require a relocation of sewers or pipe-systems to the financial detriment of a municipality, a public utility or an individual. These things tend to increase the cost of grade crossing elimination which, as a state-wide proposition must be very great.

"This is illustrated by the experience of Massachusetts where conditions are not dissimilar to those in New Jersey. There was expended in that state for grade crossing elimination from the time its grade crossing act became effective in 1890, until the close of 1910, the sum of $34,372,048.03. Of this total the different railroad companies expended $21,109,841.75, the State $8,809,021.74; the different cities and towns, $4,414,995.60, which sum of $38,188.94 was paid from the Metropolitan Park Loans Fund.

"The magnitude of the task of planning for the supervision of grade crossing elimination makes imperative, therefore, an adequate additional appropriation to the funds of this Board, in addition to its other work, is to be charged by law with responsibility for this project.

"It is not the province of the Board to insist upon any particular plan of grade crossing elimination, but it is not deemed improper

to suggest that in planning for such elimination the law should provide for an equitable division of the cost between the companies, the State and the municipalities.

"So far as the elimination of a grade crossing lessens damage costs, and the cost of protecting the crossing, it redounds directly to the financial benefit of the railroad. So far as it permits greater speed and facility of operation it also helps railroad earnings. But the carriers must make a capital outlay on this elimination work; and so far as the annual charges on the outlay are not met by the economies and facilities provided by track elevation, the railroads are bound to obtain the residue of the increased annual charge from rates and fares. If the public owned and operated the roads, track elevation would necessarily be a public charge in its entirety. While it is argued that private ownership and operation for gain transfers the responsibility from the public to the carrier, the interests of both are so closely related that in the final analysis, no matter what provision is made for its immediate assumption, a part of the charge must be borne by the public.

"If a law is passed which provides that grade crossings shall be eliminated without cost to the municipalities, it is not unreasonable to assume that, no public burden being apparent, an agitation will start for the elimination of grade crossings wherever they exist, for all grade crossings are objectionable and possess some element of danger.

"But to remove all these crossings must be necessarily the work of years; disappointment would ensue to those who had been led to look for immediate results, and doubt would arise as to the efficacy of the law, no matter how earnest and intelligent the efforts made for its application.

"If, on the other hand, the law provides that a part of the cost, which may be small, in proportion to that paid by the railroads, shall be borne directly by the municipality sharing the benefit, local movements for the abolition of grade crossings would be accomplished by a sense of direct financial responsibility, which would tend to concentrate public attention on efforts for the elimination of crossings where the danger and annoyance are greatest.

"It would seem that this concentration of attention would lead to more practical results than could be reasonably looked for if the efforts for crossing elimination are based upon the general public impression that all grade crossings in the State are to be eliminated without cost to any municipality in which such crossings exist. Any law providing for a division of the cost of eliminating grade crossings should be so framed that the municipalities would be protected against any extravagant or disproportionate expenditure of public funds for this purpose."

From Third Annual Report of Board of Public Utility Commissioners for the year 1912, pp. 10-12:

"In its report last year the Board expressed its opinion on the elimination of grade crossings. The Board reaffirms the views there outlined. The rational solution of the railroad grade crossing problem requires three things. It requires first of all an appreciation of the difference in hazard existing in the various classes of the 3,000 or more grade crossings now extant in this state. Grade crossings that girdiron a populous city section are immeasurably more perilous than a similar number of grade crossings intersecting a sparsely inhabited rural section, a scrub pine warren, a stretch of sea meadow or a

strip of desert sand dunes. Evidently an intelligent estimate of the danger to be guarded against depends on a careful examination of the hazards presented by the various kinds of grade crossings, and a scientific classification of the crossings with respect to the hazards they offer.

"The solution of the problem demands, second, a realization of the magnitude of the work of elimination, and of the time and money that will be required for its completion. The state will be more than fortunate if by the end of two decades it sees the removal of all the really dangerous crossings at grade. The cost alone would prevent much speedier elimination. In the case of a few of the smaller carriers it will prevent any immediate removal of grade crossings whatever. To require them annually to eliminate a certain number of grade crossings per mile might easily bankrupt several of the smaller roads in the state.

"It is difficult now for some of these smaller railroads to maintain their tracks, bridges and equipment in such condition as to satisfy this Board that their trains may be safely operated. Several years ago the lessees of one line cancelled their lease and passed out of existence as a railroad company, because they were financially unable to spend on the track and bridges the sum necessary to meet the reasonable requirements of the then Board of Railroad Commissioners. An arrangement was subsequently effected with other lessees, whereby the road was put in safe condition, and operation was resumed. But recently, and against the protests of those living along the line, the Board has most reluctantly given its consent to discontinuance of daily passenger service on this road during part of the year. The Board was satisfied from a careful consideration of the revenue and operating ex-

penses of the road that it was being conducted at a material loss, and that a requirement of continued daily passenger service might and probably would result in its abandonment, with little prospect of any other company affording even the limited service the present operating company provides. It is not difficult to see what would happen if a road like this and a number of others barely able to keep their tracks and bridges safe for operation should be directed to spend thousands of dollars to eliminate their crossings at grade.

In all railroad operations there are elements of danger, not alone in the crossing of highways at grade, but to those who travel on trains. It is the duty of railroad companies by good management, the installation of mechanical devices, proper system of signaling and strict enforcement of salutary rules, to eliminate these dangers so far as practicable. it is the duty of the state, and of railroad and utility commissions to whom power is delegated by the Legislature to require railroad companies to take measures for the protection of the public and of their employees where reasonable protection is not voluntarily provided. There is a limit, however, to such requirements, which cannot be passed if the railroad company is to continue to supply service.

"In the third place, a solution of the problem of grade crossing elimination will be hastened by a recognition of the justice of distributing the cost between the carriers and the public, as represented by the state and the municipalities. There are cases where the grade crossings within the past two years have been forced on the carriers against their will. It is indisputable that in such cases the entire cost of removal could not be put upon the carrier without a gross violation of the dictates of common fairness. Where progress has been most marked in eliminating grade

crossings, as in Massachusetts, there has been an equitable partition of the cost of elimination.

"Moreover, it must not be forgotten that the investment in grade crossing elimination cannot be had for nothing. If the companies are to spend the vast amounts such elimination requires, the consumer must expect in rates and fares to contribute to the cost. If the companies at their own expense exclusively pay the cost, the indemnity they may reasonably exact will be heavier than if the public contribute in the first instance to the project, and thereby obtain some rightful control over the process of elimination."

From message of Governor Wilson to the Legislature Re Chapter 412, Laws of 1912, as printed in Laws of 1912, p. 918 and following:

"The circumstances which surround this problem are not the same for any two railways of the state, but what might be a reasonable enough requirement for one of the railway systems of the state might be a very impossible situation and breakdown of the law, and that is certainly not the purpose of the people of this State. The bill does not forbid the creation of new grade crossings, neither does it attempt any classification of those already in existence. I take the liberty of quoting the following from the 'Comments of the Board of Public Utility Commissioners on Grade Crossings' in the report of the Board for the year 1911."

(Here follows extract from Board's Report of 1911—see above.)

"This quotation makes very clear the possible complexity and engineering difficulty of the whole matter.

"What is needed is an adequate enlargement of the powers of the Board of Public Utility Commissioners. That Board can be

empowered, and should be empowered, to push the elimination of such crossings as fast as is possible to push it without bringing hopeless embarrassment upon the railways. The law could easily establish a principle by which it might be determined when it was equitable that the several communities affected should participate in the expense and to what extent, if any, they should participate. In this way all the results that could possibly be attained by the present bill would be attained without the risk and perhaps the discouragement and discredit of attempting a thing, in itself inequitable and impracticable.

"The non-enactment of this bill into law will, of course, be a serious disappointment to the people of the State, but it will only concentrate their attention upon the just and equitable way of accomplishing the end in view. I do not believe that the people of the State are in such haste as to be willing to work a gross injustice, either to the railroads or to private owners of the property or to the several communities affected.

"Respectfully,

"WOODROW WILSON,

"Governor."

INDIANA.

In its report for the year 1909 the R. R. Commission of Indiana (p. 13) suggested the enactment of a law for the elimination of grade crossings; the cost to be "divided between the railroad and the counties, cities and towns, wherein the crossings are located, according to some fair basis to be determined by the Railroad Commission."

CALIFORNIA.

The California R. R. Commission, in its report for the period of January 1, 1911 to June 30, 1912, under the heading of "Formal Applications," at p. 97, sets out in full Sec. 43 of the Public Utilities Act, ch. 14, laws of 1911. Division (b) of this section reads as follows:

> "(b) The Commission shall have the exclusive power to * * * alter or abolish any such crossing, and to require where, in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality, or other public authority in interest."

At page 98 the Commission says:

> "In the determination of applications presented under the above section of the law, the Commission is addressing itself to the problem of safeguarding against accidents. And with the assured construction in the future of many new roads and of increased traffic, this problem promises to grow in importance."
>
> "*While the protection of the public demands and is being given every consideration, the Commission, in imposing requirements, unavoidably must act within the limits of commercial feasibility.* It manifestly would be unwise, by denying a projected road the right to cross highways at grade, to render its construction financially improvident, and, therefore, impossible by reason of the great additional expense of constructing over or under crossings. Nor should such additional cost

be required of a county which desired to construct a new public highway across existing tracks, if the crossing at grade may be reasonably safeguarded.

"In each proceeding the applicant must establish a *prima facie* case of necessity to construct at grade. The proposed crossing is inspected by the Commission and its engineer and the manner and point of crossing approved or modified and the terms of installation, operation, maintenance, use and protection prescribed in the other in accordance with the circumstances of each particular case.

* * * * * *

"Underlying its decision is the constant endeavor of the Commission so to exercise its powers as not only to protect the public against those corporate practices which have led to state regulation, but to foster and encourage the development of public utility enterprises and the investment of capital therein. The best interests of the public imperatively demand the observance of this general policy."

MASSACHUSETTS.

Under date of January 9, 1913, the Board of Railroad Commissioners and the Massachusetts Highway Commission reported to the Senate and House of Representatives of that State "on the advisability of changing the present basis of the apportionment of the cost of abolishing grade crossings." This report was made after an elaborate investigation, made pursuant to Chapter 125 of the Resolutions of the year 1912.

The report recites that the joint Board made a careful study of the statutes relating to the elimination of grade crossings in other States and of the history of the work of abolishing grade crossings in Massachusetts. The report then calls

attention to the Massachusetts statute of 1890 providing for the cost to be apportioned on the basis of 65 per cent. to the railroad and the remaining 35 per cent. between the Commonwealth and the city or town in which the crossing is situate—provided that no more than 10 per cent. should be apportioned to such city or town. This method was amended in 1902, whereby a street railway company was assessed not exceeding 15 per cent. The report further calls attention to the fact that, in certain cases, the apportionment has been changed by special statutes, for example, in Boston, in one case the railroad paid but 55 per cent., in another 39 per cent., in another 50 per cent. The report continues:

> "The problem is to determine what policy should be applied for the elimination of crossings which now exist as the result of the indifference of the public in their eagerness for railroad facilities and of the poverty of the railroad companies during the early years of railroad construction.
>
> "It will be seen from the resume of the law and practice of other states, which is appended to this report, that there is considerable diversity of policy among the different states in regard to grade crossing elimination. In a large number of states there are no laws whatever with regard to that matter. In other states the law applies to future crossings only.
>
> "Where provision is made for the abolition of existing crossings a limited recognition is given in some jurisdictions to the theory that the entire cost should be assessed upon the railroad company. In Connecticut and New Hampshire, when the railroad company is the petitioner, it is obliged under the law to pay the entire expense. In New Hampshire the law also provides that a city or town may, subject to appeal to the Public

Service Commission, require a railroad company to abolish any crossing in such city or town at the expense of the company, but in the only case where such action has been taken by any city or town, appeal was taken to the Public Service Commission and an agreement was reached by which the railroad was to pay 65 per cent., the State 23 per cent. and the town 12 per cent. In Indiana, where there is no statute on the subject, the Supreme Court has decided that the railroad commission, under its general powers, may require the separation of a grade crossing in order to protect passengers on the trains, the entire expense to be borne by the railroad company. Broadly stated, therefore, the policy of assessing the entire cost of grade crossing abolition upon the railroad company is recognized in the statutory law of two states only, and in these is limited to proceedings brought on the initiative of the company."

* * * * * *

"There has been a general recognition of the equities in the case as above stated. In the two states where the theory of assessing the entire cost on the railroads is recognized, it is limited, as we have already shown, to cases arising on the petition of the company. Whatever justice there may be in requiring railroad companies to pay the entire cost of any grade crossing elimination which they may desire in their own interests, this policy is open to the practical objection that under it very few grade crossings are likely to be abolished, and it seems to be the interest of the state to promote rather than to retard this work.

"The policy which not only seems to be most equitable but is found to be most effective in securing results is that of apportioning the cost of grade crossing abolitions between the railroad and other parties in in-

terest. Under this arrangement a portion of the cost is generally paid by the city or town, and in some cases by the county or state where the grade crossing abolition occurs. Street railway companies having locations on public ways included in the scheme of grade crossing elimination are also required to pay a portion of the cost involved.

* * * * * *

"As the relative advantage to the parties may vary widely in different cases of grade crossing elimination much may be said in favor of the principle of apportioning the cost according to the equities in each particular case. This policy has been adopted in Arizona, California, Michigan, North Carolina and Wisconsin, as well as in the Dominion of Canada. In all these cases the apportionment is made by the railroad commission or other public board exercising supervision over railroad companies. So far as we are informed, this principle has never been recognized where the apportionment is made by other than a public board.

Owing to the disinclination to leave such large discretionary power in the hands of any board, the principle of fixed percentages for the various parties in interest has been adopted in Connecticut, Massachusetts, New York, Ohio, and Vermont.

In Connecticut, when proceedings are brought on the petition of the city or town the percentage varies, as we have already stated, according to the priority of the highway or railroad. If the highway was opened before the construction of the railroad, 25 per cent. of the cost was assessed to the city or town and 75 per cent. to the railroad company; but if the railroad was constructed before the opening of the highway, the city or town and the railroad each paid 50 per cent. of the cost. In New York the cost of the

abolition of existing crossings is apportioned between the railroad company, the State and the city or town, the railroad company paying 50 per cent., the state 25 per cent. and the city or town the remaining 25 per cent. In Ohio, 65 per cent. of the cost is assessed to the railroad company and the remaining 35 per cent. to the city or town. In Vermont, none of the percentages are definitely fixed, except that the railroad must pay at least 65 per cent., the city or town not more than 10 per cent., and the state not more than 25 per cent. If, therefore, less than the maximum amount is assessed to the state or to the city or town, the proportion paid by the railroad company is correspondingly increased.

"In Massachusetts, the legislation enacted shows that the theory of apportionment according to the equities in each case, and the theory of apportionment according to fixed percentages, have both been considered by the public authorities. We have already stated that prior to 1890 the cost of grade crossing abolition was apportioned among the parties in interest at the discretion of the commission having the matter in charge, as is still done in proceedings for the alteration of crossings. This principle, moreover, was approved by the commission of 1888, as appears from the following statement:

"But we do not consider it practicable for the legislature to fix in advance a proportion to be paid by the parties interested, for the reason that in no two places that have so far come under our observation have the benefits or the disadvantages been equally divided. We would recommend that each one be divided on its own merits by some tribunal such as we have hereinbefore suggested.

"The experience in this state under both of the principles of apportionment which have

been under consideration has shown that the principle of fixed percentages has been the one most productive of results. We believe that it would be unwise to abandon that principle, so long, at any rate, as special commissions continue to be appointed for each proceeding.

"A comparison of the law and practice in other states seems also to indicate that the percentage of cost paid by the different parties in interest is apportioned on an equitable basis. The provision by which the railroad company pays 65 per cent., or substantially two-thirds of the entire cost, is generally regarded as reasonable, though there may be individual cases where this amount is either too large or too small. As the benefits of grade crossing elimination are not merely local, but are of great benefit to the whole traveling public, the assessment of 25 per cent. to the state does not seem unreasonable, especially as this amount may be greatly decreased where a street railway company is a party to the proceedings. The provision requiring an amount not exceeding 10 per cent. to be paid by the city or town seems also to be reasonable, as recognizing the peculiar local benefits received, but limiting the maximum amount which may be paid in any case.

"In our opinion, the present law has proved as satisfactory in operation as the law of any other state in relation to this matter. We do not deem it expedient, therefore, at this time, to recommend any radical change in the law as it now stands. We believe, however, that there are certain details in which the law might be amended to advantage. While the law does not provide that a fixed percentage of 10 per cent. of the cost of grade crossing elimination shall be paid by the city or town, but only an amount not exceeding 10 per cent., we find that in practice the amount paid by the town has been fixed at less than the maximum amount author-

ized by the statute in only 5 grade crossing eliminations out of a total of 482. There may be cases, especially where the grade crossing elimination is made in a sparsely settled community, where the benefit received by the town represents less than 10 per cent. of the total cost of the grade crossing elimination. Moreover it may not only be inequitable in certain cases to assess 10 per cent. of the cost to the city or town, but such an assessment may prove a disproportionate burden to a town of small size or limited financial resources.

"We would recommend, therefore, that the law be amended so as to provide expressly that the amounts assessed upon the cities and towns shall be proportionate to the benefits received and to the ability of these municipalities to pay; and that the Board of Railroad Commissioners should be given the right, before the final decree is entered by the court, to review the apportionment of the cost as well as the general plan of grade separation made by the special grade crossing commission.

"We would suggest that the Legislature might also consider the advisability of substituting a permanent board representing the public for the separate special commissions now authorized by law, in accordance with the following recommendation of the commissions of 1888:

> " 'Some board or court should be clothed with power to act on petition, and, furthermore, they should have the power to act on their own motion, in case such action should be required for the purpose of carrying out the provisions of the law, and we suggest that it would be a step in advance if the authority and responsibility now somewhat widely distributed were concentrated into one set of hands and the same persons were required to decide what should

be done, who should do it and also who should pay for it, making all reasonable provisions at the same time for appeal; but if the custom of employing a special commission to apportion the cost is to be kept up, we would suggest that it should be made permanent to that extent; that the same persons should be called in all cases, in order that whatever experience is gained from year to year may be utilized.'

"We desire also to call attention to the fact that in certain states the railroad or public service commission is empowered on its own motion to order the abolition of grade crossings in the interest of public safety or convenience. While we deem it proper to call these matters to the attention of the Legislature, we make no recommendation in relation thereto."

APPENDIX VII.

GRADE CROSSING STATUTES.

ALABAMA.

General Acts of 1907, page 736, section 1, authorizes cities having a population of more than 35,000 to compel the construction and maintenance of bridges, viaducts and tunnels and their approaches over, under or across railroad tracks within city limits, and provides that where a viaduct, bridge or tunnel crosses over or passes under the tracks of two or more railroad companies, the city has full power and authority to apportion the cost thereof equitably among the different railroads owning said tracks. Where there is only one railroad, the expense is to be borne by said road.

ARIZONA.

The Public Service Corporation Act of 1912, Revised Statutes of 1913, section 2319, page 803, gives the Commission exclusive power to alter or abolish existing grade crossings and to prescribe the terms upon which the separation of grades shall be made and the proportions in which the expense of the alteration or abolition of such crossings shall be divided between the railroad, street railroad and state, county, municipality or other public authority in interest.

ARKANSAS.

There is, apparently, no general law in this State for the elimination of grade crossings, but Act 172 of the laws of 1913, page 728, requires the St. Louis, Iron Mountain & Southern Railway Company and the Missouri & North Arkansas Railway Company to raise their tracks to the maximum grade of the cross levee at the point where said track crosses the same near Helena, Arkansas.

CALIFORNIA.

The Public Utilities Act, Chapter 14, laws of 1911, provides that the Commission shall have the exclusive power to alter or abolish grade crossings and to prescribe the terms upon which such separation shall be made and the proportion in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality or other public authority in interest.

COLORADO.

An examination of the laws of this State discloses no provisions requiring the alteration or elimination of grade crossings.

CONNECTICUT.

Chapter 196, laws of 1911, amending section 3713 of the General Statutes, revision of 1912, provides that the selectmen of any town, the Mayor and Common Council of any City, the Warden and Burgesses of any borough or the directors of any railroad company may petition the Public Utilities Commission for the alteration of a grade crossing, the closing of a highway crossing and the substitution of another therefor not at grade and the Commission determines what alterations and removals if any should be made and by whom. If the petition is brought by the directors of a railroad company, the entire expenses are to be paid by the railroad. If brought by a municipality, not more than one-quarter of the expense is to be paid by the municipality and the remainder by the railroad, if the highway affected was in existence when the railroad was constructed or the layout of the highway was changed for the benefit of the railroad. If the highway was constructed since the railroad, the Commission may order the town, City or borough to pay not more than one-half of the whole expense. The directors of every railroad are required to remove or apply for the removal of one grade crossing each year for every fifty miles of road. If they fail to do so, the Commission shall, if in its opinion, *the financial condition of the company will warrant,* order such crossing or crossings removed, as in its opinion said directors should have applied for. The Commission may upon its motion, order alterations in any grade crossing,

determine and direct by whom such alteration shall be made, at whose expense and within what time, provided that in all cases under this section (Section 3714, page 925, General Statutes, revision of 1912) one-quarter of the entire expense shall be paid by the State and the remainder by the railroad or railroads benefited, and further provided that alterations thus made at the primary expense of the Commissioners shall not direct the construction of more than one bridge in any one year or any one railroad. Any street railway company having authority to lay tracks in a highway which crosses a steam railroad at grade but not to do so at grade may bring its petition for removal of such crossing in the manner specified for municipal authorities and the Commission has the right to proceed in the same manner and with the same powers.

Chapter 168 of the laws of 1913 provides that whenever it is desired to eliminate any grade crossing whereby it becomes necessary to take or occupy any property or whereby any damage will be done to any property adjacent thereto, the owner or owners shall be paid or tendered such damages as they are entitled to receive, whether caused by the county or by any railroad company or companies whose tracks or roadbeds are located at such crossings.

Chapter 164, Laws of 1905, authorizes the Mayor and Council of Wilmington to borrow $100,000 to be expended for the abolition of grade crossings in the city of Wilmington, and for other municipal improvements. An examination of the statutes discloses no general act requiring the abolition of grade crossings.

FLORIDA.

An examination of the laws of this State discloses no statute requiring the abolition of grade crossings.

GEORGIA.

An examination of the laws of this State discloses no statute requiring the abolition of grade crossings.

IDAHO.

An examination of the laws of this State discloses no statute requiring the abolition of grade crossings.

ILLINOIS.

The Public Utilities Act, laws of 1913, page 460, Article VI, section 58, grants the Public Utilities Commission power to alter or abolish any grade crossing and to prescribe the terms upon which the separation shall be made and the proportion in which the expense of the alteration or abolition shall be divided between the railroad or street railroad companies affected or between such companies and the state, county or municipality or other public authority in interest.

INDIANA.

Burns' Annotated Indiana Statutes, 1908, Vol. 3, section 8864, provides that upon petition or upon its own initiative the Board of Public Works of any city of more than 100,000, may adopt a resolution for the alteration of any grade crossing or crossings in said City. The railroad or railroads whose tracks are affected shall pay 75 per cent. of the total cost of such alteration and where such crossing is occupied by the track of any street

railway company such railway company shall pay 5 per cent. of such total cost. Where both street railway tracks and steam railroad tracks occupy said crossing, the City shall pay 14 per cent. and the county in which said city is located shall pay 6 per cent. of the total cost. Where there is no street railway at the crossing, the City shall pay 17 per cent. and the county in which the said City is located 8 per cent. of the total cost.

Section 8871 limits the expenditure in eliminating grade crossing to $400,000 a year.

Section 8873, etc., provides for similar procedure upon the part of the Board of Public Works of any City having between 43,000 and 49,000; the expense and cost shall be borne by the company or companies and the City in the following proportion: The steam railroad company or companies shall pay 75 per cent. of the cost, the City 25 per cent.; but if the track or tracks of any street railroad company or companies are upon the street so improved, the City shall pay 15 per cent. and the street railroad company 10 per cent. of the cost of the improvement at such crossing where its or their tracks are so located or used. The amount required from said street railway company or companies shall not exceed $10,000 at any such crossing where the right of way and tracks of two or more steam railroad companies join and are continguous to each other, or more than $5,000 at any other crossing where the street is used by such street railroad company or companies. If the 10 per cent. of the total cost exceeds the maximum amount permitted to be charged to such street railroad company or companies, the excess shall be paid by the City. If the cost of the work to be performed by said railroad company or companies amounts to more than the amount of the estimate allowed by the Board or Court, then the railroad

company shall pay the excess; and if the actual cost of the work to be performed and completed by the City shall be more than that stated in the estimate, then the amount of the excess is to be borne solely by the City.

Chapter 182 of the laws of 1913, page 508, provides that the Railroad Commission shall examine conditions existing at highway crossings and ascertain which should be separated. Section 4, amended by Chapter 75, laws of 1915, provides that whenever the Commission shall conclude that the grades of such crossings should be separated and it be found practicable to do so, the Commission shall, if satisfied that the crossing is dangerous, order the manner in which the separation shall be made, and the cost of such separation shall be borne one-quarter by the county or counties in which the crossing is located and three-quarters by the railroad company or companies. The provisions of this section do not apply to cities of over 20,000 population, and provided, further, that the provisions of this act other than those contained in this section shall not apply to cities or incorporated towns.

IOWA.

The supplemental Supplement Code of Iowa, 1915, page 174, section 2017, provides that the Board of Railroad Commissioners of the State, upon application of the Board of Supervisors, or of 25 freeholders of any county or the township trustees of any township or the railroad company interested, may provide for the changing, altering, relocating or vacating of an established highway where the same crosses a railroad, and that the portion of expense that is borne by any City, town, county, state or public body shall forever be considered as held in trust by the rail-

road company receiving the same and shall not be a part of the value of the properties or the railroad upon which it is entitled to receive a return.

Cities of 7,000 or over may require railroads operating upon or across any public streets of the City to erect, construct, reconstruct, complete and maintain viaducts, provided the Railroad Commissioners determine the same are necessary for public safety and convenience and approve the plans. Not more than one viaduct with its approaches shall be required in any year. Damages caused to property by the construction of such viaduct and approaches are paid by the City. By implication it appears that the railroad pays the entire cost of the viaduct. When two railroads operate separate lines to be crossed by a viaduct, the City Council apportions the cost and the construction to be done by each. Street railway lines crossing the viaduct are required to pay revenue to be applied for repairs upon such viaduct. The expenses of all ordinary repairs to the viaduct or its approaches are paid, one-half by the City and the other half by the railroad company or companies.

KANSAS.

Chapter 106, laws of 1913, empowers the Mayor and Council or Commissioners of first and second class cities to require any company or companies owning or operating railroads or street railways upon or across any public street or streets to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or over or tunnels under such street or streets over or under any such track or tracks, including the approaches thereto, as may be deemed necessary for the convenience, safety or protection of the public. The public authorities shall provide for appraising,

assessing and determining the damage caused to any property by the construction of such viaduct, etc. The amount of damage thus ascertained and awarded shall be promptly paid by the railroad or railroads. Where there are two or more railroad companies, the proportion thereof and of the approaches thereto to be constructed by each and the proportion of cost to be borne by each shall be determined by the City authorities.

KENTUCKY.

An examination of the laws of this State discloses no statute requiring the abolition of grade crossings.

LOUISIANA.

An examination of the laws of this State discloses no statute requiring the abolition of grade crossings.

MAINE.

Chapter 325, laws of 1915, provides that municipal officers of a town or City, and the State Highway Commission may file a petition with the Public Utilities Commission for the abolishment or alteration of any grade crossing. The Commissioners shall determine what abolishment, alteration, change or removal, if any, shall be made and by whom. The Commissioners shall apportion the expenses and damages between the State, the town in which the crossing is located and the corporation owning or operating the railroad and shall order 25 per cent. thereof to be paid by the State, 10 per cent. to be paid by the town in which such crossing is located and the remainder to be paid by the railroad. The Commission shall not make any order upon any such petition until they are satisfied by investigation or otherwise *that the*

financial condition of the corporation owning or operating the railroad will enable said corporation to comply with such order, and that the probable benefit to the public will warrant the order and the probable expense resulting therefrom, and that the order can be complied with without exceeding the State appropriation.

Section 4, Chapter 325, Laws of 1915, provides that the State shall not pay more than $15,000 in anyone year and that said sum shall be annually appropriated. Where a street railroad has a right of way in a public way crossing a railroad, the Commission shall apportion to such street railway an equitable share of the damages and expenses of alteration, and the balance of such expenses and damages shall be apportioned as provided in Section 1.

MARYLAND.

Section 303, page 672, of the Annotated Code, Volume 1, provides that the Commissioners of the county in which any grade crossing is located may change the said grade crossing so as to pass said highway with an under or over grade crossing. There is no provision for the apportionment of costs.

MASSACHUSETTS.

Chapter 463, Acts of 1906, provides that the Superior Court has jurisdiction in equity on a petition filed to appoint a commission, which if the parties so agree, may consist of the Board of Railroad Commissioners.

Section 151, as amended by section 34, Acts of 1906, page 433 and chapter 722, Acts of 1914. The Commission, if it decides that the security and convenience of the public require the alterations, including the change or discontinuance of a private

way, if any, to be made, shall prescribe the manner and limits thereof and determine which of the parties shall do the work, or shall apportion the work to be done between each of the railroads and the City or town. The railroad shall pay 65 per cent. of the total actual cost of alterations, including the cost of the hearing, the actual cost of the street railway company of changing its railway and location, compensation of the commissioners and auditors and all damages, except as otherwise provided, the street railway company shall pay not more than 15 per cent. of the total cost, and the remainder shall be apportioned between the commonwealth and the City or town, but not more than 10 per cent. of said total cost shall be apportioned to such City or town. If there be no trolley company then 35 per cent. shall be apportioned between the commonwealth and the City or town, but not more than 10 per cent. shall be apportioned to such City or town. In case less than 10 per cent. of such total cost is assessed upon the City or town, the difference between the amount so assessed and said 10 per cent. shall be assessed upon such railroads in addition to said 65 per cent. or upon the commonwealth, or shall be apportioned between the railroad and the commonwealth. If the crossing was established after June 21, 1890, no part of said cost shall be charged to the commonwealth, and such part thereof as becomes thereby unapportionable shall be borne by the railroad corporation, the street railway company, if any, and the City and town in such proportions as the commission shall determine. The commission shall equitably apportion the 65 per cent. between the several railroads which may be parties to the proceedings. The entire cost shall be paid by the railroad if the crossing is of a private way and

no crossing of a public way is abolished in connection therewith.

Sections 152 and 153 of the Revised Laws of 1902, chapter 111, as amended by section 2, Acts of 1905, chapter 408. The commission shall specify the general method of construction, but if the decision involves a change in the grade of the railroad, the Board of Railroad Commissioners' consent shall first be obtained. This only applies if the commission consists of others than the Board of Railroad Commissioners. The expense of maintenance and repair shall be paid as follows: If the public way crosses a railroad by an overhead bridge, the railroad shall keep in repair the framework of the bridge and its abutments, the surface of the bridge and its approaches by the municipal authority; if under the railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad, the public way and its approaches by the City or town. If several railroads cross a public way, the commission shall apportion and award in what manner and proportion each of said corporations shall maintain and keep in repair the framework of the bridge and its abutments if the public way crosses a railroad by an overhead bridge, and the bridge and its abutments if the public way passes under said railroads.

MICHIGAN.

By the laws of 1915, No. 175, page 292, at page 295, the Michigan Railroad Commission and the State Highway Commissioner have power to require the separation of grades at grade crossings and to prescribe the terms upon which the separation shall be made and the proportion in which the expense of the alteration or abolition shall be divided between the railroad corporation and the State, county, good roads district or towns. The

State's portion in no case exceed 25 per cent. of the total cost.

Howell's Michigan Statutes Annotated, page 2790, section 6826, where any grade crossing is within the limits of any City the common council of that City may agree with the railroad or railroads for the abolition thereof. Where the crossing is within the county outside the limits of the City and upon any State or territorial road, the agreement may be made by the board of supervisors of the county. Where the crossing is outside of the City limits and upon any county road, by the commissioners of county roads. Where the crossing is inside any township, by the township commissioner of highways. Where the crossing is on the line between any City and territory outside of such City, (1) where the crossing is on a State or territorial road, by the joint action of the City common council and the Board of County Supervisors; where the crossing is on a county road, by the joint action of the City council and the Board of Commissioners of county roads. Where it is on a township road, by the joint action of the common council and township commissioner of highways. Where the crossing is on the line between two or more counties or two or more townships of the same county, by the action of the Boards of County Supervisors, Boards of Commissioners of county roads or township commissioners of highways, according as the crossing is on a State or territorial road, county road or township road.

The agreement shall provide for paying the cost of making and maintaining the separation, for the division of the total expense between the parties to the agreement, and shall fix the amount of damages, if any, to be paid to the railroad or railroads as compensation for injury to it or them resulting from the changes, exclusive of the expense of construction and maintenance.

Section 6834. If the railroad and the representative Board of officers fail to agree, or if the agreement, having been made, fails to become enforceable for any reason, a petition may be made to the Board of railroad and street crossings, which shall determine the manner of making the separation and shall also estimate as near as may be and determine the cost and expense of doing and constructing the work to be done by said railroad company or companies, and the portion of such cost or expense, if any, which it would be just and equitable that the city, county or township by whom it is provided herein, the expense of such separation shall be paid, shall pay the said companies as its fair share thereof, and they shall also determine the cost and expense of the work to be done or constructed by the city, county or townships, as its or their fair share of the said cost and expense. If there is any dispute as to the value of the property to be condemned, a summons shall issue, and on the return day thereof a jury shall be impaneled in the cause to ascertain and determine the public benefit of separating the grades and to ascertain and determine the just compensation to be made therefor to the street railroad companies, if any, and persons interested in the abutting property who have been made parties to the hearing.

Section 6841. The jury shall assess in their verdict the total compensation awarded for damages for such property as may be damaged by such improvements and to any street railroad company, and also assess the amount determined by said report of the crossing Board to be paid by said city, township or county as its fair share of the expense of the work to be done by said railroad or railroads. When the crossing is within the limits of the petitioner against the petitioner, and in all other cases against the city, county or

counties, township or townships that are parties to the proceedings in equal shares. They shall likewise assess against the said railroad company or companies and in favor of and to be paid to said county, city or township the portion of the cost or expense which it was determined by said crossing Board would be just and equitable that the company should pay to the petitioner or other body politic.

Section 6852. When the street or highway will cross over the railroad, the framework of that part of the bridge within the sidelines of the right of way and all abutments and supports sustaining that part of said bridge shall be built, maintained and kept in repair by the railroad company or companies. Where the street or highway passes under the railroad or railroads, the bridge, its abutments and the sustaining walls along the highway within the sidelines of its own right of way shall be built, maintained and kept in repair by each railroad company. The surface and approaches of such bridge or right of way under the railroad and the approaches thereto shall be constructed, maintained and kept in repair by the township, county or city, or in case of line crossings by the joint action and under the joint supervision of the representative board of officer of the county or township and of the persons or bodies in whom, by the charter of the city, the power to contract for and supervise the pavement of streets is vested. The expense of all work to be done by any railroad or railroads shall be paid by them. The expense of that to be done by any state, county or township shall be paid by it, or in case work is to be done by a city and county or counties, township or townships jointly, the expense shall be shared equally among them.

MINNESOTA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

MISSISSIPPI.

There is apparently no legislation in this state on the subject of grade crossings. Section 4053, page 1115, code of 1906, provides that where a railroad is constructed so as to cross a highway and it be necessary to raise or lower the highway, it shall be the duty of the railroad company to make proper and easy grades in the highway so that the railroad may conveniently cross and to keep such crossings in good order. It is also the duty of the company to erect and keep in order all bridges on any highway at such points as bridges may be necessary to cross the railroad.

MISSOURI.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

MONTANA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

NEBRASKA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

NEVADA.

Revised Laws of 1912, section 4555, provides that the railroad commission shall have full power to "order repairs, reinforcements or reconstruction of property, including buildings, tracks and equipment."

NEW HAMPSHIRE.

Section 13, Chapter 159, Public Statutes and Session Laws of 1901, empowers the Board of railroad commissioners upon petition of the proprietors of a railroad to authorize the latter to raise or lower a highway or other way where it is crossed by a railroad. The Board may, upon like proceedings (section 14), authorize the change or location of a highway or other way for the purpose of avoiding or improving a crossing. A town may, by vote, (section 15) require a railroad to raise or lower a highway for the purpose of abolishing a grade crossing. Section 17 gives the right to the railroad to apply to the commission for determination of the question whether the change proposed or any other change should be made, and the commission is required to make such order as it adjudges the public good requires, after a hearing. The entire cost of any abolition of grade crossings would seem from the act to be at the expense of the railroad.

In one case where a town voted to require the abolition of a grade crossing, an appeal was taken to the commission and upon a hearing an agreement was made for the elimination at the joint instance of the railroad, state and town. The railroad was to pay 65 per cent., the state 23 per cent. and the town 12 per cent. of the cost.

NEW MEXICO.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

NEW YORK.

Section 91 of the Railroad Law of New York provides that the mayor and common council of any city, the president and trustees of any village, the town board of any town or any steam surface railroad company may petition the public service commission for the elimination of highway and railroad crossings.

Section 94 of the Railroad Law of New York, as amended by Laws of 1915, chapter 240, section 1 and subdivision 3. Whenever a change is made as to an existing crossing in accordance with the provisions of section 91, 50 per cent. of the expense is to be borne by the railroad. 25 per cent. by the municipal corporation and 25 per cent. by the state, except where the crossing is located wholly or partly within an incorporated village having not to exceed 1,200 inhabitants. The portion of expense required to be borne by the municipal corporation shall be borne by the town or towns in which such crossing is situated.

Subdivision 4. In cases where the highway is a state or county highway, one-half of the expense of changing the crossing is to be paid by the railroad, the remaining one-half by the state, and jointly by the state, county and town in the case of a county highway in the proportion in which the cost or construction or improvement of such state or county highway is paid.

Subdivision 8. If the appropriation made by the state in any one year is insufficient to pay the state's proportion of the expense, the first pay-

ment from the appropriation of the succeeding year shall be on account of said charge.

The public service commission may, on its own motion, institute proceedings for the alteration of grade crossings.

NORTH CAROLINA.

The Corporation Commission of North Carolina has the power to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and to designate who shall pay for the same, and to partition, when they think proper, the cost of such abolition among the railroads and municipalities interested.

NORTH DAKOTA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

OHIO.

A municipality or county may join with a railroad company or companies in the alteration or abolition of a grade or other crossings. The municipal council, by a two-thirds vote of all the members, or the county commissioners, by a unanimous vote, shall declare how their cost is to be apportioned between the municipality or county and the railroad company or companies. If it is decided to proceed with the contract, an ordinance by the council or resolution by the commissioners shall be passed, which must contain a statement of the damages claimed or likely to accrue, and how their payment is to be apportioned between the municipalities or county and the railroad company or companies. Upon the acceptance of this resolution or ordinance, by resolution of the railroad or railroads through their directors, it shall constitute

an agreement valid and binding on the municipality or county.

The cost of any such construction, including the cost of land or property purchased or appropriated and the payment of damages to abutting property, shall be apportioned as follows: The railroad company or companies shall pay not less than 65 per cent., the municipality or county not more than 35 per cent. Where the public way crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company and the surface of the bridge and its approaches by the municipality or county. When the public way passes under the railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad, the public way and its approaches by the municipality or county. When the grade crossing is on a county line, the commissioners of the counties in which the crossing is situated may join in all the necessary proceedings as above provided, and that portion of the cost which is not paid by the railroad shall be paid by the counties in equal proportions. Any municipal corporation may raise or lower or cause to be raised or lowered the grade of any street or way above or below railroad tracks, and may require any railroad in such municipality to raise or lower the grade of its tracks and construct ways or crossings for them or require the railroad companies to construct the same, that are to be passed under its tracks. The municipality may also require the railroad to erect permanent piers or other appropriate supports whenever the raising or lowering of the grade or of the ways may be necessary.

The Court of Common Pleas has the power to proceed to a hearing upon the petition and answers filed in case of the neglect or refusal of either city or railroad to proceed with the alterations,

and the court shall determine whether or not the security and convenience of the public require the alterations to be made.

The cost of any such improvements shall be borne, 35 per cent. by the municipality and 65 per cent. by the railroad company or companies.

When the public way crosses a railroad by an overhead bridge, the municipality bears the cost of maintenance. When it passes under the railroad, the bridge and its abutments shall be kept and maintained by the railroad company, the public way and its approaches by the municipality.

If the track or tracks of any street railway company or companies within the limits of a municipality where the improvements above-mentioned are made cross a public street or right of way of any railroad company at grade at a point where it has been determined to construct such improvements, the municipality, by ordinance, may require the street railway to bear a reasonable portion of the cost assumed by it, not exceeding one-half the portion payable by the municipality.

OKLAHOMA.

There is no law in this state compelling the elimination of grade crossings. Section 18, article IX of the Constitution of Oklahoma provides in part as follows:

> "The corporation commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling the transportation and transmission companies doing business in this state in all matters relating to the performance of their public duties and their charges therefor and of correcting abuses and preventing unjust discrimination and extortion by such companies."

OREGON.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

PENNSYLVANIA.

Section 59, etc., Purdon's Digest, 13th Ed., Vol. 5, page 5893, provides that the Court of Quarter Sessions of the county in which any grade crossing is situated may vacate the highway which so crosses a railroad and declare any undergrade subway or overgrade bridge or crossing, whether constructed by the railroad or others, to be the public way. Boroughs are authorized to locate and build viaducts or bridges over railroads, and to enter into a contract or contracts with railroads, street railways and others in interest for the building, construction and maintenance of viaducts or bridges, or for certain portions or parts thereof, and for the payment of damages caused by the said location and erection. When the bridge or viaduct does not cross a river, creek, stream or other place over which the county is authorized to build bridges, but merely crosses railroads or railroads and private property, the county commissioners may contract, subject to the approval of the Court of Quarter Sessions of the proper county, to pay not more than 30 per cent. of the entire cost. Such viaduct or bridge shall be maintained by the borough as a borough structure, which is authorized to contract with any of the parties interested except the county, for maintenance.

Purdon's Digest, 13th Ed., Vol. 4, page 3871, etc., section 131, etc., allows railroads, except in cities of the first and second class, and such cities at its or their own cost and motion to vacate or alter its or their tracks or highways at a grade crossing, except on highways constructed at grade by per-

mission of the Court of Common Pleas. Such highways shall not be altered without permission of said court, unless by agreement with the city or railroad as the case may be.

Purdon's Digest, 13th Ed., Supplement to Jan. 1, 1912, p. 560, section 13, etc., allows townships to enter into contracts with the county commissioners of the proper county, and also with railroads, street railways, and others in interest, for the erection of bridges and viaducts, and provide for the apportionment of the expense.

The Public Service Co. Law, No. 384, Laws of 1913, page 1374, at page 1391, provides that the public service commission has the power, upon its own motion or complaint, to order any existing or hereafter constructed crossing to be relocated or altered or to be abolished according to plans and specifications to be approved, and upon just and reasonable terms and conditions to be prescribed by the commission. In prescribing the terms and conditions and the proportionate contributions to the expense thereof, the commission may take into consideration the relative importance to the public of the services rendered by the public service companies as well as the priority of location. Where any portion of the cost and expense has been or shall be borne by the commonwealth or any municipal corporation, such portion shall not be taken into account in fixing any valuation, and provided further that where the commission shall, as part of the regulation of the construction, relocation, alteration or abolition, require, as incidental thereto, a relocation, changes in or removal of any adjacent structures, equipment or other facilities of any other public utility company, said company at its own expense shall relocate, etc., such structures, etc.

The compensation as well as the expense of the construction, relocation, alteration or abolition of

any crossing shall be borne and paid by the public service company or companies or municipal corporations or by the commonwealth either severally or in such proper proportions as the commission may determine, unless the said proportions are mutually agreed upon and paid by those interested.

Section 18, page 1414, article V, provides that when an application is made to the commission for approval of the abolition of any grade crossing, the approval shall be given only if, and when, the commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public.

RHODE ISLAND.

General Laws of Rhode Island, 1896, chapter 187, page 605, sections 44 and 45, provide that if the town council of any town wherein a turnpike crossed by a railroad on a level therewith is situated think it necessary for public safety that the turnpike should be raised or lowered so as to pass over or under the railway, they may in writing request the corporation so to raise or lower such turnpike. If the corporation neglects or refuses so to do, the town council may apply to the railroad commissioner to decide the reasonableness of the request. Either party has the right to petition the Appellate Division of the Supreme Court for relief from the decision of the commissioner, and said court has the full power finally to decide the question as to the necessity of the change. The cost and expense thereof shall be borne by the railroad and the town in such proportion as decided upon by the court. If the railroad unreasonably neglects or refuses to change the grade, after the decision of the court, or having taken no appeal

from the decision of the commissioner, the town council may proceed to make the change and may, in an action against the corporation, recover all charges and expenses occasioned thereby. Chapter 931, Laws of Rhode Island, 1901, page 24, provides that the New York, New Haven & Hartford Railroad Company or any railroad owned, operated or controlled by it, shall abolish the grade crossing at Dike Street, Grove Street and Acorn Street, so-called, in the City of Providence. The city and the railroad may agree upon the amount or proportion or what items of the cost shall be paid by each respectively.

Chapter 896, Laws of 1912, provides for the elimination of certain grade crossings in Pawtucket and Central Falls by a special grade crossing commission. When this work is done, the expenses will be apportioned 65 per cent. to the railroad corporation and 17½ per cent. to each of the cities.

SOUTH CAROLINA.

Section 3232 of the Code of Laws, Vol. 1, provides that the county supervisors shall point out the location of crossings considered by them to be unsafe and shall indicate how and in what manner such crossings shall be constructed so as to secure safety, and shall have power to require such construction to be made within sixty days. The railroad company may raise or lower any highway or other way so as to have its road pass over or under the same, but must obtain a decree from the county commissioners prescribing what alterations may be made and the manner and time of making the same. After a decree by the county commissioners, the railroad may alter the grades of the highway or other way, other than a street in any incorporated city, town or village, to facilitate crossing of the

same by its road or permitting its road to pass at the side thereof without crossing.

Act No. 194 of the Laws of 1913, requires the Southern Railway to construct across its line at a point between Greer and Taylor Station in Greenville County on the public highway of said county an overhead bridge, and provides a penalty for failure to do so. The entire cost must evidently be borne by the railroad, as there is no provision for any contribution.

SOUTH DAKOTA.

Chapter 126, Laws of 1909, provides that the mayor and council or Board of Commissioners may declare by ordinance when any viaduct shall be deemed necessary for safety and protection of the public and shall provide for the appraising, assessing and determining of the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. Such damage shall be paid by the city and may be assessed by the authorities against property benefited. When two or more railroad companies own or operate separate lines of track to be crossed by any viaduct, the proportion thereof and the approaches thereto to be constructed by each or the cost to be borne by each shall be determined by the municipal authorities. In case of such refusal, failure or neglect upon the part of the companies, the municipal authorities may proceed with the erection, construction, reconstruction or repair of any viaduct or viaducts by contract or in any manner provided by ordinance and assess the cost of the erection, construction, etc., against the property of the railroad company or companies, and such costs shall be valid and subsisting liens against such property, and also a legal indebtedness which may be enforced and collected by suit in the proper court by such city.

TENNESSEE.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

TEXAS.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

UTAH.

Laws of 1911, chapter 120, page 206, section 206:

"The city council shall have the powers in the following sections enumerated."

Section 206x33:

"To provide for or change the location, grade or crossing of any railroad."

VERMONT.

Chapter 194, Public Statutes of Vermont, 1906, section 4544, amended by chapter 108, Public Acts of 1908, provides that the selectmen of the town of the directors of a railroad may petition the public service commission for the elimination of grade crossings and the Board shall determine what alterations, changes or removals, if any, shall be made and by whom.

The Board shall apportion the expense, including damages, between the state, the town in which the public highway or crossing is located and the corporation owning or operating the railroad, and shall order an amount not to exceed 25 per cent. of the whole expense to be paid by the state, an amount not exceeding 10 per cent. to be paid by the town and the remainder to be paid by the railroad. If the public highway has been constructed since the railroad, the Board may order

an amount not exceeding 25 per cent. of the whole expense to be paid by the state, an amount not exceeding 15 per cent. to be paid by the town and the remainder by the railroad corporation. The commission, where the removal of a crossing located wholly in one town materially benefits a contiguous town or towns, or the alteration requires the construction of an underpass or overpass of a connecting section of the public highway or part thereof in a contiguous town or towns, or where such alterations, etc., are ordered to be made at a crossing located in not more than one town, may severally assess such towns in proportion to the benefits conferred, but the total of such assessment shall not exceed ten per cent. of the expense including land and special damages. Where a street railway occupies the highway at any such crossing, the Board, upon ordering alterations, etc., shall assess such street railway such per cent. of the total expense, including the land and special damages, as is according to the special benefits conferred.

Every railroad of more than 80 miles of single track road shall remove at least one grade crossing every year (sections 45 and 46). The amendment of chapter 148, Public Acts of 1915, allows the commission, upon application therefor or upon its own initiative for cause shown, to exempt any railroad corporation in whole or in part from this requirement for the current year. Where there is more than one crossing, one of them shall be that which the Board considers the most dangerous, and the remaining shall be those which in the opinion of the directors of the corporation are among the most dangerous; provided that not more than one grade crossing in any town in any one year shall be abolished when such change necessitates the construction of an underpass or an overpass at such crossing, unless the town consents and agrees

thereto. If a railroad corporation fails to remove at least one crossing every year for every 80 miles or fraction thereof exceeding 40 miles, the Board shall, if in its opinion *the financial condition of the corporation will warrant,* order such crossing or crossings removed as in its opinion the directors should have removed, and the Board in so doing shall proceed in all respects as if the directors had voluntarily applied therefor. The Board may, at its own motion, order such alterations at any crossing as it deems best, shall determine and direct by whom the alterations are to be made, and at whose expense and within what time provided, that in all cases arising under this section (section 4547) 20 per cent. of the expense, including all damages as set forth in the second preceding section, shall be paid by the state, the remainder to be assessed upon the railroad corporation or corporations benefited, and such alterations as are thus made at the primary instance of the Board shall not be ordered so as to direct the construction of more than one bridge in any year on any railroad. Where two or more railroads cross a public highway and the tracks of the railroads are so near together that public convenience requires the separation to be done in compliance with one order, the Board shall determine what alterations shall be made, if any, and by whom the work shall be done and the proportion of expense to be borne by the railroad corporations in a manner deemed just and proper by said Board.

VIRGINIA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

WASHINGTON.

General Laws 1913, chapter 30, section 4. The mayor and city council or other governing body of any city or town or the commissioners of any county may file a petition in writing with the railroad commission requesting an alteration in the method and manner of crossing at any grade crossing. The commission shall specify whether the highway shall continue to be at grade or shall be changed. The commission may, on its own motion, file a petition for elimination of grade crossings. The entire cost of eliminating a grade crossing shall be apportioned between the railroad, municipality or county affected, or if the highway is a state highway, between the railroad and the state, as justice may require, *regard being had for the benefits accruing to the railroad, municipality, county or state by reason of the improvement.* Where an existing crossing is ordered eliminated, the commission may, in its discretion, pay an amount not to exceed 10 per cent. of the cost out of the appropriation provided in this act.

WEST VIRGINIA.

An examination of the laws of this state discloses no statute requiring the abolition of grade crossings.

WISCONSIN.

Laws of Wisconsin, 1909, page 722, section 1797, 12e, amended by Laws of 1911, chapter 191, and again amended by Laws of 1915, chapter 136, provides that the railroad commission upon a petition lodged with it by the common council of any city, the village board of any village, the town board of any town, the county board of supervisors of any county, within which the crossing is located, or whenever it is lodged by any railroad

company, shall determine what alteration in such crossing, approaches, mode of crossing or substitution of another crossing at grade, and the substitution of another crossing not at grade, if any, shall be made.

Section 2 of the above chapter 191 provides that the commission shall fix the proportion of the cost and expense of such alteration, etc., which is to be paid by the railroad company or companies and the municipality or municipalities in interest.

Section 1797, 12f, amended by chapter 603, page 744, Laws of 1913, provides that the commission may, in the absence of any petition therefor, order any alteration in such street, highway or railroad as it deems proper, including substitution of another crossing at grade or not at grade, and determine and direct by whom and within what time such changes, etc., shall be made, and the expense of such alteration, etc., shall be apportioned and paid as provided in the preceding section. The procedure is the same where the highway is crossed by more than one railroad and the tracks of the same are so close together as to make the order for the elimination thereof as one order.

Sanborn & Berrymore's Annotations, Wisconsin Statutes, 1898, Vol. 1, page 971, section 1299h, allows the supervisors of any town, the trustees of any village or the county Board in the case of a county road to agree with the owner or operator of any railroad which crosses any highway at grade as to the manner of constructing such crossing and doing the work necessary for its construction and to enter into a contract for the same. The supervisors, etc., shall assess a tax sufficient to raise the amount required to carry out such contract.

WYOMING.

Section 40, chapter 146, Laws of 1915, Public Utilities Act, provides that the public service commission shall have the power to apportion the costs between the various utility companies and the city, town or county in the case of a highway crossing.

APPENDIX VIII.

(a)

Cases decided by Court of Chancery under P. L. 1895, p. 462 (repealed by P. L. 1904, p. 314) and now incorporated in sections 32 and 33 of the General Railroad Law of 1903.

In the case of *In Re Atlantic Highlands, etc., R. Co.,* 35 Atl. (N. J. E.), 387, 389, the Court ordered the electric railway to give bond in the sum of $5,000, conditioned to pay salaries of tower men at crossing to be constructed, "and such other expenses as shall be necessary to the efficient maintenance and management of signals and cut-offs mentioned, *during the continuance of said crossing,*" and also "erect Gibbs signal system, including the power cut-off and the scotch block or derailing switch." Also, "The electric company must bear whatever expense shall be necessary to adopt those gates (at crossing) for continued use after their wires shall be erected." (Reversed 55 N. J. Eq. 522 on another point not now material.)

In re Saddle River Traction Co., 41 Atl. (N. J. Eq.), 107, a like decree was ordered, as in the case last above cited.

In the *Watchung Railroad case,* Bloomfield avenue crossing, Essex County (of which there is no report), the Court of Chancery assessed two-thirds of the cost of installing and maintain-

ing a crossing for a street railway over the steam railroad upon the steam railroad, and one-third upon the street railway (See 62 N. J. Eq. 394).

Unreported cases in which the Court of Chancery has decreed that street railway companies should pay all or part of the expense incurred in changing railroad crossings so as to permit their street railways to pass over same.

In the case of *In Re Application of The West End & Long Branch Railway Co.* to define a mode of crossing the West End Railroad in Long Branch, (decree filed May 7, 1896), Chancellor McGill decreed "that said crossing shall be constructed wholly at the expense of said West End & Long Branch Railway, and shall thereafter be maintained by it in good order." Also, "the expense of constructing and maintaining said protecting apparatus shall be borne by the petitioner, The West End & Long Branch Railway Company." Also, "the said protecting apparatus shall be operated by signal men to be selected and employed by the corporations owning and operating said steam railroad, and the amount of wages of such signal men, the usual wages for such occupation, shall be paid by the petitioner, The West End & Long Branch Railway Company." On May 23, 1904, the decree was modified so as to permit the installation of certain iron poles at the crossing, in place of wood. The Court then decreed "The said Electric Railway shall install said iron poles at said crossing in place of wood, as shall be necessary to guard against the electric and other wires of the Electric Railway falling thereon."

In the case of *Re Application of the Jersey Central Traction Co.* to define the mode of crossing the Freehold and Atlantic Highlands Railway Com-

pany's tracks in the Township of Raritan, decree filed Sept. 14, 1904, Chancellor Magie decreed "that the crossing of said Jersey Central Traction Company's electric railway over its tracks and right of way of the said Freehold & Atlantic Highlands Railroad, a steam railroad in the Township of Raritan aforesaid, shall be overgrade and shall be constructed and hereafter maintained by the petitioner (railway company) at its expense and in the following mode, and in accordance with the following provisions."

In the case of *Re Application of The New Jersey & Hudson River Railway & Ferry Co.* to define the mode of crossing the Bergen County Railroad Company, decree filed December 24, 1902, Chancellor Magie decreed, "that the crossing by the said applicant (railway company) with its two tracks be constructed under the grade of said steam railroad company, and that for that purpose the grade of the highway called Broadway," etc., and the Court outlines how the work is to be done. So far as can be ascertained from the decree the railway company was to bear the entire expense of depressing its tracks.

In the case of *Re Application of the Bergen Turnpike Co.* to define the mode of crossing by its electric railway line of the steam railroad, the New York, Susquehanna & Western Railroad Co. in the village of Hackensack, decree dated July, 1916, it was decreed that the cost of laying and maintaining the track crossing frogs of the petitioner across the tracks of the defendant be paid and borne by the petitioner. It was also decreed that each party pay one-half of the cost of operating and maintaining the gates, switches, tower and interlocking system of signals.

(b)

Cases decided by the Court of Chancery under its general jurisdiction to regulate conflicting easements.

In *West Jersey, etc. R. R. Co.* v. *Atlantic City, etc., Traction Co.* 65 N. J. Eq. 613, it was held: (Headnote)

> "Where a newly organized (railway) company is authorized to lay its railroad tracks at grade across 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."

The expenditure involved was $1,800.

In *J. C. & etc. Ry. Co.* v. *N. Y. S. & W. R. R. Co.*, 62 N. J. Eq. 390, 396, the Court said:

> "If the signal system is considered sufficient, I shall direct that the defendant company (railroad) pay two-thirds of the cost of installing and maintaining it, and the street railway company one-third. The terms of the decree may be similar, so far as applies, to those in the Bloomfield ave. case." In this case "The first cost (for installation) will be about $1,800 and it will require about $1,000 a year to maintain it." The Court decreed on March 10, 1902, "the expense of installing the signal system and of maintaining and operating the same shall be divided between the complainant and defendant in the proportion of two-thirds thereof to be paid by the defendant (railroad company) and one-third by the complainant (railway company)."

Appendix IX.

COMPARATIVE CONDENSED GENERAL BALANCE SHEET

June 30, 1914, and June 30, 1913.

(Pages 26 and 27 of Annual Report of 1914, omitted by oversight from printed book.)

June 30, 1913.	ASSETS.	June 30, 1914.	
	PROPERTY INVESTMENT.		
	ROAD AND EQUIPMENT:		
$272,239,017.24	INVESTMENT TO JUNE 30, 1907	$272,239,017.24	
	INVESTMENT SINCE JUNE 30, 1907:		
19,179,251.32	Road	25,712,848.21	
14,758,040.95	Equipment	22,700,147.39	
		$320,652,012.84	
6,828,136.91	RESERVE FOR ACCRUED DEPRECIATION—CR.	8,062,300.35	$312,589,712.49
	SECURITIES:		
	SECURITIES OF PROPRIETARY, AFFILIATED AND CONTROLLED COMPANIES PLEDGED—		
30,683,650.00	Stocks	30,683,650.00	
45,659,200.00	Funded Debt	46,735,200.00	77,418,850.00
	SECURITIES ISSUED OR ASSUMED— PLEDGED—		
25,160,000.00	Funded Debt		26,824,000.00
	SECURITIES OF PROPRIETARY, AFFILIATED AND CONTROLLED COMPANIES, UNPLEDGED—		
773,538.44	Stocks	773,538.44	
1,628,471.73	Funded Debt	161,496.73	
600,000.00	Miscellaneous	600,000.00	1,535,035.17
	OTHER INVESTMENTS:		
	ADVANCES TO PROPRIETARY, AFFILIATED AND CONTROLLED COMPANIES FOR CONSTRUCTION, EQUIPMENT AND BETTERMENTS:		
4,997,654.45			5,065,754.69
	MISCELLANEOUS INVESTMENTS:		
$ 8,285.93	Physical Property	$ 21,019.81	
27,520,481.00	Securities—Pledged	28,691,733.37	
6,589,567.97	Securities—Unpledged	6,118,599.48	$ 34,831,352.66
	WORKING ASSETS.		
9,741,206.68	Cash	6,297,438.51	

	MARKETABLE SECURITIES:		
17,982.18	Funded Debt	47,585.78	
	Miscellaneous	278.93	
55,024.60	LOANS AND BILLS REIVABLE	35,024.60	
	TRAFFIC AND CAR-SERVICE BALANCES DUE FROM OTHER		
1,607,339.08	COMPANIES	2,381,503.92	
1,629,686.93	NET BALANCE DUE FROM AGENTS AND CONDUCTORS	1,351,572.20	
2,680,271.44	MISCELLANEOUS ACCOUNTS RECEIVABLE	2,640,381.23	
5,981,294.93	MATERIALS AND SUPPLIES	5,566,269.10	18,320,054.27
	ACCRUED INCOME NOT DUE.		
7,882.00	UNMATURED INTEREST, DIVIDENDS AND RENTS RECEIVABLE		9,382.00
	EDFERRED DEBIT ITEMS.		
	ADVANCES.		
	Temporary Advances to Proprietary, Affiliated and Controlled		
5,408,875.21	Companies	4,594,313.09	
140,690.16	Working Funds	51,457.41	4,645,770.50
28,307.16	RENTS AND INSURANCE PAID IN ADVANCE		61f820.88
604,024.59	SPECIAL DEPOSITS		225,374.77
5,531,110.81	CASH AND SECURITIES IN SINKING AND REDEMPTION FUNDS		6,296,162.45
	CASH AND SECURITIES IN INSURANCE AND OTHER RESERVE FUNDS		
300.00			300.00
163,998.94	OTHER DEFERRED DEBIT ITEMS		282,640.54
$476,567,016.83			$488,106,210.42

June 30, 1913.	LIABILITIES.	June 30, 1914.	
	STOCK.		
	CAPITAL STOCK:		
$112,378,900.00	COMMON	$112,378,900.00	
47,892,400.00	FIRST PREFERRED NON-CUMULATIVE	47,892,400.00	
16,000,000.00	SECOND PREFERRED NON-CUMULATIVE	16,000,000.00	
			$176,271,300.00
	MORTGAGE, BONDED AND SECURED DEBT.		
	FUNDED DEBT:		
$164,110,900.00	MORTGAGE BONDS	$166,110,900.00	

64,749,500.00	COLLATERAL TRUST BONDS	65,749,500.00	
14,108,000.00	EQUIPMENT TRUST OBLIGATIONS	17,217,457.45	
1,158,531.52	MISCELLANEOUS FUNDED OBLIGATIONS	1,103,065.63	
			$250,180,923.08
	WORKING LIABILITIES.		
$ 22,466.42	LOANS AND BILLS PAYABLE	$ 6,000,000.00	
2,340,711.52	TRAFFIC AND CAR-SERVICE BALANCES DUE TO OTHER COMPANIES	2,995,069.24	
6,749,302.40	AUDITED VOUCHERS AND WAGES UNPAID	4,374,590.95	
26,442.44	MISCELLANEOUS ACCOUNTS PAYABLE	27,515.51	
1,999,064.55	MATURED INTEREST, DIVIDENDS AND RENTS UNPAID	2,045,153.48	
471,225.00	MATURED MORTGAGE, BONDED AND SECURED DEBT UNPAID	446,225.00	
			$ 15,888,554.18
	ACCRUED LIABILITIES NOT DUE.		
$ 2,475,170.36	UNMATURED INTEREST, DIVIDENDS AND RENTS PAYABLE		2,358,359.82
	DEFERRED CREDIT ITEMS.		
$ 4,022.18	UNEXTINGUISHED PREMIUMS ON OUTSTANDING FUNDED DEBT		
184,116.43	OTHER DEFERRED CREDIT ITEMS		216,923.96
	APPROPRIATEDSURPLUS.		
$ 4,274,594.56	ADDITIONS TO PROPERTY SINCE JUNE 30, 1907, THROUGH INCOME	777,337.33	
	RESERVES FROM INCOME OR SURPLUS.		
5,732,470.39	INVESTED IN SINKING AND REDEMPTION FUNDS	$ 6,593,896.38	
			$ 11,371,233.71
	PROFIT AND LOSS.		
$ 31,889,199.06	BALANCE		$ 31,818,915.67
$476,567,016.83			$488,106,210.42

Appendix X.

Order of Board.

Dated April 20, 1915.

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

In the Matter of the Application of the City of Paterson for Alteration of Grade Crossings on the Line of the Erie Railroad. } *Order.*

The Board of Finance of the City of Paterson, a municipality of this state, having presented to, and filed with, the Board of Public Utility Commissioners, a petition in writing, and an amendment to said petition, likewise in writing, praying that, by virtue of the powers conferred by an Act of the Legislature of this state, entitled, "A Supplement to an Act concerning Public Utilities; to create a Board of Public Utility Commissioners, and to prescribe its duties and powers, approved April 21, 1911," which supplement was approved March 12, 1913, and which constitutes Chapter 57 of the Laws of 1913, the Board order the alteration of the crossing of Madison Avenue, Clay and Straight Streets (two crossings), Cedar Street, Market Street and Park Avenue (one crossing), Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Franklin Street, Keen Street, Warren Street, River and Putnam Streets (one crossing), each of which streets and highways is a public highway in said City of Paterson, where the same cross at the same level the railroad of the

Erie Railroad Company, in said City of Paterson, "according to plans to be approved by said Board by substituting for each of such crossings a crossing not at the grade of such public highways 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 place of the one or ones ordered vacated," and which petition set forth the facts upon which relief under said statute was sought, and the Board having fixed a time and place for a hearing before it upon said petition, and having given notice thereof to the said municipality, the Erie Railroad Company, the Paterson and Ramapo Railroad Company, the President and Board of Directors of the Paterson and Hudson River Railroad Company, and all corporations, co-partnerships and individuals interested, all in accordance with the provisions of said act, and the said Erie Railroad Company having filed its answer to said petition, which answer was later amended, and the Paterson and Ramapo Railroad Company, the President and Board of Directors of the Paterson and Hudson River Railroad Company, Passaic Water Company, Western Union Telegraph Company, National Silk Dyeing Company, Fullers' Express Company, the Herman Company, John Agnew Company, James Wilson & Sons (Inc.), P. S. Van Kirk Company, Henry M. Post, Paterson Brewing and Malting Company, Public Service Electric Company, Public Service Gas Company, Public Service Railway Company, D. Fullerton & Company, Meyer & DeVogel, Leslie Elliott & Co., Samuel Smith & Sons Company, Morris & Company, McNab & Harlin Manufacturing Company, New York Telephone Company, and Paterson, Passaic & Suburban Tele-

phone Company having likewise filed answers, and all of the parties in interest who appeared having been duly heard, the Board of Public Utility Commissioners filed a report of its findings and determinations on January 11th, 1915, which report is made part of this order by reference thereto herein, and it

Now appearing to said Board that the Board of Finance of the City of Paterson is the board or body having charge of the finances of said municipality, and that said Madison Avenue (Clay Street, Straight Street), Cedar Street, Market Street, Park Avenue, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Franklin Street, Keen Street, Warren Street, River Street and Putnam Street is each a public highway; and that the said public highways, and each of them, and the railroad of the Erie Railroad Company in said city cross each other at the same level, and that such crossings are, and each of them is, dangerous to public safety and that the public travel on such highways, and each of them is impeded thereby and that the said Erie Railroad Company is operating said railroad, and that said crossings, and each of them, should be altered according to a plan and profile approved by the board, and such a plan and profile having been prepared.

Now, therefore, it is on this twentieth day of April, nineteen hundred and fifteen, ORDERED, and the said Board of Public Utility Commissioners by virtue of the power and authority vested in it by the aforesaid act, does hereby ORDER the Erie Railroad Company to alter such crossings, and each of them, according to the plan therefor annexed to and made part hereof, entitled, "State of New Jersey Board of Public Utility Commissioners Division of Bridges and Grade Crossings Plan for Elimination of Grade Crossings on Main Line of Erie Railroad

from Madison Avenue to River Street, Paterson, N. J. Based on Surveys Made by the City of Paterson, H. J. Harder, Eng'r. Scale, 1 in. = 50 ft. January, 1915, Approved Chas. A. Mead, Chief Inspector Div. of Bridges and Grade Crossings," and profile of same also annexed to and made part hereof, entitled, "State of New Jersey Board of Public Utility Commissioners Division of Bridges and Grade Crossings. Profile for Elimination of Grade Crossings on Main Line of Erie Railroad from Madison Avenue to River Street, Paterson, N. J. Based on surveys made by the City of Paterson, H. J. Harder, Eng'r. Scales: Hor. 1" = 100' Vert. 1" = 4'. January, 1915, Drawn by J. L. Vogel, Approved Chas. A. Mead, Chief Inspector Div. of Bridges & Grade Crossings," which said plan and profile are hereby approved; by substituting therefor crossings not at the grade of the public highways known as Madison Avenue, Straight Street, Clay Street, Market Street and Park Avenue Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Keen Street, Warren Street, Putnam and River Streets; by changing the lines, width and direction thereof and carrying so much thereof as so changed under the said railroad, except in the case of Madison Avenue, which is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further by vacating the 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; by substituting for the existing crossings at Cedar Street a crossing under the railroad at Taylor Street and for the existing crossing at Franklin Street a crossing under the railroad at

Montgomery Street and also by widening and altering the existing highways known as Essex Street, Governor Street and Fulton Street, adjusting the structures spanning them to the proposed grade or grades (which said new highways shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated); by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile.

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

AND IT IS FURTHER ORDERED, that the said Erie Railroad Company and the City of Paterson, and Public Service Railway Company, Public Service Gas Company, Public Service Electric Company, Passaic Water Company, New York Telephone Company, Paterson, Passaic and Suburban Telephone Company and Western Union Telegraph Company, and all other parties to this proceeding, and each and every of them proceed with due diligence to the execution of this order, and comply with all of the requirements thereof and the duties imposed upon them thereby, and by the said act under which this order is made, and the laws of this state, and that to that end, they and each of them exercise in good faith, all of the powers conferred upon them and each or any of them by the laws of this state.

AND IT IS FURTHER ORDERED, that the said Erie Railroad Company begin the actual work of construction required in the performance and execution

of this order on or before the first day of August, nineteen hundred and sixteen, and continuously carry on the same thereafter and perform and fully comply with the directions and requirements of this order, and complete all of the work required to be done, within eight years from the date hereof, and that in the continuous prosecution of said work it takes up in the order named the divisions thereof in said profile marked and designated "A," "B," "C," and "D"; the work required in connection with Section "A" thereof to be begun on or before August 1st, 1916, and to be completed within four years and three months from the date hereof; the work required in connection with Section "B" to be begun within four years and three months from the date hereof and completed within five years and six months from the date hereof; the work required in connection with Section "C" to be begun within five years and six months from the date hereof and completed within seven years and three months from the date hereof; and the work in connection with Section "D" to be begun within seven years and three months and completed within eight years from the date hereof.

And it appearing to the Board that the street railway operated by Public Service Railway Company uses the said crossings at (1) Park Avenue and Market Street, (2) Broadway and (3) River Street, the Board in accordance with the power and authority vested in it by said act further ORDERS the Public Service Railway Company 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.

And the said Erie Railroad Company and said Public Service Railway Company are ordered to

keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by said street railway of said Public Service Railway Company and leave is hereby given to said companies or either of them, to make application to the Board for further order in the event that they cannot agree upon the amount of such expenses so directly chargeable to said crossings used by the street railway operated by said Public Service Railway, or any of them.

This order shall take effect May 20th, 1915.

Dated April 20th, 1915.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By

(Signed) RALPH W. E. DONGES,
President.

(SEAL)

Attest:

(Signed) ALFRED N. BARBER,
Secretary.

I hereby certify the foregoing to be a true copy of order adopted by the Board of Public Utility Commissioners, at a meeting held Tuesday, April 20th, 1915, and recorded in the minutes of said meeting.

(Signed) ALFRED N. BARBER,
Secretary.

Appendix XI.

(98 Atl., 13.)

NEW JERSEY SUPREME COURT.

November Term, 1915.

ERIE RAILROAD COMPANY,
Prosecutor,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and CITY OF PATERSON,
Defendants.

Argued December 23 and 24, 1915.
Decided June 23, 1916.

SYLLABUS.

1. The act of 1913, P. L., 1913, p. 91, known as the Fielder Grade Crossing Act, is not confined in its operation, to a single crossing, but in a proper case may include one or more crossings in the same petition.

2. The Supreme Court, upon certiorari, or under section 38 of the act of 1911, p. 374, can review the action of the Board of Public Utility Commissioners, in ordering an alteration of the grade of a highway with a steam railroad, for the purpose of ascertaining whether or not such order is purely arbitrary; whether or not it has a reasonable basis to rest upon; whether or not it is supported to any extent by the facts submitted to the Board for its consideration.

3. The evidence in the record is sufficient to support the findings of the Board, that such crossings are dangerous to public safety or the public travel is impeded, being the jurisdictional facts.

4. *Quere,* upon the review of such an order, can additional testimony be taken under the provisions of the certiorari act?

5. The word "impede" in this statute means to place obstructions in the way of; obstruct; hinder; as, to impede progress. It is synonymous with check, hinder, delay.

6. The Erie Railroad Company, as the lessees of the Paterson and Hudson River Railroad Co. and the Paterson and Ramapo Railroad Co., is "the company operating such railroad" within the meaning of the statute. The order of the Board of Public Utility Commissioners was properly directed against the prosecutor, the Erie Railroad Company. The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad by the Erie Railroad Co.

7. The statute provides the Board of Public Utility Commissioners "may" order the company operating, etc., to alter the crossing. As to the prosecutor, the statute is mandatory. The prosecutor is not concerned with what might happen to some one else. When in a statute the word "may" means must or shall.

8. Where the work is in itself a reasonable, proper and fair exaction, when considered with reference to the object to be obtained, the expense is not a reason against its legality, when the order for such work is based upon, and made in an exercise of the police power, which is a part of the reserved power of the state.

9. The Fielder Act (P. L., 1913, p. 91; 57) authorizes the Public Utility Board, in a proper case, to order a railroad company to alter grade crossings according to plans to be approved by the Board, by substituting therefor crossings not at grade, either by carrying the highway under or over the railroad, or by reconstructing the railroad under or over the highway, or by vacating, relocating or changing the lines, width, direction or location of the highway and the opening of a new

highway in the place of the one vacated, and this includes the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings.

10. An order of the Public Utility Board made pursuant to the Fielder Act which is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad, and by performing such work as is required thereby, does not require the company to make changes in private sidings, and the like, not its property, and not within the limits of the right of way.

11. Where an order of the Public Utility Board for the elimination of grade crossings under the Fielder Act is confined in its direction to the railroad company to the alteration of crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, a change in the location of a station building not fairly incidental to, nor rendered necessary by, the changing of the highways or the reconstruction of the railroad, is not required by such order.

12. An order of the Public Utility Board for the elimination of grade crossings under the Fielder Act which is confined in its direction to the railroad company to the alteration of the crossings by changing the highways and by reconstructing the railroad and by performing such work as is required thereby, does not require the construction by the railroad company of structures upon its lands for the use of private parties in substitution for structures not occupied by them as lesses, and which will be rendered useless by the elimination work.

13. Where the order of the Public Utility Board under the Fielder Act for the elimination of grade crossings directs the street railway company to pay ten per centum of the expense of the changes required by the order

directly chargeable to the crossings used by it, that being the maximum amount allowed by the statute, the steam railroad company cannot complain that the street railway company was not ordered to pay more.

14. An order made by the Public Utility Board under the Fielder Act requiring the railroad company to make changes in the existing and remaining streets in respect to grade, width and structure, and to make other changes by the abolition of existing crossings and the substitution of other crossings therefor on new highways, is not invalid by reason of such requirements, it appearing that such changes are all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroad.

15. Section 13 of the General Railroad Act as amended by P. L. 1914, p. 490, confers upon a railroad company power to take by condemnation any land or property required for the purpose of complying withan order made by the Public Utility Board under the Fielder Act and the owners of property to be taken have no right to be made parties to, or to demand a hearing in, the proceedings under the Fielder Act.

16. The provisions of the Fielder Act are applicable alike to highways existing at the time of the construction of the railroad and to highways subsequently laid out.

17. An order made by the Public Utility Board under the Fielder Act requiring the railroad company to make changes in the highways outside of its right of way at its own expense, is valid in respect to such requirement, it appearing that such changes are fairly incidental to the changes ordered in the crossings at the railroad.

18. The Supreme Court, upon review by certiorari of an order of the Public Utility Board under the Fielder Act will not disturb the action

of the Board in adopting plans of its own, rather than those suggested by the railroad company unless such action was unreasonable, or based upon some illegal principle, or lacks evidential support.

19. The fact that an order made by the Public Utility Board under the Fielder Act makes no provision for such modification of the details of the plans as may become necessary during the progress of the work, is no reason for setting aside the order. There is a reasonable presumption in favor of the plans adopted and the Board may at any time, for good reason, properly modify its order.

20. Statutory requirements enacted by the legislature for public safety under the police power of the state are not a taking of private property for public use without just compensation, although conformity to such requirements involves expense.

21. Railroad corporations may in the exercise of the police power by the legislature be required at their own expense not only to abolish grade crossings that existed when the railroad was constructed, but also to carry their tracks over highways laid out since the construction of the railroad or to carry such highways over their tracks; and the expense of such permanent improvement of the railroad property may be imposed by the legislature upon the railroad corporation operating such railroad without violating any constitutional provision.

22. A statutory requirement for the abolition of grade crossings is neither unconstitutional or unreasonable because it does not affirmatively authorize the railroad company to lessen or eliminate the danger at such crossing by decreasing the number of its train movements.

23. The object of a law must, by force of the constitution, be single and be expressed in its title; but the methods of attaining such object and the matters relating thereto, which may be as various as such object requires, need be expressed in the terms of the enactment only.

24. Any contract that a railroad corporation is empowered by the state to enter into is made sub-

ject to the future exercise by the state of its police power, and hence, the obligations of such contracts are not in a constitutional sense impaired by such future legislation.

25. A State statute requiring the elimination of dangerous grade crossings is an exercise of the police power that is within the scope of the local law, and is not an interference with interstate commerce in the present state of federal legislation upon that subject.

26. The supplement to "An Act concerning public utilities," approved March 12, 1913 (Fielder Act), is not an invasion of the exclusive jurisdiction of the Court of Chancery to regulate conflicting public easements.

27. The Fielder Act does not impair the mandamus power of the Supreme Court.

On Certiorari, &c.

There are two writs of certiorari in this case. The first was allowed on June 16, 1915, for the purpose of reviewing an order of the Board of Public Utility Commissioners, dated April 20, 1915. The second writ was allowed on July 22, 1915, for the purpose of reviewing an order of the said Board dated July 9, 1915, denying the petition for a rehearing of the previous order. The order under review was made, by virtue of the alleged power and authority vested in the said Board by the statute P. L. 1913, p. 91, known as the Fielder Grade Crossing Act, which is a supplement to the act creating a Board of Public Utility Commissioners and prescribing its duties and powers. The records of both writs, with the writs allowed seven other prosecutors, for convenience, have been included in the record of the proceedings under the first writ allowed. The prosecutor, the Erie Railroad Company, is ordered to alter fifteen grade crossings in the City of Paterson, by changing the grade of the streets and reconstructing the steam railroad according to the plan and profile annexed thereto; by substituting therefor, crossings not at the grade of the public highways known as Madison

Avenue, Straight Street, Clay Street, Market Street, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Franklin Street, Keen Street, Warren Street, Putnam Street and River Street. The order further directs any telegraph or telephone company, etc., whose property or construction, it may be necessary to change or remove, in order to carry said plan and order into effect, to change or remove the same according to said plan. The Erie Railroad Company, the City of Paterson and all other parties are ordered to proceed with due diligence, to the execution of the order and comply with all the requirements thereof. It was ordered that the work shall be begun on or before August 1st, 1916, and be completed within eight years from April 20th, 1915; that it be prosecuted in accordance with a single plan, but in four separate divisions, marked A, B, C and D. Section A provides for the elimination of the crossings at Market Street, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street and Franklin Street. Section B provides for the elimination of the crossings at Keen Street, Warren Street and River Street. Section C provides for the elimination of the crossings at Straight Street and Clay Street. Section D provides for the elimination of the crossings at Madison Avenue, according to a plan submitted by the Erie Railroad Co., known as Exhibit R-105, at an estimated cost of $192,133.92 less than the plan prepared by the city and which carries Madison Avenue over the tracks of the railroad. River St. and Madison Ave. are at the two extreme points. Measured along the railroad, the distance is about 10,800 feet or substantially two miles. Market Street, in Section A, is practically in the centre of the City of Paterson, and is the most traveled of all the streets mentioned in the order. From Market Street to Madison Avenue, at the southerly end of the work, is about six thousand

feet, and to River Street, at the other or northern end, it is about four thousand eight hundred feet. From Market to Clay and Straight Streets in Section C, it is about three thousand feet. From Market Street to Ellison Street in the same section, it is six hundred feet, to Van Houten Street, three hundred and fifty feet further on, to Broadway, three hundred feet more, Fair Street, two hundred and fifty feet and Hamilton Avenue, two hundred and fifty feet, all in the same section, and from Market Street to Keen Street in Section B, about four thousand feet and to River Street about four thousand eight hundred feet, the most northerly end of the work, thus considering all the crossings mentioned in the petition in one comprehensive plan or scheme.

The order states the time in which each section is to be completed, commencing with Section A, in which Market Street is included. The Public Service Railway Company, operating trolley lines over three of the crossings, viz: Park Avenue and Market Street, one crossing, Broadway, and River Street, is charged with ten per centum of the cost of the alterations, including damages to adjacent property, directly chargeable to the alteration of those crossings used by the trolley company.

The statute provides, the Board may order the company operating the railroad, to alter the crossing, and the entire expense of such alterations, including damage to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event, an amount of such cost, not exceeding ten per centum of such expense directly chargeable to the crossing used by the street railway company, is to be paid by such company. The estimated cost of the alteration of the crossings is $2,948,218., for what is called Plan No. 2, the one adopted by the Board. This does not include damage to adjacent property. The amount of such damage due to changing grades of streets, estimated at $168,500; the amount due to revision of buildings and sidings off the railroad right of way, estimated at $131,922.

The jurisdiction of the Board is derived from the provisions of the statute, which provides, that "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 Pubilc Utility Commissioners may order the company operating such railroad" to alter such crossing according to plans to be approved by said Board. The order was based upon proceedings initiated by the Board of Finance of the City of Paterson, being the Board directed in the statute, to file a petition in writing for that purpose, in which the facts are stated, upon which the relief under the act is sought. In the petition, it is recited, that the Erie Railroad Company operates said railroad by virtue of a lease from two separate railroad companies, viz: The Paterson and Hudson River Railroad Company and The Paterson and Ramapo Railroad Company. Certain facts relating to each of the fifteen crossings are alleged, and it prays, that the said railroad should be elevated to pass over said highways. A time and place were fixed for hearings, notice of which was given to the corporations therein named. Answers were filed. Testimony was taken before the Board commencing on the seventeenth day of October, 1912, and lasting until February fifth, 1915, eighteen hearings in all.

From the testimony it appeared, that some of the streets mentioned in the petition were laid out after the railroad was built. The charters of the lessor companies, P. L. 1831, p. 29, sec. 9; P. L. 1841, p. 103, sec. 11, provide and impose a duty upon the said railroads to construct and keep in repair good and sufficient bridges or passages over and under said railroads or roads, where every public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be "prevented" thereby.

The findings of the Board were made in a report dated January 11, 1915, which recites the facts on which the order was made, dated April 20, 1915.

The Board found and determined the crossing of each of the streets involved in the proceeding to be dangerous to public safety and that public travel on such highways is impeded thereby. The Board also found that the consideration of the entire subject is simplified by the acquiescence of all parties to the proceeding, and that all the crossings mentioned in the petition must be considered in any plan of elimination. It was not questioned, but that a general plan for the separation of grades at the crossings was practicable. There was a difference of opinion between the engineers, as to details, but the chief objection raised was to the expense.

Then on February 5, 1915, a petition for a further hearing was filed by the Erie Railroad Company, and on April 20, 1915, the same date as the order, a report by the Board was made denying a further hearing, in which it is stated, as to the reduction of train movements, that the company was afforded every opportunity to furnish such proof, if it had any, and did not avail itself of such opportunity; in addition, the offer on this score was so indefinite, that it did not appear reasonable to delay the proceedings for that purpose. Then writs of certiorari were obtained, by the Erie Railroad Company, Public Service Railway Company, Passaic Water Company, Western Union Telegraph Company, D. Fullerton & Co., Meyer & De Vogel, Fuller's Express Company and Morris & Company.

On June 15, 1915, a petition for a rehearing was filed by the Erie Railroad Company, and testimony thereunder was taken June 28, 1915, by the Board. On July 9, 1915, a report was made by the Board, denying the application for a rehearing. On July 22, 1915, a certiorari was obtained by the Erie Railroad Company to review this report, determination, or order, and on the 27th of September, 1915, an order was obtained from a Justice of the Supreme Court, granting leave to take affidavits on two days notice. Such affidavits or depositions were taken on the part of the Erie Railroad Company, before a Supreme Court Examiner on Sep-

tember 30, 1915. Many reasons have been filed by each of the prosecutors, why the order of April 20, 1915, should not be set aside. The reasons of all the prosecutors are substantially included within the seventy-eight reasons filed by the Erie Railroad Company and their amendments, except when the facts specially apply to a particular prosecutor. Under the certiorari obtained by the Erie Railroad Company to review the order denying a rehearing, the Erie Railroad Company has filed six separate reasons, why that order should be set aside. Under section 38 of the Public Utility Act P. L. 1911, p. 374, the Supreme Court is given jurisdiction by petition to review the order of the Board and to set aside such order when it clearly appears, that there was no evidence before the Board to support reasonably such order, or that the same was without the jurisdiction of the Board, or the order of the Board may be reviewed by certiorari in appropriate cases.

All the points made by the counsel for the prosecutor, are covered in the opinion of the court. To facilitate reference thereto, the numbering employed by the counsel for the prosecutor, the Erie Railroad Company, will be adopted in the opinion and adhered to throughout.

The writs of certiorari other than those prosecuted by the Erie Railroad Company will be disposed of in separate memoranda or opinions.

Argued November, 1915, before Garrison, Trenchard and Black, *J. J.*

Gilbert Collins and Geo. S. Hobart, both of Jersey City, and Duane E. Minard and Herbert T. Taylor, both of New York City, for prosecutor.

Frank H. Sommer, of Newark, for defendant Board of Public Utility Commissioners.

Edward F. Merrey, of Paterson, for defendant City of Paterson and its Board of Finance.

Per Curiam.

I. The first ground of attack made by the prosecutor, the Erie Railroad Company, is on the construction of the statute. It is contended, that the

words, "such crossing," "a crossing," "the crossing," in the statute, indicate, that it was the intention of the legislature to have only one crossing considered in any one proceeding. The petition of the City of Paterson prays for, and the order of the Board of Public Utility Commissioners provides for, the separation or alteration of fifteen separate crossings. The Board in its report determined, that, at each of the crossings involved, a condition exists, such as was designed to be remedied by the statute. The question then arises, as to whether it is practicable and feasible to alter such crossings.

The Board further found, that the entire subject is simplified by the acquiescence of all parties, to the proceedings, that all of the crossings mentioned in the petition must be considered in any plan of elimination. There was no intimation from anyone, that a change of a particular crossing only, should be considered. It was not questioned, but that, a general plan for the alteration of grades at the crossings was practicable. The question then is: what was the legislative intent? The Board having found the jurisdictional facts, which will be considered hereafter, does the statute limit the Board, to the alteration of a single crossing in a separate proceeding, or can two or more crossings, or a group of crossings, that are dangerous to public safety, or that impede public travel on such highways, and which are connected or related to one another, so that, an alteration in the one necessarily makes an alteration in the other, be considered by the Board under the statute, in a single proceeding, and a single plan be made for their alteration? It may be observed, in the first place, the statute does not expressly or inferentially prohibit such a proceeding, and second, if a restricted construction be placed upon the statute, the effect will be, as shown by this record, to leave those crossings in the cities of the state where the greatest use is made of the highways, at the railroad crossings, and presumptively, where the greatest danger is, intact and not subject to altera-

tion. No substantial reason is stated for limiting the construction of the statute, to a single crossing, in a separate proceeding, excluding a group of crossings, where the record shows, that much of the testimony applicable to one, is applicable to all. The plan of alteration applicable to one, as a practical and engineering problem, is so intimately connected with all, that it involves all the crossings, except, perhaps, Madison Avenue in Section D, which will be considered hereafter. The record discloses no valid reason for so construing and limiting the operation of the statute. True, we are not concerned with the reasonableness or unreasonableness of the statute. Our duty is to find the intention expressed by the legislature and to give it effect. If a separate plan of alteration of each crossing and a separate proceeding is requisite, it would make it wholly impossible to alter any of the crossings, from a practical point of view, since, the alteration of the several crossings must, as is conceded, proceed under a general plan. Such a purpose should not be attributed to the legislature, when the statute will reasonably admit of a different construction. In determining the meaning of a statute, the courts will keep in mind the circumstances surrounding its enactment and the objects, sought to be obtained by the statute. *Alton &c. R. R. Co.* v. *Vandalia & C. R. R. Co.,* 268 Ill. 75, 108 N. E. 800; *Warner* v. *King,* 267 *Id.* 87, 107 N. E. 837. This being a remedial statute, it should receive a liberal, rather than a narrow construction. As was said, by Mr. Justice Dixon, speaking for the Court of Errors and Appeals, in reference to the first grade crossing statute, passed by the legislature, P. L. 1874, p. 45: "The avowed object of these statutes is highly beneficent, and therefore, its provisions tending towards the accomplishment of that object should be liberally construed." *Read* v. *City of Camden,* 54 N. J. L., 373, 24 Atl. 549. Subsequently this language was cited with approval, by that Court in the case of *Morris Dredging Co.* v. *Jersey City,* 64 N. J. L., 590, 46 Atl. 609.

The prosecutor does not point out, or even attempt to show, how or in what way, fifteen separate petitions, with fifteen separate hearings, would be more advantageous to it, but on the contrary, rather acquiesces in the idea, that all the crossings mentioned in the petition must be considered in one plan of alteration, if alteration is to be made at all, and that, a general plan of the alteration of the grades, at the several crossings is practical, as an engineering problem.

Mr. Brameld, the engineer of the prosecutor, the Erie Railroad Company, at page 509 of the record, testified, "there are various changes which I think will have to be made." At page 526, "of course, I haven't worked up the detailed solution of every one of them, but from my general knowledge of the situation, I think they could be taken care of"—*i. e.* the details. The testimony further shows, that Section D provides for the elimination of the crossing at Madison Avenue, according to a plan submitted by the prosecutor, the Erie Railroad Company, known as Exhibit R-105, which is an estimated cost of $192,133.92 less than the plan prepared by the city, and which carries Madison Avenue over the tracks of the railroad, instead of under the tracks. We think the construction of the statute cannot be limited, to a single crossing in a separate proceeding, but in a proper case, where the jurisdictional facts appear, several crossings may be considered in one proceeding, when so related to one another, that the consideration of the one, necessarily involves the consideration of the other, as a practical engineering problem.

The next ground of attack is that the evidence taken before the Board of Public Utility Commissioners does not justify, nor reasonably support the Board's conclusions or findings. To that end, the insistence is, that this Court has power and should review the Board's findings of fact. We understand such to be the power of this Court. The rule on this point is stated thus, by Chief Justice Gummere, speaking for the Court of Errors and Appeals, in the case of *West Jersey &c. R. R.*

Co. v. *Board of Public Utility Commissioners,* 87 N. J. L., 170, 94 Atl. 60, "that Court (*i. e.*, the Supreme Court) can, upon certiorari, or under the statutory procedure provided by Section 38 of the Act of 1911, p. 374, review such action for the purpose of ascertaining whether or not it is purely arbitrary, whether or not, it has a reasonable basis to rest upon, whether or not, it is supported to any extent by the facts submitted to the Board for its consideration; and, if it shall be made to appear to the court that such action is purely arbitrary, or that it has no reasonable basis upon which to rest; or is unsupported by the facts laid before the Board, the court may declare it null and void, and order it to be set aside. So, too, if the Board refuses to consider the matter at all, the court by mandamus can compel it to do so." *Public Service Gas Co.* v. *Board of Public Utility Commissioners,* 84 N. J. Law, 463, 87 Atl. 651; *City of Passaic* v. *Board of Public Utility Commissioners,* 87 N. J. Law, 705, 95 Atl. 127; *Erie R. R. Co.* v. *Board of Public Utility Commissioners,* 87 N. J. Law 438, 95 Atl. 177.

Our reading of the record shows that a mass of testimony was presented to the Board particularly with reference to the various elements of danger and the impediments to travel, at all of the level crossings of the highways, such as a list of accidents, at some of the crossings; obstructions to the view of persons traveling along the highways in both directions; a series of photographs, made and produced by the railroad company, showing the obstructions to the view at each crossing; delays to travel in general; the fact that at the crossings where there are trolley tracks, every street car is stopped, near the railroad crossing, until the conductor goes over it on foot, and releases a derail switch; schedules made at different times, as to the number of persons, vehicles drawn by horses, automobiles, bicycles and trolley cars passing over such crossings, in a given period; testimony, that the crossings were protected by gates and automatic bells; the number of trains and drill locomotives passing over the crossings, within a given

time; operation of gates, etc., from which the Board found the facts, in its report, that each of the crossings was dangerous to public safety, and we think after reading the evidence, the conclusion of the Board is supported by the facts, that were before it. The question is one of fact, to be determined according to the circumstances of each case. *Mayor &c. of Newark* v. *Erie Railroad Co.*, 75 N. J. Eq., 29, 71 Atl. 260. This applies to both conditions called for in the statute, viz: that such crossings are dangerous to public safety, or the public travel on such highways, is impeded. This, at the same time disposes of the prosecutor's contention that the evidence, as to one crossing cannot be extended to include other crossings, or that non-dangerous crossings cannot be ordered to be eliminated at the expense of the prosecutor, the Erie Railroad Company. This also was considered under Point I.

In this connection, may be considered Point 22 of the brief of the prosecutor, the Erie Railroad Company. It is there urged, that the prosecutor had the right to take additional testimony under the provisions of the certiorari act. Such testimony was taken before a Supreme Court Examiner and returned with the record, but as the prosecutor says, to use the words of the brief, the point is perhaps of comparatively small importance in the present case, for the reason, that the affidavits and exhibits served but to explain, the evidence and exhibits, that were already in evidence. This renders it unnecessary to further consider this point. See *Dubelhbeiss* v. *Town of West Hoboken*, 82 N. J. L., 683, 82 Atl. 897.

But it is further urged, that the word "impede" has a well recognized meaning, having been used in many of the earlier charters of the railroad companies. The argument is that the obvious purpose of those statutes was to make the surface of the railroad ties and rails conform to the surface of the highway, at a railroad crossing; that the rails and ties, as they passed the highway would impede travel, and if the railroad happened to be

constructed in a cut or on an embankment, the impediment to travel would thereby be increased; that the word "impede" refers to permanent physical obstructions, due to the grade and construction of the railroad tracks, citing *North Manheim Twp.,* 14 Atl. 137, Sp. Court, Pa.; and that the highway crossings are to be so constructed and maintained, as not to unreasonably obstruct, the use of the crossings by highway travelers. This is too narrow. The dictionary definition of the word "impede" is to place obstructions in the way of; obstruct, hinder, as, to impede progress. It is synonymous with check, hinder, delay.

The evidence in the record shows, the public travel is impeded, in this sense, at each of these crossings, and the Board so found. The word "prevent" is used in the early charters of the lessors of the prosecutor in place of the word "impede."

It is quite evident, that rule, as to negligence and contributory negligence at grade crossings, as laid down by the courts, cannot be used as a guide in construing this statute, because in those cases, the statute requires the railroad company, only to ring a bell or blow a whistle, under normal conditions, on the approach of a train to a grade crossing, at a distance of nine hundred feet. Then, too, there is a well recognized distinction, between actions, where the interest of the general public at crossings is involved and those which assert the rights of individuals who are injured. *Palmyra* v. *Pennsylvania Railroad Co.,* 62 N. J. Eq., 614.

II. The next ground of attack is that the order, under the statute, should have been directed to the two original chartered railroad companies, construing the words of the statute, "the company operating such railroad" to mean, the company which is charged with the legal duty of operating, or at least, that the order should have been directed to the prosecutor and the said two companies jointly, so that, the expenses of altering the grades might be apportioned, among all the companies, in accordance with their several interests. The original companies are the Paterson and Hudson River R. R. Co., organized under P. L., 1831, p. 24, and the

Paterson and Ramapo R. R. Co., organized under P. L., 1841, p. 97. They were leased, by two separate leases, each dated September 9th, 1852, to a company known as the "Union Railroad Company." These leases were declared legal and valid by the Legislature March 14, 1853; P. L., 1853, p. 480. This validating act speaks of the corporation or individuals *using* the aforesaid roads. By various assignments, foreclosures, proceedings and sales, the Erie Railroad Company, the present prosecutor, on November 14th, 1895, acquired title to all the property and rights of the two lessor companies. As stated above, the statute provides (section 1 of the act, P. L., 1913, p. 91), that "the company operating such railroad" and the expense (section 2) "shall be paid by such railroad," "the balance to be paid by the company operating such railroad."

On behalf of the two original companies, it is insisted, that they do not directly or indirectly institute, direct or control any of the operations upon these respective roads, nor is the duty of operating such roads charged upon them by law. The lease of the Paterson and Hudson River Railroad Company provides, "and that at the termination of the leases or either of them, any erections or improvements on the said above mentioned and demised property that may have been made by the parties of the second part, or their assigns, at their own expense, shall be paid for by the parties of the first part, at their appraised and just value." The lease of the Paterson and Ramapo Railroad Company has a like provision, but in different language. Both leases provide, that the erections and improvements shall be valued by arbitrators, and the party of the first part shall pay and discharge the amount so valued to the parties of the second part or their assigns. Both leases, however, provide that "the parties of the second part do hereby covenant and agree with the parties of the first part, that the said parties of the second part, and their assigns, will keep and maintain and run said rail-

road and other premises hereby demised, in such manner, order and condition, as the said parties of the first part are bound to keep, and maintain and run the same by the charter of the said parties of the first part, and the statutes supplementary thereto, and that they will indemnify and save harmless the said parties of the first part from all damages to which they may be subject by reason of said road and premises not being so kept, maintained and run." The prosecutor in paragraph three of its answer admits, that it operates a railroad running through the City of Paterson.

The Legislature's intention on this point is not obscure. Apt and precise words are used to express that intention, and taken in connection with the provisions of the leases and the validating act of the Legislature above referred to, the intention of the Legislature cannot be misunderstood.

There is no reason why the courts should not give to the words used by the Legislature, their plain, natural meaning, viz., that power or instrument, which puts in action and supervises the workings of the plant, the Erie Railroad Company, as being "the company operating such railroad." The dangerous conditions, to the elimination of which the act is directed, are the result of the operation of the railroad by the Erie Railroad Company, against whom the order is directed in accordance with the plain terms of the statute.

III. The next ground of attack is based upon that clause of the statute which provides that the Board *may* order the company operating such railroad to alter the crossing. The insistence is, if the statute is construed to confer on the Board arbitrary power to order or refuse to order the alteration of the grade crossings in its discretion, the statute is invalid. It is conceded that the Board could constitutionally be delegated power to determine whether or not certain facts exist, but when such facts have been found, it is urged the statute then leaves it to the Board to decide arbitrarily

whether it will or will not make an order for the alteration of the crossings.

The obvious answer to this point of the prosecutor is the fact that the prosecutor was required by the order to make the alterations and changes in the grades, so as to it the statute is mandatory, and if the facts before the Board justify the order, it is not arbitrary. The prosecutor is not concerned with what might be ordered to be done by some one else, by the Board of Public Utility Commissioners.

There is a line of authorities, however, which hold that "*may*" in a statute means must or shall. Thus, in England, in the case of *King v. Barlow* 2 Salk., 609, it was said that the word "*may*" in a statute shall be taken to be mandatory, where the thing to be done, is for the sake of justice or the public good. So Chancellor Kent in the case of *Newburgh Turnpike Company* v. *Miller,* 5 Johns, Ch. 113, 9 Am. Dec. 274, said in respect to statutes, the rule of construction seems to be that the word "*may*" means must or shall only in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure,* that the power shall be exercised. These cases were cited with approval by our courts, in the cases of *Davison* v. *Davison,* 17 N. J. L., 171; *Seiple* v. *Borough of Elizabeth,* 27 N. J. L., 410; *Atlantic City Water Works Co.* v. *Read,* 50 N. J. L., 672, 15 Atl. 10. So there is a line of authorities which hold that the agencies of government do not act automatically. It is necessary to vest in its officers certain general powers with a discretion in the governmental agents, as to their exercises. It would be as impracticable as it is undesirable to attempt to formulate in advance a set of hard and fast rules by which every conceivable public act should be governed. In order to accomplish the ends of local government, it has been found expedient to create various boards and commissions which are charged with the duty of supervising, directing and controlling particular

subjects. It has been held that the granting of such power by the legislature was not a grant of either legislative or judicial power. *People* v. *Roth,* 249 Ill., 532, 94 N. E., 953, Ann. Cas. 1912, p. 1100. For other illustrative cases, see *In re Connecticut Co.* v. *City of Norwalk,* 94 Atl., 992 (Conn.), 89 Conn. 528. In *Matter of New York Elevated R. R. Co.* 70 N. Y., 327; *Trustees of Saratoga Springs* v. *Saratoga Gas &c. Co.,* 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 528; *Alton & Co. R. R. Co.* v. *Vandalia &c R. R. Co.,* 268 Ill. 68, 108 N. E. 800.

It is further urged that if the Court should hold the statute valid, still the order in the present case should be set aside for the reason that it is insisted the evidence shows without dispute that the prosecutor has not and in all reasonable probability will not have sufficient funds for the purpose of meeting the cost of complying with the order. The determination of this question is one of fact, in the first instance, devolving upon the Board of Public Utility Commissioners. The Board had before it the financial history of the Erie Railroad Company, its indebtedness, its income and many other details bearing upon the finances of the company, and from this evidence the Board found adversely to the prosecutor, the Erie Railroad Company. After a careful reading of the voluminous testimony on this point, we are unable to say that the Board's determination is without sufficient facts to support its conclusion. The prosecutor has eight years in which to comply with the order of the Board and do the work. Where the work is in itself a reasonable, proper and fair exaction when considered with reference to the object to be attained, the expense is not a reason against its legality. *Health Department of the City of New York* v. *Rector, etc., of Trinity Church,* 145 N. Y., 32; 39 N. E. 833; 27 L. R. A., 710; 45 Am. St. Rep, 579; *Woodruff* v. *New York &c. R. R. Co.,* 59 Conn., 63; 20 Atl. 17, the order being based upon and made in an

exercise of the police power, which is a part of reserve power of the state.

Point VIII is that the order of the Board is invalid in so far as it requires the prosecutor to make changes in switches, side tracks, leads bridges, yards, structures and other facilities and property of the prosecutor and of other companies, co-partnerships or individuals.

We think in this respect the order properly interpreted is justified by the statute properly construed.

The statute authorizes the Board, in a proper case, to order the railroad to alter grade crossings according to plans to be approved by the Board, by substituting therefor crossings not at grade, either by carrying the highway under or over the railroad, or by reconstructing the railroad under or over the highway or by vacating, relocating or changing the lines, width, direction or location of the highway and the opening of a new highway in the place of the one vacated, and this includes the power to order such changes in the property and facilities of the railroad company as are fairly incidental to, or rendered necessary by, the alteration of the crossings.

Now the order of the Board directs the railroad company "to alter such crossings, and each of them, according to the plan therefor annexed to and made part hereof * * * and profile of same, also annexed to and made part hereof * * * and profile of same, also annexed to and made part hereof * * * which said plan and profile are hereby approved; by substituting therefor crossings not at the grade of the public highways known as Madison Avenue, Straight Street, Clay Street, Market Street and Park Avenue, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Keen Street, Warren Street, Putnam and River Streets; by changing the lines, width and direction thereof and carrying so much thereof as so changed under the said railroad, except in the case of Madison Avenue which

is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further by vacating 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; by substituting for the existing crossings at Cedar Street a crossing under the railroad at Taylor Street and for the existing crossing at Franklin Street a crossing under the railroad at Montgomery Street and also by widening and altering the existing highways known as Essex Street, Governor Street and Fulton Street, adjusting the structures spanning them to the proposed grade or grades (which said new highways shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated), by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile."

It therefore appears, we think, that the order is confined in its direction to the company to the alteration of the crossings in question by changing the highways and by reconstructing the railroad and by performing such work as is required thereby. It does not require the railroad company to make changes in private sidings, and the like, not its property, and not within the limits of its right of way. The closing words of the order "and by performing all other work required according to and as shown on said plan and profile" do not affect this conclusion as to the scope of the order. These general words follow specific provisions of the order and under an elementary rule of construction are limited thereby. Further they refer back to the introductory general mandate of the order requiring the company to "alter said crossings and each of them" and are limited thereby.

Neither does the order require the owners of such private sidings to reconstruct them. The plan which accompanies the order simply suggests to such owners a method by which their property may be conformed to the new conditions so as to admit of a continuance of the siding facilities theretofore enjoyed. The order only requires others than the railroad company to make such changes in, and removals of, their property and constructions as are necessary to carry the order and plan into effect. In this it accords with Sec. 4 of the statute. Since the mandate of the order to the railroad company is limited to requiring the changing of highways and the reconstruction of the railroad, the changes in, or removal of, such private sidings cannot be said to be necessary to carry the order to the railroad into effect. Of course, the plan does indicate a way in which, in part, existing siding facilities may be continued after the ordered changes in the highways, and the ordered reconstruction of the railroad are made. It is appropriate that it should do so, for in the adoption of a plan, the effect thereof on existing industrial facilities should be taken into account, and this factor should also be taken into consideration in determining whether the plan adopted is reasonable or unreasonable.

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

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

We think this point is not well founded in fact.

The order (leaving out of account the plan and profile) does not require any change in the construction or location of these station buildings. It

does not deal with them. The plan and profile do display reconstructed stations at new nearby locations. If these changes are fairly incidental to the changing of the highways or the reconstruction of the railroad, they are deemed to be a part of the order and must be made. That some reconstruction of both stations is rendered necessary by the reconstruction of the railroad, and will have to be made some time, either according to the judgment of the railroad managers or as may be lawfully directed by the Public Utility Board, is not questioned. But it is contended that the change in the location of the stations was not fairly incidental to the changing of the highways or the reconstruction of the railroad. If so, the reconstruction of the stations at new locations is not required by the present order. Upon full consideration we think that is so. We do not find that the change in the location of the stations was incidental to, or rendered necessary by, the elimination of the grade crossings. Accordingly, we hold that the order under review does not require the railroad company to reconstruct these station buildings at the new locations as indicated and suggested upon the plan. No doubt Sec. 17 (b) of the Public Utility Act (P. L., 1911, p. 379) conferring upon the Board power "after hearing upon notice" to require a public utility "to furnish safe, adequate and proper service and to keep and maintain its property and equipments in such condition as to enable it to do so," is ample to authorize the Board, in a proper case, to order the relocation of a railroad station. But this was not a proceeding under that section. Aside from the fact that such relocation was not ordered, it will be noticed that such changes were not asked for in the petition. There was no hearing and no evidence upon the question whether the existing stations at these points were safe, adequate and proper, nor was any notice given to the prosecutor that such question was to be passed upon by the Board in this proceeding, other than such as might be inferred from the "suggestion"

of the city engineer that such changes might be desirable if the tracks were elevated.

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

It is true that the plan adopted by the Board has indicated upon it suggested possible locations upon the lands of the railroad company of substituted structures for these private companies, but it does not require the railroad company to provide such locations or to erect such structures since neither the existing structures, nor the suggested structures constitute any part of the railroad. This matter is sufficiently discussed under Point VIII.

Point XI is that the statute and order, in so far as they permit or require the prosecutor to make certain changes in the properties of the Public Service Railway Company, and in so far as they limit the proportion of the expense of the alterations in certain of the grade crossings to be paid by the street railway using the same, are unconstitutional and invalid.

The alleged unconstitutionality of the imposition by Sec. 2 of the statute of not exceeding ten per centum of the cost directly chargeable to the elimination of the grade crossings used by the street railway upon that company, is dealt with elsewhere in this opinion.

The contention that the order is invalid in that it requires the prosecutor to do the physical work of removing and changing the property of the Public Service Railway Company is not well founded in fact. The order does not require the prosecutor to do that. It requires the Public Service Railway Company to change and remove such of its property and construction as is necessary to carry into effect the order, and further directs that both the prosecutor and the Public Service Railway

Company keep, specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by such street railway company.

The order directs the Public Service Railway Company to pay ten per centum of the expenses of the changes required by the order directly chargeable to the crossings used by it. This was the maximum amount allowed by the statute and, of course, the prosecutor cannot complain that it was so limited.

Point XII is that the statute and order are unconstitutional and invalid in so far as they permit or require the prosecutor to make changes in the existing streets with respect to grade, width and structure, and to make other changes by the abolition of existing crossings and the substitution of other crossings therefor on new highways.

We have elsewhere herein indicated that the statute in this respect violates no constitutional provision. We also think that the order in this respect is within the powers conferred by the statute. The changes required in respect to the grade and width and structures in existing highways which remain, and those requiring the abolition of existing crossings and the substitution of other crossings therefor on new highways, are all fairly incidental to, and were rendered necessary by, the separation of grades, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroads. Being so regarded it is valid. *In Selectmen of Norwood* v. *New York & N. E. R. Co.*, 161 Mass., 259; 37 N. E., 199. *Davis* v. *County Commissioners of Hamshire Co.*, 153 Mass., 218; 26 N. E., 848; 11 L. R. A. 750.

In so far as the execution of such order may require the exercise of the power of eminent domain, it will be seen that Sec. 13 of the general railroad act as now amended (P. L., 1914, p. 490), confers upon the railroad company power to take by condemnation any land, any property required for

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the purpose of complying with any order made by the Board of Public Utility Commissioners. It will also be noticed that the owners of property to be taken have no right to be made parties to, or to demand a hearing in this proceeding. *In re Directors of Old Colony Railroad Co.*, 163 Mass., 356; 40 N. E., 198. It is also to be noticed in this connection that, under the charter of the City of Paterson, the City has ample power to lay out, open, change, alter or vacate the streets involved, and to take such lands and real estate as may be necessary therefor, P. L., 1871, p. 846, Sec. 92; P. L., 1907, p. 114; P. L., 1910, p. 524; P. L., 1911, p. 179. Under this latter act the Board of Public Works of Paterson has power to vacate streets. *Sherwood* vs. *City of Paterson,* 94 Atl., 311. The order directs the railroad company, the City of Paterson and all other parties to proceed with due diligence to the execution of the order and to comply with all the requirements thereof. Of course, in carrying out its part of the order, the City of Paterson must act in conformity with its charter and the laws amending same. *Clark* vs. *City of Elizabeth,* 61 N. J. Law, 565; 40 Atl. 616, 737.

Point XIII is that the order in so far as it requires the prosecutor to reconstruct the railroad is invalid because not made in accordance with the statute; and that the staute is unconstitutional because it does not permit the Public Utility Board to order the elimination of the grade crossings by depressing the highway in part or by elevating the railroad in part.

We think there is no merit in this contention for reasons elsewhere stated in this opinion.

Point XIV is that the order is invalid and the statute is unconstitutional in so far as they require the elimination of grade crossings of highways laid out after the railroad tracks were constructed.

There is no merit in this point. We have elsewhere sufficiently indicated that we think that such a requirement in a statute would not render it unconstitutional. Undoubtedly the statute in question

applies alike to highways existing at the time of the construction of the railroad and to highways subsequently laid out. The order in the respect mentioned is therefore within the powers conferred by the statute.

Worcester, N. & R. R. Co. vs. *City of Nashua,* 63 N. H., 593; 4 Atl., 298.

New York & N. E. R. Co. vs. *City of Waterbury,* 60 Conn., 1; 22 Atl., 439.

Northern Pacific Railway Co. vs. *State of Minnesota, ex rel. Duluth,* 208 U. S., 583; 28 Sup. Ct. 341, 52 L. Ed. 630.

Point XV is that the statute and order are unconstitutional and illegal in so far as they require the prosecutor to reconstruct highways outside of the right of way of the prosecutor at the crossings.

With respect to the suggestion that the statute is unconstitutional for such reason we have nothing to add to what we have elsewhere said.

With respect to the contention that the order is illegal in that it requires the railroad company to make changes in the highways outside of its right of way at its own expense, we say that it appears that such changes are fairly incidental to the changes in the crossings of the railroad and are therefore proper.

Selectmen of Norwood v. *New York & N. E. R. Co.,* 161 Mass. 259, 37 N. E. 199; 161 Mass., 259; 37 N. E., 199.

Davis vs. *County Commissioners of Hamshire Co.,* 153 Mass., 218; 26 N. E., 848; 11 L. R. A., 750.

Point XVII is that the order is unreasonable in that it requires the prosecutor to alter the crossings according to a plan which is more expensive to the prosecutor than is necessary for the purpose of removing the danger to public safety or the impediment to public travel.

The real complaint under this point is that the Board refused to adopt certain modifications suggested by the prosecutor respecting the plans for the elimination of crossings at Keen, Warren and

River Streets, and for the consolidation of the crossing at Straight and Clay Streets.

But we think that the propriety of the plan adopted by the Board is amply supported by evidence. This Court will not disturb such a finding unless it be unreasonable, or based upon some illegal principle, or lacks evidential support. *Public Service Ry. Co.* v. *Public Utility Board,* 87 N. J. L., 250; 93 Atl. 585.

Point XVIII is that the order is unreasonable in that (a) it arbitrarily limits the dates of the beginning and completion of the work, (b) it arbitrarily requires the work to be done in designated divisions and in the sequence of such divisions, and (c) it makes no provision for such changes or modification of details of the plan as may become necessary during the progress of the work.

With respect to the first two propositions, we are clearly of the opinion that the times fixed, and the division of the work, are entirely reasonable and proper.

Passing now to the other complaint. The fact that the order makes no provision for such modifications of the details of the plans as may become necessary during the progress of the work is no reason for setting it aside. There is a reasonable presumption in favor of the plan adopted by the Board. *In re Selectmen of Westborough,* 169 Mass., 495, 48 N. E., 763. If in the course of executing the order unforeseen contingencies arise, or details are found to require change or things required become unnecessary by reason of changed conditions or for any other cause, the order made and plan adopted by the Board may be modified on application. Section 31 of the Public Utility Act provides that the Board may at any time modify an order made by it. P. L., 1911, p. 386.

The constitutional objections argued by counsel for the prosecutor will be considered in the order in which the points are presented in his brief.

Point IV. That the statute is unconstitutional because it takes the property of the prosecutor as

the lessee and operator of the railroads owned by the Paterson & Hudson Railroad Company and the Paterson & Ramapo Railroad Company for the private use and benefit of the said two companies, the respective owners of said railroads.

The argument is that inasmuch as the order for grade crossing elimination calls for the permanent improvement at the expense of the operating lessee of the property owned by the lessors, the money of the lessee so expended is taken for the private use of the owners of the property so improved. Is this so in point of fact? The lease of the Paterson and Hudson River Railroad Company to the Union Railroad Company made on September 9, 1852, and assigned to the New York and Erie Railroad Company contains the following provision: "And it is in like manner further agreed by and between the parties to these presents that if any erections or improvements shall, during the said term hereby demised, or any future term or terms hereafter demised, be made on said demised premises or appurtenant thereto, the same shall, at the termination of said term or terms, and the cessation of the interest of the parties of the second part of, in and to the same, by the expiration thereof, or other termination thereof, be valued by arbitrators to be appointed in like manner as last above provided, and the award of a majority of such arbitrators shall be conclusive as to the value of the said erection and improvements; and the parties of the first part shall pay and discharge the amount so valued to the parties of the second part or their assigns."

The lease from the Paterson and Ramapo Railroad Company to the Union Railroad Company and assigned to the New York and Erie Railroad Company contains a precisely similar covenant.

Such permanent erections or improvements and the monies thereon expended are not therefore taken for the private use of the lessors in the sense contemplated by the constitution; upon the contrary, such improvements are to be used and enjoyed by the lessee during its term, and if taken at

all by the lessor are to be paid for at their value, which may be greatly in excess of their cost. Such a prearranged purchase is not the taking of property *in invitum* that is reprobated by the constitutional provision on which the argument is based.

These same considerations apply also to the second contention made under this point in the brief, viz.: that compliance with the order constitutes a confiscation of the property of the prosecutor, because of the cost of such compliance.

The broader ground, however, by which both of these contentions are met is that the provisions in question of the Fielder Act constitute a regulation adopted by the Legislature for public safety under the police power of the state and hence are not a taking of private property without just compensation, although conformity to such regulation involves expense. This is the language of our court of last resort delivered by Mr Justice Depue in the case of *Morris and Essex Railroad Company* v. *The City of Orange* (63 N. J. L., p. 252). 43 Atl. 730; 47 Atl. 363. This definitive statement and concrete application of the police power is sufficient authority for this Court in the present case, unless it be necessary that whenever the police power is mentioned an essay on the subject shall be delivered, on the contrary, it would seem that the proper way for a lower court to deal with an established rule of law was to treat it as established.

Inasmuch, however, as a federal question is involved it may be well to quote from one of the most recent decisions of the Supreme Federal Court. In the case of *Chicago, Milwaukee & St. Paul R. Co.* v. *Minneapolis* (232 U. S., p. 430), 34 Sup. Ct. 400; 58 L. Ed. 671, Mr. Justice Hughes delivering the opinion of the court said:

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks,

or to carry their tracks, over such highways," citing a large number of cases in the State and Federal courts.

Other specific illustrations of the application of this established rule to the elimination of grade crossings are *Davis* v. *County Commissioners,* 153 Mass., p. 218; 26 N. E. 848; 11 L. R. A. 750. *N. Y. & N. E. R. R. Co.* v. *Bristol,* 151 U. S., p. 556; 14 Sup. Ct. 437; 38 L. Ed. 269. *Selectmen of Norwood* v. *New York & N. E. R. Co.,* 161 Mass., p. 259; 37 N. E. 199. *Illinois Central R. R. Co.* v. *Copiah County,* 81 Miss., p. 685; 33 S. 502. *City of Harriman* v. *Southern Ry. Co.,* 111 Tenn., p. 538; 82 S. W. 213. *St. Louis & S. F. R. Co.* v. *Fayetteville,* 75 Ark., p. 534; 87 S. W. 1174. *C. B. & Q. Rw. Co.* v. *Drainage Commrs.,* 200 U. S., p. 561; 26 Sup. Ct. 341; 50 L. Ed. 596; 4 Ann. Cas. 1175. *Cincinnati I. & W. R. R. Co.* v. *Connersville,* 218 U. S., p. 336; 31 Sup. Ct. 93; 54 L. Ed. 1060; 20 Ann. Cas. 1206. *Chicago, M. & St. Paul R. R. Co.* v. *Minneapolis,* 232 U. S., p. 430; 34 Sup. Ct. 400; 58 L. Ed. 671. *Mo. & Pac. Ry. Co.* v. *Omaha,* 235 U. S., p. 121; 35 Sup. Ct. 82; 59 L. Ed. 157.

Upon the point that these federal decisions, especially the two last cited, extend the rule of some of our earlier state decisions, it is to be remarked, first, that there is no conflict as to the fundamental doctrine of the police power but only as to its application, and, secondly, that as to due process of law and other matters involving ultimately a federal question the decisions of the state courts yielded those pronounced upon such questions by the Supreme Federal tribunal.

Point V. Which is that the statute under review is unconstitutional because it deprives the prosecutor of its property without due process of law or just compensation, in that it requires the entire expense of abolishing the grade crossings to be paid by the prosecutor is fully answered by what has just been said under the previous point. We have nothing to add excepting that the case of *New York & New England R. R. Co.* v. *Bristol* (151 U. S., p. 556); 14 Sup. Ct. 437; 38 L.

Ed. 269, on which counsel relies for his main argument, has been stripped of the force accorded to it by counsel by the more recent case of *Chicago, Milwaukee & St. Paul* v. *Minneapolis* in 232 U. S. 430; 34 Sup. Ct. 400; 58 L. Ed. 671.

The contention that the Legislature could not lawfully limit the proportion of expense to be borne by the street railway company to ten per cent. of the total expense of the alteration of a crossing is, of course, unsound if the entire expense might at the legislative will have been placed upon the prosecutor. The opposite contention viz., that the imposition of any part of the expense upon the trolley company was unlawful is, of course, not now under consideration.

The same remark applies to the limitation of the expense imposed upon the municipality affected.

Under this point there is also a running attack made upon the principle of Utility Boards in general, involving their powers as well as their procedure, but as far as discoverable no constitutional limitation is pointed out or discussed. Under this subhead similar Boards in other jurisdictions are described and the differences noted, but no constitutional question raised that is not covered, as far as we are able to do so, by the principles decided in the cases already cited.

Point VI. is that, "Said statute is unconstitutional and said order is unreasonable, for the reason that the prosecutor is not given the alternative of decreasing or eliminating the alleged danger to public safety and the alleged impediment to public travel by decreasing the number of train movements or by abandoning the railroad." Insofar as this reason challenges the discretion exercised by the Board in making its order we are not concerned with it in this part of our opinion, insofar as it constitutes an attack upon the statute the contention must be that the legislative act was unconstitutional because it did not affirmatively authorize the railroad company to decrease

the number of its trains or to abandon its railroad.

The abandonment of the railroad was not germane to the object of the statute, and the power to deal with that question could not be delegated to the agency created by the act.

The decrease in the number of train movements was a matter primarily under the control of the prosecutor, and hence required no statutory permission; if by such decrease the danger and congestion at the crossings were in fact eliminated or reduced to a negligible point that fact would doubtlessly be recognized by the Board and dealt with accordingly. It was for the prosecutor to make that fact appear and its failure to do so involved no constitutional infirmity in the statute.

Point VII. is an attack upon the title of the original Public Utility Act of 1911, and upon the duality of the objects alleged to be embraced in that act as supplemented by the Fielder Act of 1913.

The title of the original act expressed broadly and inclusively the object of the statute; it does not express the means and methods of attaining that object; but this is not required.

Bumstead v. *Govern,* 47 N. J. L., p. 368; 1 Atl. 835.

Affirmed, 48 N. J. L., p. 612; 9 Atl. 612.

Hickman v. *State,* 62 N. J. L., p. 499; 41 Atl. 942.

Affirmed, 63 N. J. L., p. 666; 44 Atl. 1099.

As was said by this court in *Moore* v. *Burdett* (62 N. J. L., p. 164), 40 Atl. 631, "The object of a law must not be confused with its product. * * * The object of every law, by force of the constitution must be single and be expressed in the title of the law; the product may be as diverse as the object requires and finds its expression in the terms of the enactment only. In fine, the title of an act is a label not an index." The statute has, in a constitutional sense, a single object. To attain this object it enacts various methods and matters so related

to such object and to each other as to effectuate a single purpose. The inclusion of such interrelated matters is not the intermixing of things that have no proper relation to each other, hence the statute as a whole has a single object.

Payne v. *Mahon,* 44 N. J. L., p. 213.

Newark v. *Mt. Pleasant Cemetery Company,* 58 N. J. L., p. 168; 33 Atl. 396.

Point XVI. is that, "The statute and order violate the Constitution of the United States in that they impair the obligation of the prosecutor's contracts as follows:

(a) Contracts with the holders of the prosecutor's stocks, bonds, notes and other obligations.

(b) Contracts between the State of New Jersey and the prosecutor or its predecessors in interest.

(c) Contracts between the prosecutor or its predecessors and the Public Service Railway Company or its predecessors.

(d) Contracts between the prosecutor and the various switch owners.

(e) Contracts between the Paterson and Hudson River Railroad Company and Ramapo Railroad Company; and the prosecutor or its predecessors."

These objections may be considered together, since, despite their apparent diversity, they rest upon a common principle and present but a single legal question, to wit, whether these contracts whenever made or upon whatever consideration based were subject to the future exercise by the state of its police power. The specific application of the general doctrine treated under Point IV. to the obligation of contracts is well stated by Mr. Justice Depue in *M. & E. R. R. Co.* v. *Orange,* where, after pointing out that certain New York and Connecticut decisions were placed upon the ground that the charters of the respective companies were subject to alteration or repeal, but that the opinion of the Connecticut Court and of the Supreme Court of the United States in *New*

York and New England Railroad v. *Bristol,* 62 Conn. 252; 26 Atl. 122; 151 U. S. 556; 14 Sup. Ct. 437, 38 L. Ed. 269, lays stress upon the fact that the regulations were a proper exercise of the police power of the state, he said: "In *Boston and Maine Railroad Co.* v. *County Commissioners,* 79 Me. 386, 10 Atl. 113, an act requiring the expense of building and maintaining so much of the townway or highway as was within the limits of the highway where such way crossed the track at grade, should be borne by the railroad company, was held to be constitutional. This decision was made against a company whose charter provided that it should not be altered, amended or repealed. The power of the legislature to impose such burdens for general safety under the police power was declared to be fundamental and that the act did not impair any contract in the company's charter. Whether the corporation has an irrepealable contract in its charter or not is immaterial. Police powers are inherent in the government, and the legitimate exercise of legislative power in securing public safety does not impair the obligation of contracts nor deprive anyone of property without due process of law."

A later expression of the same thought by the Supreme Court of the United States speaking through Mr. Justice Day is as follows: "The exercise of the police power cannot be limited by contract for reasons of public policy, and it is immaterial upon what consideration the contract rests, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to public safety.

Chicago, Burl. & Q. R. R. Co. v. *Nebraska,* 170 U. S., p. 57; 18 Sup. Ct., 513, 42 L. Ed. 948.

Northern Pacific Ry. Co. v. *Minnesota,* 208 U. S., p. 583; 28 Sup. Ct. 341, 52 L. Ed. 630.

Many of the cases cited under Point IV are to the same effect and sustain the same doctrine, the acceptance of which renders it unnecessary and indeed futile to follow the brief in its recapitula-

tion of the hardships that result from the observance of such legal rule.

That the contracts of the railroad with others for switch connections and service were subject to the police power was held by the Court of Errors and Appeals in *Swift* v. *Delaware, Lackawanna & Western R. R. Co.* (66 N. J. Eq., p. 34), 58 Atl. 939.

Cases in other jurisdictions are:

Branson v. *Philadelphia,* 47 Pa. St., p. 329.

Kinealy v. *St. Louis, K. & North R. R. Co.,* 69 Mo., p. 658.

Otis Elevator Co. v. *Chicago,* 263 Ill., p. 419; 105 N. E. 338, 52 L. R. A. (N. S.) 192.

As to the Public Utilities, the doctrine of their subservience to the police power is the same.

Jersey City v. *City of Hudson,* 13 N. J. E., p. 420.

Stillwater Water Co. v. *Stillwater,* 50 Minn., p. 498; 52 N. W. 839.

Detroit v. *Fort Wayne & E. Ry. Co.,* 90 Mich., p. 646, 51 N. W. 688.

Columbus Gas & Coke Co. v. *Columbus,* 50 Ohio St., p. 65; 33 N. E. 292; 19 L. R. A. 510; 40 Am. St. Ry. 648.

Natick Gas Co. v. *Natick,* 175 Mass., p. 246; 56 N. E. 292.

New England Tel. & Tel. Co. v. *Boston T. Co.,* 182 Mass., p. 397; 65 N. E. 835.

New Orleans Gas L. Co. v *Drainage Comm'rs.,* 197 U. S., p. 453; 25 Sup. Ct. 471; 49 L. Ed. 831.

Point XIX. is that, "Said order imposes a burden upon the interstate traffic of the prosecutor and interferes with and impairs its operation to perform its duty as an interstate carrier of freight and passengers because:

(a) It requires changes in the location or grade of switches, sidetracks, leads, bridges, yards, structures and other facilities and properties of the prosecutor which are used by the prosecutor in the furtherance of its interstate business.

(b) It compels the prosecutor to raise and expend moneys for the purpose of complying with said order which said moneys would otherwise be available for and would be used by the prosecutor in the making of changes and improvements which are essential for the purpose of enabling the prosecutor to carry on its interstate business."

Whether or not the police regulations of a state constitute an unlawful interference with interstate commerce is distinctly a question for the ultimate decision of the highest federal court. The attitude of that court upon this question is well expressed by Mr. Justice Gray delivering the opinion of the Court in the case of *Chicago M. & St. P. R. R. Co.* v. *Solan*, 169 U. S., p. 133; 18 Sup. Ct. 289; 42 L. Ed. 688:

"The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

So long as this attitude is maintained by the federal court the doctrine enunciated by it would gain nothing by our concurrence and suffer nothing by our dissent. We, however, not only recognize the authority but also concur in the soundness of the rule laid down.

Point XX. is that, "Said order is in violation of the Constitution of the State of New Jersey and of the United States, in so far as it deprives the prosecutor of the rights, benefits, advantages, privileges and contracts now possessed by it with reference to the several leads, switches and side tracks, which under said order are required to

be destroyed or relocated and reconstructed, for the following reasons." Upon this point we can add nothing to what has already been said in discussing the scope and dominance of the police power.

Point XXI. is that, "Said order and the statute upon which same is based are in violation of the Constitution of the State of New Jersey, because:

(a) They impair the jurisdiction of the courts of equity of the State of New Jersey by depriving them of their jurisdiction over the regulation of the use of easements.

(b) They impair the jurisdiction of the courts of law of the State of New Jersey by depriving them of their jurisdiction to compel the performance of the duties imposed by law upon the prosecutor or its predecessors in interest."

As to the alleged invasion of the exclusive jurisdiction of the Court of Chancery to regulate conflicting public easements our decision might well rest upon the reasoning of the opinion of Mr. Justice Kalisch in this court in the case of *Erie R. R. Co.* v. *Board of Public Utility Commissioners* (87 N. J. L., p. 438; 95 Atl. 177). In view, however, of the argument of counsel and the attempt to distinguish that case from the present one, it will be as well to point out that there is an essential difference between the jurisdiction exercised by Chancery over conflicting public easements and the exertion by the legislature of its police power to avert danger at railway crossings. Under the inherent power of the Court of Equity all questions as to the existence, character, duration and priority of such conflicting easements, together with their respective paramountcy or subservience, as well as questions of acquiescence, estoppel, contribution and expense are considered by the Court of Chancery and are either adjudicated by it or are relegated to a court of law for decision, as the case may be; whereas, in the legislative exercise of its police power all of these matters are determined by the statute, leaving nothing of a

judicial nature to be adjudicated by the statutory tribunal excepting the applicability of such legislative scheme to a given state of facts, if it be found to exist, and the determination thereupon of the practical methods of accomplishing the legislative object. 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.

In the case of *Palmyra* v. *Pennsylvania R. R. Co.* (62 N. J. Eq., p. 601; 50 Atl. 369), the contention of the railroad was that powers of this nature were so essentially legislative that they could not constitutionally be exercised by the Court of Chancery under legislative authority, which is the precise opposite of the contention of the prosecutor in the present case. The truth is that neither extreme view is the proper one; the correct view being that the mixed administrative and quasi-judicial functions to be performed by the Board of Public Utilities Commissioners under the statute, which do not in a constitutional sense properly belong to either of the three great departments of government may, because of that circumstance, be lawfully exercised under express legislative authority by a statutory tribunal without infringing upon the Constitution itself or upon the prerogatives of the Court of Chancery. This principle, although not this precise application of it, is illustrated in *Paul* v. *Gloucester Co.*, 50 N. J. L., p. 584; 15 Atl. 272; 1 L. R. A. 86. *Moreau* v. *Freeholders of Monmouth*, 68 N. J. L., p. 480; 53 Atl. 208. *Ross* v. *Freeholders of Essex*,

69 N. J. L., p. 291; 55 Atl. 310. *Iowa Life Ins. Co.* v. *Eastern Mutual Life Ins. Co.*, 64 N. J. L., p. 340; 45 Atl. 762.

In the matter of Drainage of Lands, 35 N. J. L., p. 497. *Palmyra* v. *Penn. R. R. Co.*, 62 N. J. Eq., p. 601; 50 Atl. 369. *Eckert* v. *Perth Amboy & W. R. R. Co.*, 66 N. J. Eq., p. 437; 57 Atl. 438. As to the alleged impairment of the mandamus power of this court, what has just been said as to the Court of Chancery measureably covers this matter also, at least in principle.

There is, however, another doctrine peculiar to the prerogative writs of this court, viz: that stated by Mr. Justice Trenchard in *Newark* v. *Kazinski* (86 N. J. L., p. 59; 90 Atl. 1016), to the effect that where this court may by its writ of certiorari supervise the action of a statutory tribunal the fact that such tribunal is exercising under legislative authority powers similar to or identical with those exercised by this court under its prerogative writs is a negligible circumstance. The question is, however, almost if not entirely academic, since the functions exercised by the Statutory Board in this case do not bear the slightest resemblance to the mandamus function of this court.

We have now reviewed *seriatim* the points of constitutional law as presented in the elaborate brief of counsel for the prosecutor without finding that any of them requires us to declare invalid the Statute of 1913 as a whole or as to any of its essential features. If any other constitutional question has been argued by counsel, incidentally and outside of his stated points, it may upon that account have escaped our attention, but it will, nevertheless, we confidently believe, be found to be covered by the principles we have discussed and by the cases cited to illustrate them.

The conclusion that we have reached from the foregoing considerations of all of the reasons filed and argued by the prosecutor is that each of the orders of the Board of Public Utility Commissioners brought up by the two writs of certiorari in this case should be affirmed, with costs.

Appendix XII.

(98 Atl. 28.)

NEW JERSEY SUPREME COURT.

November Term, 1915.

PUBLIC SERVICE RAILWAY COMPANY,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS AND CITY OF PATERSON.

Argued December 12, 1915. Decided 1916.

1. The provision of Section 2 of the Supplement to an Act concerning Public Utilities, approved March 12, 1913 (Fielder Act), (P. L. 1913, p. 91), by which ten per centum of the expense of eliminating a grade crossing of a steam railroad used by a street railway may be ordered to be paid by the company operating such street railway is within the legitimate sphere of legislation under the police power of the state.

ON CERTIORARI.

The order of the Board of Public Utility Commissioners drawn under review as to one of its terms by this certiorari is fully set out in the statement of facts prefaced to the opinion delivered at this term in the case of *Erie Railroad Company* v. *Board of Public Utility Commissioners.*

Before Justices Garrison, Trenchard and Black.

For the prosecutor, Frank Bergen, Esq.

For the defendants, Edward F. Merrey, Esq., Frank H. Sommer, Esq.

The opinion of the Court was delivered by Garrison, *J.*

The prosecutor of this writ, the Public Service Railway Company, objects to the order of the

Board of Public Utility Commissioners imposing upon the prosecutor ten per centum of the cost incurred in abolishing grade crossings on three highways over which the prosecutor operates its cars. The reasons relied on by counsel "briefly stated are, that the burden which the order attempts to impose on the prosecutor is neither a tax nor an assessment nor a legitimate exercise of the police power." Inasmuch as the order merely follows the statute the attack is really upon the latter. The language of the statute is that "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."

We agree that this imposition of a part of the expense of abolishing dangerous grade crossings is neither a tax nor an assessment for a public improvement, but, we think, that it is a legitimate exercise of the police power. The contention of counsel for the prosecutor is placed squarely upon the proposition that the police power is not legitimately exercised in the present case "unless the property (of the prosecutor) has become a public nuisance and so lost its right to protection"; and he then proceeds to demonstrate that a street railway is not a public nuisance. We, of course, agree to this, but we entirely dissent from the narrow definition of the police power which would restrain its exercise to the case of property that had become in a legal sense a nuisance.

If such a narrow definition has any place in the doctrine of the police power, it is confined to the appropriatory aspect of that power, i. e., to such appropriation as is incidental to the destruction of property as a nuisance and has no place in the vastly wider scope of such power that is regulative of energies that are curbed, not that they may be impaired or destroyed, but, on the contrary, that they may be of greater service and beneficence to the public.

Instances of such regulative exercises of the police power are met at every turn and constitute in fact the chief characteristics of modern social life. There are, to use a rough analogy, two aspects of the exercise of the police power, one so to speak *in rem* and the other *in personam;* and it is to the former alone that the proposition of counsel has any possible pertinence, and even in that connection it is of doubtful value as a definition, and of no apparent service as a criterion.

The distinction between these two aspects of the police power is perfectly patent. The destruction of a pest house would be an illustration of appropriation of property because it was *per se* a nuisance, i. e., a menace to the public health, while the compulsory vaccination of school children would be in order to prevent them from becoming such. The securing of public safety from anticipated dangers rather than the abatement of consummated nuisances is the essence of the police power in its broader scope. That there are such dangers to be anticipated from the operation at a grade crossing of a steam railroad and a trolley line is not more obvious than that each of these public agencies contributes its element to such danger. The steam road may indeed furnish in greater degree the active element of danger to human life, but the surface road in its operation brings to such place of danger its human freight in extraordinary numbers and under special conditions, which, or so the legislature might determine, greatly increase and accentuate the normal danger and hence justify its elimination by the joint act or at the joint expense of both of the public agencies that contribute in its production. It is matter of common knowledge that during what are termed the rush hours of the day a single surface car of modern construction carries a hundred or more passengers and that the cars thus crowded follow each other in an almost unbroken procession. The stalling of one of these cars

upon a grade crossing by the sudden giving out of the electric current, or its propulsion on to the railroad track by the failure of a brake to work properly, or as in the Newark case (*State* v. *Young,* 56 Atl. Rep., p. 471), by the failure to sand the track would imperil the lives of scores, who were brought into such position of peculiar peril by reason of being passengers on a street railway. It is not at all a question of the creating of a common nuisance, but solely of the participation in and constribution to a common source of danger arising from the transportation problem in its relation to grade crossings of common carriers of passengers.

The state grants this use of its highways for the convenience of its citizens, and the incorporators of such companies eagerly seek the privileges thus granted because of the profits to be derived therefrom; heence, if dangers arise from the very success of such enterprises it is eminently within the exercise of the police power of the state in the elimination of such dangers to place a portion of the expense of so doing upon those who profit by the very success which has contributed to such dangers.

The fact that by such a collision as we have suggested the lives of the passengers on the steam railroad are also imperilled, so far from demonstrating that the entire expense of eliminating the dangerous condition should be borne by such railroad, merely emphasizes the participation of each carrier in the production of a common source of danger, and hence points to their joint contribution to the expenses of its elimination.

In support of this obvious conclusion counsel for the defendant cites a number of pertinent authorities, but the question would seem to be at bottom one of fact, from which, when the fact is once established, the legal result follows as a necessary consequence. The establishment of such fact is, moreover, a part of the legislative function and as such is not subject to review by the Judicial Department.

In *Hopper* v. *Stack* (69 N. J. L., p. 562), 56 Atl. 1 we said, "Every exercise of the police power involvees, of necessity, the determination by the law maker of some fact quite apart from the exercise of any legislative discretion concerning it," and illustrations of such determinations of fact were given and the matter discussed at some length.

The proposition thus advanced has been not only adopted by the Court of Errors and Appeals, but has been elevated into a presumption. "Police regulations of this character," said Chancellor Pitney in *Meehan* v. *Excise Commissioners* (75 N. J. L., p. 557), 70 Atl. 363, "must, in the absence of clear evidence to the contrary, be deemed to be based upon facts within the possession of the legislature rendering such legislation proper, if not necessary, see *Hopper* v. *Stock* (40 Vroom, 562), 69 N. J. L., 562; 56 Atl. 1." And in *State* v. *Sutton* (87 N. J. L., p. 192), 94 Atl. 788, also a Court of Errors decision, a condition that would justify the exercise of the police power, was spoken of as "one of those determinations of fact that the legislature has the right to make for itself when prescribing a police regulation," citing *Hopper* v. *Stack* and *Lyons* v. *Morris Co.* (86 N. J. L., p. 206, 90 Atl. 1111). It is this prerogative of the Legislative Department of the government thus to predicate its exercise of the police power of the state upon facts within its own possession and keeping that renders such power so unamendable to precise judicial definition rather than any inherent difficulty in defining the limits of such power when applied to a given state of facts.

The foregoing remarks, coupled with our discussion of the topic and citation of authorities in the case of *Erie R. R. Co.* v. *Board of Public Utility Commissioners,* 98 Atl. 13, decided at this term, lead to the conclusion that the provision of the Fielder Act drawn under review was within the proper sphere of legislation and that the order of the Utility Board brought up by this certiorari merely carried out the clearly expressed

intent of the legislature. That the state through its chosen agencies is not required in such a sitnation to ascertain *the* exact quota of contribution to a common danger and by that standard assign the expense of its elimination is borne out by the cases cited by counsel for the defendant. Under such circumstances the province of the judicial office is thus stated by Chief Justice Beasley in *Douglas* v. *Essex Co.* (38 N. J. L., p. 214: "Where that which is directed to be done is within the sphere of legislation and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience or even abusrdity of the result is out of place. It is no province of the courts to supervise legislation and keep it within the bounds of propriety and common sense, so that even if in this case it could be demonstrated that the regulation in question was incommodious or even hurtful, an appeal for relief to the judicial power would be utterly in vain." This is stronger language than is called for by the circumstances of the present case, but the rule of law to which it leads up cannot be too strongly stated, or too rigidly observed if the relative spheres of the Legislative and Judicial Departments of the government are to be kept separate in obedience to the constitutional mandate.

The order of the Utility Board brought up by this writ is affirmed with costs.

Appendix XIII.

(98 Atl. 30.)

NEW JERSEY SUPREME COURT.

November Term, 1915.

JOHN POTTER,
Prosecutor,

vs.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, THE CENTRAL RAILROAD CO. OF NEW JERSEY and the TOWNSHIP OF CRANFORD, UNION COUNTY, NEW JERSEY,
Defendants.

Argued December 24, 1915. Decided June 23, 1916.

1. Property merely desirable for park development around the railroad station, cannot be ordered taken, by the Board of Utility Commissioners, under the Act of 1913, P. L. 1913, p. 91.

2. The order of the Board of Public Utility Commissioners, in such a case, cannot be sustained, under the acts of the legislature, P. L. 1914, p. 490, or the act of 1911, p. 379, sec. 17 (b).

3. The Supreme Court, on certiorari, has power to review the testimony, to ascertain whether or not, the order is supported to any extent, by the facts submitted to the Board for consideration.

On certiorari to review an order of the Board of Public Utility Commissioners, altering a certain grade crossing under P. L. 1913, p. 91, known as the Fielder Grade Crossing Act.

Before Justices Garrison, Trenchard and Black.

Robert Carey, Esq., for John Potter.

George Holmes, Esq., for Central Railroad Co. of N. J.

Berkeley C. Austin, Esq., for Township of Cranford.

Frank H. Sommer, Esq., for Board of Public Utility Commissioners.

The opinion of the Court was delivered by Black, *J.*

In this case, there are forty reasons presented to the Court, for setting aside the order made by the Board of Public Utility Commissioners. The order is dated the sixteenth day of April, 1915. All the points involved in these reasons, however, have been disposed of, in the opinion filed this term, in the case in which the Erie Railroad Company is prosecutor and the City of Paterson is defendant, except those points which will now be brought under discussion. In general terms, they are, that, in so far as the order directs the taking of the prosecutor's property, it is in excess of the jurisdiction of the Board of Public Utility Commissioners, and also, the findings of the Board are not supported by the evidence. On both of these grounds, the order of the Public Utility Commissioners in this case will have to be set aside. The Board in its report found that a proposed walk "known as North Avenue, the walk extending westward, through the small triangular block known as the Potter Building, returning into the westerly sidewalk of Eastman Street. In the development of this plan, the Potter Building is therefore proposed to be taken for the triple purpose of making an adequate approach to the station, a new highway from the west, and to open the end of Eastman Street in a proper manner," * * * "The taking * * * of the Potter property on the north side of the tracks bounded by Eastman Street, North Avenue and Union Avenue, are necessary for the full, proper and adequate development of the problem of providing a proper accommodation for traffic to and from the north and south sides of the railroad." * * * "In its judgment, however, a proper and adequate development and treatment

of the problem before it, makes necessary the adoption of the plan as a whole and the taking of the property requisite to its execution."

The facts, as shown by the record, illustrating the situation, upon which the Board of Public Utility Commissioners were called upon to act, in brief, are these, a petition had been filed by the Township Committee of the Township of Cranford, Union County, under the act of 1913, p. 91; known as the Fielder Grade Crossing Act, petitioning the Board to alter the grade crossing of Union Avenue with the Central Railroad Company of New Jersey, at Cranford, at that point, Union Avenue and the Central Railroad Company of New Jersey cross at the same level. The angle of crossing is about 45 degrees. Walnut Avenue on the south and Eastman Street on the north side of the crossing of Union Avenue terminate at the crossing. Stations of the railroad company are located on each side of the tracks. They are connected by an underground passageway, located wholly on the lands of the railroad company. Six main tracks and a siding cross Union Avenue at that point. Schedule A shows in detail, the plan of alteration. The only material part which is necessary for this discussion is that part which shows the new underground passageway, between the two stations. The opening on the north side is directly opposite the apex of the triangular building of the prosecutor, at the junction of Eastman Street and North Avenue. The opening at the south end of the new proposed underground passageway comes out on a new highway on the south side of the railroad tracks, which connects Union Avenue with Walnut Avenue.

Mr. Mosher, the township engineer, testified the building on the triangular plot of land in the angle between Eastman Street and Union Avenue is approximately twenty (20) feet from the right of way line of the railroad company. It does not abut on the railroad property at any point. He

does not pretend to say in any portion of his testimony, that the taking of the Potter property is necessary to the alteration of the grade crossing. Neither does Mr. Owen, the engineer for the Central Railroad Company, the only other engineer testifying. The best that can be said of this testimony is that the Potter property is desirable for park development in connection with the new subway. It is desired, so that it may be used, as an approach to the proposed new foot subway.

From Mr. Owen's testimony these questions and answers are taken:

"Q So that in your judgment as an engineer, it was entirely feasible and practicable to eliminate that crossing if necessary, without interfering in any way, shape or manner with the Potter property?

A It is practicable, yes.

Q In your judgment, then, the destruction of the Potter property and the taking of it as a part of this improvement is simply in the interest of the park development around the station?

A It is in the general interest of the improvement, both from the railroad standpoint and the municipal standpoint.

Q But has no distinct relation to the abolition of the crossing?

A Not necessarily, no."

We think the findings of the Board are not supported by the testimony, on this branch of the case. This court has the power to review the testimony, to ascertain whether or not the order is supported to any extent, by the facts submitted to the Board, for its consideration. *Erie Railroad Co.* v. *Board of Public Utility Commissioners,* 98 Atl. 13, not yet reported, *West Jersey &c. R. R. Co.* v. *Board of Public Utility Commissioners,* 88 N. J. L.; 94 Atl. 60. *Public Service Gas Co.* v. *Board of Public Utility Commissioners,* 84 N. J. L., 463; 88 N. J. L., 95 Atl. 127; *Erie Railroad Co.* v. *Board of Public Utility Commrs.,* 88 N. J. L., 95 Atl. 177. Nor can we find anything in the act of the legis-

lature, which gives the Board of Public Utility Commissioners jurisdiction to order private property taken, when, as in this case, such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition and order. That such property may be desirable for the purpose of park development around the railroad station is not sufficient, to give the Board jurisdiction, under this statute, for ordering private property to be taken.

It is urged, however, the order may be sustained, under the act of 1914, p. 490; which confers upon the railroad company power to take by condemnation any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners, upon ascertainment and payment or tender of compensation, as provided by law. Or under the act of 1911, p. 379, sec. 17 (b), which confers upon the Board of Public Utility Commissioners, power, after hearing, upon notice, to require every public utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so. It requires no argument to show, that the order of the Board cannot be sustained under either of these statutes. They cannot be made to apply to this proceeding by any accepted canons of statutory interpretation.

For these reasons, the order made by the Board in this case will be set aside with costs.

New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY, *Prosecutor-Appellant,* VS. THE BOARD OF PUBLIC UTILITY COMMISSIONS OF THE STATE OF NEW JERSEY, ET ALS., *Defendants-Respondents.*	*On Appeal from Supreme Court On Certiorari.*

Brief in favor of The President and Board of Directors of the Paterson and Hudson River Railroad Co., and the Paterson and Ramapo Railroad Company, defendants.

The *certiorari* was allowed to review an order of the Board of Public Utility Commissioners made under the power supposed to be given by Chapter 57 of the laws of 1913, ordering the prosecutor to alter certain grade crossings of the railroad operated by it through the City of Paterson.

These respondents are brought into the controversy because they were the companies originally chartered by the legislature of New Jersey to build and operate the railroads through Paterson which are now operated by the Erie Railroad Company, and, therefore, as the prosecutor contends, are the companies upon which the burden of making the prescribed changes in grade should fall; wholly or in conjunction with the prosecutor.

The contention of the prosecutor is that the Board of Public Utility Commissioners has power to order only the company, *operating* a railroad to alter its grade crossings; that *these respond-*

ents operate the railroad whose grade crossings are now ordered to be altered by such Commission; therefore, the Commission should have ordered these respondents to alter such sub-grade crossings. The minor premise is false and renders the conclusion invalid. As will appear from the matters hereinafter referred to, these defendants do not operate their respective railroads, either in fact or theory. *They do not directly or indirectly institute, direct or control any of the operations of or upon their respective roads, nor is the duty of operating such roads charged upon them by law.*

The prosecutor makes no claim that these defendants operate their respective railroads in fact, but insists that the legal duty of so operating them, in so far as the State is concerned, is charged upon them by law, and that when Chapter 57 of the laws of 1913 empowers the Public Utility Commission to order the company "operating such railroad" to alter grade crossings, the company intended by that statute is not the company which *actually operates* the railroad, but is the *company which in law is charged with the duty of operating.* This proposition substantially constitutes Point XIII of the prosecutor's brief, p. 307, and is the principal subject matter of this brief for these defendants.

Upon this point the pertinent provisions of Chapter 57, Laws of 1913 are contained in Section 1 of that statute and are as follows:

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

I.

These Defendants do not actually operate the railroad in question in this proceeding.

This point may be very shortly disposed of. There is absolutely no evidence in the voluminous record in this proceeding which shows or tends to show operation in fact of the railroad by these defendants. Nor, is it pretended in any reason filed, or in the briefs, that defendants are the operators of such railroad.

On the other hand, it not only appears from the evidence, but it is admitted by the Erie Railroad Company that it operates the railroad. Paragraph 3 of the amended petitions of the Board of Finance of the City of Paterson is as follows:

> "3. The Erie Railroad Company operates a railroad running through the City of Paterson, in the County of Passaic and State of New Jersey, entering the said city from the south at the border line of the Township of Acquackanonk, and thence running in a northwesterly direction to about Taylor street, where it assumes a northerly direction, running to about Godwin street, in the said city, where it assumes a northeasterly direction, finally crossing the city line into the Borough of Hawthorne at the Passaic River."

(Case Vol. IV. p 1635, l. 24).

On October 17, 1913, the first hearing upon the petition was had before the Public Utility Commission. The printed Case, Volume I, p. 1, shows the following:

> "For the Erie Railroad Company appears H. A. Taylor, Esq.
>
> "*Mr. Taylor.* I would like to file an answer but not at this time. Messrs. Collins and Corbin represent us in this proceeding but unfortunately Mr. Hobart is engaged in Court. I have come here not prepared to file an answer but will do so at a future date. I would like permission to do that.
>
> "*Commissioner Donges.* That permission will be granted.
>
> "*Mr. Merrey.* You will file an answer for the Paterson & Hudson River Railroad Company and the Paterson and Ramapo Railroad Company?
>
> "*Mr. Taylor.* We do not represent those companies. * * * * *
>
> "*Mr. Merrey.* I presume the practice would have been to have the railroad company answer. They would answer and admit some of the facts and it would seem unnecessary to prove them. * * * * *
>
> "*Commissioner Donges.* Perhaps Mr. Taylor will stipulate some of the allegations in the petition. * * * * *
>
> "*Mr. Merrey.* * * * Paragraph 3; will you admit the facts set forth there, the Erie Railroad Company operates a railroad running through the City of Paterson, and so on? That seems so plain.
>
> "*Mr. Taylor.* Yes, I believe that is the fact.

"*Commissioner Donges.* Paragraph 3 is admitted."

Subsequently the Erie Railroad filed its answer. (Case, Vol. IV, 1664).

The pertinent part thereof is as follows:

"The respondent, Erie Railroad Company, answers the petition herein as follows: * * *

"3. Respondent admits paragraph 3."

Paragraph 5 of the petition of the Finance Board is as follows: (Vol. IV, 1635).

"Your petitioner further shows that it is informed that the said Erie Railroad Company operates said railroad by virtue of a lease from two separate railroad companies."

The answer aforesaid admits this allegation (Vol. IV. 1664) and at the first hearing the folloing colloquy occurred. (Vol. I. p. 4):

"*Mr. Merrey.* The fifth, you don't know about that.

"*Mr. Taylor.* That fifth is correct, except the lease runs to the Union Railroad Company in the first place and by various conveyances vests finally in the Erie Railroad.

"*Commissioner Donges.* So the Erie Railroad is operating these.

"*Mr. Taylor.* The Erie Railroad is operating them."

Those admissions, it is submitted are conclusive upon the prosecutor in respect to the fact that it is the company operating the railroad. It is true

that prosecutor contends that the word "operating" as used in the statute is not to be taken in its ordinary and literal acceptation which, according to the Standard Dictionary is:

> "1. To put in action and supervise the working of; as, to operate a machine. 2. To conduct or manage the affairs of; superintend; as to operate a mining business or a railroad. 3. To effect by some course of action or procedure; accomplish."

but is to be interpreted as meaning the company which in law is charged with the duty of operating. Though not discussing the question of interpretation at present, it is insisted that the admission of the prosecutor should be taken as an admission that it is actually operating the road, or as an admission that it is the company charged with the duty of operation or as an admission that it is operating the road in fact and is the company charged with the duty of operating it.

II.

Assuming that Chapter 57, Laws of 1913, is to be construed as authorizing the Public Utility Commissioners to order the company which in law is charged with the duty of operating the railroad to alter its grade crossings, nevertheless, these defendants, Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company, are not subject to such order, because they are not the companies which in law are charged with the duty of operating.

The position of the prosecutor in regard to the point now being considered is stated at page 316 of its brief, as follows:

> "There is nothing in the original charters of the Paterson and Hudson River Railroad Co. or the Paterson & Ramapo Railroad Co., or in any of the supplements thereto, which relieves those companies from the duty of operating. The State was not a party to the agreement between the companies. So far as the State is concerned the *duty* to operate still rests upon the two original companies. Under these statutes, and the several leases, the Erie Railroad Co. does not operate the railroad of the two original companies except in the sense that it runs trains over tracks owned by those railroads as their agent or lessee."

It is now proposed to show that the above stated proposition is erroneous because the leases referred to and subsequent acts of the legislature have relieved these defendants of the duty of operating their several railroads. Though the wording of the lease made by the Paterson & Hudson River

Railroad differs in some respects from the lease of the Paterson and Ramapo Railroad Company both may be conveniently considered together. The subsequent acts of the legislature touching the question affect both of the lessors. In quoting from the leases and statutes the italics used are ours.

(a.)

The leases of the Paterson and Hudson River Railroad Co. and The Paterson and Ramapo Railroad Co. and the title of the Erie Railroad Co. thereunder, and the duties thereby imposed.

The Paterson and Hudson River Railroad leased to the Union Railroad Company by lease dated Sept. 9th, 1852. (Ex. R. 15, Vol. II 986).

The Paterson and Ramapo Railroad Co. leased to the said Union Railroad Co. by lease dated Sept. 9th, 1852. (Ex. R. 15, Vol. II 1025).

The Union Railroad Co. assigned both of said leases to the N. Y. and Erie Railroad Co. by assignment dated Sept. 10, 1852 (Ex. R. 15, Vol. II, 1031).

The N. Y. and Erie Railroad Co. mortgaged its property, rights and franchises on June 1, 1858. This mortgage was foreclosed and under the foreclosure proceedings the mortgaged premises became vested in Messrs. Gregory and Davis as trustees. The foreclosure and sale were had under the provisions of Chapter 229 of the Laws of 1860 of the State of New Jersey, and of Chapter 160 of the Laws of 1860 and Chapter 119 of the laws of 1861 of the State of New York. Under the latter act the Erie Railway Company was incorporated. (Vol. II, 952).

Gregory and Davis conveyed the mortgaged premises to Erie Railway Co. by deed dated Dec. 28, 1861. (ibid),

Erie Railway Co. mortgaged all its property, rights and franchises on Feb. 4th, 1874. Under the foreclosure of said mortgage the mortgaged premises became vested in Edwin D. Morgan and others, trustees. (Vol. II, 953).

The Erie Railway Co. was reorganized under the New York act of 1874 and its amendments. On April 27, 1878, Morgan and others conveyed to the new corporation, known as the New York, Lake Erie and Western Railroad Co. (Vol. II, 954).

The N. Y. L. E. & Western R. R. Co. mortgaged all its property, rights and franchises on Oct. 5, 1878. Under the foreclosure of this mortgage the mortgaged premises next vested in Coster and others as trustees. On Nov. 14, 1895, said Coster and others, trustees, conveyed the mortgaged premises to the prosecutor the Erie Railroad Company. This conveyance was confirmed by all parties in interest. (Vol. II, 954-957).

> "Said Erie Railroad Company has since that time continued to *possess and to operate the same as a common carrier of passengers and freight for hire;* that the property so obtained, and additional property soon thereafter obtained, constitutes the line of railroad extending from the City of New York through the States of New Jersey, Ohio, Indiana and Illinois."

The quoted statement is from Exhibit R-15, offered and admitted in evidence by the prosecutor (offered Vol. I, 245; printed Vol. II, 950 at p. 957).

The prosecutor complied with the conditions and requirements of Chapter 11 of the Laws of New Jersey of 1898, (Ex. R-15, Vol. II, at p. 957). It thereby, under Sec. 2 of the act became entitled to

> "hold, possess and *operate* the part of the mortgaged premises with their appurtenances, in this state, and the other property and rights covered by said mortgage, and shall have and possess all the rights, powers, privileges and franchises (subject to the duties and obligations attached thereto) theretofore possessed in this state by the company executing the mortgage," etc.

What the rights, powers and franchises which so became vested in the prosecutor, and what were the *duties and obligations* attached to them appears from the original leases and from the subsequent acts of the legislature which affected them and the various lessees of the railroad.

The grant made by the Paterson and Hudson River Railroad Co. to the Union Railroad Company, by the lease of Sept. 9th, 1852 (Vol. II, p. 986) was as follows:

> "Witnesseth, that the parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said parties of the second part, their successors and assigns, to be paid, kept and performed have granted bargained and sold, demised and to farm letton and by these presents do grant, bargain and sell, demise and to farm let unto the said parties of the second part, their

successors and assigns *all and singular the railroad* of the parties of the first part, as it is now constructed and exists, and *all the land and real property forming, or connected with, or appurtenant thereto,* from and including its terminus and station at and in the city of Paterson, in the county of Passaic and State of New Jersey, to and including its terminus and station at and on Bergen Hill, in the county of Hudson, in the State of New Jersey, at the junction of said railroad with the railroad of the New Jersey Railroad and Transportation Company, and the rails, *bridges,* culverts, viaducts, turnouts, switches, fixtures and superstructures of every kind threon or connected therewith; and also all their buildings, erections, depots, stations, station houses, offices, shops and superstructures on or adjacent to or connected with, or appurtenant to the said road as above described; and all the estate, right, title and interest, property, profession and demand of the parties of the first part, of, in and to the premises and every and any of them, and every part and parcel thereof; and also all the *rights, privileges, franchises, titles, power, property, claims and pretensions* of the parties of the first part, *to transport persons, mails and property of every description on said railroad* and to charge, demand, collect, sue for and receive in the name of the parties of the first part or otherwise, but for the exclusive benefit of the parties of the second part, money for tolls and for the transportation of persons, mails and merchan-

dise, in as full and ample a manner as the parties of the first part were authorized to do by the State of New Jersey.

And also all and singular the cars and engines mentioned and described in the schedule hereto annexed and marked C. x xxxx and also the machinery and tools of every description of the said party of the first part used in the shop or works of the company, or in making or repairing said road, and also the hand carts and tools connected therewith used in the repairing of the track, and other articles of personal property appurtenant to said railroad."

The grant made by the Paterson and Ramapo Railroad Company to the Union Railroad Co., by lease of September 9th, 1852 (Vol. II, p. 1025) was as follows:

"Witnesseth, that the parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the said parties of the second part, their successors and assigns, to be paid, kept and performed, have granted, bargained and sold, demised and farm letton and by these presents do grant, bargain and sell, demise and to farm let, unto the parties of the second part, their successors and assigns, *all and singular the railroad of the parties of the first part,* as it is now constructed and exists, and *all the land and real property,* forming or connected with, or appurtenant thereto, and all the rails, tracks, *bridges,* culverts, viaducts,

turnouts, switches, fixtures and superstructures of every kind connected therewith, and also all their buildings, erections, depots, stations, station-houses, offices, factories, shops and edifices on, or adjacent to, or connected with, or appurtenant to the said road, as above described; and all the estate, right, title, interest, possession and demand of the parties of the first part, of, in and to the premises and every and any of them, and every part and parcel thereof; and also, all the *rights, privileges, franchises, titles, powers, property, claims and pretensions*, of the parties of the first part to transport persons, mails and property of every description on said railroad, and to charge, demand, collect, sue for and receive (in the name of the parties of the first part, or otherwise, but for the exclusive benefit of the parties of the second part) money for tolls and for the transportation of persons, mails and merchandise, in as full and ample a manner as the parties of the first part were authorized to do by the laws of the State of New Jersey."

In both leases the following covenant is made by the Union Railroad Co.

"And the parties of the second part do hereby covenant and agree with the parties of the first part that the said parties of the second part and their assigns will keep and maintain and run said railroad and other premises hereby demised, in such manner, order and condition as the said parties of the first part are bound to keep and main-

> tain and run the same by the charter of the said parties of the first part and the statutes supplementary thereto, and that they will indemnify and save harmless the said parties of the first part from all damages to which they may be subject by reason of said road and premises not being so kept, maintained and run."
>
> (Vol. II, 992, 1030).

The foregoing leases, as between the parties, unquestionably divested the two lessor companies of every part of their respective railroads and of every vestige of right to operate the same. If they attempted to operate the roads they would have been trespassers. The covenant above quoted, as between the parties, made it the duty of the Union Railroad Co. to operate—to "keep and maintain and run" the railroads.

(b.)

It is not contended that these leases, in themselves, relieved the lessors of any duty they owed the state. But in conjunction with subsequent legislation they afforded such relief in respect to the matters now in controversy,

On September 10, 1852, the day after the execution of the leases to the Union Railroad Company that company assigned them to the New York and Erie Railroad Company. In the following March the Legislature of New Jersey passed the following act: (Vol. II., p. 977).

> "An act to enable parties having claims against the New York and Erie Railroad

Company and others, using the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad, to prosecute for such claims or damages in the courts of this State, and to legalize the leases or contracts made by the Paterson and Ramapo Railroad Company and the Paterson and Hudson River Railroad Company to the Union Railroad Company.

Whereas, the New York and Erie Railroad Company are now in possession of the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad under certain leases and contracts made by said companies, and are now carrying on the business of said roads under said leases and contracts; and whereas, the New York and Erie Railroad Company being a foreign corporation, and any other corporation or individuals using said roads, or either of them, and transacting the business of the same, ought to be liable to actions for damages done in operating said roads as fully as the said companies are by their charters now liable, and to effect that purpose all doubts as to the authority of said companies to make such leases and contracts ought to be removed; and whereas, all persons having claims for debt or damages of any and every kind ought to be enabled to prosecute said foreign corporation in the courts of this State; therefore:

I. Be it enacted, By the Senate and General Assembly of the State of New Jersey, that the New York and Erie Railroad Com-

pany, and any other corporation or individuals using the aforesaid roads or either of them, shall be, and they are hereby declared liable for all claims for debts, damages, omissions and delinquencies arising from the running or operating said railroads, and carrying freight and passengers on the same, as fully as the said the Paterson and Hudson River Railroad Company, and the Paterson and Ramapo Railroad Company, are now liable by the laws of the State.

II. And be it enacted, That whenever any action shall be commenced against the said The New York and Erie Railroad or any other foreign corporation using said roads, in any of the courts of this State, the first process to be made use of may be a summons or subpeona, a copy whereof shall be served on the president, or one or more of the directors, or the superintendent, or on any station agent of said corporation, six entire days before its return.

III. And be it enacted, That when the sheriff or other officer shall return such summons or subpoena "served" or "summoned" the defendants shall be considered as appearing in court, and may be proceeded against accordingly.

IV. And be it enacted, That the power and authority of the said Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, to make such leases and contracts is hereby declared and affirmed, and said leases and contracts are hereby declared legal and valid; provided, that said leases and con-

tracts shall not be held to grant any power, privilege or right, not granted to said companies respectively by their charters, and the supplements thereto.

V. And be it enacted, That the Legislature may at any time alter, amend or repeal this act.

Approved March 14, 1853.

The prosecutor, in its brief (p. 314) says:

> "There is nothing in the statute which either expressly or impliedly relieves the original companies of their duty to the public imposed upon each of them by their respective charters."

It is to be observed that at present the only duty we are concerned about is the "*duty of operating.*" We submit, even if there were nothing more, that the act in question relieved both companies of the duty of operating.

We assume it to be beyond question that the legislature may relieve a railroad from the duty of operating a railroad in so far as that duty concerns the public.

> "That a state may, without impairing any contract contained in the charter of a corporation, discharge the latter from the performance of duties which it owes to the State, or release it from disabilities imposed for the public good, is a proposition so obviously correct as to require no support of authorities."
>
> 2 *Morawetz on Corporations, p.* 1084, and see p. 400.

It is plain that the leases transferred all right of the companies to operate. If the transfer was good, it became impossible for them to operate. The ratification by the legislature of these leases placed the State's seal of approval upon the divestiture. It was the consent of the State to what the lessors had done. If the act did not amount to that, it meant nothing. It declared that the lessors had "power and authority" to make the very leases and contracts and that said "leases and contracts" were legal and valid. It was as though the legislature had recited the leases in the act itself and had in the very words of the demises granted to the lessors the power to make them. As was said by Mr. Justice Collins in delivering the opinion of the Court of Errors and Appeals in *Allison v. Corker*, 67 *N. J. L.*, 596, 600.

> "It is entirely within the legislative power to give effect to documents without their full recital. Statutes validating agreements of lease merger or consolidation of railroad corporations are usually cast in that form.—e. g. Pamph. L. 1871, pp. 946, 1093; Id. 1872, p. 567.

The cases relied upon by the prosecutor are

> *Ryerson v. Morris Canal Co.* 71, *N. J. L.* 381.
>
> *Hayes v. Northern Pacific R. R. Co.* 74 *Fed.* 279.
>
> *Morris Canal Co. v. State Board*, 76 *N. J. L.* 627.
>
> *Rochester R. R. Co. v. City of Rochester*, 205 *U. S.* 236.

The cases are not in point. They all involved the construction of powers. In each case the statute relied upon as giving validity to the leases under consideration in them, was a statute authorizing the execution of a lease, not a statute of ratification and confirmation.

> "The shareholders of a railroad company may by their ratification or acquiescence cure the invalidity of a perpetual lease of their railroad, so far as this results from the absence of authority in the majority or in the directors to bind them by such lease; and if the State should also give its consent to the lease, all question of its validity would be removed."
>
> *Morawetz on Corporations p.* 620, *and see* pp. 651, 941.

In *Ryerson v. Morris Canal, supra,* it is plainly to be inferred from the language of the opinion that when a power is given to lease, a lease, when made, imposes upon the lessee the duty to operate without any express words to that effect. There were no words in the act of 1871, p. 444, which expressly imposed upon the Lehigh Valley R. R. Co., the lessee, the duty of operating the canal. Yet the court in the case cited says:

> "The maintenance of bridges at parts of the highway is a different duty from operating a canal for the purpose of transporting persons and goods, and when the legislature authorizes a transfer by lease of the works and franchise, necessary for the latter, it hereby necessarily imposes upon

> the lessee the obligations arising from the use of the works."

We take it that the "obligation arising from the use" of the canal was to operate it, and that the "obligation arising from the use" of the railroads was to operate them.

The prosecutor further quotes from the opinion mentioned the language following that above set forth:

> "but does not inferentially transfer, by the act of leasing, the duty of maintaining the bridges which form part of the highways crossed."

It is difficult to see the pertinency of the last quotation. If it is supposed that it has any relation to the fact stated in the brief that "Each of the two charters of these companies above referred to requires the company to construct and keep in good repair good and sufficient bridges or passages over and under the said railroad where any public or other road shall cross the same," such supposition is without foundation.

The supposition is groundless because;

First, in *Ryerson v. Morris Canal,* the court was dealing with a transfer of obligation by inference or implication, not express. In the leases by these defendants there was an express assumption by the prosecutor's assigns, by means of the convenant hereinbefore quoted, of all the obligations of the lessors, including the obligation "to construct and keep in repair" bridges or passages. They covenanted

> "to keep and maintain and run said railroad and other premises hereby demised in such manner, order and condition as the

> said parties of the first part are bound to keep, and maintain and run the same by the charter of the said parties of the first part and the statutes supplementary thereto."

Second: Because the duty to change the grade of the railroads, springs not from the charter of these railroads, but from the order of the Public Utility Commission as authorized by Chapter 57, Laws of 1913 of the State of New Jersey. Under the charters of the company there is no duty to change the grade. Chapter 57, Laws of 1913, does not authorize the commission to direct a change of grade to be made by the company whose charter originally required it to construct and keep in repair the bridges and passages over and under the railroad. Such duty is cast upon the company operating the railroad under the police power of the state.

FURTHER LEGISLATION.

In 1856 the legislature of New Jersey passed an act of which the following is the title and a portion of the preamble:

> "An act to authorize the New York and Erie Railroad Company to purchase and hold lands, and to complete and finish the railroad of the Paterson and Hudson River Railroad Company.
>
> Whereas, The New York and Erie Railroad Company, by virtue of certain leases and agreements, made by the Paterson and Hudson River Railroad Company and the Paterson & Ramapo Railroad Company to the Union Railroad Company, bear-

> ing date the ninth day of September, eighteen hundred and fifty-two, and assigned to the New York and Erie Railroad Company, have the right to use the railroads of said two first mentioned companies, during their respective charters, and have the right to extend said Paterson and Hudson River Railroad and to make a railroad from any point in the same to the Hudson River, at some point opposite the city of New York, *which leases and agreements were approved and confirmed by an act of the Legislature of this State, approved March fourteenth, eighteen hundred and fifty-three.* (Vol. II, 979).

In 1860 the legislature of New Jersey, by Chapter 229 of the laws of that year authorized a foreclosure and sale under the mortgage made by the New York and Erie Railroad Company, by which the title of that company passed to the Erie Railway Company.

In 1862 the legislature of New Jersey passed an act (P. 2, 1862, C. 102) entitled "an act to confirm the sale under foreclosure of the property rights and franchises of the New York and Erie Railroad Company, and to complete the organization of the Erie Railway Company." The third section thereof is as follows:

> "3. *And it be enacted,* that the Erie Railway Company, and any other corporation of individuals using the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad, under leases and contracts heretofore made, and hereby con-

firmed, and using the road and tunnel connecting the Paterson and Hudson River Railroad with Pavonia Ferry at Jersey City, shall be and are hereby declared liable for all claims for debts, damages, omissions and delinquencies that hereafter shall arise from the running and operating said railroads and carrying freight and passengers on the same, as fully as the said Paterson and Hudson River Railway Company and the Paterson and Ramapo Railway Company, or any other company, are now liable by the laws of this state."

No question as to the constitutionality of Ch. 57 *of the Laws of* 1913 *arises in view of the fact that the law has charged the duty of operating the railroad upon the prosecutor; but assuming that defendants are not relieved from the duty of operating so far as the public are concerned, yet the statute and order would not be unconstitutional.*

The prosecutor contends that such statute and order would be unconstitutional in regard to it because requiring "such lessee company at its expense to perform the public duties imposed upon the lessor company, and in effect amends the charter of the lessor, as well as impairs the contract made between the lessor and lessee." This proposition overlooks the covenant hereinbefore set forth which is a part of the consideration of the lease, and which has been ratified and approved by the act of 1853. *Allison v. Corker, supra.*

By it the prosecutor is bound to keep, maintain and run the railroad as the lessors are bound to by the charter and the statutes supplementary thereto.

It is deemed unnecessary to argue that any view of the statute which would result in placing the burdens of making the changes ordered by the commission upon these defendants would make it unconstitutional because it would result in the confiscation of the lessor's property. The principles of law involved in such a question are elaborately dwelt upon in the prosecutor's brief. So far as the facts are concerned, they are very simple. The estimated cost of the work is $2,948,-218.68.

The annual value of the lease of the Paterson & Hudson River Railroad is $45,600, which capitalized at five per cent. would be $912,000.

The annual value of the lease of the Paterson & Ramapo Railroad is $26,500, which capitalized at 5 per cent. would be $530,000.

The rental and the possible reversion constitutes the whole interest of these defendants in the railroads.

It is respectfully submitted that in whatever sense the word "operating" as used in the statute may be taken, the prosecutor comes within its meaning. It operates the railroads in fact, it is charged by law with the duty of operating them and, for all the purposes of the statute, it has admitted by its attorney before the commission and by its answer that it is such operating road.

III.

The leases made by the Paterson and Hudson River Railroad and The Paterson and Ramapo Railroad vested a base fee in the assignors of the prosecutor. They divested the lessors of the estate necessary to enable either of them to file a petition under section 5 of the "Grade Crossing" act as railroads "whose tracks cross or are crossed at grade."

The relevant portion of section 5 of the Grade Crossing Act is as follows:

> "The board or body having charge of the finances of any municipality wherein any such crossing exists, may present to the Board of Public Utility Commissioners a petition in writing setting forth the facts upon which relief under this act is sought, or upon the petition of any *railroad company whose tracks cross or are crossed at grade,* or said Board of Public Utility Commissioners may, of its own motion, proceed with respect to any such crossing."

It is premised that by the words "railroad whose tracks cross or are crossed at grade" the legislature intends a railroad actually possessing railroad tracks, or a railroad having a reversionary right of possession. It is manifest that the lessors are not in the actual possession of the tracks in question. It is demonstrable that lessors have no legal reversion. It is demonstrable, also, that they are not "owners" of tracks in any sense in which that word may be properly used.

"An estate to one and his heirs, so long as a tree stands, would be one of those where there is a reversion, because the law contemplates as certain the destruction of the tree at some future time, and, therefore, that there will certainly be an estate in some one other than the tenant and those holding under him, after the happening of that event.

"On the other hand, if it be to A and his heirs till B comes back from Rome, the right to have it when he comes back is not a reversion but a mere possibility; he may and may not come back, and if he were to die before he came back the estate would become absolute in the grantee."

1 Washburn, page 90.

The respective charters of both the above mentioned lessors contain no limitation of time upon their respective corporate existences.

Vide, charter of the Paterson and Hudson River Railroad, Vol. II, 958.

Charter of the Paterson and Ramapo Railroad, Vol. II, 1025.

Both charters were granted prior to the act of 1846 making charters of corporations repealable at the will of the legislature:

The Paterson & Hudson River Railroad charter contained no reservation of legislative power over it. That of the Ramapo railroad reserved the right to "alter, amend or modify," but not to repeal.

Both charters are therefore irrepealable. At

any rate they *may* endure forever, which is sufficient for the purposes of the present argument.

Story v. Jersey City &c. Road Co. 16 *N. J. E.* 13.

State v. Berry—17 *N. J. L.* 80.

1 Washburn supra.

The granting clause in the lease made by the Paterson and Hudson River Railroad Company (Vol. II, 987) is as follows:

> "Have granted, bargained and sold, demised and to farm letton, and by these presents do grant, bargain and sell, demise and to farm let unto the said parties of the second part their successors and assigns."

The granting clause in the lease made by the Paterson and Ramapo Railroad Company is in substantially the same language (Vol. II, 1025).

The *habendum* in the lease of the Paterson and Hudson River Railroad Company is as follows:

> "To have and to hold the said above mentioned and described premises with the appurtenances unto the parties of the second part, their successors and assigns, from and including the fifteenth day of September, one thousand eight hundred and fifty-two for and during the existence and continuance of the charter of the parties of the first part, and the legal existence of the said the President and Directors of the Paterson and Hudson River Railroad Company by virtue and in pursuance of the act of incorporation of the legislature of the State of New Jersey, passed Jan. 21,

1831, and all other acts of said legislature relating thereto."

The *habendum* in the lease of the Paterson and Ramapo Railroad Company is as follows:

"To have and to hold the said above mentioned and described premises with the appurtenances, unto the parties of the second part, their successors and assigns, from and including the fifteenth day of September, one thousand eight hundred and fifty-two for and during the existence and continuance of the charter of the parties of the first part and the legal existence of the said The Paterson and Ramapo Railroad Company by virtue and in pursuance of the act of incorporation of said company."

In view of the charters and the language of the leases the effect of the latter was to vest a qualified or base fee in the assignors of the prosecutor.

The grant to the prosecutor's assignor "their successors and assigns" gave a fee simple; the *habendum* being during the existence and continuance of the charter operated to reduce the fee simple to a base or qualified fee.

Pipe Line v. D. L. & W. R. R. Co. 62 *N. J. L.* 254.

State v. Brown, 27 *N. J. L.* 13, 20.

It is true both leases reserve what is called a rent; but there is no reservation of a right to reenter for non-payment.

Jonas Glass Co. v. Ross, 69 *N. J. L.* 157.

"Lands and tenements may be granted in fee by a deed in which rent is reserved or covenanted to be paid."

1 *Taylor's Landlord & Tenant, Sec.* 50.

Though the fee is a qualified one, "yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple." So long as the qualified fee remains the grantor and his heirs have no right of entry upon the land.

Pipe Line Co. v. D. L. & W. R. R., supra.
State v. Brown, supra.
1 *Cruise Dig.* 65.
Ployd, 557.
4 *Kent Com.* 11.
Seymours Case, 10 *Co.* 97.
Preston on Estates, 404.

Hence, it is respectfully submitted, not only are the lessors not the operating roads, but, also, they are not railroads "whose tracks cross or are crossed at grade," and are not railroads which could file a petition under section 5 of the grade crossing act.

IV.
The true test of liability is possession.

We assume that if the "Grade Crossing" act is to be sustained as a valid act of legislation, authority for its passage must be found in the right of the legislature to exercise the police power of the state.

It is not an act which affects the charter or franchises of either the lessor or lessee.

> "It is evident that the legislature may thus require additional precautions of rail-

way companies, involving expense to them, to prevent injuries to persons and property within and without their cars, while exercising their franchises under their charter. Such requirements are in the nature of police regulations, and do not conflict with the constitution, because they take away no vested rights, nor do they interfere with or impair the powers conferred on the company by the act of incorporation. The essential franchises of the corporation are not disturbed."

Del. Lack. & W. R. v. East Orange 41 *N. J. L.* 127, 132.

It acts upon the possessor. It is intended to regulate the operation of the road by the company in possession. If the statute had required the changes to be made by the "owner" instead of by the "company operating such railroad" the result would have been the same. The following are analogous cases.

Baltimore & Ohio Railroad Co., v. Walker, 45 *Ohio St.* 577.

Held, a railroad company which has the possession and control of a railroad in Ohio, and is managing and operating the same, as the lessee thereof, is one "owning the tracks" of such railroad within the meaning of section 3333 of the Revised Statutes, which provides that: 'When the tracks of two railroads cross each other, or in any way connect, on a common grade, the crossing shall be made and kept in repair, and watchmen

maintained thereat, at the joint expense of the companies owning the tracks."

> Williams, J. : "The necessity for keeping the crossings in repair and maintaining watchmen thereat, grows out of the use and operation of the railroads whose tracks cross each other at a common grade, and lessee companies having the possession and control of the roads and operating them as such, receive all the advantages and securities resulting from safe crossings, and the services of the watchman, as fully in all respects as companies that are the absolute owners thereof, could if they were operating them, and it would appear but reasonable, that while operating the roads they should receive the benefits subject to the burden of their expenses as provided by the statute and we are of the opinion that such lessees are companies 'owning the tracks' of the road operated by them, in the sense in which that phrase is used in the statute."

Buffalo Stone & Cement Co. v. Delaware, Lackawanna & Western R. R. Co., 130 *N. Y.* 152.

Held, that where a railway company organized under the laws of the state leases its property to a foreign company, and by a covenant in that lease, the latter agrees to perform all things in connection with the road which the lessor might be required by law to perform, the lessee must maintain farm crossings, as required by Laws 1850, c. 140 Sec. 44.

Follett, C. J.: "In Jones v. Seligman, 81

N. Y. 190 a railroad corporation mortgaged its property to trustees to secure the payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage the trustee entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to build fences and farm crossings, which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties except those mentioned in the statutes. It was held that the trustees being in possession with power to make reparation and additions, they had the right, and it was their duty, to construct fences and necessary farm crossings; that being in possession of the property and engaged in operating it, they must carry out the provisions of the statutes as the representative of the corporation. In this case the defendant, by a covenant in the lease above quoted, expressly agreed to perform all things in connection with the road which the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of Jones v. Seligman.

"The position that the defendant is not liable because it is not a corporation of this state, or organized under Chapter 140, Laws 1850, is not tenable. It having the right to operate its leased lines under the statutes of this State, it must be held to have assumed to discharge the same duties

to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes."

Schott v. Harvey, 105 *Pa. St.* 222.

Held, that the provision of P. L. 1879 p. 128, that certain factories, &c. shall be provided with fire escapes by the 'owners' or other persons therein designated, does not apply to an owner in fee, not in possession, who has leased the premises to a tenant who occupies the same as such factory and that such tenant in possession, using the premises as such a factory, is the 'owner' of the factory within the meaning of said act.

Mr. Justice Paxson: (227) "But the question which more immediately concerns us is, who is the 'owner' of a factory within the meaning of the Act? The plaintiff contends that the owner is the person who holds the fee in the land on which the factory building stands. The word 'factory' is a contraction of manufactory, which Webster defines to be a building, or collection of buildings, appropriated to the manufacture of goods. But a manufactory is something more than a building. It includes not only the building but the machinery necessary to produce the particular goods manufactured, and the engines or other power requisite to propel such machinery. A building with only bare walls and a roof could no more be a manufactory than it would be a hotel. Such a building would be a mere shell and would not impose the duty of erecting fire escapes. It is only when it is completed by the addi-

tion of machinery and operatives are introduced to assist in the manufacture that the duty of erecting fire escapes attaches. To whom does that duty attach? Clearly to the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of their services. If he is the lessee of the building, then he is a tenant in possession. For all practical purposes he is the owner until the end of his term, which may be in one year or in one hundred years. There is a large amount of property held in reversion in the city of Philadelphia. Some of the leases are for several hundred years. However long the term the lessee is but a tenant for years; the fee is in him that hath the reversion. Yet the broad principle contended for would make the reversioner, who has practically parted with all control of the property, responsible for the neglect of the tenant in possession to put up fire escapes. And this would be so even if the property leased had been a vacant lot, and the factory buildings had been erected, and the machinery placed therein by the tenant subsequent to the lease. We cannot impute to the legislature an intention of doing a thing so palpably unjust and absurd as this. When, therefore, they used the word 'owner' in this connection, it is plain the owner at the time of the injury was contemplated without regard to the quantity or duration of his estate. * * * This view meets all of the requirements of the Act. It places the

responsibility where it properly belongs, upon the person in possession and occupancy of the property as owner for the time being and the nature of whose business renders the erection of fire escapes necessary to protect the lives of his employees."

Lee v. Smith, 42 *Oh. St.* 458, 51 *Am. Rep.* 839.

Held, that section 2573 of Revised Statutes, as amended April 19, 1883 (80 O L. 188), does not impose upon any owner in fee of a building more than two stories high, the duty to provide a convenient exit from the different upper stories of said buildings when such owner is not in possession or control thereof, although his tenant in possession and control of the building may use the same as a factory or workshop.

McIllvaine, J.: "We have considered a single proposition in this case, to wit: the true meaning of the phrase 'any owner of any factory or workshop.' * * * *

"That a factory or workshop is not synonymous with building must be admitted. * * * *

"The owner of a building and the owner of a factory which is conducted in the building, may be different persons, and when this is so, the owner of the factory and not the owner in the remainder or reversion of the building is the person on whom the statute imposes the duty. * * * * If the building were constructed and used for a factory by the owner who afterwards transfers the building in fee and the business to another, the duty of providing fire

escapes thereafter devolves upon the purchaser who continues the business, and the grantor is relieved therefrom. This proposition will not be questioned. We think the same result would follow the transfer of a life estate or an estate for years. *The true test of liability is the possession and right to control the factory by one who is owner of the business or agent for such owner, although owner of the building for the time being only.*"

"Where the lease is authorized a very different question is presented from that which arises in cases where the lease is unauthorized. If it is the imperative duty of the lessor company to operate the road and it has no discretionary power in the matter and that duty was transferred to the lessee by the lease, it would seem clear that the lessee could be compelled by mandamus to perform the duty. This conclusion is supported by decisions in analogous cases. It is settled that a railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and we can see no reason why this principle should not apply to a company in full possession of a road under an authorized lease. In authorizing the lease the legislature empowered the transfer of the duty of operating the road to the lessee, and, with the duty, authorized the transfer of important rights and privileges, so that the duty of the lessee accepting the lease with its benefits becomes imperative. The lessor having rightfully transferred possession to the les-

see company cannot operate the road and hence the duty necessarily devolves on the lessee.

1 Elliott on Railroads, sec. 458 and cases cited.

Respectfully submitted,

WM. I. LEWIS,

Of Counsel with the Paterson and Hudson River Railroad Co. and The Paterson and Ramapo Railroad Co.

New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY, *Prosecutor-Appellant,* vs. THE BOARD OF PUBLIC UTILITY COMMISSIONS OF THE STATE OF NEW JERSEY, ET ALS., *Defendants-Respondents.*	*On Appeal from Supreme Court On Certiorari.*

Brief in favor of The President and Board of Directors of the Paterson and Hudson River Railroad Co., and the Paterson and Ramapo Railroad Company, defendants.

The *certiorari* was allowed to review an order of the Board of Public Utility Commissioners made under the power supposed to be given by Chapter 57 of the laws of 1913, ordering the prosecutor to alter certain grade crossings of the railroad operated by it through the City of Paterson.

These respondents are brought into the controversy because they were the companies originally chartered by the legislature of New Jersey to build and operate the railroads through Paterson which are now operated by the Erie Railroad Company, and, therefore, as the prosecutor contends, are the companies upon which the burden of making the prescribed changes in grade should fall; wholly or in conjunction with the prosecutor.

The contention of the prosecutor is that the Board of Public Utility Commissioners has power to order only the company *operating* a railroad to alter its grade crossings; that *these respond-*

ents operate the railroad whose grade crossings are now ordered to be altered by such Commission; therefore, the Commission should have ordered these respondents to alter such sub-grade crossings. The minor premise is false and renders the conclusion invalid. As will appear from the matters hereinafter referred to, these defendants do not operate their respective railroads, either in fact or theory. *They do not directly or indirectly institute, direct or control any of the operations of or upon their respective roads, nor is the duty of operating such roads charged upon them by law.*

The prosecutor makes no claim that these defendants operate their respective railroads in fact, but insists that the legal duty of so operating them, in so far as the State is concerned, is charged upon them by law, and that when Chapter 57 of the laws of 1913 empowers the Public Utility Commission to order the company "operating such railroad" to alter grade crossings, the company intended by that statute is not the company which *actually operates* the railroad, but is the *company which in law is charged with the duty of operating.* This proposition substantially constitutes Point XIII of the prosecutor's brief, p. 307, and is the principal subject matter of this brief for these defendants.

Upon this point the pertinent provisions of Chapter 57, Laws of 1913 are contained in Section 1 of that statute and are as follows:

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

I.

These Defendants do not actually operate the railroad in question in this proceeding.

This point may be very shortly disposed of. There is absolutely no evidence in the voluminous record in this proceeding which shows or tends to show operation in fact of the railroad by these defendants. Nor, is it pretended in any reason filed, or in the briefs, that defendants are the operators of such railroad.

On the other hand, it not only appears from the evidence, but it is admitted by the Erie Railroad Company that it operates the railroad. Paragraph 3 of the amended petitions of the Board of Finance of the City of Paterson is as follows:

> "3. The Erie Railroad Company operates a railroad running through the City of Paterson, in the County of Passaic and State of New Jersey, entering the said city from the south at the border line of the Township of Acquackanonk, and thence running in a northwesterly direction to about Taylor street, where it assumes a northerly direction, running to about Godwin street, in the said city, where it assumes a northeasterly direction, finally crossing the city line into the Borough of Hawthorne at the Passaic River."

(Case Vol. IV. p 1635, l. 24).

On October 17, 1913, the first hearing upon the petition was had before the Public Utility Commission. The printed Case, Volume I, p. 1, shows the following:

> "For the Erie Railroad Company appears H. A. Taylor, Esq.
>
> "*Mr. Taylor.* I would like to file an answer but not at this time. Messrs. Collins and Corbin represent us in this proceeding but unfortunately Mr. Hobart is engaged in Court. I have come here not prepared to file an answer but will do so at a future date. I would like permission to do that.
>
> "*Commissioner Donges.* That permission will be granted.
>
> "*Mr. Merrey.* You will file an answer for the Paterson & Hudson River Railroad Company and the Paterson and Ramapo Railroad Company?
>
> "*Mr. Taylor.* We do not represent those companies. * * * * *
>
> "*Mr. Merrey.* I presume the practice would have been to have the railroad company answer. They would answer and admit some of the facts and it would seem unnecessary to prove them. * * * * *
>
> "*Commissioner Donges.* Perhaps Mr. Taylor will stipulate some of the allegations in the petition. * * * * *
>
> "*Mr. Merrey.* * * * Paragraph 3; will you admit the facts set forth there, the Erie Railroad Company operates a railroad running through the City of Paterson, and so on? That seems so plain.
>
> "*Mr. Taylor.* Yes, I believe that is the fact.

"*Commissioner Donges.* Paragraph 3 is admitted."

Subsequently the Erie Railroad filed its answer. (Case, Vol. IV, 1664).

The pertinent part thereof is as follows:

"The respondent, Erie Railroad Company, answers the petition herein as follows: * * *

"3. Respondent admits paragraph 3."

Paragraph 5 of the petition of the Finance Board is as follows: (Vol. IV, 1635).

"Your petitioner further shows that it is informed that the said Erie Railroad Company operates said railroad by virtue of a lease from two separate railroad companies."

The answer aforesaid admits this allegation (Vol. IV. 1664) and at the first hearing the folloing colloquy occurred. (Vol. I. p. 4):

"*Mr. Merrey.* The fifth, you don't know about that.

"*Mr. Taylor.* That fifth is correct, except the lease runs to the Union Railroad Company in the first place and by various conveyances vests finally in the Erie Railroad.

"*Commissioner Donges.* So the Erie Railroad is operating these.

"*Mr. Taylor.* The Erie Railroad is operating them."

Those admissions, it is submitted are conclusive upon the prosecutor in respect to the fact that it is the company operating the railroad. It is true

that prosecutor contends that the word "operating" as used in the statute is not to be taken in its ordinary and literal acceptation which, according to the Standard Dictionary is:

> "1. To put in action and supervise the working of; as, to operate a machine. 2. To conduct or manage the affairs of; superintend; as to operate a mining business or a railroad. 3. To effect by some course of action or procedure; accomplish."

but is to be interpreted as meaning the company which in law is charged with the duty of operating. Though not discussing the question of interpretation at present, it is insisted that the admission of the prosecutor should be taken as an admission that it is actually operating the road, or as an admission that it is the company charged with the duty of operation or as an admission that it is operating the road in fact and is the company charged with the duty of operating it.

II.

Assuming that Chapter 57, Laws of 1913, is to be construed as authorizing the Public Utility Commissioners to order the company which in law is charged with the duty of operating the railroad to alter its grade crossings, nevertheless, these defendants, Paterson and Hudson River Railroad Company and Paterson and Ramapo Railroad Company, are not subject to such order, because they are not the companies which in law are charged with the duty of operating.

The position of the prosecutor in regard to the point now being considered is stated at page 316 of its brief, as follows:

> "There is nothing in the original charters of the Paterson and Hudson River Railroad Co. or the Paterson & Ramapo Railroad Co., or in any of the supplements thereto, which relieves those companies from the duty of operating. The State was not a party to the agreement between the companies. So far as the State is concerned the *duty* to operate still rests upon the two original companies. Under these statutes, and the several leases, the Erie Railroad Co. does not operate the railroad of the two original companies except in the sense that it runs trains over tracks owned by those railroads as their agent or lessee."

It is now proposed to show that the above stated proposition is erroneous because the leases referred to and subsequent acts of the legislature have relieved these defendants of the duty of operating their several railroads. Though the wording of the lease made by the Paterson & Hudson River

Railroad differs in some respects from the lease of the Paterson and Ramapo Railroad Company both may be conveniently considered together. The subsequent acts of the legislature touching the question affect both of the lessors. In quoting from the leases and statutes the italics used are ours.

(a.)

The leases of the Paterson and Hudson River Railroad Co. and The Paterson and Ramapo Railroad Co. and the title of the Erie Railroad Co. thereunder, and the duties thereby imposed.

The Paterson and Hudson River Railroad leased to the Union Railroad Company by lease dated Sept. 9th, 1852. (Ex. R. 15, Vol. II 986).

The Paterson and Ramapo Railroad Co. leased to the said Union Railroad Co. by lease dated Sept. 9th, 1852. (Ex. R. 15, Vol. II 1025).

The Union Railroad Co. assigned both of said leases to the N. Y. and Erie Railroad Co. by assignment dated Sept. 10, 1852 (Ex. R. 15, Vol. II, 1031).

The N. Y. and Erie Railroad Co. mortgaged its property, rights and franchises on June 1, 1858. This mortgage was foreclosed and under the foreclosure proceedings the mortgaged premises became vested in Messrs. Gregory and Davis as trustees. The foreclosure and sale were had under the provisions of Chapter 229 of the Laws of 1860 of the State of New Jersey, and of Chapter 160 of the Laws of 1860 and Chapter 119 of the laws of 1861 of the State of New York. Under the latter act the Erie Railway Company was incorporated. (Vol. II, 952).

Gregory and Davis conveyed the mortgaged premises to Erie Railway Co. by deed dated Dec. 28, 1861. (ibid),

Erie Railway Co. mortgaged all its property, rights and franchises on Feb. 4th, 1874. Under the foreclosure of said mortgage the mortgaged premises became vested in Edwin D. Morgan and others, trustees. (Vol. II, 953).

The Erie Railway Co. was reorganized under the New York act of 1874 and its amendments. On April 27, 1878, Morgan and others conveyed to the new corporation, known as the New York, Lake Erie and Western Railroad Co. (Vol. II, 954).

The N. Y. L. E. & Western R. R. Co. mortgaged all its property, rights and franchises on Oct. 5, 1878. Under the foreclosure of this mortgage the mortgaged premises next vested in Coster and others as trustees. On Nov. 14, 1895, said Coster and others, trustees, conveyed the mortgaged premises to the prosecutor the Erie Railroad Company. This conveyance was confirmed by all parties in interest. (Vol. II, 954-957).

> "Said Erie Railroad Company has since that time continued to *possess and to operate the same as a common carrier of passengers and freight for hire;* that the property so obtained, and additional property soon thereafter obtained, constitutes the line of railroad extending from the City of New York through the States of New Jersey, Ohio, Indiana and Illinois."

The quoted statement is from Exhibit R-15, offered and admitted in evidence by the prosecutor (offered Vol. I, 245; printed Vol. II, 950 at p. 957).

The prosecutor complied with the conditions and requirements of Chapter 11 of the Laws of New Jersey of 1898, (Ex. R-15, Vol. II, at p. 957). It thereby, under Sec. 2 of the act became entitled to

> "hold, possess and *operate* the part of the mortgaged premises with their appurtenances, in this state, and the other property and rights covered by said mortgage, and shall have and possess all the rights, powers, privileges and franchises (subject to the duties and obligations attached thereto) theretofore possessed in this state by the company executing the mortgage," etc.

What the rights, powers and franchises which so became vested in the prosecutor, and what were the *duties and obligations* attached to them appears from the original leases and from the subsequent acts of the legislature which affected them and the various lessees of the railroad.

The grant made by the Paterson and Hudson River Railroad Co. to the Union Railroad Company, by the lease of Sept. 9th, 1852 (Vol. II, p. 986) was as follows:

> "Witnesseth, that the parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said parties of the second part, their successors and assigns, to be paid, kept and performed have granted bargained and sold, demised and to farm letton and by these presents do grant, bargain and sell, demise and to farm let unto the said parties of the second part, their

successors and assigns *all and singular the railroad* of the parties of the first part, as it is now constructed and exists, and *all the land and real property forming, or connected with, or appurtenant thereto,* from and including its terminus and station at and in the city of Paterson, in the county of Passaic and State of New Jersey, to and including its terminus and station at and on Bergen Hill, in the county of Hudson, in the State of New Jersey, at the junction of said railroad with the railroad of the New Jersey Railroad and Transportation Company, and the rails, *bridges,* culverts, viaducts, turnouts, switches, fixtures and superstructures of every kind threon or connected therewith; and also all their buildings, erections, depots, stations, station houses, offices, shops and superstructures on or adjacent to or connected with, or appurtenant to the said road as above described; and all the estate, right, title and interest, property, profession and demand of the parties of the first part, of, in and to the premises and every and any of them, and every part and parcel thereof; and also all the *rights, privileges, franchises, titles, power, property, claims and pretensions* of the parties of the first part, *to transport persons, mails and property of every description on said railroad* and to charge, demand, collect, sue for and receive in the name of the parties of the first part or otherwise, but for the exclusive benefit of the parties of the second part, money for tolls and for the transportation of persons, mails and merchan-

dise, in as full and ample a manner as the parties of the first part were authorized to do by the State of New Jersey.

And also all and singular the cars and engines mentioned and described in the schedule hereto annexed and marked C. x xxxx and also the machinery and tools of every description of the said party of the first part used in the shop or works of the company, or in making or repairing said road, and also the hand carts and tools connected therewith used in the repairing of the track, and other articles of personal property appurtenant to said railroad."

The grant made by the Paterson and Ramapo Railroad Company to the Union Railroad Co., by lease of September 9th, 1852 (Vol. II, p. 1025) was as follows:

"Witnesseth, that the parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the said parties of the second part, their successors and assigns, to be paid, kept and performed, have granted, bargained and sold, demised and farm letton and by these presents do grant, bargain and sell, demise and to farm let, unto the parties of the second part, their successors and assigns, *all and singular the railroad of the parties of the first part,* as it is now constructed and exists, and *all the land and real property,* forming or connected with, or appurtenant thereto, and all the rails, tracks, *bridges,* culverts, viaducts,

turnouts, switches, fixtures and superstructures of every kind connected therewith, and also all their buildings, erections, depots, stations, station-houses, offices, factories, shops and edifices on, or adjacent to, or connected with, or appurtenant to the said road, as above described; and all the estate, right, title, interest, possession and demand of the parties of the first part, of, in and to the premises and every and any of them, and every part and parcel thereof; and also, all the *rights, privileges, franchises, titles, powers, property, claims and pretensions*, of the parties of the first part to transport persons, mails and property of every description on said railroad, and to charge, demand, collect, sue for and receive (in the name of the parties of the first part, or otherwise, but for the exclusive benefit of the parties of the second part) money for tolls and for the transportation of persons, mails and merchandise, in as full and ample a manner as the parties of the first part were authorized to do by the laws of the State of New Jersey."

In both leases the following covenant is made by the Union Railroad Co.

"And the parties of the second part do hereby covenant and agree with the parties of the first part that the said parties of the second part and their assigns will keep and maintain and run said railroad and other premises hereby demised, in such manner, order and condition as the said parties of the first part are bound to keep and main-

> tain and run the same by the charter of the said parties of the first part and the statutes supplementary thereto, and that they will indemnify and save harmless the said parties of the first part from all damages to which they may be subject by reason of said road and premises not being so kept, maintained and run."
>
> (Vol. II, 992, 1030).

The foregoing leases, as between the parties, unquestionably divested the two lessor companies of every part of their respective railroads and of every vestige of right to operate the same. If they attempted to operate the roads they would have been trespassers. The covenant above quoted, as between the parties, made it the duty of the Union Railroad Co. to operate—to "keep and maintain and run" the railroads.

(b.)

It is not contended that these leases, in themselves, relieved the lessors of any duty they owed the state. .But in conjunction with subsequent legislation they afforded such relief in respect to the matters now in controversy,

On September 10, 1852, the day after the execution of the leases to the Union Railroad Company that company assigned them to the New York and Erie Railroad Company. In the following March the Legislature of New Jersey passed the following act: (Vol. II., p. 977).

> "An act to enable parties having claims against the New York and Erie Railroad

Company and others, using the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad, to prosecute for such claims or damages in the courts of this State, and to legalize the leases or contracts made by the Paterson and Ramapo Railroad Company and the Paterson and Hudson River Railroad Company to the Union Railroad Company.

Whereas, the New York and Erie Railroad Company are now in possession of the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad under certain leases and contracts made by said companies, and are now carrying on the business of said roads under said leases and contracts; and whereas, the New York and Erie Railroad Company being a foreign corporation, and any other corporation or individuals using said roads, or either of them, and transacting the business of the same, ought to be liable to actions for damages done in operating said roads as fully as the said companies are by their charters now liable, and to effect that purpose all doubts as to the authority of said companies to make such leases and contracts ought to be removed; and whereas, all persons having claims for debt or damages of any and every kind ought to be enabled to prosecute said foreign corporation in the courts of this State; therefore:

I. Be it enacted, By the Senate and General Assembly of the State of New Jersey, that the New York and Erie Railroad Com-

pany, and any other corporation or individuals using the aforesaid roads or either of them, shall be, and they are hereby declared liable for all claims for debts, damages, omissions and delinquencies arising from the running or operating said railroads, and carrying freight and passengers on the same, as fully as the said the Paterson and Hudson River Railroad Company, and the Paterson and Ramapo Railroad Company, are now liable by the laws of the State.

II. And be it enacted, That whenever any action shall be commenced against the said The New York and Erie Railroad or any other foreign corporation using said roads, in any of the courts of this State, the first process to be made use of may be a summons or subpeona, a copy whereof shall be served on the president, or one or more of the directors, or the superintendent, or on any station agent of said corporation, six entire days before its return.

III. And be it enacted, That when the sheriff or other officer shall return such summons or subpoena "served" or "summoned" the defendants shall be considered as appearing in court, and may be proceeded against accordingly.

IV. And be it enacted, That the power and authority of the said Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, to make such leases and contracts is hereby declared and affirmed, and said leases and contracts are hereby declared legal and valid; provided, that said leases and con-

tracts shall not be held to grant any power, privilege or right, not granted to said companies respectively by their charters, and the supplements thereto.

V. And be it enacted, That the Legislature may at any time alter, amend or repeal this act.

Approved March 14, 1853.

The prosecutor, in its brief (p. 314) says:

> "There is nothing in the statute which either expressly or impliedly relieves the original companies of their duty to the public imposed upon each of them by their respective charters."

It is to be observed that at present the only duty we are concerned about is the "*duty of operating.*" We submit, even if there were nothing more, that the act in question relieved both companies of the duty of operating.

We assume it to be beyond question that the legislature may relieve a railroad from the duty of operating a railroad in so far as that duty concerns the public.

> "That a state may, without impairing any contract contained in the charter of a corporation, discharge the latter from the performance of duties which it owes to the State, or release it from disabilities imposed for the public good, is a proposition so obviously correct as to require no support of authorities."
>
> 2 *Morawetz on Corporations, p.* 1084, and see p. 400.

It is plain that the leases transferred all right of the companies to operate. If the transfer was good, it became impossible for them to operate. The ratification by the legislature of these leases placed the State's seal of approval upon the divestiture. It was the consent of the State to what the lessors had done. If the act did not amount to that, it meant nothing. It declared that the lessors had "power and authority" to make the very leases and contracts and that said "leases and contracts" were legal and valid. It was as though the legislature had recited the leases in the act itself and had in the very words of the demises granted to the lessors the power to make them. As was said by Mr. Justice Collins in delivering the opinion of the Court of Errors and Appeals in *Allison v. Corker*, 67 *N. J. L.*, 596, 600.

> "It is entirely within the legislative power to give effect to documents without their full recital. Statutes validating agreements of lease merger or consolidation of railroad corporations are usually cast in that form.—e. g. Pamph. L. 1871, pp. 946, 1093; Id. 1872, p. 567.

The cases relied upon by the prosecutor are

Ryerson v. Morris Canal Co. 71, *N. J. L.* 381.

Hayes v. Northern Pacific R. R. Co. 74 *Fed.* 279.

Morris Canal Co. v. State Board, 76 *N. J. L.* 627.

Rochester R. R. Co. v. City of Rochester, 205 *U. S.* 236.

The cases are not in point. They all involved the construction of powers. In each case the statute relied upon as giving validity to the leases under consideration in them, was a statute authorizing the execution of a lease, not a statute of ratification and confirmation.

> "The shareholders of a railroad company may by their ratification or acquiescence cure the invalidity of a perpetual lease of their railroad, so far as this results from the absence of authority in the majority or in the directors to bind them by such lease; and if the State should also give its consent to the lease, all question of its validity would be removed."
>
> *Morawetz on Corporations p.* 620, *and see* pp. 651, 941.

In *Ryerson v. Morris Canal, supra,* it is plainly to be inferred from the language of the opinion that when a power is given to lease, a lease, when made, imposes upon the lessee the duty to operate without any express words to that effect. There were no words in the act of 1871, p. 444, which expressly imposed upon the Lehigh Valley R. R. Co., the lessee, the duty of operating the canal. Yet the court in the case cited says:

> "The maintenance of bridges at parts of the highway is a different duty from operating a canal for the purpose of transporting persons and goods, and when the legislature authorizes a transfer by lease of the works and franchise, necessary for the latter, it hereby necessarily imposes upon

> the lessee the obligations arising from the use of the works."

We take it that the "obligation arising from the use" of the canal was to operate it, and that the "obligation arising from the use" of the railroads was to operate them.

The prosecutor further quotes from the opinion mentioned the language following that above set forth:

> "but does not inferentially transfer, by the act of leasing, the duty of maintaining the bridges which form part of the highways crossed."

It is difficult to see the pertinency of the last quotation. If it is supposed that it has any relation to the fact stated in the brief that "Each of the two charters of these companies above referred to requires the company to construct and keep in good repair good and sufficient bridges or passages over and under the said railroad where any public or other road shall cross the same," such supposition is without foundation.

The supposition is groundless because;

First, in *Ryerson v. Morris Canal*, the court was dealing with a transfer of obligation by inference or implication, not express. In the leases by these defendants there was an express assumption by the prosecutor's assigns, by means of the convenant hereinbefore quoted, of all the obligations of the lessors, including the obligation "to construct and keep in repair" bridges or passages. They covenanted

> "to keep and maintain and run said railroad and other premises hereby demised in such manner, order and condition as the

> said parties of the first part are bound to keep, and maintain and run the same by the charter of the said parties of the first part and the statutes supplementary thereto."

Second: Because the duty to change the grade of the railroads, springs not from the charter of these railroads, but from the order of the Public Utility Commission as authorized by Chapter 57, Laws of 1913 of the State of New Jersey. Under the charters of the company there is no duty to change the grade. Chapter 57, Laws of 1913, does not authorize the commission to direct a change of grade to be made by the company whose charter originally required it to construct and keep in repair the bridges and passages over and under the railroad. Such duty is cast upon the company operating the railroad under the police power of the state.

FURTHER LEGISLATION.

In 1856 the legislature of New Jersey passed an act of which the following is the title and a portion of the preamble:

> "An act to authorize the New York and Erie Railroad Company to purchase and hold lands, and to complete and finish the railroad of the Paterson and Hudson River Railroad Company.
>
> Whereas, The New York and Erie Railroad Company, by virtue of certain leases and agreements, made by the Paterson and Hudson River Railroad Company and the Paterson & Ramapo Railroad Company to the Union Railroad Company, bear-

> ing date the ninth day of September, eighteen hundred and fifty-two, and assigned to the New York and Erie Railroad Company, have the right to use the railroads of said two first mentioned companies, during their respective charters, and have the right to extend said Paterson and Hudson River Railroad and to make a railroad from any point in the same to the Hudson River, at some point opposite the city of New York, *which leases and agreements were approved and confirmed by an act of the Legislature of this State, approved March fourteenth, eighteen hundred and fifty-three.*
> (Vol. II, 979).

In 1860 the legislature of New Jersey, by Chapter 229 of the laws of that year authorized a foreclosure and sale under the mortgage made by the New York and Erie Railroad Company, by which the title of that company passed to the Erie Railway Company.

In 1862 the legislature of New Jersey passed an act (P. 2, 1862, C. 102) entitled "an act to confirm the sale under foreclosure of the property rights and franchises of the New York and Erie Railroad Company, and to complete the organization of the Erie Railway Company." The third section thereof is as follows:

> "3. *And it be enacted,* that the Erie Railway Company, and any other corporation of individuals using the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad, under leases and contracts heretofore made, and hereby con-

firmed, and using the road and tunnel connecting the Paterson and Hudson River Railroad with Pavonia Ferry at Jersey City, shall be and are hereby declared liable for all claims for debts, damages, omissions and delinquencies that hereafter shall arise from the running and operating said railroads and carrying freight and passengers on the same, as fully as the said Paterson and Hudson River Railway Company and the Paterson and Ramapo Railway Company, or any other company, are now liable by the laws of this state."

No question as to the constitutionality of Ch. 57 of the Laws of 1913 *arises in view of the fact that the law has charged the duty of operating the railroad upon the prosecutor; but assuming that defendants are not relieved from the duty of operating so far as the public are concerned, yet the statute and order would not be unconstitutional.*

The prosecutor contends that such statute and order would be unconstitutional in regard to it because requiring "such lessee company at its expense to perform the public duties imposed upon the lessor company, and in effect amends the charter of the lessor, as well as impairs the contract made between the lessor and lessee." This proposition overlooks the covenant hereinbefore set forth which is a part of the consideration of the lease, and which has been ratified and approved by the act of 1853. *Allison v. Corker, supra.*

By it the prosecutor is bound to keep, maintain and run the railroad as the lessors are bound to by the charter and the statutes supplementary thereto.

It is deemed unnecessary to argue that any view of the statute which would result in placing the burdens of making the changes ordered by the commission upon these defendants would make it unconstitutional because it would result in the confiscation of the lessor's property. The principles of law involved in such a question are elaborately dwelt upon in the prosecutor's brief. So far as the facts are concerned, they are very simple. The estimated cost of the work is $2,948,-218.68.

The annual value of the lease of the Paterson & Hudson River Railroad is $45,600, which capitalized at five per cent. would be $912,000.

The annual value of the lease of the Paterson & Ramapo Railroad is $26,500, which capitalized at 5 per cent. would be $530,000.

The rental and the possible reversion constitutes the whole interest of these defendants in the railroads.

It is respectfully submitted that in whatever sense the word "operating" as used in the statute may be taken, the prosecutor comes within its meaning. It operates the railroads in fact, it is charged by law with the duty of operating them and, for all the purposes of the statute, it has admitted by its attorney before the commission and by its answer that it is such operating road.

III.

The leases made by the Paterson and Hudson River Railroad and The Paterson and Ramapo Railroad vested a base fee in the assignors of the prosecutor. They divested the lessors of the estate necessary to enable either of them to file a petition under section 5 of the "Grade Crossing" act as railroads "whose tracks cross or are crossed at grade."

The relevant portion of section 5 of the Grade Crossing Act is as follows:

> "The board or body having charge of the finances of any municipality wherein any such crossing exists, may present to the Board of Public Utility Commissioners a petition in writing setting forth the facts upon which relief under this act is sought, or upon the petition of any *railroad company whose tracks cross or are crossed at grade,* or said Board of Public Utility Commissioners may, of its own motion, proceed with respect to any such crossing."

It is premised that by the words "railroad whose tracks cross or are crossed at grade" the legislature intends a railroad actually possessing railroad tracks, or a railroad having a reversionary right of possession. It is manifest that the lessors are not in the actual possession of the tracks in question. It is demonstrable that lessors have no legal reversion. It is demonstrable, also, that they are not "owners" of tracks in any sense in which that word may be properly used.

"An estate to one and his heirs, so long as a tree stands, would be one of those where there is a reversion, because the law contemplates as certain the destruction of the tree at some future time, and, therefore, that there will certainly be an estate in some one other than the tenant and those holding under him, after the happening of that event.

"On the other hand, if it be to A and his heirs till B comes back from Rome, the right to have it when he comes back is not a reversion but a mere possibility; he may and may not come back, and if he were to die before he came back the estate would become absolute in the grantee."

1 Washburn, page 90.

The respective charters of both the above mentioned lessors contain no limitation of time upon their respective corporate existences.

Vide, charter of the Paterson and Hudson River Railroad, Vol. II, 958.

Charter of the Paterson and Ramapo Railroad, Vol. II, 1025.

Both charters were granted prior to the act of 1846 making charters of corporations repealable at the will of the legislature:

The Paterson & Hudson River Railroad charter contained no reservation of legislative power over it. That of the Ramapo railroad reserved the right to "alter, amend or modify," but not to repeal.

Both charters are therefore irrepealable. At

any rate they *may* endure forever, which is sufficient for the purposes of the present argument.

Story v. Jersey City &c. Road Co. 16 *N. J. E.* 13.

State v. Berry—17 *N. J. L.* 80.

1 Washburn supra.

The granting clause in the lease made by the Paterson and Hudson River Railroad Company (Vol. II, 987) is as follows:

> "Have granted, bargained and sold, demised and to farm letton, and by these presents do grant, bargain and sell, demise and to farm let unto the said parties of the second part their successors and assigns."

The granting clause in the lease made by the Paterson and Ramapo Railroad Company is in substantially the same language (Vol. II, 1025).

The *habendum* in the lease of the Paterson and Hudson River Railroad Company is as follows:

> "To have and to hold the said above mentioned and described premises with the appurtenances unto the parties of the second part, their successors and assigns, from and including the fifteenth day of September, one thousand eight hundred and fifty-two for and during the existence and continuance of the charter of the parties of the first part, and the legal existence of the said the President and Directors of the Paterson and Hudson River Railroad Company by virtue and in pursuance of the act of incorporation of the legislature of the State of New Jersey, passed Jan. 21,

1831, and all other acts of said legislature relating thereto."

The *habendum* in the lease of the Paterson and Ramapo Railroad Company is as follows:

"To have and to hold the said above mentioned and described premises with the appurtenances, unto the parties of the second part, their successors and assigns, from and including the fifteenth day of September, one thousand eight hundred and fifty-two for and during the existence and continuance of the charter of the parties of the first part and the legal existence of the said The Paterson and Ramapo Railroad Company by virtue and in pursuance of the act of incorporation of said company."

In view of the charters and the language of the leases the effect of the latter was to vest a qualified or base fee in the assignors of the prosecutor.

The grant to the prosecutor's assignor "their successors and assigns" gave a fee simple; the *habendum* being during the existence and continuance of the charter operated to reduce the fee simple to a base or qualified fee.

Pipe Line v. D. L. & W. R. R. Co. 62 *N. J. L.* 254.

State v. Brown, 27 *N. J. L.* 13, 20.

It is true both leases reserve what is called a rent; but there is no reservation of a right to reenter for non-payment.

Jonas Glass Co. v. Ross, 69 *N. J. L.* 157.

"Lands and tenements may be granted in fee by a deed in which rent is reserved or covenanted to be paid."

1 *Taylor's Landlord & Tenant, Sec.* 50.

Though the fee is a qualified one, "yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple." So long as the qualified fee remains the grantor and his heirs have no right of entry upon the land.

Pipe Line Co. v. D. L. & W. R. R., supra.
State v. Brown, supra.
1 *Cruise Dig.* 65.
Ployd, 557.
4 *Kent Com.* 11.
Seymours Case, 10 *Co.* 97.
Preston on Estates, 404.

Hence, it is respectfully submitted, not only are the lessors not the operating roads, but, also, they are not railroads "whose tracks cross or are crossed at grade," and are not railroads which could file a petition under section 5 of the grade crossing act.

IV.
The true test of liability is possession.

We assume that if the "Grade Crossing" act is to be sustained as a valid act of legislation, authority for its passage must be found in the right of the legislature to exercise the police power of the state.

It is not an act which affects the charter or franchises of either the lessor or lessee.

> "It is evident that the legislature may thus require additional precautions of rail-

> way companies, involving expense to them, to prevent injuries to persons and property within and without their cars, while exercising their franchises under their charter. Such requirements are in the nature of police regulations, and do not conflict with the constitution, because they take away no vested rights, nor do they interfere with or impair the powers conferred on the company by the act of incorporation. The essential franchises of the corporation are not disturbed."

Del. Lack. & W. R. v. East Orange 41 *N. J. L.* 127, 132.

It acts upon the possessor. It is intended to regulate the operation of the road by the company in possession. If the statute had required the changes to be made by the "owner" instead of by the "company operating such railroad" the result would have been the same. The following are analogous cases.

Baltimore & Ohio Railroad Co., v. Walker, 45 *Ohio St.* 577.

Held, a railroad company which has the possession and control of a railroad in Ohio, and is managing and operating the same, as the lessee thereof, is one "owning the tracks" of such railroad within the meaning of section 3333 of the Revised Statutes, which provides that: 'When the tracks of two railroads cross each other, or in any way connect, on a common grade, the crossing shall be made and kept in repair, and watchmen

maintained thereat, at the joint expense of the companies owning the tracks."

> Williams, J. : "The necessity for keeping the crossings in repair and maintaining watchmen thereat, grows out of the use and operation of the railroads whose tracks cross each other at a common grade, and lessee companies having the possession and control of the roads and operating them as such, receive all the advantages and securities resulting from safe crossings, and the services of the watchman, as fully in all respects as companies that are the absolute owners thereof, could if they were operating them, and it would appear but reasonable, that while operating the roads they should receive the benefits subject to the burden of their expenses as provided by the statute and we are of the opinion that such lessees are companies 'owning the tracks' of the road operated by them, in the sense in which that phrase is used in the statute."

Buffalo Stone & Cement Co. v. Delaware, Lackawanna & Western R. R. Co., 130 *N. Y.* 152.

Held, that where a railway company organized under the laws of the state leases its property to a foreign company, and by a covenant in that lease, the latter agrees to perform all things in connection with the road which the lessor might be required by law to perform, the lessee must maintain farm crossings, as required by Laws 1850, c. 140 Sec. 44.

> Follett, C. J.: "In Jones v. Seligman, 81

N. Y. 190 a railroad corporation mortgaged its property to trustees to secure the payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage the trustee entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to build fences and farm crossings, which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties except those mentioned in the statutes. It was held that the trustees being in possession with power to make reparation and additions, they had the right, and it was their duty, to construct fences and necessary farm crossings; that being in possession of the property and engaged in operating it, they must carry out the provisions of the statutes as the representative of the corporation. In this case the defendant, by a covenant in the lease above quoted, expressly agreed to perform all things in connection with the road which the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of Jones v. Seligman.

"The position that the defendant is not liable because it is not a corporation of this state, or organized under Chapter 140, Laws 1850, is not tenable. It having the right to operate its leased lines under the statutes of this State, it must be held to have assumed to discharge the same duties

to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes."
Schott v. Harvey, 105 *Pa. St.* 222.

Held, that the provision of P. L. 1879 p. 128, that certain factories, &c. shall be provided with fire escapes by the 'owners' or other persons therein designated, does not apply to an owner in fee, not in possession, who has leased the premises to a tenant who occupies the same as such factory and that such tenant in possession, using the premises as such a factory, is the 'owner' of the factory within the meaning of said act.

Mr. Justice Paxson: (227) "But the question which more immediately concerns us is, who is the 'owner' of a factory within the meaning of the Act? The plaintiff contends that the owner is the person who holds the fee in the land on which the factory building stands. The word 'factory' is a contraction of manufactory, which Webster defines to be a building, or collection of buildings, appropriated to the manufacture of goods. But a manufactory is something more than a building. It includes not only the building but the machinery necessary to produce the particular goods manufactured, and the engines or other power requisite to propel such machinery. A building with only bare walls and a roof could no more be a manufactory than it would be a hotel. Such a building would be a mere shell and would not impose the duty of erecting fire escapes. It is only when it is completed by the addi-

tion of machinery and operatives are introduced to assist in the manufacture that the duty of erecting fire escapes attaches. To whom does that duty attach? Clearly to the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of their services. If he is the lessee of the building, then he is a tenant in possession. For all practical purposes he is the owner until the end of his term, which may be in one year or in one hundred years. There is a large amount of property held in reversion in the city of Philadelphia. Some of the leases are for several hundred years. However long the term the lessee is but a tenant for years; the fee is in him that hath the reversion. Yet the broad principle contended for would make the reversioner, who has practically parted with all control of the property, responsible for the neglect of the tenant in possession to put up fire escapes. And this would be so even if the property leased had been a vacant lot, and the factory buildings had been erected, and the machinery placed therein by the tenant subsequent to the lease. We cannot impute to the legislature an intention of doing a thing so palpably unjust and absurd as this. When, therefore, they used the word 'owner' in this connection, it is plain the owner at the time of the injury was contemplated without regard to the quantity or duration of his estate. * * * This view meets all of the requirements of the Act. It places the

responsibility where it properly belongs, upon the person in possession and occupancy of the property as owner for the time being and the nature of whose business renders the erection of fire escapes necessary to protect the lives of his employees."

Lee v. Smith, 42 *Oh. St.* 458, 51 *Am. Rep.* 839.

Held, that section 2573 of Revised Statutes, as amended April 19, 1883 (80 O L. 188), does not impose upon any owner in fee of a building more than two stories high, the duty to provide a convenient exit from the different upper stories of said buildings when such owner is not in possession or control thereof, although his tenant in possession and control of the building may use the same as a factory or workshop.

McIllvaine, J.: "We have considered a single proposition in this case, to wit: the true meaning of the phrase 'any owner of any factory or workshop.' * * * *

"That a factory or workshop is not synonymous with building must be admitted. * * * *

"The owner of a building and the owner of a factory which is conducted in the building, may be different persons, and when this is so, the owner of the factory and not the owner in the remainder or reversion of the building is the person on whom the statute imposes the duty. * * * * If the building were constructed and used for a factory by the owner who afterwards transfers the building in fee and the business to another, the duty of providing fire

escapes thereafter devolves upon the purchaser who continues the business, and the grantor is relieved therefrom. This proposition will not be questioned. We think the same result would follow the transfer of a life estate or an estate for years. *The true test of liability is the possession and right to control the factory by one who is owner of the business or agent for such owner, although owner of the building for the time being only.*"

"Where the lease is authorized a very different question is presented from that which arises in cases where the lease is unauthorized. If it is the imperative duty of the lessor company to operate the road and it has no discretionary power in the matter and that duty was transferred to the lessee by the lease, it would seem clear that the lessee could be compelled by mandamus to perform the duty. This conclusion is supported by decisions in analogous cases. It is settled that a railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and we can see no reason why this principle should not apply to a company in full possession of a road under an authorized lease. In authorizing the lease the legislature empowered the transfer of the duty of operating the road to the lessee, and, with the duty, authorized the transfer of important rights and privileges, so that the duty of the lessee accepting the lease with its benefits becomes imperative. The lessor having rightfully transferred possession to the les-

see company cannot operate the road and hence the duty necessarily devolves on the lessee.

1 Elliott on Railroads, sec. 458 and cases cited.

Respectfully submitted,

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Chronology.

March 12, 1913—Fielder Grade Crossing Law approved. (P. L. 1913, p. 91.)

September 11, 1913—Board of Finance of the City of Paterson ordered petition filed with Board of Public Utility Commissioners. (Case, 1635, 1636.)

Answers filed to petition. (Case, 1664, 1744.)

October 17, 1913—First hearing; city offers maps and witnesses showing conditions at crossings, including census showing use of crossings. (Case, 1-97.)

October 31, 1913—Second hearing; continuation of city's case. (Case, 98-120.)

November 14, 1913—Third hearing; continuation of city's case. (Case, 121-160.)

December 4, 1913—Fourth hearing; opening of case for Erie. Witnesses testify to financial condition of company. (Case, 160-256.)

December 5, 1913—Fifth hearing. Erie offers testimony as to physical condition of road in Paterson. (Case, 257-324.)

December 11, 1913—Sixth hearing. Paterson & Hudson River and Paterson & Ramapo Railroads produce witnesses as to early conditions of their railroads. (Case, 325-335.)

December 26, 1913—Seventh hearing. Erie introduces additional evidence as to its financial condition. Siding owners gave evidence of effect anticipated from changes in railroad. (Case, 336-394.)

January 9, 1914—Eighth hearing. Additional evidence by Erie engineers and by siding owners as to conditions of the railroad and adjoining property. (Case, 395-454.)

January 29, 1914—Ninth hearing. Erie puts old maps and records concerning streets in evidence. (Case, 455-473.)

May 21, 1914—Tenth hearing. City offers a plan for the elimination of the crossings at grade referred to in its petition and the same is explained by the city engineers. Plan is given to Erie for criticism. (Case, 474-507.)

July 9, 1914—Eleventh hearing. Erie engineers criticize plan. (Case, 508-540.)

July 13, 1914—Twelfth hearing. Criticism continued. Siding owners explain how their property will be affected by plan. Case is closed and is taken into conference by Board. (Case, 541-583.)

October 9, 1914—Public Service Railway Company asks to be heard concerning cost to it. (Case, 584-587.)

October 16, 1914—Thirteenth hearing. Public Service Railway Company puts in evidence as to cost to it under plan. (Case, 588-605.)

October 23, 1914—Fourteenth hearing. Conference of engineers suggested. (Case, 605-612.)

October 29, 1914—Fifteenth hearing. Matter reopened and Erie offers additional evidence as to financial condition. (Case, 612-698.)

November 2, 1914—Sixteenth hearing. More evidence as to financial condition. (Case, 699-746.)

November 4, 1914—Seventeenth hearing. More evidence as to financial condition. (Case, 747-795.)

January 11, 1915—Board files its report. (Case, 1748-1771.)

February 5, 1915—Eighteenth hearing. Evidence on time required to complete work offered by both parties. (Case, 796-842.)

February 5, 1915—Erie asks case to be reopened. (Case, 796-842.)

April 20, 1915—Board makes order now before Court. (Case, 1787-1792.)

April 20, 1915—Commission filed report on application for further hearing. (Case, 1793-1795.)

June 15, 1915—Erie files petition for rehearing and offers substitute plan of joint operation of Erie and Susquehanna Railroads. (Case, 1879-1884.)

June 16, 1915—Writ of certiorari to review order of April 20, 1915, allowed. (Case, 1796.)

June 28, 1915—Board hears evidence on substitute plan. (Case, 1885-1918.)

July 9, 1915—Board denies application of June 15, 1915. (Case, 1919-1920.)

July 22, 1915—Writ of certiorari to review this last order allowed. (Case, 1921-1922.)

September 15, 1915—Reasons filed. (Case, 1815-1924.)

September 30, 1915—Depositions taken before David A. Newton, Supreme Court Examiner, on behalf of the company over objection of defendants. (Case, 1927-1991.)

June 23, 1916—Opinions of Supreme Court sustaining order filed. (Case, 2256-2312.)

June 23, 28, 1916—Rules for judgment. (Case, 2312.) Entered.

July 12, 1916—Notices of Appeal. (Case, 2325.) Filed.

July 24, 1916—Grounds of Appeal filed. (Case, 2334-2340.)

New Jersey Court of Errors and Appeals

Appellants.		*Respondents.*
Erie Railroad Company	*vs.*	Board of Public Utility Commissioners, City of Paterson, and Board of Finance of Said City.
Public Service Railway Company	*vs.*	Same.
Passaic Water Company	*vs.*	Same.
Western Union Telegraph Co.	*vs.*	Same.
D. Fullerton & Co.	*vs.*	Same.
Jacob Meyer *et al.* partners &c.	*vs.*	Same.
Morris & Company	*vs.*	Same.

On Appeal from Supreme Court.

BRIEF OF RESPONDENT

Board of Public Utility Commissioners.

I.

Statement of Facts.

The line of the Erie Railroad begins in Jersey City, runs across the salt marshes in Hudson and Bergen counties gaining the highland at Rutherford, then crosses the Passaic River and enters the City of Passaic, running thence northward through Acquackanonk Township to the City of Paterson. The Paterson station (Market Street) is a little more than fifteen miles from Jersey City. The road in leaving Paterson again crosses the Passaic River, then proceeds in a northerly direction through Ridgewood, in this State, to Suffern, in the State of New York, about sixteen miles above Paterson.

The length of the main line in New Jersey is a little more than thirty miles. The road runs through Paterson generally in a northerly and southerly direction, although the railroad men speak of it as east and west, because that is the general course of the railroad from New York to Chicago. Trains from New York are said to be westbound and to New York eastbound.

Much of the heavy freight is taken around Paterson by means of a cut-off known as the Bergen County Railway, which leaves the main line at Rutherford and joins it at Ridgewood.

The area of the City of Paterson is small, being about eight and one-third square miles. This area is entirely laid out in streets, most of which are open. The population according to the last census is one hundred and twenty-five thousand, making it the third city in population in the State. In the two larger cities of Newark and Jersey City, the important grade crossings on the main lines of railways have been eliminated, leaving the problem in Paterson probably the most serious in the State.

The length of the main line of the railroad through Paterson is nearly four miles, and it runs directly through the heart of the city. Entering the city at the south, the railroad crosses Crooks Avenue, the boundary line between Paterson and Acquackanonk Township, at grade. This is a much traveled road, but is not involved in the present proceeding. The railroad then runs through a section which is fairly well built up, but where few streets cross until it reaches Madison Avenue. This is the first street considered in the proceeding. Before reaching Madison Avenue, Gould Avenue is crossed by the railroad at grade, but at this time Gould Avenue is very little traveled. At Madison Avenue the large works of the American

Locomotive Company are located, which on one side obstruct the view of approaching trains. The travel on Madison Avenue is large and increasing, as it provides the principal outlet from the growing east side of the city to the south.

Just north of Madison Avenue there is located a large freight yard on the east and an extensive manufacturing plant on the west. Near this point the main line is joined by what is known as the Newark Branch. Just north of this junction the railroad is crossed at grade by two important streets, Clay and Straight. Measured along the railroad the center lines of these streets are about one hundred and fifty feet apart. These streets run at right angles to each other and cross the railroad at a point where it curves abruptly. This locality is wholly built up with large manufacturing establishments. The main freight yard of the company is located north of Clay Street. This yard serves several manufactories, and also the public generally. Side tracks are provided for the unloading of freight cars by persons not having private sidings. The nearness of this yard causes much switching back and forth over Clay and Straight Streets. Cedar Street crosses the main freight yard of the company at grade a short distance north of Clay Street. Here there are four through tracks and five tracks used for switching. Cedar Street is now protected by two sets of gates, and is much used for heavy trucking.

Just north of Cedar Street the railroad passes over Essex Street, which is an under grade crossing. This under grade crossing is very narrow and passes directly under the railroad freight yard.

The main railroad passenger station is located a few hundred feet north of Essex Street. This

station is located at the end of the freight yard, and in the very center of the city. Crossing the railroad at this point is Market Street, an extremely busy thoroughfare, in many respects the most important in the city. Park Avenue also runs to this crossing and there merges into Market Street. There are three tracks of the street railway crossing at this point. This is one of the most traveled grade crossings on the railroad in the State.

Just north of Market Street the railroad right of way narrows and is only sufficient for the two main tracks. This section is closely built up with high buildings on either side.

Leaving Market Street, the railroad crosses Ellison Street about 600 feet to the north at grade; 350 feet further on it crosses Van Houten Street at grade, and 300 feet beyond it crosses, at grade, Broadway, an important thoroughfare, carrying much traffic. Here the railroad is crossed by two tracks of the street railway, over which are operated several important lines, one running to the Hudson River at a point opposite 129th Street, New York City.

North of Broadway, the railroad crosses at grade, at intervals of 250 feet, Fair Street and Hamilton Avenue. The next streets to the north, Governor Street and Fulton Street, run under the railroad, which comes to grade at Franklin Street, which crosses at grade, as do Lafayette Street and River and Putnam Streets. River and Putnam Streets makes a peculiarly dangerous crossing, because River Street, an important thoroughfare, crosses at an acute angle. The street railway crosses the railroad on River Street. The section between River Street and Market Street is closely built up. North of River Street the territory is not so thickly settled, but there are large manufactur-

ing establishments along the right of way extending to where the railroad leaves the City of Paterson by crossing the Passaic River near Fifth Avenue.

A freight yard is located between the River Street crossing and the Passaic River.

There are on the line of railroad in the City of Paterson sixty-one industries served by sixty-eight private sidings.

The elimination of the various grade crossings along this line of railroad has been considered by the people and the authorities of the City of Paterson for a great many years. That all of them are peculiarly dangerous and impede traffic has never been seriously questioned. Committees have negotiated with the company for the elimination of the crossings and in 1911 the company prepared a sketch showing how eliminaation could be effected, and made an estimate of the cost.

The crossings being so near each other and the section of the city traversed being built up so closely around them, it has always been conceded that the only practical method of elimination involved the changing of grade of the railroad.

It has been generally conceded that depression of the railroad is not practical, and that elevation of the railroad is the only feasible method of elimination.

Shortly after the passage of the statute hereinafter referred to as the Fielder Grade Crossing Law (P. L., 1913, p. 91), the Board of Finance of the City of Paterson, the Board having charge of the finances of the municipality, filed with the Public Utility Commissioners a petition asking for the elimination of these crossings. The Board at that time had not adopted rules regulating the filing of such peti-

tions, but shortly afterwards did so and returned the petition first received. A new petition was filed by the Board of Finance of the City of Paterson in September, 1913, and this was called by the Board of Finance an amended petition. It was considered by the Board of Public Utility Commissioners and by all of the parties thereafter as an original petition.

This petition asked for the separation of grades at the following fifteen crossings:

A. Madison Avenue.
B. Clay and Straight Streets (two crossings).
C. Cedar Street.
D. Market Street.
E. Ellison Street.
F. Van Houten Street.
G. Broadway.
H. Fair Street.
I. Hamilton Avenue.
J. Lafayette Street.
K. Franklin Street.
L. Keen Street.
M. Warren Street.
N. River Street.

A set of maps accompanied the petition, copies of the petition were served upon the companies operating the utilities involved, notice of hearing was given.

The matter came on for hearing before the Board. The taking of testimony extended from October 17, 1913, to February 5, 1915, and covered eighteen days.

The city showed the condition of the crossings—the amount of traffic over them; there was no substantial conflict between this testimony and that offered on the same subject later by the railroad company. The bulk of the

testimony offered by the company concerned its financial condition. No evidence was put in by any utility company, affected by the elimination of the crossings, with the exception of testimony as to costs by the street railway company.

After the taking of the testimony offered by the company, a question arose as to who should furnish a proposed plan for the elimination of the crossings. To expedite the matter the city offered to do so and employed an engineering force which produced a plan which the city put in evidence before the Board. This plan provided for the elevation of the railroad tracks and treated the matter of private sidings in such a way as to work a minimum of damage to them.

The railroad company was furnished with a copy of the plans, which were submitted to its engineers for criticism. They criticised them only in some minor details. In regard to the Madison Avenue crossing which was so located as to permit of separate treatment they suggested a radical change, which was finally adopted by the Board. They also made suggestion of an extensive change of plan at River Street, but this was not adopted. The objections to the central portion of the plan were trivial.

One important suggestion *made by the company's engineers* was that the elimination work under the plan could be divided into five sections.

At the conclusion of the taking of testimony, the general attitude of the company toward the plan offered by the city was that it was a good plan, and if elimination was to be effected it should be under this plan, modified as suggested by its engineers.

It was not intimated by anyone for the company that any plan differing materially from that proposed was practical.

On January 11th, 1915, the Board of Public Utility Commissioners reported and ordered the railroad company to eliminate the crossings according to the plans adopted by it, which were the plans proposed by the city, modified in certain particulars, and excepting Section E therefrom.

The Board on April 20th, 1915, adopted an order fixing the time within which the company was required to do the work. The work was divided into four sections, *as suggested by the railroad company,* called A, B, C, and D, Section E being omitted. The order provided "that the Erie Railroad Company begin the actual work of construction required in the performance and execution of this order on or before the first day of August nineteen hundred and sixteen, and continuously carry on the same thereafter and perform and fully comply with the directions and requirements of this order, and complete all of the work required to be done, within eight years from the date hereof, and that in the continuous prosecution of said work it takes up in the order named the divisions thereof in said profile marked and designated 'A,' 'B,' 'C,' and 'D,' the work required in connection with Section 'A' thereof to be begun on or before August 1st, 1916, and to be completed within four years and three months from the date hereof; the work required in connection with Section 'B' to be begun within four years and three months from the date hereof and completed within five years and six months from the date hereof; the work required in connection with Section 'C' to be begun within five years and six months from

the date hereof and completed within seven years and three months from the date hereof; and the work in connection with Section 'D' to be begun within seven years and three months and completed within eight years from the date hereof."

The order in prescribing the time for beginning and completing the work and dividing the work into four sections was based upon testimony taken before the Board. Case, 818-842.

After the order of April 20, 1915, was made, the Erie Railroad Company petitioned the Board for a rehearing. Testimony was taken upon this petition, and on July 9, 1915, an order was made by the Board denying a rehearing. Both of these orders were brought under review by writs of certiorari, sued out of the Supreme Court as stated in the brief of Prosecutor-Appellant Erie Railroad Company, pp. 1 and 2. The Supreme Court sustained the orders and dismissed the several writs of certiorari. From the judgments of the Supreme Court the prosecutors of the several writs respectively appealed to this Court.

History of the Erie Railroad in Paterson.

In 1831 the Paterson & Hudson River Railroad Company was incorporated by an act of the Legislature of New Jersey (P. L. 1831, p. 24; Exhibit R-15). This corporation laid out a railroad running from Paterson to a point near the Hudson River. The terminus of this road in Paterson was near the corner of DeGrasse and Main Streets. It is shown on the Allen Map (Exhibit R-76). This terminus is referred to in the testimony of the ancient witness, William H. Levi. From Main and DeGrasse Streets the road ran to the south and

joined the present line of the Erie about at the present Straight Street crossing. From Main and DeGrasse Streets the cars were drawn by horses to the corner of Main and Market Streets (Testimony of Peter Doremus, p. 331). This explains the old time table of 1835 shown on page 326, wherein reference is made to trains drawn by horses. It is not at all likely that trains were drawn over the line from Paterson to New York by horses. The road from DeGrasse and Main Streets to the junction point at Straight Street was abandoned, permission being given by the Legislature in 1856 (Exhibit R-15, p. 983).

In 1841 the Paterson & Ramapo Railroad Company was organized under an act of the Legislature of New Jersey to lay out and construct a railroad from Paterson to the line of the State of New York at Suffern (P. L. 1841, p. 97; Exhibit R-15, p. 1005).

This railroad commenced running about 1850 (see testimony of Peter Doremus, p. 332). The title map shows that its right of way was purchased in 1847 and 1848, that is, from Market Street in Paterson to the west. A strip running from Market Street east to Clay Street and the Paterson & Hudson River Railroad was purchased in 1850.

The New York & Erie Railroad Company was organized under the laws of New York in 1832, and laid out a railroad which reached the Hudson River at Piermont, passing through Suffern.

On September 9th, 1852, the Paterson & Hudson River Railroad Company and the Paterson & Ramapo Railroad Company leased their lines to the Union Railroad Company. The next day the Union Railroad Company assigned these leases to the New York & Erie Railroad Com-

pany. These assignments were affirmed by the Legislature of the State of New Jersey, March 14th, 1853 (P. L. 1853, p. 480, and P. L. 1862, p. 206). These two roads were then made part of the Erie main line, which connected with them at Suffern.

After 1852 the property passed from the New York & Erie Railroad Company to the Erie Railway Company, to the New York, Lake Erie & Western Railroad Company and finally in 1895 to the present corporation, the Erie Railroad Company (see Exhibit R-15).

The charter of the Paterson & Hudson River Railroad Company contains the following clauses (Case, p. 966):

> "IX. And be it enacted, That it shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over and under the said railroad or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be prevented thereby, and also where the said road shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagon ways, over and under said railroad, so that they may conveniently pass the same." * * *
>
> "XVII. And be it enacted, That at any time after the expiration of fifty years from the completion of the said road, the Legislature of this State may cause an appraisement of the said road and the appendages thereof to be made by six persons, three of whom shall be appointed by the chief justice of this State for the time being, the remaining three by the company, who, or a

majority of them, shall report the value thereof to the Legislature within one year from the time of their appointment; or, if they cannot agree, they shall choose a seventh, who, with the aforesaid six, shall report as aforesaid, or in case the said company shall neglect or refuse to appoint the said three persons on their part for two months after the said appointment by the said chief justice, then the three persons so appointed by him shall proceed to make such appraisement, which shall be binding on the said company; or in case the said six commissioners shall be appointed as aforesaid, and they cannot agree upon the seventh man, then, upon two weeks' notice to the said company, the said chief justice shall appoint such seventh man as aforesaid, to make such appraisement as aforesaid, and thereupon the State shall have the privilege for three years of taking said road, upon the payment to the company of the amount of the said report within one year after electing to take said road, which report shall be filed in the office of the secretary of this State, and the whole property and interest of said road, and the appendages thereof, shall be vested in the State of New Jersey upon payment of the amount so reported to the said company; and that it shall be the duty of the president of the company to lay before the Legislature, under oath or affirmation, when they shall so request, a full and fair statement of the costs of the said road, and of all the receipts and disbursements of the company; Provided always, that the aforesaid valuation shall be made without reference to the receipts or disbursements of the company, or advance of the stock, and the

> said valuation shall in no case exceed the first costs of the said railroad, with the lands and appendages thereof."

The life of the corporation was not limited.

The lease of the Paterson & Hudson River Railroad to the Union Railway Company contained the following provisions (Case, p. 986):

> "The parties of the first part, for and in consideration * * * grant, bargain, sell * * * all the land and real property * * * and also all the rights, privileges, franchises, titles, power, property, claims and pretensions of the party of the first part, to transport persons, mails and property of every description on said railroad, and to charge, demand, collect, sue for and receive in the name of the parties of the first part or otherwise, but for the exclusive benefit of the parties of the second part, money for tolls and for the transportation of persons, mails and merchandise, in as full and ample a manner as the parties of the first part were authorized to do by the laws of the State of New Jersey. * * *"
>
> "To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said parties of the second part, their successors and assigns, from and including the fifteenth day of September, 1852, for and during the existence and continuance of the charter of the parties of the first part and the legal existence of the said the President and Directors of the Paterson and Hudson River Railroad Company. * * * "

There is a clause providing for a new lease in case of any renewal or extension of the charter of the parties of the first part.

There is a further provision, as follows (Case, p. 993):

> "and it is in like manner further agreed by and between the parties to these presents, that if any erections or improvements shall, during the said term hereby demised, or any future term or terms hereafter demised, be made on said demised premises or appurtenant thereto, the same shall, at the termination of said term or terms, and the cessation of the interest of the parties of the second part of, in and to the same, by the expiration thereof, or other termination thereof, be valued by arbitrators to be appointed in like manner as last above provided, and the award of a majority of such arbitrators shall be conclusive as to the value of the said erection and improvements; *and the parties of the first part shall pay and discharge the amount so valued to the parties of the second part or their assigns.*"

The charter of the Paterson & Ramapo Railroad Company contains the following clauses (Case, p. 1005):

> "XI. And be it enacted, That it shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be prevented thereby, and where the railroad shall intersect any farm or lands, they shall provide and keep in repair

suitable wagon ways over or under the said railroad, so that persons may conveniently pass the same." * * *

"XIX. And be it enacted, That at any time after the expiration of fifty years from the completion of the said road the Legislature of this State may cause an appraisement of said road and the appendages thereof to be made by six persons, three of whom shall be appointed by the chief justice of this State for the time being, the remaining three by the company, who, or a majority of them, shall report the value thereof to the Legislature within one year from the time of their appointment; or, if they cannot agree, they shall choose a seventh, or in case the said company shall neglect or refuse to appoint the said three persons on their part for two months after the said appointment by the said chief justice, then the three persons so appointed by him shall proceed to make such appraisement, which shall be binding on the said company; or in case the said six commissioners shall be appointed as aforesaid, and they cannot agree upon the seventh man, then, upon two weeks' notice to the said company, the said chief justice shall appoint such seventh man as aforesaid, to make such appraisement as aforesaid, and thereupon the State shall have the privilege for three years of taking the said road, upon the payment to the company of the amount of the said report within one year after electing to take said road, which report shall be filed in the office of the secretary of this State, and the whole property and interest of said road, and the appendages thereof, shall be vested in the State of New Jersey upon the payment of

the amount so reported to the said company; and that it shall be the duty of the president of the company to lay before the Legislature, under oath or affirmation, when they shall so request, a full and fair statement of the costs of the said road, and the appendages thereof; provided always, that the aforesaid valuation shall be made without reference to the receipts or disbursements of the company, or advance of the stock; and the said valuation shall in no case exceed the first cost of the said railroad, with the lands and appendages thereof." * * *

"XXIII. And be it enacted, *That it shall be lawful for the Legislature, at any time hereafter to alter, amend, or modify this Act,* whenever in their opinion the public good may require it."

The life of the corporation was not limited.

The Paterson & Ramapo Railroad lease to the Union Railroad Company contains clauses similar to those contained in the lease of the Paterson & Hudson River Railroad (Case, p. 1025).

The following are extracts from this lease:

"The parties of the first part for and in consideration * * * grant, bargain, sell * * * all the land and real property * * * and also all the rights, privileges, franchises, titles, powers, property, claims and pretensions of the parties of the first part to transport persons, mails and property of every description on said railroad, and to charge, demand, collect, sue for and receive (in the name of the parties of the first part, or otherwise, but for the ex-

clusive benefit of the parties of the second part) money for tolls and for the transportation of persons, mails and merchandise, in as full and ample a manner as the parties of the first part were authorized to do by the laws of the State of New Jersey."

"To have and to hold the said above mentioned and described premises with the appurtenances, unto the parties of the second part, their successors and assigns, from the and including the fifteenth day of September one thousand eight hundred and fifty two, for and during the existence and continuance of the charter of the parties of the first part, and the legal existence of the said The Paterson and Ramapo Railroad Company, by virtue and in pursuance of the Act of Incorporation of said company. * * *"

"And these presents further witness, that for the considerations above expressed, the parties of the first part further covenant and agree to and with the parties of the second part, their successors and assigns, that in case of a renewal or extension of the charter of the parties of the first part by an act of the Legislature of New Jersey, or in pursuance of the laws of said State, they the parties of the first part will make and execute to the parties of the second part a new lease and demise of all the property and premises hereinbefore mentioned and referred to, for a term coextensive in duration with the renewal or extended charter of the parties of the first part, at the same rents and under the same covenants (including a covenant for further renewal) as are contained in these presents. * * *"

"And it is in like manner further agreed by and between the parties to these presents, that if any erections or improvements shall, during the said term hereby demised, or any future term or terms hereafter demised, be made on said demised premises, or appurtenant thereto, the same shall, at the termination of said term or terms and the cessation of the interest of the parties of the second part, of, in and to the same by the expiration thereof, or other termination thereof, be valued by arbitrators to be appointed in like manner as last above provided, and the award of a majority of such arbitrators shall be conclusive as to the value of said erections and improvements, *and the parties of the first part shall pay and discharge the amount so valued, to the parties of the second part or their assigns.*"

By an act of the Legislature of New Jersey, approved March 14, 1853, the above leases were confirmed (Case, p. 1021).

The act in part provides as follows:

"WHEREAS, the New York and Erie Railroad Company are now in possession of the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad under certain leases and contracts made by said companies, *and are now carrying on the business of said road* under said leases and contracts; and whereas, the New York and Erie Railroad Company being a foreign corporation, and any other corporation or individuals using said road or either of them, *and transacting the business of the same,* ought to be liable to actions for damages

done *in operating said roads* as fully as the said companies are by their charters now liable, and to effect that purpose, all doubts as to the authority of said companies to make such leases and contracts ought to be removed; * * * ."

"IV. And be it enacted, That the power and authority of the said Paterson and Hudson River Railroad Company, and the Paterson and Ramapo Railroad Company, to make such leases and contracts, is hereby declared and affirmed, and said leases and contracts are hereby declared legal and valid; *provided, that said leases and contracts shall not be held to grant any power, privilege or right, not granted to said companies, respectively by their charters, and the supplements thereto."*

"V. *And be it enacted, That the Legislature may at any time alter, amend or repeal this act."*

LAND NOT HELD UNDER LEASE.

An examination of the title map R-16 will show that some parts of the railroad within the City of Paterson are owned by the Erie Company and are not held under lease.

Financial Condition of Erie Railroad Company and Estimated Cost of Work.

The company put in a mass of testimony relating to its financial condition. This testimony is very confusing, for such confusion the company is alone responsible. For instance, in Exhibit R-1 (Case, pp. 932 and 933), the total operating revenue, including outside operations for the year 1913, is stated to be $67,326,282.

In Exhibit R-123 (Case, p. 1349), the gross operating revenue for that year is stated to be $62,647,359.12, and this includes outside operations. It may be that there is a difference between operating revenue and gross operating revenue, but whatever the difference, one would expect that the latter would be larger and not smaller than the former. In Exhibit R-1 (Case, p. 932), operating income for 1913 is stated to be $17,728,424, while in Exhibit R-123 (Case, p. 1349) the same item for the same year is stated as $16,500,599.15.

Exhibit R-1 was compiled by A. L. Sorensen, a statistician for the railroad company. It purports to show the per cent. of return on property devoted to railroad purposes. The company has other income besides this, such as dividend from a coal company, the stock of which is owned by it.

The Exhibit R-1 states that the property owned by the railroad company devoted to the railroad purposes in the year 1913 only earned 1.13 per cent.

This statement is palpably incorrect. In the first place, it assumes that the property of the company is worth $453,045,352. This is a pure assumption, as there never was any physical valuation of the property of the company (Sorenson, p. 183). The above figure is made up from the valuation put upon the company at the time of its reorganization with the amount thereafter expended for additions and betterment added.

The witness attempts to show that the property devoted to railroad purposes in 1913 only earned 1.13 per cent. This statement is wide of the mark, even though we assume the valuation placed upon such property to be the true

valuation. From this table it appears that the net operating income for 1913 was $15,975,037. But to arrive at the percentage found by this statistician, he first deducts the sum of $10,819,-941, which the road paid out as interest. But this interest payment went to bondholders whose capital was invested in the road, and was part of the $453,045,352. In order to find the percentage of return earned, this deduction should not have been made, and the percentage earned was actually a little over three times as great as stated.

The outstanding capital stock of the system on June 30, 1913 (see table, appendix IX to brief for Erie Railroad) was $176,271,300. We may assume that the interest payment of $10,-819,041 paid all interest charge on the bonded and other indebtedness of the road, leaving the balance of $5,112,707 to be the amount earned by the capital stock. This shows that the capital stock in that year earned very nearly 3 per cent.

But this $5,112,707, after paying operating expenses and interest charges, is not all that the company had as net income in that year. It also had other income. It appears from Exhibit R-113 (Case, p. 1337) that in the year 1913 this other income raised the $5,112,707 to a net income of $8,105,675.23. In that year, after using some of this net income for sinking funds and for additions and betterments, there was a surplus of $6,682,568.31. This is almost enough to pay 4 per cent. on the entire outstanding capital stock, common and preferred.

In the annual report for 1914, we find, on page 1366 (printed case), the following:

> "Your company has expended from current cash for construction and equipment purposes from December 1, 1895, to June 30, 1914, $32,413,254.10, for which it is or will be entitled to be reimbursed from the sale of either Erie Railroad General Lien Bonds or Erie Railroad Convertible Bonds."

In all evidence offered by the company upon its financial condition, and in all discussions by counsel, the greatest stress is laid upon the result of operations during the year 1914. This is the poorest business year the company has had, with one exception, since 1903.

Mr. Crawford, the comptroller of the Erie, testified (Case, p. 638):

> "Q Mr. Crawford, how did the operating income of the Erie system for the year ending June 30th, 1914, compare generally with the operating incomes earned by the system for the last ten years? A It was the smallest of any year since 1905, with the exception of the panic year of 1908.
>
> * * * * * *
>
> Q How does the surplus in 1914 compare with the surplus as shown in the last ten years? A The smallest of any for the past ten years, with the single exception of 1908.
>
> Q What was the smallest surplus, excepting 1908 and 1914? A $2,565,717.
>
> Q As compared with the surplus in 1914 of one hundred and fifty-nine thousand and some odd dollars; is that correct? A $159,523 in 1914; yes, sir.

Q I understand, Mr. Crawford, that the appropriations for additions and betterments are taken out of the net income of the system before you state your surplus; is that correct? A *They are, yes, sir.*"

It will be seen from the above that the earnings of the Erie system for 1914 were much below a ten years' average, and that it is not fair in examining its financial condition to take the year 1914 as a test. It will be observed that the net operating income since 1903, as shown by Exhibit R-1, has been nearly level, the year 1908 showing the only wide variation. It is quite natural to expect an occasional bad year, such as 1914, but when it arrives it is not to be taken as the test of the earning power of the company.

Even with bad conditions of 1914 it is to be noted that the company made additions and betterments to its property and equipment aggregating $14,475,703.33 (Annual Report of 1914, Case, p. 1366). It will be noted from the annual report of 1914 that a greater amount was spent during that year for "Maintenance of Way and Maintenance of Equipment" than was spent during the year 1913 (Case, p. 1354).

Exhibit R-1 only shows the return to the company from property devoted to railroad purposes. The company is in receipt of other income. This is shown in Exhibit R-113 (Case, pp. 1336 and 1337) under the heading "Other Income."

There will be noted a very material drop in this other income for 1914 as compared with 1913. The total other income fell from $6,133,-812.06 in 1913 to $2,852,654.26 in 1914.

In the examination of Mr. Crawford, the comptroller, it was developed that in this respect 1914 was below the usual average. It will be noted that under the heading of "Other Income," item No. 12, "Dividend Income," fell from $2,611,880.50 in 1913 to $800,320.50 in 1914.

On page 640, Mr. Crawford, comptroller of the company, explains this item:

> "*Commissioner Donges.* Let me ask Mr. Crawford, before you leave this other statement—by the way, has it been offered and given a number?
>
> *Mr. Taylor.* Yes, 113.
>
> *By Commissioner Donges.*
>
> Q Item No. 12, dividend income, shows, in the year 1913, $2,611,880, and 1914, $800,320. Of what does that item consist? A. Dividends on capital stock owned by the Erie Railroad Company.
>
> Q And it showed a decrease of $1,811,560? A A great decrease. One company which, in 1913, we had dividends amounting to $2,450,000, in 1914 the same company only paid dividends of $500,000.
>
> *By Mr. Merrey.*
>
> Q May we ask what company that is? A The Pennsylvania Coal Company."

The witness' explanation of the reason for the small dividend in 1914 is given on page 645:

> "*By Commissioner Treacy.*
>
> Q Do you know, Mr. Crawford, of your own knowledge, what was the cause of the decrease of the dividend of the Pennsylvania

Coal Co.? A Only in a general way. I had understood they had an immense amount of coal stock and had not sold it, their surplus being tied up in stock of coal rather than being in cash."

No other explanation of the decrease of dividend of the Pennsylvania Coal Company for 1914 was offered, but a statement was put in evidence showing the dividends to the Erie from that company for a period of years. This statement was marked Exhibit R-126. It will be seen from this statement that the dividend for 1914 was considerably more than a million below the average.

There is no statement in evidence to show what the entire system has earned in the past, except for the years 1913 and 1914 and the months of July and August, 1914. The table R-1 is not complete, as it only shows the amount earned by property devoted to railroad purposes.

The average other income per year for the two years 1913 and 1914 is about four and a half millions. This table "Other Income" in Exhibit R-113 was not explained in full, and it may be there should be some deductions from it as it is not stated to be net income, but from the testimony of Mr. Crawford the average net income from dividends, unfunded securities and funded securities should exceed $3,000,000. This amount should be added to "Net Income from Railroad Operating Investment" shown in Exhibit R-1 to show the total net income.

The net income from railroad operating investment for the last four years shown in Exhibit R-1 is:

1910,	$5,136,944
1911,	5,904,139
1912,	2,816,972
1913,	5,112,707

An average per year for these four years is $4,742,690. If the average of other income is added to this, we find that the company is in receipt of an average income of $8,000,000, which it can use for betterments and improvements.

If we take into consideration the year 1914, this average would be reduced to about six and a half million.

It is far more reasonable to use this figure as a basis of calculation than to use the figures for the exceptional year 1914. Besides, the company for many years has been expending great sums, both out of capital account and from income in improvement and betterments. The results of these investments are only beginning to show in the receipts, so that there is every reason to believe that in the future the net income of the company will be very materially increased.

Exhibit R-128 shows that from 1906 to 1914 the company has spent $55,727,039 for improvement and betterments. Of this amount $46,352,-427 is charged to capital account and $9,374,612 is charged to income. But this table does not show how much of the money actually came from income of the company. It seems to be the practice of the company to pay for improvements out of current cash, charge the same to capital account, which increases the surplus of the company until such time as

the company is reimbursed from the sale of bonds as referred to in the annual report of the company as printed on page 1366.

In connection with this question, let us consider the cost of the work ordered performed by the Board.

Cost of the Work.

In the report of the Board (Case, p. 1765), it is stated that the estimated cost of the work is $2,948,218.68. *This is not to be understood as the estimated cost to the railroad company, but is the estimate of the railroad engineers as to the cost of the entire work. The share of the railroad company is much less.*

The engineers for the city estimate the work will cost considerably less than the above amount.

A summary of the city's estimate is shown near the bottom of page 919 in Exhibit P-55. This includes first an estimate on the complete plan which comprehends the separation of grade at Fifth Avenue and Sixth Avenue crossings. These streets were not included in the petition of the city, and that part of the plan was not adopted. The second estimate was of the cost of executing the complete plan, but leaving Fifth Avenue at grade. The third was the cost of the plan, leaving Fifth Avenue and Madison Avenue both at grade. The fourth was leaving Madison Avenue at grade, but separating the grades at Fifth Avenue.

So far as the city's plan was concerned, the Board adopted the plan, leaving Fifth Avenue and Madison Avenue out, so that the third estimate of the City Engineer covers the part of

the city's plan adopted by the Board. It is as follows:

	Railroad	Street	Total
"3. Plan leaving both Fifth Avenue and Madison Avenue at grade	$1,843,998.92	$194,025.93	$2,038,020.85."

The city made no estimate as to the cost of the elimination of Madison Avenue under the plan offered by the company and adopted by the Board.

To the above amount we should add, therefore, the cost to the railroad of eliminating Madison Avenue as estimated by the company's engineers. This amounts to $104,278.02 and makes the total cost to the railroad $1,948,276.02, as estimated by the city for the main work and using the railroad company's estimate for the Madison Avenue part.

The estimate for Madison Avenue is obtained from Exhibit R-104; that is $127,474.67 shown in that estimate, less $23,196.65, the items of sidewalk, curb and brick pavements, plus 15 per cent. thereon.

The estimate of the railroad engineers of the part to be paid for by the railroad is shown in Exhibit R-103, page 1324:

Section A,	$1,442,719.30
Section B,	418,260.78
Section C,	572,319.51
Section D (as above),	104,278.02
	$2,537,577.61

(Exhibit R-104).

The city estimate did not include damage to property by changing grades of streets nor for extra operating costs while work was in prog-

ress. These items are charged in the railroad estimate as follows:

Section A,	Street damages,	$63,000.00
	Handling traffic,	50,000.00
Section B,	Street damages,	21,500.00
	Handling traffic,	15,000.00
Section C,	Street damages,	34,500.00
	Handling traffic,	25,000.00
		$209,000.00

This sum should be added to the city estimate and brings it up to $2,157,276.02.

We have, therefore, the following estimates of the cost to the railroad of carrying out of the order.

Railroad estimate,	$2,537,577.61
City's estimate as revised above,	2,157,276.02

From both the above estimates there must be deducted the 10 per cent. to be charged against the street railway company. This amount cannot be estimated from the evidence.

In the estimates offered by the engineers for both sides the work is divided into work on the railroad and work on streets. The above statement is a summary of the work to be done on the railroad.

Taking up Exhibit R-102, we find on page 1312 a statement of the street work to be done at Essex Street and Market Street. The items include curb, sidewalk, pavements, changing drainage, trolley track, gas pipe, sewer pipe, telephone conduits, electric conduits and water pipe. None of this work is to be paid for by the rail-

road company under the Fielder Act, which provides:

> "Sec. 3. The expense of removing, relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same, and also the expense of paving, curbing and flagging the highway constructed as the result of the change of grade.
>
> "Sec. 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."

Frequent references to the cost of this work as being $3,000,000 have been made.

As shown above the estimate by the city is $2,157,276.26 for the work on the railroad, and this includes the portion to be paid for by the trolley company.

Not only is it possible that the work may be done for this lesser sum, but it is now for the first time suggested by the company that many economies may be effected in the work that will materially reduce the expense to the company.

After the making of the order by the Board and after the original writ of certiorari was

granted the company took depositions to show that economies might be effected that would materially reduce the cost of the plan (Deposition of Brameld, p. 1948).

Although the plan finally adopted, with modifications, was in the hands of the company for more than a year, during which time hearings were pending, the suggestions made in these depositions were never presented to the Board for its consideration, with the exception of the suggested change at Straight and Clay Streets, and at the time this suggestion was made no detailed plan was presented.

Suggestions of this nature should be presented to the Board, which can only act on the evidence before it, and not in the first instance to the Court.

It may well be that if these matters were even now presented to the Board that the order might, under the Board's power, be modified and the suggestions adopted in whole or in part.

In all of the proceedings the attitude of the City of Paterson was not to impose any unnecessary expense upon the company, and there is no reason to believe that it would not join the company in asking the Board to modify its order in any respect that might reduce the cost of the work so long as the modifications did not unreasonably interfere with the plan.

The following are the savings which the company feels that it could make as suggested above:

At Essex Street (Exhibit Erie 16, p. 2246),	$ 80,225.73
At Market Street station (Exhibit Erie 17),	116,680.00

At River Street station (Exhibit Erie 19),	24,265.00
Section C changed as at page 1964 (see Exhibit Erie 25).	360,381.20
Total	$581,551.93

If the company applied to the Board to make the above modifications and was successful, on its own estimate the cost to it would be reduced to considerably less than two million and on the city's estimate to the neighborhood of a million and half of dollars.

Exhibit P-42 on the part of the city shows the taxed valuations of all property in the City of Paterson within four or five hundred feet of the line of the Erie Railroad. There is no proof that this property would be affected by the change of grades ordered by the Board. It was offered in evidence before the city started work on the plan which it afterward offered to the Board. The rules of the Board called for a list of adjacent property that might possibly be affected by the elimination of crossings. At the time this list was prepared it was not known how far the changes might extend. Some of the property shown in this list is a mile from the nearest street changed. It covers all property within 400 feet of the right of way from Crooks Avenue, where it enters the city on the south, to the Passaic River, where it leaves it on the north.

The estimate made by the railroad engineers as to the amount of damage to adjacent property is probably more than ample.

The cost of doing the work under Section A as estimated by the railroad company, including the work at Essex Street and the depot at

Market Street, is $1,442,719.30. The city offered no estimate on the cost of Section A separate from the whole work, but the city's estimates are about 15 per cent. less than the railroad; the city's figures would be about $1,225,000. If application to the Board for modifications in the Essex Street widening and Market Street depot were successful the amount would be cut about $200,000, so that we can say the estimated cost to the railroad is between $1,225,000 and $1,442,-719.30, as the order stands, and between $1,000,-000 and $1,250,000, if the company should be successful in obtaining the modification. The work at the Market Street station as ordered by the Board might be made to result in a very material saving to the company, as it would permit a joint station with the Susquehanna Railroad, which is operated by the Erie but maintains a separate station near Market Street.

Under the order of the Board, the company is given four years to finish the work of Section A.

This will require an average expenditure of from $250,000 to $350,000 per year. If the money were borrowed at 6 per cent. after the completion of the work there would be required an interest charge of from $60,000 to $90,000 per year.

The interest charge at the same rate on the whole work would be from $126,000 to $150,000 per year, and the maximum interest charge would not be reached for eight years.

The company would save the cost of protecting crossings, which now amounts to $14,736.87 per annum; the amount paid for injuries on account of crossing accidents; would probably save the expense of the Susquehanna station. In addition, the movement of trains would be facilitated; the company could speed up its trains

through the city, which indirectly would increase its revenues. Other roads have spent large sums of money to abolish grade crossings along their route and have spent it without compulsion. It is to be assumed that they receive a return on the money thus expended because of the improvement of the service.

The railroad in question, notwithstanding its financial condition, in its petition for a rehearing offered to complete its substitute plan in the time allowed for the completion of Section A. There was no estimate of the cost of this work, but it is fair to assume that it would cost about as much as the work under Section A. This work included a new depot and considerable double tracking, besides the elevation of the main tracks of the Erie.

The company evidently knew where it could get the funds for this work. Its claim that it cannot get the funds to do the work ordered by the Board is without support in the evidence. In fact it contemplates using the money this work would cost on other improvements which will produce a quicker return. The position of the railroad company is set forth by Mr. Falconer on page 763, as follows:

> "Q In your judgment, if the railroad company was required at this time to spend three millions or more for the elimination of grade crossings in Paterson, would its ability to handle the improvement, its duty with regard to interstate business be impaired? A In my opinion it would. In my opinion that three million, or whatever it is, should be expended in making some improvement that would enable the railroad to earn a greater income and it might

thereby be enabled to set aside sums to carry out work which is not non-income producing. The elimination of grade crossings in Paterson or any other city produces no income, adequate, when compared to the expenditure. The saving in expenses is a very small fraction of 1 per cent. of the cost of the elimination, as a rule, and it will be so in Paterson. In other words, if the Paterson elimination is undertaken, the company will be burdened by fixed charges equal to the interest on the cost of construction and will save practically nothing in operating expenses, whereas if this same amount of money is expended at a point where operating expenses are reduced, such as grade reduction or additional tracks where they are necessary, the saving in operating expenses will help to pay for such improvement at a later time. The credit of the company is impaired by expenditures which do not improve, which do not increase its revenue. The credit of the company is improved by expenditures which do increase its revenue and the company, as I see it, cannot make expenditures of such magnitude as the Paterson grade crossing elimination without borrowing money."

History of Streets.

It is impossible to get an authentic history of the opening of the streets involved in this proceeding. The great Paterson fire of 1902 destroyed the city records and also many of the early records of the Paterson & Hudson River Railroad and the Paterson & Ramapo Railroad. Some records were found in the office of the

Clerk of Passaic County which referred to the opening of various streets. Old maps, one of 1850 and the Allen Map of 1852, were offered in evidence. From the evidence it is certain that some of the streets were opened before the railroad was laid out and there is much uncertainty about the others. In some cases it is impossible to tell whether the street or railroad was laid out first.

In the first place, there was offered in evidence by the railroad company an ordinance of the City of Paterson passed some time in 1852, entitled "An ordinance providing for the taking up, vacating and relaying the streets and highways of the City of Paterson."

The object of this ordinance is very apparent. There must have existed before this time no proper map or surveys of the city streets; the city engineer, J. W. Allen, made a survey and map, and this survey and map were adopted as authentic. Under such circumstances it was quite likely that the survey might differ slightly from earlier conditions, which would give rise to disputes about the lines of streets, and in order that this should not occur, all the old streets were declared vacated by the first section of the ordinance and then immediately declared opened according to the lines of the Allen Map by the succeeding sections. The only value of this ordinance is to prove that the streets mentioned therein were opened before the passage thereof.

The Allen Map and the ordinance above mentioned were made and passed in pursuance of the twenty-first section of the charter of the city which was incorporated the year before (P. L. 1851, p. 457). It does not follow that this ordinance refers to, or that the map shows all the streets in the city.

In addition to the above maps and ordinance, an ancient witness, Peter Doremus, was produced, but his memory as to streets was so uncertain that his evidence was of little value. So far as it is possible to ascertain from the evidence, the following is the history of the streets involved in the proceedings:

A. Madison Avenue.

No record in existence shows when this street was opened. Prior to 1869 this territory was in the Township of Acquackanonk. The Paterson & Hudson River Railroad alone crosses this crossing.

B-1. Straight Street.

This street appears on the maps of 1850 and 1852 and there is apparently no earlier record. The right of way at this crossing is owned partly by the Paterson & Ramapo Railroad and partly by the Paterson & Hudson River Railroad. This appears from the title map Exhibit R-16, but unfortnnately the deeds for this property are missing from the abstract R-15. The map R-16 does not show from whom the property was purchased. The deeds for the adjacent plot were taken from the Society for Establishing Useful Manufactures and ran to the lands of the heirs of Van Houten, who presumably owned this property. There are some deeds in evidence from other Van Houtens and it may be that the person who made up R-15 mistook those deeds for the ones in question. The other Van Houten lands shown in the abstract are near Broadway. It is unfortunate that these deeds are missing, as it is quite likely from the shape of the right of way at this point that the description of the lands in the deed to the road would show that

the street was in existence at the time the right of way was purchased.

B-2. Clay Street.

This is not shown on the 1852 map, but it will be noted that this map does not pretend to show all the streets in the city, but only streets relaid by action of the City Council. Under the charter it was to include such dedicated streets as the city accepted. On the 1850 map, Clay Street is shown on one side of the railroad under its present name and on the other side under the name "Columbus Street." Whether it was dedicated before the purchase of the right of way by the railroad company cannot be told, as the deeds for the property were not put in evidence. The deeds of the right of way to the west of Clay Street (operating direction) came from the Society for Establishing Useful Manufactures. Perhaps that title runs to the center of the street. In these deeds the street is not mentioned. The right of way is partly owned by the Paterson & Ramapo Railroad, which purchased in 1851, and partly by the Paterson & Hudson River Railroad, which purchased in 1856.

C. Cedar Street.

The three railroads cross this street. The Paterson & Ramapo Railroad purchased from the S. U. M. in 1851; the Paterson & Hudson River Railroad purchased from the S. U. M. in 1856, and the Erie Railroad purchased from the S. U. M. in 1864. This last deed is mentioned on the title map, but there is no abstract in evidence.

The street does not appear on the Allen Map; it does appear on the 1850 map, but does not appear to cross the railroad. Another street called Perry Street is shown on the 1850 map crossing

the railroad just north of Cedar Street. There is nothing to show just when the street was opened or by what proceedings. It may have been opened after the Paterson & Ramapo Railroad purchased its right of way and before the other railroad purchased.

D. Market Street and Park Avenue.

The Paterson & Ramapo Railroad crosses this street; the land here was purchased by the company from the Society for Establishing Useful Manufactures in 1850 according to the title map. Peter Doremus testified that he remembered the opening of the Paterson & Ramapo in 1850 and that Market Street, Broadway and River Street were open at that time (Case, p. 332). The deed to the railroad company mentions Market Street in the description (Exhibit R-15, p. 1037).

There can be no question but that Market Street was in use long before the railroad. Park Avenue, then known as Willis Street, is shown on the 1850 map and was undoubtedly open before the railroad. The Paterson & Hudson River Railroad and the Erie Railroad own land abutting on the street.

E. Ellison Street.

This street does not appear to cross the right of way on the 1850 map, but does on the 1852 map. The land at this point was purchased June 14, 1850, from the Society for Establishing Useful Manufactures. Whether the street was dedicated before or after this time the evidence does not show. Only the right of way of the Paterson & Ramapo Railroad crosses this street, but other lands used by the railroad and abutting on the street are owned by the Erie.

F. Van Houten Street.

This street is crossed by the Paterson & Ramapo Railroad. The street is shown on the 1850 map under the name of Williamson Street and appeared to be opened at that time across the right of way which was purchased from Van Houten in 1847. The deed by Van Houten to the Paterson & Ramapo Railroad mentions Van Houten Street (Exhibit R-15, p. 1039). It must, therefore, have been in existence before the railroad. The company took it subject to the dedication to the public. The map of 1850 was inaccurate in calling it Williamson Street.

G. Broadway.

This street existed before the railroad was laid out. Peter Doremus so testifies.

Only the right of way of the Paterson & Ramapo Railroad crosses this street.

The deed from John R. Van Houten (Case, p. 1039) covers property running to the south side of this street and the deed from Abraham Van Houten *et al.* covers property running to the north of the street (Case, p. 1040). The company never took title to the center of the street so far as appears from the deeds. The 1850 map and the Allen Map both show the street open across the right of way.

There is no doubt that this street existed prior to the railway.

H. Fair Street.

The right of way of the Paterson & Ramapo Railroad crosses this street. The right of way was purchased from Abraham Van Houten *et al.* (Case, p. 1040). The description does not refer to Fair Street, but the lines of the street are shown on the 1850 map.

I. Hamilton Avenue.

The right of way of the Paterson & Ramapo Railroad crosses this street. It is shown on the 1850 map with dotted lines. The deed to the railroad does not refer to the street. This was formerly known as Division Street.

J. Lafayette Street.

The right of way of the Paterson & Ramapo Railroad crosses this street. On the title map the lines showing the land to which company took title do not include the street. In the deed to the company from Seth Hastings (R-15, p. 1048) Lafayette Street is mentioned. In the last part of the description is the following recitation:

> "The conveyance of half of the street not being intended to cover more than whatever right the said parties of the first part have in the same."

This street is shown on the 1850 map and the Allen Map. On the 1850 map houses are indicated on the street close to the railroad on both sides. This is undoubtedly an old street, opened and used before the railroad was laid out.

K. Franklin Street.

The right of way of the Paterson & Ramapo Railroad crosses this street. In the deed to the company by Charles Danforth and wife, Franklin Street is mentioned, the property being described as beginning on the south side of Franklin Street. This property is mentioned as being part of the Godwin property, which evidently had previously been cut up into building lots

with streets running through the property. It is referred to as part of lots 266 and 267 on the Godwin property. This street is shown on the 1850 map. The company took title to its right of way subject to the dedication of this street.

L. Keen Street.

The right of way of the Paterson & Ramapo Railroad crosses this street. The company took title to the property on either side of this street, but the description did not include the street (See Title Map R-16 and Deed, Mason to Company, p. 1052, and Award, Cummings to Company, p. 1045).

This is part of the Godwin property that was cut up into building lots before the railroad was laid out, as mentioned above. The company acquired its right of way subject to the previous dedication of this street.

M. Warren Street.

This right of way across this street is owned by the Paterson & Ramapo Railroad.

The deed for the land south of this street (east, operating direction) came to the company from Robert M. Blackwell (R-15, p. 1053). The description refers to a street leading from the lower bridge in Paterson to the dwelling of Cornelius Van Winkle. By reference to the title map, where the lines of the description are plotted, it will be seen that Warren Street is the one referred to.

This street must, therefore, have been opened before the railroad was laid out.

M-1. River Street.

The right of way across this street is owned by the Paterson & Ramapo Railroad. The Erie

Railroad owns two strips abutting on the street on the north. The ancient witness Doremus says this street was opened before the railroad was laid out.

The 1850 map does not run out as far as the point where River Street crosses the railroad, but shows the street nearby under the title Van Winkle Street. The deed to the company from Van Houten (p. 1054) crosses this street but does not refer to it. There is no record of its opening, but there is no question but this street was an old street at the time the railroad was laid out.

M-2. Putnam Street.

This street crosses at the same place as does River, and so must be considered in connection with River Street.

The Plan, Streets and Sidings.

The preparation of a plan for the elimination of these crossings presented a great many problems. With the exception of Madison Avenue it was impossible to plan for any one crossing without considering the others. A change of grade in the railroad at River Street necessarily involved Broadway, and any change at Broadway involved Van Houten, Ellison and Market Streets; changes there involved change at Cedar, Straight and Clay. In order to eliminate one crossing a plan must be made for all. In the end it was found that the work of eliminating the crossings could be carried on in sections, but must proceed under a single plan.

The first problem to be met was as to the main running tracks of the railroad. That these

tracks could not be depressed and must be elevated was conceded. The testimony of Mr. Ryon, the City's Engineer, as to this is not disputed.

This witness testified (Case, p. 485):

> "Q Taking up the question of your plan, did you consider excavating, lowering below streets levels? A Not to any extent. It didn't seem to be feasible at reasonable expense. There is no way of lowering, for instance, the river bridge, and to go below grade in the main part of town would necessitate cutting out several of the intermediate streets.
>
> Q Are these important streets? A Yes, sir." * * *
>
> "Q You consider, you say, that it would be a very expensive proposition to cut instead of elevating the railroad? A Yes, sir, practically impossible."

To change the grade of all these streets so as to pass over or under the railroad would have likewise been impracticable.

Having determined that elevation of the main tracks was the only practical plan, the rearrangement of the yards and private sidings presented an even more difficult problem.

Along the line there are sixty-eight private sidings, in addition to the large yards serving the public generally. Under the plan presented by the city and adopted by the Board, a minimum of damage will be done to the private sidings and yards. Many of the owners of private sidings filed answers and appeared at the hearings. They were represented by counsel and took every means to protect their interests.

How little injury will be done is shown by the fact that only four now attack the order.

They are:

D. Fullerton & Company,
Meyer & DeVogel,
Fuller's Express Co.,
Morris & Co.

The first is a beef company, located on River Street; the second deal in feed and grain, and are located at Franklin Street and the railroad. The last two are located on property belonging to the railroad company, the express company on Ellison Street, and Morris & Co., on Market Street.

The siding of D. Fullerton & Co., under the plan, will have to be raised sixteen feet (Testimony of Ryon, 495 and 496).

The Fullerton Company produced a witness who was heard before the preparation of the plan (Hopper, 434 to 444). He was not an expert, and the amount of damage to the Fullerton property was not shown. From his evidence, the raising of the siding does less damage than lowering it. This siding is entirely on the right of way of the railroad.

The siding of Meyer & DeVogel will have to be raised about fifteen feet (Testimony of Ryon, p. 496). This siding is entirely on the right of way of the railroad.

Under the plan, Franklin Street will be closed across the railroad, so that this plant cannot be as conveniently reached. This inconvenience is not considerable, as nearby undergrade crossings are provided.

That depression of the railroad at this point would work a serious injury to this plant and elevation as proposed, not so serious, is shown by the testimony of Mr. Meyer (pp. 384 and 571).

Fuller's Express Company.—This is a company doing an express business on the Erie, and its entire plant is located on property of the Erie at Ellison Street. According to the title map, this land was purchased by the Erie Railway Company, and runs only to the line of Ellison Street. It was not owned by the Paterson & Ramapo Railroad Company, so that the fee is now in the Erie Railroad Company. It appears from the testimony of Carroll (p. 426) that the tracks could not be depressed at this point without injuring this property for the use to which it is now put. At the time of the taking of testimony the company occupied an old freight station of the railroad company. Any elimination of the crossing at Ellison Street would practically destroy the use of this building. The tracks are elevated at this point several feet, and the engineer for the city says the business of Fuller Express Company cannot be served at this point.

> "They will necessarily have to move, because no siding can be put in for them." (Ryon, p. 493).

Mr. Ryon suggested a new location for the Fuller's Express on another plot belonging to the Erie. Doubtless there are numerous other places where the business could be located. In speaking of the suggested new location for Fuller's, Mr. Ryon said (p. 493):

> "That is the same as Morris & Company, a possible location for Fuller's Express Company."

The contract between the Erie Railroad Company and Fuller's can be terminated by either party thereto upon a year's notice (Carroll, p. 430).

Morris & Co.—This is a beef house, located on lands of the Erie adjoining the right of way of the Paterson & Ramapo Railroad at Market Street. The elevation of the main line tracks makes it impossible to serve this industry with a siding, so a new location is necessary if the company desires to continue its business with a private siding. Another location was suggested by the City Engineer. Such a location may be provided elsewhere which might suit Morris & Co. better than the one suggested. An additional reason for changing the location of this business is: that the site is a suitable one for the Market Street passenger station, which must be moved from its present location. It has been since suggested that the present station could be made to serve by building platforms on the east side of the right of way encroaching on the narrow street known as Ramapo Avenue. This suggestion was not made before the Board, and it finds no support in the evidence produced before the Board.

The above are the only users of private siding who contested the order made.

Many changes are made in other sidings. All these are necessary if private owners are to be served. If any of these do not desire to continue service, the proposed relocated siding need not, of course, be constructed.

Some of these sidings are located partly on private lands and partly on the lands of the railroad company. In order to show how service could be made it was necessary to plot on

the plan the changes on the private lands of the users of the siding.

The sidings affected are as follows:

1. *Passaic Steel Co.*

   This siding will be destroyed. This concern has a great number of sidings running into its plant. The loss of the one eliminated is a small matter, to which there has been practically no objection.

2. *R. H. McDonald.*

   This siding is destroyed. It runs partly on the private land controlled by McDonald. To reach his establishment this switch crosses Straight Street at grade. It does not appear by what right this private individual maintains a switch on a public street.

3. *G. A. Zabriskie.*

   This siding is entirely on the right of way of the railroad company, and the building served is on land owned by the railroad company and leased to Zabriskie. The siding itself, if continued, can serve the industry, as shown by the plan adopted, by moving it twenty feet and raising it slightly.

4. *Commercial Lumber & Millwork Company.*

   This siding is partly on the right of way of railroad and crosses Clay Street at grade. By what right it is maintained in a public street does not appear. The plan adopted shows that it can be continued and serve the industry by depressing it three feet and making slight changes in the platforms.

5. *C. Kelley.*

This siding is entirely on right of way of railroad company, and industry is on land leased from railroad company. Switch can be made to continue to serve industry by slight elevation and by moving it about fifteen feet.

6. *M. Goble.*

This siding is on right of way of railroad, and industry is on land leased from the railroad. Switch can be made to serve industry by moving it at one end to the extent of forty-two feet and slightly raising it.

7. *National Fuel & Supply Co., or National Wood Co.*

This siding is on right of way of railroad, and industry is on land leased from the railroad. Industry can be served, as shown on plan, by slightly raising same and moving one end sixty-five feet.

8. *Standard Oil Co.*

This siding and industry served are off the right of way of railroad. In order to serve industry siding must be moved and raised about six feet.

9. *John Agnew & Co.* (three sidings).

One is not affected. Another leads off the company's right of way on to Hamilton Avenue, which it crosses at grade, and then enters private property of Agnew. In order to serve this industry it will be necessary to raise the siding and carry it across Hamilton Avenue above grade. Considerable

changes will have to be made on property of the Agnew Co. to accommodate it to the new condition. No right is shown to maintain this switch across a public street at grade.

The third siding runs off the right of way directly on to the private property of the Agnew Co.

In order to serve the industry this siding must be raised sixteen feet.

10. *McNab & Harlin, Castings.*

11. *James W. Graham & Co., Brewery.*

12. *National Biscuit Co., Warehouse.*

Hygeia Ice Co.

Consolidated Ice Co.

The above five industries are located in a group, and are served off a lead that runs through what is sometimes called Ramapo Avenue. This may be a public street, but it seems to be practically given over to the above industries as the location for this siding. The siding serving these industries, where not on the railroad right of way, is on Ramapo Avenue. No right to maintain this siding on a public street is shown. A continuation of the siding east of Cedar Street is on land of McNab & Harlin. This siding is not changed so as to affect the industries in any way. The main tracks alongside of the siding are raised, and, in order to serve it, the lead to the siding must be lengthened in order to get down to it on a proper grade. The proposed plan requires no changes on any private property of users of sidings.

13. *Morris & Co.*

The proposed plan shows no way of serving this industry. Removal to a new location was suggested.

14. *Paterson Vehicle Co.*

15. *Paterson Beef Co.*

The sidings to these industries will have to be destroyed, and they cannot be served at their present location. The first receives very little service, about one car a month, and the second is not in use.

16. *E. M. Stiles.*

17. *David Rodgers.*

The one siding which serves these two industries cannot be continued. The Rodgers property as now used does not require service. Stiles only receives about three cars per month.

18. *The Herman Co., Wholesale Grocers.*

19. *Sulzberger Co., Packers.*

These two industries are served by one siding. The plan proposes the elevation of this siding, and that it be carried over Ellison Street on a bridge. It now crosses Ellison Street at grade, partly within the railroad right of way and partly without the same. The siding is partly on the property of the Herman Company and the Sulzberger Company.

20. *Armour & Co., Meats.*

This siding will not be changed, except that instead of running off the main line it

will run off a long siding to be constructed along the main tracks to serve a number of industries in this neighborhood. This sidnig at present is on the railroad right of way and on a public street, Ramapo Avenue. No authority is shown for occupation of this street.

21. *Hinchliffe Brewing Company.*

This siding is entirely on the right of way of the railroad company, but if it is to remain in service, it must be raised sixteen and one-half feet.

22. *Katz Brothers, Brewery.*

This siding is entirely on the right of way of the railroad. In order to give service it must be moved and connect with the new siding mentioned above in connection with Armour's.

23. *P. S. Van Kirk Co., Lumber.*
Olive Oil Soap Co.

One siding serves these two industries. It is partly on private property, and, in order to be of service, must be raised about three feet. Instead of connecting with the main running track, it is proposed to connect it with a new siding referred to in the Armour case.

24. *A. H. Smith, Coal.*

The present siding is on the railroad right of way, and the one shown on the plan extends to the private property of the owner. The siding leads off the long siding, instead of the main tracks, as at present.

25. *Meyer & De Vogle, Feed and Grain.*

At present this siding is entirely on the right of way, and is a joint siding used also by A. H. Smith. Under the plan, it leads in from the opposite direction past Smith's, where a separate line runs into his property, then to Meyer & De Vogle. The siding reaches Meyer & De Vogle fifteen feet higher than the present siding. It is all on the railroad right of way.

26. *Armstrong Sons Co., Coal.*

This siding is entirely on the railroad right of way, but if service is continued, it must be raised sixteen feet, and requires a bridge on the company's right of way across Montgomery Street.

27. *A. H. Smith, Stone* (second siding).

The present siding, which is entirely on the railroad right of way, must be raised sixteen feet.

28. *D. Fullerton & Co., Beef.*

This siding is on the railroad right of way, and, in order to give service, must be raised sixteen feet.

29. *Atherton Grain Co.*

30. *J. A. Lydecker, Grain.*

These two sidings are on the railroad right of way, but, in order to give service, must be raised fifteen feet.

31. *Public Service Gas Co.*

There are two sidings to this industry leading off the right of way across Wait

Street, a public street, and then on the property of the gas company. The grades are not changed, but the lead is. Some slight changes are made on the gas company's property, but the main changes are made on the street.

32. *J. Van Den Handle, Coal.*

The only change is a slight one in the turnout, and is to be made on the railroad right of way.

33. *Swift & Co., Beef.*

This siding will lead off a new track parallel with the running tracks, but there is no change of grade. The change will be made on the right of way of the railroad company.

34. *H. M. Post, Building Material.*

The only change required is in a turnout on the right of way of the railroad.

35. *Ashley & Bailey, Silks.*

The only change is the elevation of the turnout about six inches on the railroad right of way.

36. *National Silk Dyeing Co.*

This siding crosses Wait Street, a public street, and must be raised in the street about two feet.

37. *Graselli Chemical Co.*

Same change as in National Silk Dyeing Co.

38. *Hygeia Ice Co.*

Referred to above as No. 12.

39. *Auger & Simon Silk Dyeing Co.*

Same change as in National Silk Dyeing Co.

40. *Paterson Consolidated Ice Co.*

This is referred to above with Nos. 10, 11, 12.

41. *Diamond Coal Co.*

This is referred to above with No. 23.

42. *Bon Arbor Chemical.*

Is referred to above with McNab & Harlin, Nos. 10, 11, 12.

43. *Center Paper & Box Co.*

44. *Waldo Silk Ribbon Co.*

One siding which must be raised three feet on private lands belonging to owners of industry.

45. *Fuller's Express Co.*

This is referred to above. Cannot be served at its present location, and a new location is suggested.

46. *Olive Oil Soap Co.*

This is referred to above under No. 23.

The following industries referred to in Exhibit R-49, page 1115, have sidings which are not interfered with by the proposed plan:

1. Leslie, Elliott & Co.
2. Cooke Locomotive Works.
3. John Agnew (one siding).
4. Samuel Smith & Son.
5. Rogers Locomotive Works.
6. James Wilson & Son.
7. Weidman Silk Dyeing Co. (four sidings).
8. L. Lapat.
9. Sutherland & Edwards.
10. Nicholson File Co.
11. Puglia & Gramatica.
12. Van Winkle-Bromley Lumber Co.
13. Gulf Refining Co.
14. William Dunkley.
15. Passaic Water Co.
16. Hamilton Lumber Co.

Number of industries shown in Exhibit R-49, sixty-one.

Forty-six are affected and sixteen are not affected.

John Agnew Coal Co. is in both lists, as this company has one siding not affected and two which are.

In the following instances the only changes of any kind necessary are small changes to the turnouts or leads, and might well be added to the lists of those industries not affected by the change.

1. McNab & Harlin.
2. James W. Graham.
3. National Biscuit Co.
4. Hygeia Ice Co.
5. Consolidated Ice Co.
6. Bon Arbor Chemical Co.

The company's engineer, Mr. Brameld, estimates the cost of these changes at $815.07 on company's right of way, and $4,826.38 off the right of way, that is in Ramapo Avenue. These changes are entirely in the lead, and the industries are served in exactly the same way as now.

7. Armour & Co.
8. Public Service Gas Co.
9. J. Van Den Handle.
10. Swift & Co.
11. H. M. Post.
12. Ashley & Bailey.
13. National Silk Co.
14. Graselli Chemical Co.
15. Auger & Simon.
16. A. H. Smith (siding 32).

No change in the property of any of the above is made necessary under the plan adopted. In some instances the necessary changes to be made on the property of the switch owners are so trivial that they may be considered as not to be affected. (Exhibit Erie 28.)

17.	Center Paper Box Co.	$ 40.25
18.	Waldo Silk Ribbon Co.	40.25
19.	Standard Oil Co.	56.42
20.	Commercial Storage	350.00
21.	P. S. Van Kirk	414.00
22.	Olive Oil Soap Co.	414.00

In the last two instances, Van Kirk and Olive Oil Soap Company, the engineer of the company, in Exhibit Erie 28, has charged for certain work in putting in a new siding along the right of way, and which serves various industries apportioning the cost to each industry.

But in the above cases the plan adopted by the Board requires either no change on the property

served by the siding, or the small amount mentioned in cases 17 to 22.

Under the plan adopted, the following industries cannot be served by sidings:

1. R. H. McDonald.
2. Paterson Vehicle Co.
3. Paterson Beef Co.
4. David G. Rodgers.
5. E. M. Stiles.
6. Nelson, Morris & Co.
7. Fuller's Express Co.

McDonald is a small concern that receives but three cars per month on the average; Paterson Vehicle Company receives but one, and the Paterson Beef Company and David G. Rodgers do not use their sidings at present. Stiles receives but three carloads per month. The total receipts of the above five industries is but five cars per month.

Morris & Co. and Fuller's Express Co. are large concerns, and other locations for these industries are suggested.

In the following instances, where changes are made in sidings, the change is made entirely on the right of way of the railroad company, that is, no change to the siding off the right of way is necessary, but, in some instances, changes must be made in private buildings to adjust them to the changes in the siding:

1. C. Kelly.
2. M. Goble.
3. National Fuel & Supply Co.
4. Hinchliffe Brewing Co.
5. Katz Bros.
6. Meyer & De Vogle.
7. Armstrong Sons Co.
8. A. H. Smith (siding 32).

9. D. Fullerton & Co.
10. Atherton Grain Co.
11. J. A. Lydecker.
12. J. Van Den Handle.
13. Swift & Co.
14. H. M. Post.
15. Ashley & Bailey.
16. G. A. Zabriskie.

In the following instances changes must be made not only in the right of way, but also in a public street, or what is supposed to be a public street, but not on private property:

17. McNab & Harlin.
18. James A. Graham & Co.
19. National Biscuit Co.
20. Hygeia Ice Co.
21. Consolidated Ice Co.
22. Armour & Co.
23. National Silk Dyeing Co.
24. Graselli Chemical Co.
25. Auger & Simon Silk Dyeing Co.
26. Bon Arbor Chemical Co.

In the following instances changes must be made in the sidings on the private lands of the siding users if the sidings are to be continued:

1. Commercial Lumber & Millwork Co.
2. Standard Oil Co.
3. John Agnew Coal Co. (two sidings).
4. Herman Co.
5. Sulzberger Co.
6. P. S. Van Kirk Co.
7. Olive Oil Soap Co.
8. A. H. Smith.
9. Public Service Gas Co. (two sidings).
10. Diamond Coal Co.
11. Center Paper Box Co.
12. Waldo Silk Ribbon Co.

SUMMARY BY INDUSTRIES.

Sidings to be changed on private property	12
Sidings to be changed on street and right of way	10
Sidings to be changed only on right of way	16
Sidings to be eliminated	8
Total sidings affected in any way	46
Total with absolutely no change	16
	62
Agnew duplicated	1
Sidings shown in Exhibit R-49	61

The Relation of the Crossings to Each Other.

The order of the Board directs that the separation of the grades shall be accomplished by elevating Madison Avenue to pass over the railroad and by the elevation of the railroad to pass over the other streets.

Madison Avenue is the crossing at the easterly end of the work. The profile accompanying the city's plan shows that this is at present the highest point on the railroad line in the city. From Madison Avenue the grade of the railroad gradually descends to the low point near the River Street crossing.

The city's plan proposed to leave Madison Avenue at its present grade and to depress the railroad beginning at a point between Straight Street and Madison Avenue. The Board rejected this portion of the city's plan and adopted one proposed by the railroad. In the order of the Board this portion of the work is designated Section "D."

From Straight Street crossing to River Street crossing is about 8,000 feet, and as there are fourteen grade crossings between these points, the average distance between the crossings is less than 600 feet.

The railroad engineers object to any grade in excess of one per cent., that is, a raise of one foot in a hundred. To carry the railroad over a street requires an elevation of 13 or 14 feet, even where the street is depressed 3 or 4 feet. An elevation to that extent, if the railroad were perfectly level, would affect any other grade crossing within 1,300 or 1,400 feet. But if the railroad was not level, such an elevation (as is the case with the railroad between these crossings) would affect crossings in the direction of the down grade much further than 1,400 feet, depending on the steepness of the former grade.

The company produced an expert witness (Paterson, Case, p. 310), who criticized a former plan for this work prepared by the company because of the heavy grades.

The city's plan provided for the elevation of the tracks from a point a little east of Straight Street crossing to a point a little west of River Street crossing. The city proposed that the work should be carried on as a single piece of work, but Mr. Brameld (Case, pp. 530, etc.), the company's engineer, suggested that the work be divided into sections. The work between Straight Street and River Street he suggested be divided into three sections called "A," "B" and "C." No objection to this was offered by the city, and the Board so ordered.

The natural method of doing the work is to take the central portion, Section "A," and complete that, and then take up the end, Sections "B" and "C," and complete them in turn. To complete "B" and "C"" before "A" would

cause the trains to run up and down and up again in the manner of a Coney Island roller-coaster.

Although the Board adopted the suggestion of Mr. Brameld to do the work in the sections, it must not be assumed that these sections were independent of each other. The completion of Section "A" would close Keen Street, raise Warren Street and interfere with numerous sidings (Case, p. 532) until Sections "B" and "C" were completed.

Section A comprises the following crossings:

Market Street,
Ellison Street,
Van Houten Street,
Broadway,
Fair Street,
Hamilton Avenue,
Lafayette Street,
Franklin Street.

Section B:

Keen Street,
Warren Street,
River Street.

Section C:

Straight Street,
Clay Street,
Cedar Street.

If the crossings are considered in groups it will be noticed that each group contains crossings that are extremely dangerous and that seriously impede public travel. Taking up Group A, Market Street is found to be the most important cross-

ing; three tracks of the street railway pass over it.

A census was taken at different times at this crossing by the Board of Trade, by the City Street Commissioner and by the Railroad Company. The average taken by the Railroad Company is slightly higher than the others, so it may be assumed that all three were quite accurate, the differences being accounted for by the fact that the counts were taken on different days.

On October 4, 1913, from 5 A. M. to 11 P. M., the Market Street crossing was used by:

Pedestrians,	34,517
Street cars,	593
Horse-drawn vehicles,	1,901
Automobiles,	1,700
Bicycles,	827

This crossing is near the center of the city, so that the street cars were likely to have been well filled. Assuming they carried an average of twenty-five passengers, the horse-drawn vehicles two persons, and the automobiles three persons, nearly 60,000 crossed this railroad that day. During this period there were one hundred and sixty-four train movements over the crossing. Since it is situate close to the passenger depot, the crossing gates are lowered when a train enters the station from the east, even though the train does not cross. The gates were lowered during this period two hundred and seven times.

During the period from two to four, the gates were down thirty-four times, an average of fifty-three seconds each time; the crossing was closed in a two-hour period for over twenty-eight minutes, or nearly one-fourth of the time. The delays at this crossing seriously interfere with the schedule of the street railroad company.

The next most heavily used crossing is at Broadway. This is the crossing at which the Froehlich automobile was struck and two persons killed. The view from both sides is poor. The heaviest traffic across this crossing is in trolley cars, about 600 of which cross daily, including the large cars of the Hudson River line. This number is largely increased on Saturday and Sunday in the summer. It is a fair assumption that 18,000 persons cross in trolley cars daily, on the average. That is thirty to the car. Pedestrians average from 8,000 to 10,000. Probably 30,000 persons cross on foot and in street cars and other vehicles. This crossing is located only 1,200 feet from the Market Street crossing.

Between Broadway and Market Street are Van Houten and Ellison Streets, which are each used by about 5,000 people daily.

The other crossings in this group are not so heavily used as Market Street and Broadway, but the average number of persons crossing on foot and in vehicles run from 1,200 to 5,000. Fair and Hamilton Streets are located near to Broadway. The grade of the railroad at present drops quite rapidly north of Broadway, so that any elevation at Broadway requires a change at the other streets of the group if the grade of the railroad is to be a permissible grade.

The obstructions to the view of the users of all these streets as they approach the railroad are serious. They are referred to elsewhere in this brief.

Broadway is only 1,250 feet from Market Street. It is impossible to eliminate the crossing at Market Street without interfering with the crossings at Broadway and at Van Houten and Ellison Streets, which lie between Market Street

and Broadway. To eliminate the crossing at Market Street requires the elimination at Ellison, Van Houten Streets and Broadway. Broadway is, next to Market Street, the most used crossing, and the views are poorer there than at Market Street. Broadway cannot be eliminated by the elevation of the railroad without interfering with Van Houten, Ellison and Market Streets.

Hamilton Avenue is about 500 feet west of Broadway, and Fair Street lies between Broadway and Hamilton Avenue. It is impossible to raise the railroad at Broadway without affecting Fair Street and Hamilton Avenue.

From Hamilton Avenue to Lafayette and Franklin Streets, the railroad now descends a heavy grade. If the tracks were raised at Hamilton Avenue and allowed to remain at the present level at Lafayette and Franklin Streets, the grade caused thereby would be too great for the company to operate its trains. Any elevation of the railroad tracks at Hamilton Avenue must be followed by a like elevation at Lafayette and Franklin Streets. It will be seen, therefore, that any elevation of the railroad tracks at any one of the crossings in Section "A" will affect every crossing in the section. The same thing may be said about the other sections.

In Section "B," Keen, Warren and River Streets are all located close to each other; Keen Street is about 500 feet from River, and Warren is between the two.

In this group River Street is the most dangerous. It crosses the railroad at a sharp angle. It is a double crossing, as Putnam Street also crosses at the same point. The street railway uses the crossing. In the number of persons crossing it is second only to Market Street. The view in approaching from River Street is marked

"fair" by the Board, and from Putnam Street "poor." Keen and Warren Streets are not used as much as the other street, but the view is obstructed. One side of Keen Street is marked "bad," and the other "poor." One side of Warren Street is "poor," and the other "fair."

In Section "C," which comprises Clay, Straight and Cedar Streets, the crossings are close together; from Straight Street to Cedar is about 1,000 feet, and Clay Street is located between them. There are grounds for considering these crossings the most dangerous. There is located here an abrupt curve, and Cedar Street crosses directly through the railroad yard. There is more movement of trains and engines at this point than at any other. The number of passenger trains is the same as at other crossings, but the movements of freight trains and switch engines are more numerous. At Cedar Street there are two sets of gates. Pedestrians must first cross several side tracks before coming to the running tracks. Because of the curve and the presence of freight cars on the side tracks, this probably is the most dangerous crossing of the three, although the three must be considered as peculiarly dangerous. The crossings are each used by about 3,000 to 5,000 persons daily.

Each of the Crossings is in fact Dangerous to Public Safety and in fact Impedes Public Travel.

(a) *Elements of Danger.*

The Board of Public Utility Commissioners found as a fact that each of the crossings in question is dangerous to public safety. The Fielder Law has left the decision of this question

to the Board. By its terms it is to act "whenever 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 by reason of its experience is peculiarly fitted to pass on this question. It has the opportunity of a personal inspection of operations at the crossings. This is vastly more useful than the statement of witnesses and the examination of maps or photographs, no matter how carefully prepared.

There are many elements of danger at a grade crossing and it is impossible to lay down any hard and fast rule, or set of rules, by which it may be determined whether or not a crossing is dangerous within the contemplation of the statute.

Concerning List of Accidents.

A list of accidents happening at these crossings was put in evidence. This is not by any means to be considered a complete list. It was not offered by the city, but was produced as part of the records of the Board. It is not pretended that the Board had a complete list of accidents.

The printed book shows how this list came into the proceedings.

(Case, p. 158):

> "*Mr. Merrey.* That is all I intend to offer outside of Mr. Maybury's testimony.
>
> *Mr. Hobart.* I don't care to go ahead with our case until the city is finished.
>
> *Mr. Merrey.* The matter Mr. Maybury will give is merely that which he is re-

quired to give as part (employe) of the commission.

Commissioner Donges. Mr. Maybury is really not a witness of the municipality.

Mr. Hobart. I understand he is going to call him as a witness.

Commissioner Donges. The Board always prefers that its engineers and inspectors shall be, if called to testify, put on the stand as employes of the Board and at the Board's direction; so Mr. Maybury, if called, he will be called at the instance of the Board and you may proceed then, if you choose, on the assumption that the municipality's case is closed.

Mr. Hobart. Of course, the Board knows the testimony Mr. Maybury will give, and I would like to know what that is before we proceed.

Commissioner Donges. I don't know. Mr. Maybury may or may not be called. I would say that it wouldn't be prejudicial to your rights.

Mr. Hobart. May I make another suggestion? Of course, I don't represent any of the gentlemen or companies that are named in the answer to whom the Board is going to send notice of the hearing. It occurs to me those gentlemen should be present when the testimony is given. Their interests are seriously affected.

Mr. Merrey. The principal thing that I shall ask from Mr. Maybury is to produce before the Board its records which, I believe, he is in charge of, of accidents at these crossings.

Commissioner Donges. The reports?

Mr. Merrey. Yes.

Mr. Hobart. That is very important. We want to know what they are.

Mr. Sommer. You know. They are the ones you made to the Board.

Mr. Hobart. I don't know which Mr. Maybury will put in.

Mr. Merrey. All the crossings called for. I may say it is impossible for us to get a complete list of the accidents at these crossings, except as to those the Board has. We have a record of the number of deaths at those crossings, but we can't get you the information concerning them.

Commissioner Donges. Your case is closed with the exception of producing the report of the railroad company made to this Board.

Mr. Merrey. Yes.

Commissioner Donges. Of accidents at these crossings.

Mr. Merrey. Yes."

Later Mr. Maybury was called by the Board, and he testified as follows (see Case, p. 174):

"*Mr. Merrey.* These reports are the ones made by the company itself, and what period of time do they cover?

Mr. Maybury. A number of years.

Mr. Merry. When do they begin? At the beginning of the original Railroad Commission?

Mr. Maybury. 1909. The original Railroad Commission started in 1907.

Mr. Merrey. Do you know whether they are confined to any particular kind of accident?

Mr. Maybury. Yes, grade crossing accidents. And grade crossing only.

Mr. Merrey. Do you include those accidents where only property was damaged and life or limb not injured?

Mr. Maybury. No.

Mr. Merrey. They do not include those?

Mr. Maybury. There may have been several accidents along that line. We haven't asked for those reports unless the property damage was $100 and happened on a grade crossing.

Mr. Merrey. Do you ask for reports or does the company make them in the first instance?

Mr. Maybury. They make them in the first instance.

Mr. Merrey. Do you investigate to find or do they make a report of all accidents?

Mr. Maybury. All accidents are supposed to be reported immediately by the railroad companies. If an accident should happen and not be reported by the railroad company, the probabilities are it wouldn't be investigated, because that would be the only means of communicating accidents to the Board.

Mr. Merrey. Are you certain now you have here all accidents that have been reported by the company since the beginning of the Commission?

Mr. Maybury. No, I wouldn't say that.

Mr. Merrey. I would ask permission to have Mr. Maybury make a further search in this matter, because I believe there are many more accidents that have happened and with the privilege of suggesting dates so he may investigate his record to find if there are any further.

Mr. Maybury. May I ask a question? Mr. Merrey, just what kind of a report do you want? Suggest some you have the names of.

Mr. Merrey. For instance, I believe on June 6, 1909, a trolley car was struck at Broadway crossing by an approaching train.

Commissioner Donges. Mr. Maybury, have you thoroughly examined the records of the Board to find all the reports made by the company?

Mr. Maybury. No, there may be several others that I didn't think were necessary.

Mr. Merrey. I have a list here which we believe is very incomplete, but it contains a report to the Police Department of a great number of accidents at those crossings in addition to the ones Mr. Maybury has stated.

Commissioner Donges. You now suggest that Mr. Maybury make a further examination?

Mr. Maybury. Further search, and I will give him whatever assistance I have in this report, to assist the Commission in these reports.

Mr. Maybury. What I would like to know is whether these accidents are of a nature the Board requires a report on?

Mr. Merrey. Some of them are.

Mr. Hobart. Before testimony is given on such a list I presume we will have an opportunity to examine it.

Commissioner Donges. I understand Mr. Maybury suggests, that is the assumption, that the record ought to disclose reports made by the railroad company of other accidents than those the records of which Mr. Maybury finds in the records of the Board,

so all he is now asked to do is to produce further records of the Board.

Mr. Hobart. That have been reported?

Commissioner Donges. Yes.

Mr. Merrey. I think some may have escaped.

Mr. Hobart. I wanted to be sure his examination was confined to the records of the Board.

Commissioner Donges. Yes, his examination is to be confined to the records of the Board."

Mr. Maybury was not called by the Board, nor is it disclosed what was the result of his search, if he made any. The case dragged along for many months and the matter was overlooked.

It can be seen from the above that it is not pretended that there exists anywhere a complete list of accidents at these crossings, unless, perhaps, there is one in the possession of the railroad. If they have such a list, they have not produced it.

That the list offered was not complete is shown by its failure to include the one in which a man named Zabriskie was killed early in 1913 at the Market Street crossing. See *Zabriskie* v. *Erie,* 85 N. J. Law, 157; 86 N. J. Law, 266.

Concerning Obstructions to View.

In considering the question of danger at a grade crossing, the question of obstruction to the view of the person traveling along the highway is probably of the first importance.

The railroad company produced before the Commission a series of photographs showing the obstruction to the view at each crossing. It

also put in evidence a series of maps upon which its engineer has indicated the extent of the view from various positions on the highway near the rails.

In neither case was any consideration given to the temporary obstructions to the view.

On the view map of the Cedar Street crossing a view of 780 feet is indicated at a point 36 feet from the near rail of the eastbound track. This view is taken in the middle of the main yard of the company and at a point surrounded by sidings. Between the point of view and the eastbound track referred to there are two side tracks. If these side tracks remain open to permit movements of engines over them, the danger is within a few feet of a person at the indicated viewpoint. Besides the view indicated of 780 feet is along the westbound track, but the view along the siding from which the danger may come is not indicated. The photo, Cedar Street No. 2, shows that the view along this siding is probably less than 100 feet. In every instance the view map has indicated the view along the main tracks and not along any siding adjoining them.

The neglect to show the extent of view along sidings is a defect in the view maps that makes them practically worthless in all instances where sidings cross the street.

In another respect, the view maps lose much of their value as evidence.

The extent of the view as shown on these maps is with all side tracks clear of freight cars. There are side tracks at nearly every crossing, and for at least part of the time freight cars stand upon them. The maps do not show the extent of the view with freight cars on the siding. This is a very serious omission; there

might be a view of 1,000 feet with side tracks clear, while with freight cars on the sidings the view might be entirely cut off.

The owners of private sidings along the right of way near these crossings receive nearly nineteen hundred cars per month or about seventy average per each weekday (Exhibit R. 49, p. 1115). This does not include the cars delivered to the express companies, other than Fuller's, nor does it include cars in the yards from which delivery is made to the general public. It can be realized from this statement that many of the sidings are filled with cars most of the time, and that there must be daily movements over many of them.

In considering the question of danger at the crossings, the fact should not be lost sight of that they are all located in a busy city, and that the land nearby is occupied by industries desiring service from the railroad. Outside of cities trains generally move in only one direction over each main line track, but here where switch engines are constantly passing to and fro a movement may come from either side on both main line tracks. It is just as important that there be a clear view to the east on the eastbound tracks as to the west, likewise to the west on the westbound tracks.

Another element of danger in crossings where sidings are located is that it is impossible for the engineer to give warning of the movement. A switching crew goes to one of the yards and picks up a number of freight cars to be delivered to various sidings along the right of way; under the arrangements of tracks in Paterson, this train must proceed over the main tracks, and when it gets to the lead to the siding, it backs the cars on the siding. The engine is at

one end of the train, which may easily be more than 900 feet from the other end, so that the bell on the engine is more than the statutory distance away. If the train is thus backed over the crossing, a traveler might not have the statutory warning of its approach.

Another element that adds to the danger at these crossings is the confusion caused by the ringing of bells on different engines. In case of a train passing along a main track ringing its bell, a traveler would have difficulty in hearing the bell on a switch engine which might be approaching along a siding and out of view. It is quite possible that several switch engines might be working at one time in the vicinity of a crossing. In photo, Straight Street No. 1, two switch engines are noticeable.

That every one of the crossings is dangerous to public safety appears from the foregoing considerations and from the following summary:

(A) Madison Avenue.

At this crossing is a large building of the American Locomotive Company, shown in photos 2-4, &c. This building is close to the line of the right of way. The adopted plan shows that this building touches the line of the right of way. Photo 2 shows that a person standing between the crossing gate and the track can see quite a distance along the railway track. From photo 2 it appears that a person standing just outside of the crossing gate has practically no view to the east (operating direction) along the railroad. This crossing is dangerous to persons going on the track from the point from which photo No. 4 was taken. It would be particularly dangerous in case of a switch movement westward on the eastbound track. That

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such movements occur is to be presumed from the presence of the switch shown in photo No. 2.

Photos 3 and 5 are the only ones showing the views to the west along the railroad approaching from the south. Both the pictures are taken inside the crossing gate and near to the track. The bank along the right of way obstructs the view to a great extent.

There are about ninety-eight train movements a day over this crossing. The Street Commissioner's force counted 2,148 pedestrians, 481 horse-drawn vehicles and 236 automobiles using this crossing in one day.

(B) Straight Street.

Clay Street.

These streets lie between two large freight yards. The Board of Trade counts showed 210 train movements over the Straight Street crossing, and the Erie counts shows about the same over the Clay Street crossing. Drill engines make about ninety-eight movements a day over each of the crossings. The Newark branch joins the main line just east (*o. d.*) of these crossings.

A traveler in the place where the camera was placed to take Straight Street photo No. 1 (approach from south, view to east) would find one switch track behind him and four tracks in front of him, two of which are switch tracks and two the main line running tracks. At least one of the switch tracks must be used at times for the passenger trains of the Newark branch, which leave the main line near the signal tower in the picture, running around the rear of the building of the Passaic Steel Company on the right. This photo was taken about in line with

the crossing gate. With the switches free of freight cars, the traveler would have a fair view to the east (*o. d.*), but in case cars were on the side tracks the view at this point would be obstructed, especially as the switching movements might be in either direction, on any of the tracks. The view to the west (*o. d.*) to the same traveler is very much obstructed. This is shown in photos Straight Street Nos. 2 and 4. Note, according to the legend on photo Straight Street No. 2, that the picture was supposed to be taken 70 feet from the tracks, that is, the main running tracks, but that it was actually taken within a few feet of a long siding running to the main yard of the company. The photo was taken from a point under the signal tower and nearly in line with the crossing gates. The board fence shown on the right of the two photos (Straight Street Nos. 2 and 4) is a serious obstruction to the view of the traveler and particularly of any movement on the nearest track. The map of views and all statements of the Erie engineer fail to consider movements over this first track. There is a fair view to the west of the main line tracks, if the two sidings are clear of cars. Let these two sidings be occupied by freight cars and at once the view to the west from this point becomes very poor.

Considering the great number of movements over this crossing (210 train and switching movements), and the fact that the switching movements are likely to come from either direction on any of the tracks, it must be realized that this is a very dangerous crossing to approach from the direction the railroad men call south.

The approach from the north is not so bad apparently. The view to the east, as shown in Straight Street photos 10, 11, 12 and 14, is fairly open and clear. It appears that the company neither owns nor controls the land adjacent to its right of way in most cases, so that from time to time, as the city grows, places where the view is now clear will gradually change to places where the view is obstructed, through the erection of new structures.

The view to the west (*o. d.*) is shown in Straight Street photos Nos. 8 and 13. It is obstructed by a large silk mill built 200 feet to the west of the crossing. A traveler at this crossing would be in serious danger from a fast train movement from the west, particularly if his attention was at all distracted by one of the switching movements that occur so frequently at this crossing.

Clay Street.

This crossing is very close to Straight Street. It is shown in nearly all the photos of Straight Street.

The view to the east (*o. d.*) of the traveler coming from the north is shown in Clay Street photos Nos. 1, 2, 4, 6, 7. (It is remarkable how this photographer multiplied the views when the view was clear.) This view is the same as at Straight Street, except that it is lengthened by the distance between these crossings.

The view to the west (*o. d.*) to one approaching from the north is very bad. (See Clay Street photos 3 and 5.) The high silk mill of Dexter & Lambert Co. is built close to the main running tracks. A traveler is in great danger on this approach, which is multiplied by the nu-

merous switching movements going on just in front of him.

The danger to a traveler from the south at this crossing is unusually great. On this approach the view to the east (*o. d.*) is shown in Clay Street photos Nos. 10 and 13.

The building on the right shuts off the view of anything approaching on the nearest track. If there happened to be freight cars standing on either of these sidings, there would be no view to the west. The view to the west is shown in Clay Street photos Nos. 8, 11, 12, 14 and 15.

Photo No. 8 was taken in the middle of a number of sidings, and the photographer has gravely marked it 25 feet S. W. The freight cars are conveniently moved from all sidings in the foreground. Apparently an effort is made to show that a traveler has a clear view of the main track at a point 25 feet from the eastbound tracks. Unfortunately the company does not move its freight cars out of the view of the ordinary traveler, who, at the point shown in photo No. 8, would be anxiously wondering whether a fast train is about to round the curve to his left while he is endeavoring to escape from a switch movement directly behind him. The view to the west at this crossing is also obstructed by a number of small buildings on the right of way. The view to the east is shown in Clay Street Nos. 9, 10, 13. No. 9 is marked as having been taken 25 feet from the main tracks. The view at this point is clear, if the sidings are not filled with freight cars. Nos. 10 and 13 show a building built right up to the right of way and obstructing a view to the east.

These crossings are much used and this makes them so much more dangerous.

The Board of Trade count at Clay Street shows

Pedestrians,	5,691
Vehicles, H. D.,	871
Autos,	218

The railroad count at Straight Street shows

Pedestrians,	1,955
Vehicles, H. D.,	318
Autos,	105

(C) Cedar Street.

This is an extremely dangerous crossing. The street runs directly across the main yard of the company. There are eight tracks crossed in addition to the two main running tracks. The count shows 180 movements over the crossing. It is protected by two sets of gates. Photo Cedar Street No. 3 shows the gateman's tower in the middle of the tracks.

No photo is offered taken from the north looking east. This was probably not taken because of the condition of that view which makes it impossible to obtain a view to the east until one is on the main track. Photo No. 2, Cedar Street, shows a high board fence running along the right of way at this point. The obstructions to view caused by freight cars would, under ordinary conditions, shut off the view from all sides. The plight of the unfortunate traveler, who, finding himself stopped in the middle of the yard by one set of gates, is suddenly menaced by the movement of a train on the set of tracks upon which he has been unexpectedly stopped, can readily be imagined.

The danger of this crossing is so apparent that little more need be said about it.

The crossing is used by over 3,000 pedestrians and nearly 400 vehicles daily.

(D) Market Street.

This is the most heavily traveled grade crossing on the Erie lines in the State. (Robert C. Falconer, Case, p. 795, l. 1.) It is probably used by more people than any other grade crossing in the State. At least 60,000 people cross here daily on foot or in vehicles (street cars included). There are about 185 train movements. Approaching this crossing from the south, the view to the east (*o. d.*) is obstructed by the station. A train at the station, if eastbound, obstructs the view still more, making it peculiarly dangerous. The danger is recognized by the company, as it uses more guards at this crossing than at any other. The view to the west coming from the south is obstructed by freight cars and by gateman's house. Coming from the north the view to the east would be shut off by a train waiting in the station westbound.

The danger at this crossing is increased by the three sets of trolley tracks crossing. Park Avenue here meets Market Street at a sharp angle, to the great confusion of the traffic. A driver ordinarily would be fully occupied at this crossing looking out for other vehicles and trolley cars without watching for trains. Over 3,000 vehicles use this crossing daily. The accident resulting in the death of Zabriskie happened at this crossing. See *Zabriskie* v. *Erie,* 85 N. J. Law, 157.

(E) Ellison Street.

The danger at this crossing is caused by the obstruction of the view by buildings built up

close to the line. In fact, there is no opportunity afforded in the existing situation to see a train unless one stands upon the tracks. On approaching this crossing in a horse-drawn vehicle, the horses would be upon the track before the driver would have any view of an approaching train.

Approaching from the south, the view to the east (*o. d.*) is obstructed by the building of Fuller's Express Company and by the tower of the gateman, behind which stands a freight car at the building of the express company. This seems to be about the only instance in which the photographer was unable to have a freight car moved out of a place where it obstructed the view. This view is shown in photo No. 4, Ellison Street. The camera was placed 7 feet from the nearest main track. There is no clear view in this direction more than 6 feet from the nearest track. To deliver cars to Fuller's and to other industries nearby requires movements in both directions on the eastbound track.

The view to the west coming from the south is obstructed by the lumber shed shown in photo Ellison Street No. 3.

Coming from the north, the view to the west is obstructed by a large brick building (of Laffray & Herman). This is shown in photo Ellison Street No. 1. Alongside of this building is a siding. A car placed upon this siding would shut off the view to the west altogether.

Switching movements are made upon the nearest track, so danger is close at hand to any person crossing from the north. The view map shows a view of 1,000 feet from a point 21 feet from the westbound track. That point must be right at the corner of the large brick build-

ing, but this overlooks the danger of a movement along the siding shown in photo No. 1, and also the danger in case a freight car is standing on this siding.

The view coming from the north to the east is shown in photos Nos. 5 and 6, Ellison Street. With a freight car on the siding in the foreground the view to the east is entirely cut off. A movement along this siding would be hidden by the concrete building built close to the right of way.

The obstruction to view at this crossing is as bad as it is possible to be.

This crossing is heavily used. The Erie's count showed 4,121 pedestrians and 726 vehicles per day.

(F) Van Houten Street.

So far as views are concerned, this crossing is very dangerous. The four views are obstructed by buildings.

Coming from the south the view to the east (*o. d.*) is cut off by a high brick building built up close to the right of way. This building stands within 8 or 10 feet of the eastbound tracks. (Photo Van Houten Street No. 1.) Switching movements in either direction are to be expected over this track. A driver gets no view of an approaching train until his horses are about on the tracks.

Coming from the south the view to the west is obstructed by a large dwelling built on the line of the right of way and within about 8 or 10 feet of the nearest rail. (Photo Van Houten Street No. 2.) The view is interfered with by the gateman's house and poles. Considering the distance the side of a passenger train projects over the rail, a horse might be struck by a train before the driver

had reached a point from which he could see along the track.

Coming from the north the view to the west is obstructed by a high stone wall built along the line of the right of way and maintained by the company under its agreement with Van Houten. (See Exhibit No. R-15, p. 1039; see photo No. 3, Van Houten Street.)

Coming from the north the view to the east is obstructed by a large mill built on the line of the right of way. It would further be obstructed by a freight car on the siding shown in the center of the photo No. 4, Van Houten Street.

(G) Broadway.

This is a much used crossing and the views are bad in three directions.

Approaching from the south the view to the east is obstructed by a large brick building built close to the right of way. (See photos Broadway Nos. 1 and 2.)

The view to the west is obstructed by a gate house and fence. (See Broadway photos Nos. 3, 4 and 5.) From the sign shown in No. 5 the likelihood is that this view will soon be obstructed by a large building built close to the right of way.

Approaching from the north the view to the east is obstructed by a dwelling, which is probably the one referred to in the deed to the company from Van Houten (Exhibit R-15, p. 1039). The company was to maintain the wall under this dwelling by virtue of the terms of the deed. The wall is shown more clearly in photos Nos. 1 and 2, Broadway.

The view to the west is more open than the other three. It was at this crossing that the automobile driven by Froehlich was struck. He approached from the north and the train came from the west.

This is one of the most heavily used crossings. The counts show over 10,000 pedestrians, over 600 vehicles and 600 street cars.

(H) Fair Street.

The danger at this crossing is not as great as at the crossings to the east considered above. It is, however, a dangerous crossing. Clear views cannot be had, according to the view map, nearer to the rail than

Approaching from south to the east at 11 feet.
Approaching from south to the west at 26 feet.
Approaching from north to the east at 11 feet.
Approaching from north to the west at 11 feet.

In photo Fair Street No. 6 it will be noticed there is a switch just behind the gateman's tower leading to Agnew's coal yard beyond Hamilton Avenue. This can only be reached by a movement to the west over the eastbound track.

The dangerous conditions at the other crossings stand out when we can speak of the danger at this crossing, where a clear view cannot be had until within 9 feet of the danger point, as not as great as at the other crossings.

The danger point is at least 2 feet nearer than the nearest rail because of the overhang of the car.

The traffic at this crossing is light when compared with the other crossings in the case. Compared with crossings in other than a populous city it would be considered heavy.

(I) Hamilton Avenue.

The railroad curves just to the west of this crossing. The Agnew coal yard is located here, and cars to be delivered there are run over a siding which crosses Hamilton Avenue, adding to

the danger. The Agnew Coal Company is in receipt of 260 cars per month over its three sidings (see Exhibit R-49, p. 1115), the first of which is located at Hamilton Avenue, and the second just to the west, and the third near the main yard in the vicinity of Cedar Street.

Coming from the south the view to the west is obstructed by a fence on the Agnew property built close to the siding leading to the coal yard. A car standing on this siding would obstruct the view. (See photo Hamilton Avenue No. 6.)

The view to the east on this approach is obstructed by a frame dwelling built up to the line of the right of way. (See photo Hamilton Avenue No. 7.)

Coming from the north the view to the west is comparatively an open one, while the siding leading to Armour & Company's beef house is free of freight cars. A freight car standing on a part of this siding would block the view very much. The wagons of the company while being loaded would also interfere with the view. Armour & Company do a large business. They receive fourteen cars per month (Exhibit R-49). It is quite likely that the siding is occupied by freight cars most of the time.

On the approach from the north the view to the east is interfered with by a gateman's tower. It is not an open view.

The count shows 3,258 pedestrians, 433 horse-drawn vehicles and 108 automobiles use this crossing in a day.

(J) Lafayette Street.

This is a busy crossing; the count showed 4,611 pedestrians and 360 vehicles. There are two main tracks and a siding crossing the street.

On the approach from the north the view to the east is interfered with by tower.

On this approach the view to the west is comparatively open, if the siding in the picture (No. 5, Lafayette Street) contains no freight cars. That the siding does contain cars at times may be observed by photo No. 7. Photo No. 5 and photo No. 7 were both taken on November 30, 1913, as appears by the legend at the bottom. The freight cars standing on the siding shown in No. 7 were apparently conveniently moved for the photographer when he took photo No. 5. From the fact that in nearly all the photographs freight cars are absent from the sidings, where they might obstruct the view, the number of switching movements must have materially increased on the days these photographs were taken.

On the approach from the south the view to the west is obstructed by a fence built along the right of way and by the fact that freight cars may be standing on siding down in the foreground of photo No. 7. A movement over this long siding would be a source of danger on this approach.

The view to the east is obstructed by a dwelling and by a fence along the right of way. It would also be shut off by any freight cars on siding shown in photo No. 8.

(K) Franklin Street.

There are two main tracks and two sidings crossing this street. The traffic over this crossing is light when compared with the others, but is still considerable.

The view would be obstructed by freight cars upon the sidings. The tower shown in photo No. 2 also obstructs the view seriously.

The building shown in photo No. 6 is also an obstruction. With freight cars on the sidings this crossing is extremely dangerous.

(L) Keen Street.

This street is crossed by two main line tracks and three sidings. This is a particularly dangerous crossing.

Approaching from the south the view is obstructed toward the east by a building built up close to the right of way. Alongside of this building is a siding, as shown in photo Keen Street No. 8. This photo was taken at a point 19 feet from the eastbound track, but at a point where a movement over the siding would have dislodged it. The building, the edge of which is shown on photo No. 8, Keen Street, is part of the Fullerton plant, which receives eighty-two cars per month (Exhibit R-49, p. 1115). It is probable that this siding is filled with freight cars, except when the railroad is taking photographs. Cars are shown on this siding close to Keen Street in photo Franklin Street No. 2. Looking at photo Franklin Street No. 2, a line of freight cars is seen broken at Keen Street, which is located at the point where two pedestrians are shown standing on the tracks.

On the approach from the south the view to the west is obstructed by a high shed built along the line of the right of way. In case freight cars are on the siding shown in photo Keen Street No. 7, a driver would have no view of the train until his horse was upon the main track.

Approaching from the north the view to the east is obstructed by the warehouse of Meyer & DeVogel, as shown in Keen Street No. 2. Freight cars on the siding would shut off this view. Freight cars may be noticed on this siding in the

following photos: Franklin Street Nos. 4 and 5, Lafayette Street Nos. 6, 7 and 9, and others.

On this approach the view to the west is obstructed by the mill of the Sipp Machine Company, although this is the best view at this crossing.

The count shows 1,367 pedestrians, 131 horse-drawn vehicles and 131 automobiles use this crossing per day.

(M) Warren Street.

At this crossing three views are fair; that is, a view may be had within twenty feet of the danger point. On the approach from the south the view to the east is shut off by a building up to the right of way. It would be shut off altogether by freight cars on the siding shown in photo Warren Street No. 5.

The count shows 1,520 pedestrians, 115 horse-drawn vehicles and 48 automobiles use this crossing per day.

(N) River Street.

Putnam Street.

This crossing is one of the most heavily used. Over 10,000 pedestrians and 1,000 vehicles use it daily. The railroad crosses Putnam Street at about right angles and River Street at a very acute angle. The street railway crosses on River Street.

Distances on the view map along River Street are exaggerated by reason of the angle. Photo No. 1, River Street, is marked as having been taken 30 feet from the eastbound track. It would be 30 feet measured along the center of River Street, but actually it was about 8 feet. Vehicles do not always proceed along the center of River

Street, but frequently turn to the right around the crossing gate shown in the center of this photograph to go upon Wait Street, which appears in the photo running along the other side of the tracks. The course such vehicles would take can be seen in photos River Street Nos. 6 and 7.

The approach along River Street from the north, as shown in photo No. 1, is dangerous because the view to the west is cut off by the passenger station. This is the same view (or lack of view) as shown in Putnam Street No. 1.

The view to the east on approach from the north is fair as compared with most of the others along the right of way. The buildings at this point are not built so close to the tracks, so that it is possible to see an approaching train when within about 25 feet of the danger point.

On the approach from the south the view to the west is clear, if the siding shown in photo Putnam Street No. 5 is clear. Otherwise this view would be obstructed.

The view to the east on this approach is obstructed, as shown in photo No. 5, River Street, by a tower and a frame house. This, as shown, was taken at a distance measured along the center of River Street of 28 feet. The nearest rail would be about 8 feet from the camera, along the course which would be taken by a person turning from River Street into Putnam.

(b) *The crossings in question impede public travel along the highways.*

Every street car is stopped near a railroad crossing until the conductor goes over it on foot and releases a derail switch; the car must stop on the other side until the conductor can board it. Some time is consumed in this operation, but this

delay is not nearly so serious as the irregular delays which cause the street cars to fall behind in their schedule time. Delays of four or five minutes sometimes occur at the Market Street crossing, and without doubt street cars are frequently delayed to this extent at this crossing. This is a delay to the numerous passengers in the car and to others all along the line who are waiting to use the street cars. Such a delay to a street car frequently disarranges the schedule so that persons a mile from the crossing may be inconvenienced.

Mr. Wieda, Market Street business man, stated that on one occasion he was delayed four minutes at the Market Street crossing (Case, p. 157).

James E. Taylor (Case, p. 157) says that nearly every noon he is held up on the Market Street crossing three or four minutes.

The impediment to traffic increases with the amount of traffic at each particular crossing. If volume of traffic over the highway is not considered, the impediment to public travel is greater at the Cedar Street crossing than at any other. The railroad yard of the company is laid out over this street. There are altogether ten tracks crossing it. The traveler on the highway passes between lines of freight cars, and naturally, because of the danger, must stop and listen more than once before he is completely over. There are two sets of gates at the crossing; one set guards the main tracks and the other the sidings. There is much switching done at this point. The count by the railroad showed nearly 200 train movements over the crossing.

The impediment to travel over the highway is very great at the *Straight and Clay Street* crossings. Here there are four tracks to cross; two main tracks and two sidings. A sharp curve to

the west of Clay Street adds to the danger and makes it necessary for the traveler along the highway to proceed very slowly and with the greatest caution. The record shows the greatest number of train movements over this crossing; 215 movements on October 4th, 1913, between 5 A. M. and 11 P. M. (Exhibit P-4, p. 845); 233 train movements on November 11th, 1913, between 5 A. M. and 11 P. M. (Exhibit R-25, p. 1075). In this last report it will be noted that between 5 and 6 P. M. there were 8 passenger trains and 19 switching movements over this crossing, 27 in all in the space of an hour. The crossing gates were reported down during this hour only 13 times. They must have remained down while 2 and 3 movements were made over the crossing. The train movement at Straight Street was exactly the same on this day. (See same exhibit, p. 1073.)

James E. Taylor, the Street Commissioner, says that on one occasion he was held up for ten minutes at these crossings (Testimony, p. 157).

Delays of ten minutes at both these crossings are undoubtedly frequent with the amount of switching carried on there.

The delays at the Market Street crossing are particularly referred to in the report of the Board (Case, p. 1755).

The record kept by the railroad shows that on November 6th, 1913, the gates at the Market Street crossing were down twenty-one times between the hours of 6 and 7 P. M. Mr. Hattersley found the average time the gates were down to be fifty-three seconds. Using this average the gates at this crossing, during the hour named, were down seventeen minutes, or nearly one-third of the time.

The impediment to traffic at the other crossings is somewhat less than at the crossings above referred to, but in every case the impediment is vastly greater than at the average grade crossing.

The train movement over the main line of the Erie is much greater than that over any of its branches in New Jersey. In addition to the main line trains, those of the Newark branch pass over these crossings, with the exception of Madison Avenue. The grade crossings in Jersey City have been eliminated, so that outside of one at Rutherford the railroad movements over the crossings involved in this proceeding are undoubtedly greater than at any others on the Erie system in New Jersey. The crossings on the Erie main line in Passaic do not carry any Newark branch trains, so that the passenger train movement is less than in Paterson.

The Legislature, in using the word "impeded" in the Fielder Act, referred to the hindrance or obstruction to public travel along the highway caused by the passage of trains. It could not have contemplated an impediment of a permanent nature. Such an impediment might easily be removed without a change of grade. Undoubtedly the Legislature had in mind the impediment caused by the passage of trains, as this is the only impediment that could not be removed (and the railroad operated) without a separation of grades.

If the use by the railroad is the test to be applied in determining whether or not there is impediment to public travel, we have in these crossings the maximum impediment along the entire Erie system in the State. Outside of the Rutherford crossing referred to, if travel is not impeded at these crossings, it is not impeded anywhere on the Erie system by train movements.

In fact, there are few grade crossings in the State where public travel is impeded, if it is not impeded upon these crossings.

In Relation to the Market Street Station.

On the plan adopted by the Board the location of the main passenger station of the company is changed from the east to the west side of Market Street.

The reason for changing the location of the station appears (Case, p. 493) in the testimony of the City Engineer, as follows:

> "Q Do you think it possible to maintain the present depot with this elevation? A There is a difficulty in maintaining the present depot at that location on account of the fact that no platform can be obtained on the east side of the track. The street is only 25 feet wide, and there is no possible means of having a platform on each side of the track. It would mean that all the passengers for westbound trains would have to walk across the track, walk across the track of the eastbound train to get to the train."

No contradiction of this statement was made to the Board, which necessarily accepted it as true.

After the Board made its order and these proceedings were pending, Mr. Brameld, an engineer for the company, suggested, in depositions taken, that it was possible to carry out the elevation of the tracks without relocating the depot (Case, p. 1952).

The direct examination of this witness shows that the question had not been carefully studied

by him. He does not make his statement in a positive manner.

On page 1953 it is suggested that to avoid moving the station, Ramapo Avenue might be vacated. The cost of the vacation of this street is not estimated. This street is entirely built up, as appears from Exhibit P-42 on page 874. One building on the street is valued at $56,000 and another at $20,000 and a third at $9,000. By looking at the plan it can be seen that the platform necessary for the station in an elevated position would completely close Ramapo Avenue if the station remained where it is.

It is now claimed that the order is invalid because to relocate the station as provided in the order it will be necessary for the company to take property belonging to the Susquehanna Railroad. This railroad is part of the Erie system, although it is still operated under its original name. The Erie controls its stock. It offered on the application for a rehearing to operate Erie trains over it.

The land which will be taken is in fact part of a public street known as Crosby Place. The fee is in the Susquehanna, but the land has been used as a public street for more than twenty years. Stores and other business places exist along it, and although people approaching the Susquehanna station from the west pass over this street, yet it is mainly used by the general public (Case, pp. 1942 and 1943). Even if it were not a public street, the taking of the same by Erie would not interfere with the Susquehanna station, nor in any way with the operation of the Susquehanna Railroad.

The building of an overhanging platform over this property will not interfere in any wise with any railroad use to which this property may be put.

In Relation to the River Street Station.

Much is said in prosecutor's brief about the change of the River Street station. The witness Brameld testified to the cost of this change. As a matter of fact, no change of location at this station is ordered.

In the plan accompanying the order of the Commission the station at River Street is shown at exactly the same place as it is on the maps of the company showing the present condition. The present station is on the east side of the tracks (north side, operating direction). The word "depot" appears on the plan of the Board in the center of Wait Street and on the opposite side of the track from the rectangle representing the station, but the plan in this regard was fully explained by Mr. Ryon (Case, p. 497), as follows:

> "Q There is a depot at River Street, is there not? A Yes, sir.
>
> Q You make a change in that, do you? A We simply raise the depot up and put a platform on each side of the tracks."

There is some claim about ordering the company to build a sidewalk on its right of way. No sidewalk is ordered built outside the lines of any street. Two sidewalks are shown by dotted lines on the plan at the River Street crossing. One runs along the right of way, but it is entirely within the lines of River Street as at present located. Another crosses the right of way in the line of Warren Street. Although both of these sidewalks are within the lines of the right of way, they are on that part of the right of way which is within a public street.

It is claimed by the prosecutor that it is ordered to build the sidewalks referred to, yet

the order of the Board distinctly orders the city to do it.

The city makes no objection and is willing to build the sidewalks in River and Putnam Streets as ordered.

In Relation to Plan to Divert Trains to Susquehanna Railroad.

The main certiorari in the present case was allowed on June 16, 1915 (Case, p. 1796). The day before the allocatur was signed the company filed with the Board a petition asking for a rehearing (Case, p. 1879). A hearing was accorded to the company on this petition on June 28, 1915 (Case, p. 1885), and the application was denied by the Board on July 9, 1915 (Case, p. 1920).

The petition for a rehearing sets up:

> "6. Since the making of the order of April 20th, 1915, and after the denial of respondent's petition for further hearing, this respondent has conducted a further investigation to show the feasibility of removing *the danger and impediment to public safety and travel* by reducing the number of train movements over said crossings."

The proceedings had at that time been pending two years; the plan prepared by the city and offered to the Board had been in the hands of the company a year; the company had prepared a plan of its own at least five years before.

On behalf of the City of Paterson it is submitted that the Board had no authority to order any plan put into effect which simply reduced the danger or the impediment to public travel. If

danger to public safety existed or if there was impediment to public travel, then the Board was obliged under the statute to order the grades separated.

In view of the present argument of the company that danger does not exist at the crossings and that they do not impede public travel, and that the Board erred in so finding, it is refreshing to read this petition, which solemnly admits that the Board was correct in its finding and that there is danger to public safety at these crossings and that public travel is impeded. The Board was justified in rejecting the petition for a rehearing.

The plan submitted by the company only transferred the danger from one set of grade crossings to another. While it had some merit in that it would enable the company to give the City of Paterson better service, yet it had little merit as a plan for the elimination of grade crossings.

To understand the plan the company proposed as a substitute for the one adopted by the Board, take up a map of the City of Paterson and it will be noticed that the main line of the Erie runs from the north to the south, cutting the city about into two equal parts.

The New York, Susquehanna & Western Railroad enters the city from the east and curves around, leaving the city at the north. Just beyond the city, in the Borough of Hawthorne, the line of the Susquehanna crosses the Erie. About half way through the city a spur leaves the Susquehanna line and runs to near the Market Street station of the Erie, but does not connect with the Erie line. Within the city the lines of the two roads resemble the letter "A," the Susquehanna spur being the cross-piece.

The railroad company proposed to elevate the main running tracks of the Erie commencing at

about Essex Street as in Section A of the plan adopted by the Board, the elevation attaining sufficient height when Market Street was reached to carry the main tracks over that street, which would be depressed slightly. At this point the elevated tracks were to be carried around a very sharp curve to connect with the Susquehanna spur. At the junction of the spur with the Susquehanna another curve would be put in to take trains around to the north and then over the Susquehanna main line to the main line of the Erie at Hawthorne.

The spur of the Susquehanna leaves that road at Madison Avenue, which it crosses at grade; it next crosses East 18th Street at grade at the corner of Pearl Street and then runs into a cut over which Graham Avenue, Carroll Street and Summer Street are carried by bridges; leaving this cut, the spur crosses Straight Street at grade at the Paterson City or Straight Street station. On the Susquehanna, north of where the spur connects with it, that road crosses thirteen streets at grade in the City of Paterson, in addition to Broadway. On the Erie this plan would eliminate only the Market Street crossing, but would materially reduce the train service over all crossings west of Market Street; on the Susquehanna it would eliminate the Straight Street grade crossing; it would create a new grade crossing on Ellison Place, where the new connection was to be made between the spur and the Susquehanna main line.

While this plan provided for the elimination of the Market Street crossing on the Erie and the Straight Street crossing on the Susquehanna, it proposed to leave Madison Avenue, Straight Street, Clay Street and Cedar Street crossings in the same dangerous condition they are today.

The crossings to the west of Market Street (operating direction) on the Erie would be continued, but passenger train movements would be reduced from one hundred and eighteen per day to seven per day. Freight and switching movements would remain the same. This would materially reduce the danger on the crossings to the west of Market Street, but this danger would be transferred to the crossings on the Susquehanna north of Park Avenue.

The closing of Ellison Street across the Erie would be necessary.

This plan would create an unusually dangerous situation at the point where the spur joins the Susquehanna. At the junction the spur would take the shape of a Y, with the Susquehanna line crossing the top, making a triangle. Ellison Place would cross two arms of this triangle at grade. Madison Avenue would cross one arm and join Ellison Place in the center of the triangle. The Broadway passenger station of the Susquehanna (now the busiest Paterson station of that road) would be in the center of the triangle and all persons using the station would have to cross over at least one set of tracks at grade.

The one hundred and eighteen passenger trains of the Erie and the fifty-two passenger trains of the Susquehanna would pass over Ellison Place at grade. This would make a worse situation than there is at present at Market Street on the Erie.

The grade crossing at East 18th Street would also be made a dangerous one. At this point the spur emerges from a cut and it would be impossible to see trains coming out of this cut until they were almost on the crossing. The plan would add one hundred and eighteen passenger trains to the present number that cross at this point. The Susquehanna train movement

at this point would be decreased under the plan, as some trains at the present time run down this spur and out again.

The Broadway crossing of the Susquehanna main line would be continued at grade. This is a much used crossing. Most of the traffic that passes over the Broadway crossing of the Erie continues over the Susquehanna. The crossings are about 3,000 feet apart. Under the proposed substitute plan this crossing would be too dangerous to be permitted.

North or west of Broadway there are thirteen streets that the Susquehanna crosses at grade (Lincoln, Case, p. 1904). The proposed plan would cause between ninety and a hundred additional passenger trains to cross over these thirteen crossings per day.

It can readily be seen that this plan was not carefully studied by the railroad engineers. No engineer was called to explain it. The only witness called was Mr. F. B. Lincoln, the general manager of the road. He is in charge of operation and has no control over construction (Case, p. 1893).

Mr. Lincoln did not make the surveys to see if this plan could be worked practically, but he believed it could, as preliminary profiles had been made (Case, p. 1895). These were not produced at the hearing and they were never put in such shape as to make them practicable to submit as a working drawing.

It can readily be seen from the examination of Mr. Lincoln that this substitute plan was offered at the last minute and that very little study had been put upon it from a construction standpoint. It is claimed that much attention was given to the detail of operation.

Operation is directly under the control of Mr. Lincoln and he certainly would have been familiar

with the results to be obtained. Yet it is very apparent from his examination that not very much time was given by him to this subject. On page 1896 he stated that of the one hundred and eighteen passenger trains that now run over the Erie, sixty-one would not run west of the Broadway station on the Susquehanna. On page 1911, on cross examination, he admits this was an error. This was an important part of the plan; in fact it was the only one that much study would be required on, so far as operation was concerned. It was important that as few trains as possible pass over the grade crossing at Broadway and the thirteen others to the west. That the detail of the operation had not been worked out is admitted on page 1896, case.

The officials of the City of Paterson gave considerable attention to this plan and felt that the improved service it would provide made it worthy of consideration. However, the elements of danger in it were so many that they felt they must oppose it strongly.

The City Counsel announced the position of the city at the close of the hearing, as appears on page 1918:

> "*Mr. Hobart.* Do I understand the city's position to be that they will be satisfied with this plan except for the difficulty you suggest at Broadway and Ellison Place?
>
> *Mr. Merrey.* We would be willing to agree with the company, I think, about this, if we could at the present time have eliminated the proposed crossings at Ellison Place, 18th Street and Broadway.
>
> *Mr. Hobart.* 18th Street, too?
>
> *Mr. Merrey.* Yes, and with the expectation that in the future, some time, these other crossings would be eliminated."

Mr. Lincoln thought that it was impracticable to avoid grade crossings at Broadway and at Ellison Place. (Case, p. 1906):

> "Q Do you know whether it is possible under this plan to make an under grade crossing at Broadway and Ellison Place instead of a grade crossing?
>
> *Commissioner Donges.* On the Susquehanna, you mean?
>
> *Mr. Merrey.* Yes.
>
> A Why, it is possible to put the railroad over the streets.
>
> Q Over or under at Broadway and at Ellison Place? A Why, all things are possible, Mr. Merrey, but I should consider it a very impracticable piece of operation and a very difficult piece of engineering to get the railroad under Broadway as it exists on its present grade. I am not thoroughly familiar with the ground around Broadway, except as I have seen it from the train. It would probably be possible from an engineering standpoint to get Broadway over the railroad, leaving the railroad on its existing grade, but it would be pretty difficult to work in that Y connection and change the grade of the railroad, within a reasonable expense, All things are possible in that line."

The company was given an opportunity to supplement its proofs with reference to this plan but decided not to do so (pp. 1916-1917).

A serious objection to the consideration of the plan by the Board was the fact that the Susquehanna Railroad did not join in the petition nor appear.

The company in its petition proffered itself as willing to complete the whole of the work in the

time limited by the Board for the doing of Section A. There is no estimate as to the cost of this work, but it can be seen that the cost must about equal the cost of Section A under the plan adopted by the Board.

Evidently the company felt that it could surmount all the financial difficulties in its path and secure the necessary funds.

II.

ARGUMENT.

The Italics used are not in the text quoted, but are ours.

POINT I.

The Fielder Act should not be declared to be void for unconstitutionality, if its unconstitutionality is in anywise doubtful.

A well-defined, though self-imposed limitation of the judicial function of declaring legislative acts to be void for unconstitutionality exists. This limitation may, for practical purposes be stated to be, that an act will not be declared void by the courts, if its unconstitutionality is in anywise doubtful.

(1909) *Attorney General* v. *McGuinness*, C. T. Court of E. & A., 78 N. J. L., 346.

GARRISON, *J.* (373):

> "The judicial function therefore with respect to the invalidation of a legislative act does not consist merely in comparing the determination evinced by such act with that reached by the court and the substitution of

the latter for the former whenever they happen to differ. On the contrary, the ultimate judicial question is not whether the court construes the constitution as permitting the act, but whether the constitution permits the court to disregard the act; a question that is not to be conclusively tested by the court's judgment as to the constitutionality of the act, but by its conclusion as to what judgment was permissible to that department of the government to which the constitution has committed the duty of making such judgment.

A court by force of its own reasoning, or by reason of the diversity of sentiment among its own members, may often conclude that, while according to what it deems the correct view, an act is void, still there is another view that is permissible that would support the act. As legislators the judges would be bound to follow their own judgment, but as a court they must accord that same right to those in whom the constitution has reposed it."

(1909) *Attorney General* v. *McKelvey,* C. T. Court E. & A., 78 N. J. L., 621.

SWAYZE, *J.* (622):

"The fundamental principle which is controlling upon the courts in passing upon the constitutionality of a statute has been nowhere better stated than by Mr. Justice Garrison, speaking for this court, in Attorney General *v.* McGuinness, *ante.,* p., 346. After reviewing the authorities, he says (at p. 371): 'These citations, which might be indefinitely extended, show the existence of a well-defined though self-imposed limitation

of the judicial function of declaring legislative acts to be void for unconstitutionality, which limitation is for practical purposes stated to be that an act will not be declared void by the courts if its unconstitutionality is in anywise doubtful.' He adds that the notion that a legislative act will be sustained only when it is demonstrably constitutional 'in effect supplements the constitution by requiring the affirmative concurrence of all three departments of the government, where that instrument of the organic laws requires but two, viz., the legislative and the executive, and thus, in effect, annexes to the judicial branch a quasi-legislative function akin to that which the constitution itself has annexed to the executive by the veto power.' 'The ultimate judicial question,' he says, 'is not whether the court construes the constitution as permitting the act, but whether the constitution permits the court to disregard the act, a question that is not to be conclusively tested by the court's judgment as to the constitutionality of the act, but by its conclusion as to what judgment was permissible to that department of the government to which the constitution has committed the duty of making such judgment.'

"A court by force of its own reasoning or by reason of the diversity of sentiment among its own members may often conclude that, while according to what it deems the correct view, an act is void, still there is another view that is permissible that would support the act. As legislators the judges would be bound to follow their own judgment, but, as a court, they must accord that same right to those in whom the constitution has reposed it."

(1913) *Hudspeth* v. *Swayze,* C. T. E. & A., 85 N. J. L., 592.

WALKER, *C.:*

"In fine, where there are two permissible views as to the existence of a constitutional limitation—one unfavorable and the other favorable—to a given statute, the courts must accord to the legislature the right to hold that view of the constitution which supports its enactment, even should the other view seem to the court to be the preferable one. The mere fact that dissentient views to a generally accepted doctrine are held, or have been expressed, does not conclude the question that there are two permissible views within the meaning of this rule. The existence of such dissenting views is merely a reason, which, together with other relevant considerations, are to be taken into account by the court in the determination of the question whether there are two permissible views. In the present case, upon such consideration, we have determined that there are two permissible views within the meaning of the rule stated. This same question was before us in Attorney General *v.* McKelvey, 49 Vroom 621, and Mr. Justice Swayze, who wrote the opinion for this court, says (at p. 622):

"The fundamental principle which is controlling upon the courts in passing upon the constitutionality of a statute has been nowhere better stated than by Mr. Justice Garrison, *ante,* p. 346. After reviewing the authorities, he says (at p. 371): 'These citations, which might be indefinitely extended, show the existence of a well-defined though self-imposed limitation of the judi-

cial function of declaring legislative acts to be void for unconstitutionality, which limitation is for practical purposes stated to be that an act will not be declared void by the courts if its unconstitutionality is in anywise doubtful.' He adds that the notion that a legislative act will be sustained only when it is demonstrably constitutional 'in effect supplements the constitution by requiring the affirmative concurrence of all three departments of the government, where that instrument of the organic law requires but two, viz., the legislative and the executive, and thus, in effect, annexes to the judicial branch a quasi-legislative function akin to that which the constitution itself has annexed to the executive by the veto power.' ''

GARRISON, *J.* (Concurring):

''The question is whether the constitution of this state sets a limitation upon the legislative power that was overstepped in the enactment of the statute before us.

As to the existence of such a constitutional limitation there are two opposing views, one that relied upon by the court below in declaring the statute to be unconstitutional, the other that relied upon by this court in sustaining the constitutionality of the statute: views that are set forth at length in the opinions of these courts respectively.

That either of these views is a permissible one is thus practically tested and demonstrated, and that such is the case is expressly decided by this court.

Such demonstration and decision render it unnecessary to determine which of these two views is the preferable one in the opinion of this court, since regardless of such determination the act of the legislature under review cannot be declared to be unconstitutional if such act can be sustained upon a view of the constitution that it was permissible for the legislature to take, and that such a view exists is both decided and demonstrated in the opinion of Chancellor Walker speaking for this court.

This is the rule announced for this court in Attorney General *v.* McGuinness, 49 Vroom 346, and followed and re-affirmed by this court in Attorney General *v.* McKelvey, 49 *Id.* 621.

Upon the ground, which is the one last stated in the Chancellor's opinion, I base my vote for the reversal of the judgment rendered by the Supreme Court."

POINT II.

The common law imposes upon a railroad company the duty to maintain the public highways where they cross the railroad in condition for safe and convenient use at all times and under all circumstances. This duty is continuing and applies alike to highways in existence when the railroad was laid out and to those constructed later.

(1900) *State ex rel.* v. *St. Paul & Minn. Transfer Ry. Co.*, 80 Minn., 108; 83 N. W., 32.

HELD, that at common law the duty rests upon a railroad corporation, when it occupies a public thoroughfare with its tracks, to restore the same by some reasonably safe and convenient means

to its former condition of usefulness, and that the duty is a continuing one.

(1906) *State ex rel. City of Minneapolis* v. *St. Paul, M. & M. Ry. Co.*, 98 Minn., 380; 108 N. W., 261; 28 L. R. A. (N. S.), 298.

BROWN, *J.*:

"Again, we are clear that the obligation is imposed upon the railroads at common law. The common law doctrine, that where a street or highway is laid over one already in existence, the expense of making the crossing safe rests upon the company or corporation using the new way, had its origin when railroads were unknown, at a time when the use of all highways, generally speaking, was of the same general nature, the traffic or use of either not being inherently dangerous to the free use and enjoyment of the other. Not so where a railroad crosses a public street, or a street a railroad. In such a case the operation of trains over the latter, particularly in our large cities, is highly dangerous and a menace to the public using the intersecting street. The railroad is alone responsible for this condition, and, though it has an unquestioned right to operate its trains in such manner as the practical conduct of its business may require, the dangers resulting therefrom are of its own creation, and on every principle of right and wrong it should bear the burden of protecting the public so far as practicable from accident or injury. * * *

"It is insisted that the rule of the common law above referred to applies to and governs the position of relator in the case at bar, imposing the obligation of constructing the bridge in question upon the city, because the

street was laid over the existing railroad. The rule in its abstract form can have no application to facts and conditions such as here shown, and cannot be held to impose upon the municipality the burden of constructing safety devices to protect pedestrians from dangers caused solely by the railroad company. In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its tracks, and in contemplation that it may do so, * * * and the further fact that the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street, and the further elementary principle that he who creates and maintains upon his premises a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing, must be held to apply equally to new streets. The right is a condition attached by implication of law to the charter and franchises of the railway company, and the obligation to maintain the street intersections in good repair is a continuing one, follows the franchise and applies to new streets or highways as soon as they come into existence."

(1911) *Wabash R. Co.* v. *Railroad Commission,* Ind., ; 95 N. E., 673.

MONKS, *J.:*

"It is well settled in this state that the right of a railroad company to cross a high-

way with its tracks carries with it the duty upon the part of the railroad company to restore the highway to, and keep it in, its former condition of usefulness and safety, and, if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway or the highways over or under its tracks. * * *

"While under the law of this state the railroad company may have a discretion as to the manner of performing this duty of providing a safe and useful crossing, it is a ministerial discretion. 'The act must be done, and there is no discretion as to whether it will or will not do it. If the mode chosen fails to execute the duty, though the company claims it is adequate, the law by mandamus will compel a proper performance, pointing out in the writ the point of failure and what must be done that there may be no further failure.' * * *"

(1913) *State ex rel. City of St. Paul* v. *Chicago, M. & St. P. Ry. Co.*, 122 Minn., 280; 142 N. W., 312.

DIBELL, *C.:*

"1. Whenever it is reasonably necessary for the convenience and safety of the traveling public, it is the duty of a railway company to viaduct or bridge its tracks at their intersection with streets. This duty exists at common law. * * *

"2. The power to require a railway to bridge or viaduct streets is referable to the police power. It is a legislative power."

(1915) *State ex rel. Village of Clara City* v. *Great Northern Ry Co.* (Minn.), 153 N. W., 879.

BUNN, *J.*:

> "Even at common law the burden was cast upon the railroad to maintain that part of the public highway occupied by its tracks and right of way in a proper condition for travel."

POINT III.

The acts incorporating "The President and Directors of the Paterson & Hudson River Railroad Company" (P. L., 1831, p. 24) and the "Paterson & Ramapo Railroad Company" (P. L., 1841, p. 97), each impose the duty "to construct and keep in repair, good and sufficient bridges or passages over and under the said railroad or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be prevented thereby."

The statute creating "The President and Directors of the Paterson & Hudson River Railroad Company" (P. L., 1831, p. 24) in its ninth section provides:

> "That it shall be the duty of said company to construct and keep in repair, good and sufficient bridges or passages over and under the said railroad or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be prevented thereby; and also where the said road shall intersect any farms or lands of any individual to provide and keep in repair suitable wagon ways over and under said railroad, so that they may conveniently pass the same."

The statute incorporating the "Paterson & Ramapo Railroad Company" (P. L., 1841, p. 97) contains a substantially similar provision in its eleventh section.

POINT IV.

The duty imposed by these acts of incorporation is continuous, and requires that at all times and under all circumstances the public highways where they cross the railroad, be kept in a condition fit for safe and convenient use.

An existing crossing may become insufficient either because of the increased business of the railway company, or the increased use of the public easement in the street, or both.

(1907) *Borough of Metuchen* v. *Pennsylvania R. R. Co.*, 73 N. J. E., 359 (Court of Errors and Appeals).

The charter of a railroad company provided that it should be the duty of the company to construct and keep in repair, good and sufficient bridges or passages over or under its railroad, where any public road should cross the same, so that the passage of carriages, horses and cattle should not be impeded thereby.

HELD, That when the tracks of the railroad company have been laid across a public highway at grade, and increasing travel requires the abandoning of the grade crossing for the better conserving of the safety of those using the highway, the right of the company under such a charter provision to construct a passageway under its railroad, as it then exists, of sufficient width and height to accommodate public travel, instead of lowering the grade of the highway and carrying

it in its full width under the railroad, is clear, for the imposition of the duty carries with it the power to perform that duty in exact accordance with its prescription.

HELD, Further, that, the duty resting upon the company of constructing and maintaining a good and sufficient passage under its railroad at its intersection with a public street was a continuing one, and as that passage was not originally made of equal capacity with the highway, it must, from time to time, be enlarged by the company as public accommodation demands, until it shall reach the full capacity of the highway.

(1907) *Newark* v. *Erie Railroad Company,* 72 N. J. E., 447 (Ch.).

Bill to compel the defendant companies to elevate their tracks where they cross Summer Avenue, in the City of Newark. On demurrer to bill. Demurrer overruled.

MAGIE, *Chancellor* (452):

> "The first contention raises the question of the true construction of the clause contained in the ninth section of the act of incorporation of the Montclair Railway Company, under which act that corporation obtained the franchises which the defendant now exercises, and under which the tracks were laid and are now maintained across Summer Avenue at grade. The language in which the legislature expressed its will is the following: 'It shall be the duty of the said company to construct and keep in repair, good and sufficient bridges over or under the said railway, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said rail-

way shall not be impeded thereby.' Was the duty thus imposed completely performed by the construction of 'bridges' under or over the railway, where it crossed Summer Avenue, which were at the time of their construction 'sufficient' to prevent the public use from being 'impeded' by the railway? It is impossible to give such a construction to the language of this clause. The bridges which it is the duty of the defendants to construct are to be sufficient to permit the passage, in the use of the easement, of carriages, horses and cattle, so that it shall not be impeded by the railway. If the bridge at first provided becomes insufficient for the required purpose, whether because of the increased business of the railway company, or of the in- has not been performed."

"The ninth section of the charter of the Central Railroad Company of New Jersey contains a clause identical, in all substantial effects, with the ninth section of the Montclair Railway Act above recited. It came under review in Central Railroad Company *ads.* State, 32 N. J. L. (3 Vr.), 220. The Supreme Court, in the opinion of Chief Justice BEASLEY, declared that the clause imposed a duty on the railroad company in favor of the public, which was continuous, and the performance of which must be measured by circumstances. The prescribed duty was, it was held, to keep at all times and under all circumstances the public highways at points where they cross the railroad, in a condition fit for safe and convenient use. The doctrine was again expressed in the Supreme Court in Reed *v.* Camden, 53 N. J. L. (24 Vr.), 322, and when that case came into review in the Court of Errors and Appeals,

while the judgment of the Supreme Court was reversed, there was no criticism of the doctrine. Chancellor McGill, in this Court, in construing a similar clause in the General Railroad Act, held that if the crossing constructed originally was not of sufficient capacity, it must, from time to time, be enlarged as public accommodation demands. Raritan *v.* Port Reading Railroad Co., 49 N. J. E. (4 Dick.), 11. In Clark *v.* Elizabeth, 61 N. J. Law (32 Vr.), 565, the opinion of Chief Justice Beasley was cited with approval. Vice-Chancellor Grey declared that the doctrine of a continuing duty, under such legislative prescription, had been adopted by our courts (West Jersey and Seashore Railroad Co. *v.* Waterford, 64 N. J. Eq. [19 Dick.], 663), and his opinion, giving expression to this view, in Palmyra *v.* Pennsylvania Railroad Co., 62 N. J. Eq. (17 Dick.), 601, was adopted by the Court of Errors and Appeals in affirming the decree made on his advice in 63 N. J. Eq. (18 Dick.), 799. Vice-Chancellor Van Fleet, in Newark *v.* Delaware, Lackawanna and Western Railroad Co., 42 N. J. Eq. (15 Stew.), 196, declared, and Vice-Chancellor Emery, in Swift *v.* Delaware, Lackawanna and Western Railroad Co., 66 N. J. Eq. (21 Dick.), 34, assumed that the doctrine of a continuing duty in such case is beyond doubt. See also *S. C.*, 66 N. J. Eq. (21 Dick.), 452.

"In my judgment the bill is not open to the objection made upon this ground."

POINT V.

These specific charter provisions include highways laid across the railroad at any time.

It is submitted that these provisions include highways laid across the railroad at any time.

It is conceded that in passing upon a substantially similar provision, Vice-Chancellor LEAMING, in (1912) *West Jersey & Seashore R. R. Co.* v. *Woodbury,* 80 N. J. E., 412, reached the conclusion that the provision related only to public roads which existed at the time the railroad was constructed, and did not include highways opened at a later time.

It is contended, however, that the view adopted by the Vice-Chancellor is unsound, and that the contrary view adopted and set forth by DIXON, *J.*, in (1899) *M. & E. R. R. Co.* v. *Orange,* 63 N. J. L. 253, 273, is sound, and was sustained by the Court of Errors and Appeals (1910) in *Erie Railroad Company* v. *Paterson,* 79 N. J. L., 512, 513.

Further cases in this point may be found under Points II and XIII.

POINT VI.

The leases to New York and Erie Railroad Company, confirmed by P. L., 1853, p. 480 (Case, 977, at 979) vested the powers, privileges and rights of the lessors in the lessee. These powers, privileges and rights were vested subject to the duties imposed by the acts of incorporation.

Whatever rights the Erie Railroad Company has in the railroads in question are derived from the confirmatory act of the Legislature, P. L., 1853, page 480.

In the absence of legislative authority conferred for that purpose, or of a confirmatory act, a lease made by a railroad corporation of its road and franchises would be absolutely null and void.

(1915) *West Jersey & S. R. Co.* v. *Board of Public Utility Com'rs,* 94 Atl., 57, 59 (Ct. E. & A.).

As set forth under Points III and IV, the acts incorporating the lessors each imposed the duty at all times and under all circumstances to keep the public highways where they cross the railroads in condition fit for safe and convenient use.

The confirmatory act as pointed out in the statement of facts provided.

> "that the said leases and contracts shall not be held to grant any power, privilege or right not granted to said companies respectively by their charters and the supplements thereto."

(1891) *Buffalo Stone & Cement Co.* v. *Delaware, Lackawanna & Western R. Co.,* 130 N. Y., 152.

HELD, that where a railway company organized under the laws of the state leases its property to a foreign company, and by a covenant in that lease the latter agrees to perform all things in connection with the road which the lessor might be required by law to perform, the lessee must maintain farm crossings, as required by Laws 1850, Chap. 140, Sec. 44.

FOLLETT, *C. J.*:

"In Jones *v.* Seligman, 81 N. Y., 190, a railroad corporation mortgaged its property to trustees to secure the payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage the trustee entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to build fences and farm crossings, which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties except those mentioned in the statutes. It was held that the trustees being in possession with power to make reparation and additions, they had the right, and it was their duty, to construct fences and necessary farm crossings; that being in possession of the property, and engaged in operating it, they must carry out the provisions of the statutes as the representative of the corporation. In this case the defendant, by a covenant in the lease above quoted, expressly agrees to perform all things in connection with the road which the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of Jones *v.* Seligman.

"The position that the defendant is not liable because it is not a corporation of this state, or organized under Chapter 140, Laws 1850, is not tenable. It having the right to operate its leased lines under the statutes of this state, it must be held to have assumed to discharge the same duties to the

public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes."

(1892) *Thayer* v. *Flint & P. M. R. Co.*, 93 Mich., 150; 53 N. W., 216.

McGRATH, *J.:*

"The statute makes it the duty of railroad companies to restore the highway to its former state, as near as may be, and to construct suitable crossings for the passage of teams. How. St., Sec. 3323. The obligation imposed by the statute continues until its proper discharge. By the transfer to it, the defendant took subject to the obligations and duties prescribed by the general railroad laws of the state. Laws 1889, p. 11."

(1907) *St. Louis & S. F. R. Co.* v. *Hale* (Ark.), 100 S. W., 1148.

RIDDICK, *J.:*

"This is an appeal by a railroad company, from a judgment rendered against it * * * for a penalty of $200 for failing to construct stop gaps at two places, where the railroad operated by defendant passed through inclosed land owned by plaintiff.

"The first contention on the part of the defendant is that it is only the lessee of the railroad, and not the owner thereof, and that the statute requiring railroad companies organized under the laws of this state to construct stop gaps in certain cases does not apply. But our statutes provide that any railroad corporation of another state leasing any railroad in this

state shall become subject to all the regulations and provisions of the law governing railroads in this state and held liable for the violation of any such laws. Kirby's Dig., Nos. 6732, 6743, 6757, 6758. These sections put the defendant in the same position, so far as this statute in reference to stop gaps is concerned, as the railroad company which first constructed the road, and any failure to obey the statute, subject it to the penalties pronounced by the statute. Russell *v.* Railroad, 71 Ark., 451, 75 S. W., 725."

POINT VII.

Independent of the common law and of specific charter provisions, the general statutes of the State impose upon the railroad companies operating within the State a continuing duty at all times and under all circumstances to keep the public highways where they cross the railroad in a condition fit for safe and convenient use.

Section 14 of the original *General Railroad Act,* "An Act to authorize the formation of railroad corporations and regulate the same" (P. L., 1873, p. 88), provided:

> "That it shall be the duty of any company *incorporated under this act* to construct and keep in repair, good and sufficient bridges and passages over, under and across the said railroad, where any public or other roads, now or hereafter laid, shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby * * * provided,

that in case said railroad shall cross any street or highway in any city it shall be either above or below the grade thereof, at such distance as shall not interfere with the free and uninterrupted use of said streets or highways; provided further, that the common council of any city may grant permission to cross such streets or highways at grade, if they shall deem it to the best interest of said city."

This section has gone through a process of expansion and change.

By a supplement, P. L., 1882, page 245, the section was amended so as to apply to "any company incorporated under this act or *owning or operating any railroad,* or owning any complete or incomplete right of way for a railroad within this State."

In addition this supplement provided:

"That in the event that such company shall not within a reasonable time after notification from the common council of the city, or committee of the township, in which such bridges and passages are to be constructed or repaired, proceed to construct or repair the same as required by this act, said common council or committee may proceed to construct or repair such bridges or passages, and when the cost thereof shall have been ascertained, the same may be collected of and from said corporation by the said common council or committee, by an action at law in any court of competent jurisdiction; and further provided, that the said council or committee, in the name of the city or township, may insti-

tute proceedings against said company to compel the specific performance of the requirements of this act."

In 1887 (P. L., 1887, p. 226), the Legislature further amended Section 14, making its provisions applicable to

> "any company incorporated under this act, or any company *owning, leasing or controlling* any right of way for a railroad within the state which has been graded in the whole or in part, but upon which right of way the track or tracks have not been completely laid, shall construct good and sufficient bridges and passages over, under and across the said railroad."

The foregoing act was declared unconstitutional in *N. Y., etc., R. R. Co.* v. *Montclair,* 47 N. J. E., 591.

The changes attempted to be made by it were accomplished by the supplement of March 17, 1891, P. L., 1891, page 169, which contains the further provision:

> "That the permission of the common council of any city hereinbefore referred to shall not be necessary for the purpose of crossing any street or highway at grade, unless the said street or highway at the point where said railroad shall cross, or at some point between the crossing of said railroad and the nearest terminus of said street or highway shall be in actual use by and for pedestrians and teams at the time of the acquirement of the right of way of said railroad across such street or highway."

The foregoing provisions became Sections 26, 27 and 29 of the Act Concerning Railroads, Revision of 1903, page 645, and therein are made applicable to *"every railroad company owning, leasing or controlling any right of way for a railroad within this State."*

Section 26 contains the proviso:

> "that this section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act, and whose railroad was constructed before the second day of April, eighteen hundred and seventy-three."

As to the effect of this proviso, see:

(1909) *South Amboy* v. *P. R. R. Co.*, 76 N. J. E., 57.

Same case, 77 N. J. E., 244.

The duty imposed by these general statutes is a continuing duty.

In (1867) *The Central R. R. Co.* ads *The State*, 32 N. J. L., 220, the Supreme Court had under review and set aside a judgment convicting the railroad company for obstructing a public street, the grade of which the company had begun to depress so as to pass the street beneath the tracks.

Chief Justice BEASLEY, referring to a specific provision of the charter similar to the general provision now contained in the general railroad act, said (224):

> "This provision, it will be perceived, imposes a duty on the company in favor of the public. It is to be taken most strongly

against the corporation, but it is to receive a reasonable construction. It is a continuing duty to which the company is made subject, which in its performance must be measured by circumstances. Thus, a bridge or passageway which at one time would be adequate to the public accommodation might at a subsequent period, from an increase of business or population, be totally inadequate and consequently a provision which at one juncture would be a discharge of the duty would at another amount to its infraction. Suppose a public street in a town to have been originally laid by the company over the surface of their track, and that by reason of the growth of their business at that locality their trains should pass in such quick succession as to render such street almost impassable; under these circumstances could it be contended that the company could discharge themselves from the obligation which the section in question imposes except by passing the street thus obstructed under their road so as to restore it to public use? The duty prescribed is to keep at all times and under all circumstances the public highways at the point where they cross the railroad in a condition fit for safe and convenient use. * * * So also if the passageway, which has been constructed, is insufficient, or is not kept in good condition, the defendant may undoubtedly be held criminally responsible."

From the position so taken our Courts have not receded. On the contrary, the rule as stated by Chief Justice Beasley is recognized to be the established law of the State by the Court of

Errors and Appeals in (1912) *State* v. *Lackawanna Railroad Co.*, 84 N. J. L., 289, 293, and is there declared not to be restricted to cases in which a grade crossing had previously existed, but to be applicable as well to cases in which the original crossing was not at grade.

POINT VIII.

The duty imposed by the General Railroad Act rests alike upon railroad corporations created before and after its enactment.

(1904) *Hudson County* v. *Central R. R. Company of N. J.*, 68 N. J. E., 500 (Ch.).

GARRISON, *V. C.* (508):

> "The twenty-sixth section of the revised railroad law (P. L., 1903, p. 659) prescribes the duty of railroad companies with respect to highways crossed by said companies."
>
> "Similar provisions will be found in the charters of almost all, if not all, of the railroads chartered by special act. Palmyra *v.* Pennsylvania Railroad Co., 62 N. J. Eq. (17 Dick.), 601 (Vice-Chancellor GREY, 1901).
>
> "And there seems to be no doubt that the legislature has the power to provide, as enacted in this section, in the public interest, and the railroads previously chartered would be subjected to such provisions. Palmyra *v.* Pennsylvania Railroad Co., *supra;* Montclair *v.* New York and Greenwood Lake Railway Co., 56 N. J. Eq. (18 Stew.), 436 (Chancellor MCGILL, 1889)."

POINT IX.

The Fielder Act (P. L., 1913, p. 91) provides a method of enforcing in specific cases the duty imposed specifically upon the company by the provisions of the original acts of incorporation and in general by the General Railroad Act.

The duty imposed by the original acts of incorporation and by the General Railroad Act is a general duty.

The Fielder Act provides a method of administrative procedure by means of which this general duty may be converted into a specific and definite duty with respect to particular crossings at which the condition set out by the statute, namely, that the crossings are "dangerous to public safety" or "that the public travel on such highway is impeded thereby," is found to exist.

POINT X.

The provisions of the General Railroad Act and of the Fielder Act relating to grade crossings involve merely an exercise by the Legislature of the police power of the State.

(a) The police power as the source of the State's authority.

(1874) *The Pittsburg & Cornellsville Railroad Co.* v. *The Southwest Pennsylvania Railway Co.*, 77 Pa. St., 173.

Mr. Justice MERCUR (186):

> " * * * Besides, we cannot presume the legislature ever intended to divest itself of the exercise of the police power of the state.

> The right to regulate railroad crossings naturally flows from that reserved power. It is by the exercise of the same power that the speed of trains is limited in populous districts."

(1899) *M. & E. R. R. Co.* v. *Orange,* 63 N. J. L., 252 (Court of Errors and Appeals).

DEPUE, *J.* (258):

> " * * * the duty of erecting and maintaining gates at the crossing of streets over a railroad, whether for the protection of the public using the street or of the railroad company in operating its road, *is referred to the police powers of the government.*
> * * * (259) "A regulation adopted for public safety under the police power of the state is not a taking or damaging of private property without just compensation although conformity to such regulations involves expense."

(b) The scope of the police power in effecting the elimination of grade crossings.

(1891) *Davis* v. *County Commissioners of Hampshire County,* 153 Mass., 218; 26 N. E., 848.

St. Mass., 1874, c. 305, Sec. 1, provided that where a highway crossed a railroad, if the County Commissioners should decide that any alteration should be made in such crossing, or in the approaches thereto, or in the location of the railroad or the highway, they should prescribe the manner in which it should be made. This provision was incorporated in the General Railroad Act (St., 1874, c. 372), which established

the general policy of avoiding grade crossings when possible, and authorized changes in the courses of highways to that end. Pub. St., c. 112, Sec. 120, provided that no bridge over a railway should be less than eighteen feet above the track.

HELD, that the County Commissioners might order a highway to be deflected entirely out of the original location at a railway crossing to such an extent as is reasonably necessary to avoid crossing at grade.

C. ALLEN, *J.*:

> "These statutes must be read in view of their obvious purpose to do away, as far as possible, with crossings at grade. It is also to be observed that it is provided in Pub. Stats., c. 112, Sec. 120, that no bridge over a railroad shall be constructed at a height less than 18 feet above the track, except by consent in writing of the board of railroad commissioners. To get such a difference in the grade, it may be important to change the highway to a place at some distance from the existing crossing. It is often inconvenient to change the grade of a railroad, and if a crossing at grade is to be done away with, it often may be much more practicable to change the grade of the highway than of the railway. Boston & A. R. Co. *v.* County Commissioners, 116 Mass., 73, 76. The statute expressly contemplates that it may be necessary to make an alteration in the location of the highway. Some changes certainly may be made. It is not necessary to keep strictly within the limits of the existing highway. At least, the highway may be widened. But the language of the statute

is also broad enough to admit of a larger construction than this. It may be necessary that the highway should be deflected, so that for a short distance it will be wholly out of the original location. Then within what limits must the change be confined? This is not easy to define. It may be said in general terms, that under the guise of doing away with a crossing at grade, the authority of the commissioners would not extend further than to do what is reasonably necessary to accomplish the purpose, in view of the situation of the ground and other circumstances. The fact that a location so changes that the original highway is not again entered before another street is reached is not of itself decisive. Each case must be determined by its own circumstances."

(1894) *N. Y. & N. E. Railroad Co.* v. *Bristol,* 151 U. S., 556.

(Case arose under "An Act relating to Grade Crossings," Pub. Laws, Conn., 1889, p. 134).

Mr. Chief Justice FULLER (566):

"It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power. * * *

(567) "It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by

the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be bargained away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. * * *

(571) "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are vested with the right of eminent domain, only to be exercised for public purposes; that therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the

exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

(1894) *In re Selectmen of Norwood, et al.*, 161 Mass., 259; 37 N. E., 199.

Laws 1890, c. 428, provided for the abolition of grade crossings, and required the cost of changes made to be paid by the town, the railroad company, and the State, in proportions fixed, without reference to the value of the property owned by them, or the benefits which they severally receive.

KNOWLTON, *J.*:

"It is contended that the statute under which these proceedings are had, as construed by the superior court, is unconstitutional. It is quite clear that a statute providing for general public improvements to be paid for as the changes of grade are to be paid for under this statute, would be unconstitutional, as an attempt to impose taxes which would not be proportional. The cost of these changes is to be paid by the town, the railroad company and the state, in proportions which are fixed, without reference to the value of the property owned by them, respectively and without reference to the benefits which they severally receive in any particular case. This would not be a legitimate exercise of the power of taxation to meet public charges (cases cited). The validity of this statute does not depend upon the right of the legislature to levy taxes. It was enacted rather in the exercise of the power of the legislature to enact all needful

laws to prevent accidents, and provide as well for the convenience as the safety of the public while travelling on highways across railroads, and while being transported in the cars of the railroad companies. It would have been in the power of the legislature, in granting charters to railroad companies, to provide that the railroad should not be constructed across a public highway without carrying the highway over or under the railroad, and that all the expenses of changing the grade of the way, and constructing the approaches to the railroad, should be borne by the railroad corporation. If, by an increase in the amount of travel at a grade crossing, or of the number of trains running over the railroad, or changes in the manner of running trains, or of the mode of travel on a highway, or if for any other reason, it should seem to the legislature best for the public interest that a grade crossing should be abolished, it would be within the constitutional authority of the legislature to forbid the continuance of it, and to require the railroad company to pay the whole, or any part, of the cost of making the change (cases cited). This it might do, in the exercise of the police power, for the protection of the people, and its decision in regard to what is right and proper in each particular case, or in any class of cases, would not be subject to revision by any other tribunal. This would not be taking from the railroad company its property, or any vested right. It would be merely prescribing, in the interest of the public, the mode of constructing its road. Of the power to prescribe such regulations for railroad corporations, there can be no doubt.

> These corporations are creatures of the state, engaged in doing a public business, and are bound by any reasonable statutes for the regulation of this business which the legislature chooses to enact (cases cited)."

(1903) *Illinois Central R. Co.* v. *Copiah County,* 81 Miss., 685; 33 So., 502.

A statute provided that where a railroad is constructed so as to cross a highway, and it is necessary to raise or lower the highway, it shall be the duty of the company to erect and keep in order all bridges at such points as bridges may be necessary to cross the railroad.

HELD, that the statute required the erection of bridges over a railroad on public roads constructed and laid out *after* the railroad was built; that the statute so construed was within power of the State, and not unconstitutional as depriving such previously constructed railroad of its property without due process of law, and that it was not objectionable as impairing the charter rights of the company.

WHITFIELD, *C. J.:*

> "All statutes like this, and statutes requiring roads to fence their tracks, and to establish farm cattle guards, etc., are plainly ascribable to the police power of the state for their justification."

(1904) *City of Harriman* v. *Southern Ry. Co.,* 111 Tenn., 538; 82 S. W., 213.

HELD, that Act, 1891, page 93, c. 49, which empowers a city to require railroad companies to construct bridges at public crossings, and viaducts over their tracks where they cross

streets, being referable to the police power, applies to railroads whose tracks were laid before the street was built or the city was incorporated, and to the case of tracks in a cut twenty feet below the grade of the crossing street.

McALLISTER, *J.:*

> "The ordinance adopted by the city of Harriman is based upon an estimate that the improvement will not exceed $200 or $300, and is in all respects reasonable. If the exercise of this power by the corporate authorities should be excessive or unreasonable, the courts have plenary jurisdiction to adjudge such ordinance void."

(1906) *State ex rel Minneapolis* v. *St. Paul, M. & M. R. Co.,* 98 Minn., 380; 108 N. W., 261; 28 L. R. A. (N. S.), 298.

HELD, that the State may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out *after* the construction of the railroad the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the travelling public, and that a bridge over the railroad tracks, when necessary to make the crossing safe for public use, is a "safety device" within the meaning of that expression.

BROWN, *J.:*

> "The authorities are not fully agreed upon the question whether the state may, in the exercise of the police power. compel a railroad company, without compensation, to construct and maintain suitable crossings at streets extended over the right of way subse-

quent to the construction of the railroad. Our examination of the books, however, leads to the conclusion that the great weight of authority sustains the affirmative of that proposition."

(1905) *St. Louis & S. F. R. Co.* v. *City of Fayetteville,* 75 Ark., 534; 87 S. W., 1174.

HELD, that in a proceeding to condemn a street crossing over a railroad right of way, the necessity of an overhead crossing, or the fact that the railroad company may be compelled to construct either such overhead or grade crossing and to keep it in repair, as an exercise of police power, are not elements of damage.

RIDDICK, *J.:*

"But if we concede that an overhead crossing is necessary at this place, it would not, in our opinion, entitle a company to any increase in the amount of damages. For what the city is seeking now is to acquire for the public a right to cross the railway track, and the right of way of the company at the point named. If we concede that the legislature has not empowered the city to compel the company to construct the crossing and keep it in repair, as a police regulation, yet, as the legislature can do this at any time—as it can compel the company, without compensation, to construct and keep in repair either an overhead or a grade crossing, as the circumstances may require—it follows that those matters are not elements of damage in this case. Railroad Co. *v.* City of Chicago, 166 U. S., 226; 17 Sup. Ct., 581; 41 L. Ed., 979."

(1906) *C. B. & Q. Railway Co.* v. *Drainage Commissioners,* 200 U. S., 561.

A public corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained, and made capable of cultivation, had, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. The plan required the enlarging and deepening of the channel of a natural water course running through the district, which is the only natural outlet or way of drainage of lands of the district—the best and only practicable mode by which the lands could be made tillable. The plan could not be carried out unless the timbers and stones in the creek—placed there by the railroad company when it constructed the foundation for its bridge—were removed. The timber and stones could not, however, be removed without destroying the foundations of the bridge and rendering it necessary to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the water of the creek as increased in volume under the drainage system adopted by the Commissioners.

The contention of the railway company was that, as its existing bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed and now flows, the foundation of the bridge could not be removed and its use of the bridge disturbed, unless compensation be first made or secured to it in such amount as would be sufficient to meet the expense of removing the timber and stones from

the creek and of constructing a new bridge of such length and with such opening under it as the plan of the Commissioners required. The company insisted that to require it to meet these expenses out of its own funds would be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

Mr. Justice HARLAN (594):

> "It remains to deal with a particular aspect of the case. The opening under the present bridge, we assume from the record, was sufficient, when the bridge was constructed, to pass all the water naturally flowing in the creek from lands in that locality. It is sufficient if the channel of the river be left as it is now. The commissioners demand, however, as they may rightfully do, in the public interest, a larger, deeper and wider channel in order to accommodate the increased volume of water in the creek that will come from the proposed plan of the commissioners. But that is a matter which concerns the public, not the railway company. The duty of the company will end when it removes the obstructions which it has placed in the way of enlarging, deepening and widening of the channel. It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert, and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the com-

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missioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen and widen the channel must be borne by the district. The expense to be borne by the district and the railway company respectively can be ascertained by the state court in some appropriate way, and such orders made as will be necessary to facilitate the execution of the plan of the commissioners.

"Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state, and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws."

(1909) *St. Paul, M. & M. Ry. Co.* v. *Minnesota,* 214 U. S., 497.

"This case involved a question almost the same as that in Northern Pacific Railway Co. *v.* Duluth, in which it was held that a railway was not deprived of its property without due process of law by being obliged to rebuild a viaduct over streets of a city.

"*Per curiam:* Judgment affirmed on authority of Northern Pacific Railway Company *v.* State of Minnesota *ex rel.* Duluth, 208 U. S., 583."

(1910) *Cincinnati, I. & W. R. Co.* v. *Connersville,* 218 U. S., 336.

In error to State Court to review a judgment affirming the assessing of the damages of a railway company in a street opening proceeding, without taking into consideration the expense of constructing a bridge over the highway.

HELD, that the expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.

Mr. Justice HARLAN:

> "The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court * * * (cases cited). The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrarily in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or

legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good.' Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S., 285, 297.

"Without further discussion * * * we adjudge, upon the authority of former cases, that there was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question."

(1914) *Chicago, M. & St. P. R. Co.* v. *Minneapolis,* 232 U. S., 430.

HELD, that the expense of constructing and maintaining the necessary bridge over the gap in a railway right of way made by the municipal construction across it of a canal or waterway with footpaths on each side connecting two lakes used for public recreation may be cast upon the railway company without denying it the due process of law guaranteed by the Federal Constitution.

Mr. Justice HUGHES:

"The question * * * presented is whether the refusal to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

"It is well settled that railroad corporations may be required, at their own expense,

not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways *newly laid* out over their tracks, or to carry their tracks over such highways. (Cases cited and considered.) * * *

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff-in-error, the latter would have had no grounds to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied, because the highway was laid out in order to increase the advantages of a public park. In this respect, it would be equally a crossing devoted to the public use (Shoemaker *v.* United States, 147 U. S., 282, 297; 37 L. ed., 170, 184; 13 Sup. Ct. Rep., 361); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority, because such a highway might lead to public recreation grounds instead of places of business, or might connect lakes instead of avenues.

"If there is a distinction in the present case, it must lie in the fact that the crossing is an artificial waterway instead of a road. But it is none the less a public highway established to afford an appropriate place of public passage. Walks are provided for those who go afoot, and it does not concern the plaintiff-in-error that others go in boats instead of vehicles. * * * It cannot make a difference in the constitutional rights of the railway company that this way was not

constructed entirely, or chiefly, of solid earth; it is the fact, and not the mode of public passage, that is controlling. The case must be regarded as being one of the public crossing provided by law; and the authorities we have cited lead to the conclusion that the state, without infringing the guarantees of the Federal Constitution, could require the railway company to make suitable provision for carrying its tracks over the crossing without compensation."

(1914) *Mo. Pac. Ry.* v. *Omaha,* 235 U. S., 121.

Mr. Justice Day (127):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria,* or deemed to be compensated by the public benefit which the company is supposed to share is well settled by prior adjudications of this court (cases cited).

"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted."

POINT XI.

The Fielder Act, and the order thereunder here under review being based upon and made in an exercise of the police power of the State, cannot successfully be attacked on the ground of the expense involved in performing the required work, since the evidence shows that the work is, in itself, a reasonable, proper exaction, when considered with reference to the object to be attained.

(1890) *Woodruff et al. Commissioners* v. *New York & N. E. R. Co.*, 59 Conn., 63; 20 Atl., 17.

ANDREWS, *C. J.*:

> "The twelfth paragraph alleges only that the defendants would be subjected to great expense if the order of the commission should be carried out. The resolution and the order being valid, and being required for the protection of life, *the circumstances that the enforcement would subject the defendant to expense is not any reason against its legality.* That is an argument to be addressed to the Commission."

(1895) *Health Department of the City of N. Y.* v. *Rector, etc., of Trinity Church,* 145 N. Y., 32; 27 L. R. A., 710; 39 N. E., 833.

Appeal in an action to recover statutory penalty for refusing to comply with an order of the Board of Health to place water facilities in certain tenement houses. Statute and order sustained.

The recovery below was founded upon a statute which required that all houses of a certain description upon the direction of the Board of Health should be provided with Croton or other

water in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families. The defendant, among other things, alleged as a defense that the order of the Board of Health directing the defendant to furnish the water as provided by the statute was made without notice to it, and that as it could not be complied with excepting by the expenditure of a considerable amount of money that it in fact deprived the defendant of its property without due process of law.

PECKHAM, *J.*:

> "* * * No one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of the property, and for the purpose of carrying out some provision of the law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would, without doubt, violate the constitutional rights of the individual. The exaction must not alone be reasonable, when compared with the amount of work or the character of the improvement demanded. The improvement *or work must, in itself, be a reasonable, proper and fair exaction, when considered with reference to the object to be attained.* If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be

a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this, the courts must, within proper limits, be the judges. We may own our property absolutely, and yet it is subject to the proper exercise of the police power. We have surrendered, to that extent, our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property, and which we *must* incur, either voluntarily, or else under the direction of the legislature, in order that the general health, safety, or welfare may be conserved. The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants, and of the public through them, may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class, and their cost does not exceed what may be termed one of the conditions on which individual property is held. It must not be an unreasonable exaction, either with reference to its nature or its cost. Within this reasonable restriction, the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizens that it shall not prove pernicious to his neighbors or to the public generally. The difference between what is and what is

not reasonable frequently constitutes the dividing line between a valid and void enactment by the legislature in the exercise of its police power. * * * Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure (authorities cited).

"The state, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner; but, *so long as the amount* exacted is limited as stated, the property of the citizens has not been taken in any constitutional sense, without due process of law."

(1900) *Wisconsin, etc., Rd. Co.* v. *Jacobson,* 179 U. S., 287,

a statute requiring two railroad companies to make track connections sustained.

Mr. Justice PECKHAM (302):

"Although to carry out the judgment may require the exercise by the plaintiff of the power of eminent domain, and will also re-

sult in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error."

(1907) *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission,* 206 U. S., 1.

(1913) *Pennsylvania R. Co.* v. *Ewing,* 241 Pa. St., 581; 88 Atl., 775.

Action to enjoin enforcement of "Full Crew Act." BROWN, *J.:*

> "The act of 1911 being a valid exercise of the police power by the legislature, the fact that the railroads affected by it must make additional expenditures to comply with its provisions is an immaterial matter so far as courts are concerned. That fact was for the consideration of the legislature alone in considering whether the act should be passed. *Uncompensated obedience to a regulation enacted for the public welfare or safety, under the police power of the state, is not taking property without due compensation, and any injury sustained in obeying such a regulation is but damnum absque injuria."*

(1915) *Seaboard Air Line Railway* v. *Railroad Commission of Georgia,* 240 U. S., p. 324 (sustaining a decree below dismissing a bill to enjoin the enforcement of an order of a State Railroad Commission requiring trackage connection between railroads).

Mr. Justice McReynolds (327):

> "It is within the power of a state acting through an administrative body to require railroad to make track connections where the established facts show public necessity therefor, just regard being given to advantages which will probably result on one side and necessary expenses to be incurred on the other. The facts being established, the question then presented is whether, as a matter of law, there is sufficient evidence to support a finding of public necessity—the mere declaration of a commission is not conclusive."

POINT XII.

The prescription of police regulation made by the Fielder Act was, as hereinbefore demonstrated, within the legitimate sphere of legislation. An appeal to the judicial power for relief must consequently be vain though the regulations prescribed are "incommodious or even hurtful."

The Fielder Act as hereinbefore demonstrated involves a legitimate exercise of the police power.

Every exercise of the police power involves, of necessity, the determination by the lawmakers of facts quite apart from the exercise of any legislative discretion concerning it.

The determination of facts so of necessity made in prescribing a police regulation is one the legislature has a right to make for itself and the prescription of such regulation must be deemed to have been based upon facts within the possession of the legislature rendering the legislation proper, if not necessary.

Where the prescription of the legislation is within the sphere of legislation an appeal to the judicial power for relief must be vain, thought the regulation is incommodious or even hurtful.

(1876) *Douglas* v. *Essex Co.*, 38 N. J. L., 214.
(1903) *Hopper* v. *Stack*, 69 N. J. L., 562.
(1908) *Meehan* v. *Excise Commissioners*, 75 N. J. L., 557.
(1915) *State* v. *Sutton*, 87 N. J. L., 192.

POINT XIII.

The powers, privileges and rights under the leases to New York and Erie Railroad Company, confirmed by P. L. 1853, p. 480 (Case, 977, 979), are subject by the terms of the confirmatory act to the State's power "at any time," to "alter, amend or repeal" the act.

The only rights the Erie Railroad Company had in the railroads in question are derived from the Act of the Legislature confirming the lease to the New York and Erie Railroad Company (P. L. 1853, p. 480).

Without legislative authority previously conferred, or a confirmatory act, the leases of the roads and franchises would have been wholly inoperative and void.

(1915) *West Jersey and Seashore R. R. Co.* v. *Board of Public Utility Commrs.*, 94 Atl. 57, 59 (Ct. E. & A.).

The confirmatory act in its fifth section specifically provided, "that the legislature may at any time, alter, amend or repeal this act."

Under the powers so reserved to the State, the franchises, privileges and exemptions grant-

ed by the State may be restricted, and burdens may be imposed, submission to which is the price of the continued enjoyment of such franchises, privileges and exemptions.

Cases illustrating this rule are the following:

(1879) *Railway Company* v. *Philadelphia,* 101 U. S. 528.

A company incorporated by a statute of Pennsylvania in 1864, was authorized to construct a street railway on certain streets of Philadelphia.

The charter provided that the "company shall also pay such license fee for each car run by said company as is *now* paid by other passenger railway companies in said city." That license was $30.

An ordinance passed in 1867, increased the license charge to $50.

A general statute fixed the license charge at $50.

The court held, that the charter did not amount to a contract that the company should never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated.

It further HELD, that if the charter was sufficient to import such a contract, the legislature, under the constitutional provision in force at the time of incorporation touching the alteration, revocation or annulment of any charter in such manner that no injustice be done to the corporators, had ample power to pass the act increasing the license charge.

(1896) *Atlantic & P. R. Co.* v. *United States,* 76 Fed. Rep., 186.

The charter of the Atlantic & Pacific Railroad Company provided that the directors "shall from time to time, fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property." It further provided, that the company shall not charge the government higher rates than individuals for like transportation. It reserved to Congress the power "having due regard to the rights of" said company, "to add to, alter, amend or repeal this act."

In 1892, Congress passed an act limiting payment of land-grant railroads for transportation of troops, etc., to rates which the secretary of war should deem just and reasonable, such rate not to exceed fifty per centum for such government transportation as shall at the time be charged and paid by private parties for like or similar transportation; and the amount so fixed shall be accepted as in full for all demands for such service.

Pursuant to the act the secretary of war established rates applicable to the Atlantic and Pacific Railroad Company at fifty per centum of its regular tariff rates.

The court held, the statute and the action of the secretary of state thereunder a legitimate exercise of the reserved power.

(1904) *San Antonio Traction Co.* v. *Altgelt,* 81 S. W., 106 (Texas Court of Civil Appeals).

The San Antonio Street Railway Company, predecessor of appellant, obtained an extension of its franchise. The ordinance granting such extension provided "that the street railway companies shall charge five cents fare for one

continuous ride over any of their lines, with one transfer to or from either line to the other."

At this time the bill of rights of the Texas Constitution declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority should be subject to the control thereof.

Later a statute was enacted which required street railway companies to sell tickets in lots of twenty to students not more than seventeen years of age when schools are in actual session at one-half the regular fare charged to adult persons.

The appellant attacked this statute claiming that it impaired the obligation of the contract.

NEILL, *J.*, said, supporting the legislation and denying the claim made:

> "If the ordinance * * * authorizes said company to charge five cents fare can be deemed a contract, which was 23 years after the adoption of the present constitution, which specially provides that all privileges and franchises granted by the legislature or created under its authority shall be subject to its control, no obligation of contract between the city and said street railway company, or between the state and such company, was violated or in any way impaired by the act of the legislature in question. For the right * * * to charge five cents fare * * * did not vest until after the present constitution went into effect, and therefore such regulation of fare was subject under it to legislative control * * *.

"The legislature has power to regulate the rates of fare of a street railway company in the absence of any provisions in its charter relinquishing that right * * * provided, however, the rates established are not so unreasonable as to practically destroy the value of the property of the corporation, and thereby depriving it of its property without due process of law, and denying it equal protection of the law * * *.

"It is not contended, and there is nothing in the evidence tending to show, that the rate of fare which appellee claims he is entitled to under the act of 1903, is such as not to leave to the company a sufficient income to pay repairs and a fair income on its investment."

(1905) In *San Antonio Traction Co.* v. *Altgelt,* 200 U. S., 204, this case came before the Supreme Court of the United States and the judgment of the Court of Civil Appeals was affirmed.

Mr. Justice BROWN said:

"Assuming, but not deciding, that the ordinance * * * extending the franchise of the San Antonio Street Railway Company * * * constituted a contract *pro tanto,* the question still remains whether the provision 'that the said street railway companies shall charge five cents fare' * * * constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the constitution of 1876, which in sec-

tion 17, of the bill of rights, declared that no irrevocable or uncontrollable grant of special privileges of immunity should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof * * *.

"Under the bill of rights of that constitution the legislature could not reduce the fares to a confiscatory amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenue. Indeed, it was found in the opinion of the court below, that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903 is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment."

(1906) In *Fair Haven R. R. Co.* v. *New Haven,* 203 U. S., 379, it appeared that by its original charter (1862) the plaintiff in error was required to keep the street between its tracks, with a space two feet on each side of the tracks, in good and sufficient repair.

The charter provided that the act may be altered, amended or repealed at the pleasure of the general assembly.

In the amendment of its charter in 1864 the obligation was retained.

A similar provision was contained in a general law applicable to all railways enacted in 1893.

In 1895, a statute was passed containing the following provision as to railways:

On all streets occupied by the track or tracks of any railway company * * * said company * * * shall be assessed and shall severally pay to the city the cost of paving and repairing the full length, and nine feet wide for each and every line of track on such railway * * *.

This latter statute the plaintiff in error attacked. In sustaining it Mr. Justice McKenna said (389):

> "We shall assume for the purpose of our discussion that the duty to repair did not include the duty to pave and repave * * *. Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state. Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have put upon the company the duty of paving as well as repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state; the establishment, maintenance and care of its highways."

POINT XIV.

The contracts embodied in the leases of the railroads and franchises, and the contracts between the railroad companies and the holders of their obligations and securities were subject to the police power of the State.

The powers of the State to regulate the rates exacted in the conduct of enterprise affected with a public interest and to require the elimination of grade crossings are both powers of government.

Both of these powers are continuing in their nature:

The exercise of neither power is in anywise abridged or limited by the fact that a lease of the railroad has been made to a tenant who relies upon the earnings of the road for the means of payment of the agreed rent, or that the income therefrom has been pledged as security for the payment of debts incurred.

In this connection Mr. Chief Justice WAITE in *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa, supra,* said (162):

> "Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state and continued subject to the same governmental powers that existed before."

POINT XV.

Neither the General Railroad Act nor the Fielder Act impaired the obligation of the charter contracts between the State and the railroad companies, nor deprived such companies of property without due process of law, or without just compensation, in violation of either the Federal or State Constitution.

The power exercised in these acts was the police power of the State. This power the State could not bargain away.

The charter contracts and the property of the companies were from the beginning subject to the future exercise of the police power.

The cases cited under Point X, fully sustain these propositions.

(a) Contracts.

(1893) *Minneapolis & St. L. Ry.* v. *Emmond,* 149 U. S., 364.

A statute of Minnesota provided that all railroad companies in the State should within six months after its passage "build or cause to be built good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side" of their roads and declared that they should be liable for domestic animals killed or injured by their negligence, and that a failure to build and maintain cattle guards and fences as above provided should be deemed an act of negligence on the part of such companies;" and by its fourth section, as amended, that any company or corporation guilty of the failure or neglect mentioned should be liable for all damages sustained by any person in consequence of such failure or neglect.

The statute so requiring the erection of cattle guards and fencing was sustained notwithstanding an assumed contract with the State to the contrary.

Mr. Justice FIELD (367):

> "It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining landowners, or to pay damages for not building them, imposed upon the company a duty not required by contract, common law, or its charter, and is, therefore, a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other landowner.
>
> "To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police power of the states. *No contract, with any person, individual or corporate, can impose restrictions upon the power of the states in this respect.*"

(1899) *M. & E. R. R. Co.* v. *Orange,* 63 N. J. L., 253 (Ct. E. & A.).

DEPUE, *J.*, after pointing out that certain New York and Connecticut decisions were placed upon the ground that the charters of the respective

companies were subject to alteration or repeal, but that the opinion of the Connecticut Court and of the Supreme Court of the United States in *New York and New England Railroad* v. *Bristol,* 62 Conn., 252; 26 Atl., 122; 151 U. S., 556, lays stress upon the fact that the regulations were a proper exercise of the police power of the State, said (264):

> "In Boston and Maine Railroad Co. *v.* County Commissioners, 79 Me., 386; S. C., 10 Atl. Rep., 113, an act requiring the expense of building and maintaining so much of the townway or highway as was within the limits of the highway where such way crossed the track at grade, should be borne by the railroad company, was held to be constitutional. *This decision was made against a company whose charter provided that it should not be altered, amended or repealed.* The power of the legislature to impose such burdens for general safety under the police power was declared to be fundamental and that the act did not impair any contract in the company's charter. Whether the corporation has an irrepealable contract in its charter or not is immaterial. Police powers are inherent in the government, and the legitimate exercise of legislative powers in securing public safety does not impair the obligation of contracts nor deprive anyone of property without due process of law."

(1898) *C. B. & Q. R. R.* v. *Nebraska,* 170 U. S., 57.

HELD, that the contract between the City of Omaha and two railroad companies (founded

upon an act of the Legislature of Nebraska relating to viaducts, bridges and tunnels in cities), providing for the building of a viaduct along a certain street at the expense of the two companies, was a contract in such a sense that the respective parties continue to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remains unchanged; *but it was not a contract whose continuance and operation could not be affected or controlled by subsequent legislation.*

HELD FURTHER, that it was competent for the Legislature of the State to put the burden of the repairs of such a viaduct crossing several railroads upon one of the companies, or to apportion it among all, as it saw fit; and that an apportionment might be made through the instrumentality of the City Council."

Mr. Justice SHIRAS (76):

> "Again it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to the plaintiff in error and two-thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality.
>
> "But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judically, but to exercise a legally delegated discretion."

(1908) *Northern Pacific Railway Co.* v. *State of Minnesota ex rel. The City of Duluth,* 208 U. S., 583.

Mr. Justice DAY (598):

> "The exercise of the police power cannot be limited by contract, for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contract rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety. Chicago, Burlington & Quincy R. R. Co. *v.* Nebraska *ex rel.* Omaha, 170 U. S., 57."

(1908) *People ex rel. City of Chicago* v. *Illinois Central R. Co.,* 235 Ill., 374; 85 N. E., 606.

FARNER, *J.:*

> "The charter of appellee constitutes a contract between it and the state, and is entitled to the same observance as a contract between natural persons. * * * It is well understood, of course, that this contract, like all others, is subject to the power of the state, in the exercise of its police powers, to pass such laws as may be necessary to protect the health and provide for the safety of persons and property."

(1911) *Texas & N. O. R. Co.* v. *Miller,* 221 U. S., 408.

HELD, that a provision in its charter exempting a railroad company from liability for death of employes, even if caused by its own negligenec, does not amount to an irrevocable contract within the protection of the Federal Constitution.

Mr. Justice VAN DEVENTER (414):

> "The doctrine that a corporate charter is a contract which the constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in anywise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction."

(b) Property.

(1885) *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S., 512.

HELD, that a statute of a State requiring every railroad corporation in the State to erect and maintain fences and cattle guards on the sides of its road, and, if it does not, making it liable in double the amount of damages occasioned thereby and done by its agents, cars or engines, to cattle or other animals on its road, does not deprive a railroad corporation against which such double damages are recovered, of its property without due process of law, or deny, it the equal protection of the laws, in violation of the Fourteenth Article of Amendment of the Constitution of the United States.

* * * * * *

See also:

(1889) *Minneapolis Railway Co.* v. *Beckwith,* 129 U. S., 26.

(1913) *Atlantic Coast Line* v. *Goldboro,* 232 U. S., 548, 549.

POINT XVI

The contracts between the railroad companies and others for switch connections and services, and the rights arising thereout, were subject to the police power of the State.

Since the legislation and the order made in pursuance thereof, here under attack, are based upon and justified by the police power, neither such legislation nor such order operates to unconstitutionally impair the obligation of these switching contracts, nor unconstitutionally to take property without due process of law or without just compensation.

Rights which are subject to the police power of the State cannot be removed from that power, by making a contract about them. The contract carries with it the infirmity of the subject matter.

The general principles involved in this point are considered in the following case:

(1905) *Hanigault* v. *Springs,* 199 U. S., 473.

Hanigault, Springs and others were adjoining riparian owners on the Santee river at the mouth of Kinloch Creek. Springs and others built a dam across the creek, which interfered with Hanigault's passage up the creek and his irrigation. In 1898 a contract was made between the parties by which the obstructions were to be removed to give a clear passage up the creek, and the removal was effected. In 1903 the Legislature of South Carolina authorized Springs to erect and maintain a dam across the creek in order to drain the lowlands on the Santee River and enhance their values. Hanigault applied for an injunction against this in the United States Circuit Court of South Carolina. A demurrer to his bill was sustained and

appeal was taken. On appeal the judgment below was affirmed.

Mr. Justice BROWN:

"The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31, and the free ingress and egress through the creek thereafter was impaired by the act of the general assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

"*It is the settled law of this court that the interdiction of statutes impairing the obligations of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.*

"This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquors, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, *by entering into contracts, may not estop the legislature from enacting laws intended for the public good.*

"While this power is subject to limitations in certain cases, *there is wide discretion on the part of the legislature in determining what is and what is not necessary, in a discretion which courts ordinarily will not interfere with.*"

The following case specifically supports the proposition advanced in this point.

(1904) *Swift* v. *Delaware, L. & W. R. R. Co.*, 66 N. J. E., 34.

HELD, that Gen. Stats., p. 2689, par. 221, empowers municipal authorities to make such contracts with railroad companies as shall secure greater safety to persons and property, or facilitate the construction and maintenance of other than grade crossings.

Under this statute a city contracted with a railroad company (whose charter bound it to keep its highway crossings fit for safe and convenient use, and gave it power to elevate its tracks) to remove certain tracks at a grade crossing, substituting therefor an elevated crossing.

HELD, that the obligation thus imposed on the company was paramount to the conflicting one existing by virtue of a prior contract with a private individual to maintain a switch and siding so that the latter contract would not be specifically enforced in equity in any manner, but such individual would be remitted to his legal remedies, if any.

EMERY, *V. C.* (47):

"In view of the subsequent contract made by the company with the city, under the acts

of 1874 and 1893, for the removal of its tracks, is the agreement with the complainants, if proved, one which a court of equity should specifically enforce? In my judgment, it should not, and for the reason that the track elevation contract was one made for the purpose of carrying out obligations imposed upon the company in the interest of public safety, which are paramount to the private interests of the complainants, and the performance of these public obligations should not be interfered with or prevented by the specific enforcement of complainants' supposed private rights. The railroad company at the time of the alleged contract was, under the express terms of its charter, chargeable with the duty to keep, at all times and under all circumstances, the public highways where they cross their railroad in a condition fit for safe and convenient use, and for this purpose had power, when public exigencies required, to elevate their tracks or alter the grades or highways.

"Central Railroad Co. *ads.* State, 3 Vr., 220 (Supreme Court, 1867); Newark *v.* Delaware, Lackawanna and Western Railroad Co., 15 Stew. Eq., 196 (Van Fleet, *V. C.*, 1886). Under the general law of the state as it existed prior to 1874, both the railroad and the municipal authorities were charged with the duty of providing for the public safety, and for carrying out this purpose were empowered, by the statute of 1874, to mutually agree upon the elevations or changes to be made. Read *v.* Camden, 24 Vr., 322, 326 (Supreme Court, 1891). This statute was in force at the time of the agreement now in question. By the act of 1893,

similar powers were granted to both companies, which were charged with similar duties in reference to the removal of grade crossings.

"As to the validity of any contract made by a railroad company for such a private use of or interest in its lands used for its railway or any of its appurtenances as would prevent its performance of these public obligations, to arrange for the public safety by the removal of grade crossings in cities, my view would be either that the contracts are altogether void or that they must be considered as made and taken subject to any contract subsequently made to remove its grade crossings.

"Contracts of this character, for the permanent location or use of their road or works, have been held to be subject to termination when even the interest of the road itself requires it.

" 'Railroad companies, while private corporations, are *quasi* public agencies, engaged in the performance of public duties, and contracts which prevent them from the discharge of these duties cannot be sustained.' E. & S., &c., Railroad Co. *v.* McDevitt, 24 Sup. Ct. Rep., 36 (U. S. Supreme Court, October Term, 1903). This case was an action at law for damages for breach of a contract made on securing the right of way to operate an extension of the railroad over a particular track, and it was held that damages could not be based on the company's obligation to continue permanent use under the contract."

(1904) *Swift* v. *D., L. & W. R. R. Co.*, 66 Eq., 452 (Ct. E. & A.).

Per Curiam:

> "We concur in that part of the opinion delivered in this cause by the learned vice-chancellor which holds that the alleged contract between the defendant railroad company and private persons for the permanent maintenance of grade crossings over certain streets in the city of Newark must, so far at least as the right to specific performance is concerned, be deemed subject to the public duty of that company and to the police power of the legislature vested by the act of 1893 (P L. of 1893, p. 157) in the municipal authorities of the city to secure the safety of public highways. The authorities of the city and of the railroad company having both determined that those crossings unnecessarily endangered public travel, we think, on that ground, an injunction forbidding their removal was rightly refused.
>
> "This being our conclusion, we refrain from expressing either concurrence in, or dissent from, the other propositions set forth in that opinion."

(1864) *Branson* v. *City of Philadelphia*, 47 Pa. St., 329.

HELD, that every person holding license for any public authority, exercising the whole or a portion of the right of eminent domain, necessarily takes it subject to the exercise of this right whenever the public good requires it, and that with respect to the care, regulation and control of the highways within its corporate limits, the

City of Philadelphia exercises a portion of this power of the commonwealth, subject only to the higher control of the State and the use of the public, and therefore a written license, granted by the city for a valuable consideration, authorizing the holder to connect his property with the City Railroad by a turnout and track, is not such a contract as will prevent the city from abandoning or removing said railroad, whenever in the opinion of its authorized authorities such an action will tend to the benefit of the public.

AGNEW, *J.* (331):

> "Every license from a public authority, whether a municipality, exercising a portion of the high powers of eminent domain, or the immediate agents of the Commonwealth herself, necessarily takes it subject to this right of eminent domain, to be exercised for the benefit of the public in the future, as well as in the past. It is one of the fundamental rights of the government, never stationary, but ever keeping step with the march of science, art and public improvement. Turnpikes and canals have had their day, attracting to their sides the industry and capital of the citizen, whose improvements and business rose, flourished and decayed along with their rise, progress and decline. But who has heard it said because their use has thus built up a business dependent upon them. Unquestionably actuated by a spirit of benevolence and paternal care, which induces her ever to guard the interests of all her children, she will never abandon such a work unless a greater interest dictates the necessity; and she will often resort to some mode of averting the

injuries consequent. *But no obligation at law requires her to repair the mere consequences collaterally falling upon those who suffer from the exercise of a great reserved power of acting for the general good.*"

(1879) *Kinealy* v. *The St. Louis, Kansas City & Northern Railway Company,* 69 Mo., 658.

HELD, in an action to recover damages from a railroad company, sustained in the depreciation of property, by the company's discontinuance of its old route for the passage of its through trains, and its construction of a new route for that purpose, *that* where the construction and maintenance of a railroad are authorized by legislative enactment solely for the public benefit, no contract or duty to maintain its road and to continue to run its train will be implied on the part of the company, in favor of a private citizen who has bought and improved lots on the line of the road under the belief that it will contine to be maintained and operated.

SHERWOOD, *C. J.* (666):

"Again there was no contract between the railway company and plaintiffs, either expressed or implied, that the company should continue to maintain its road or run its trains. 'Whenever an action is brought for a breach of duty, the party bringing it must show that he has an interest in the performance of the duty, and the duty is imposed for his benefit, and when the duty is imposed for the benefit of another, or for the public benefit, and his own advantage is merely incident, and no part of the design of the statute, no such right is created as forms the subject of an action. Field on Damages, No. 39.

> Here it is evident that the construction on the road, and its maintenance, were authorized by legislative enactment, solely for the 'public benefit,' and not for the benefit of any individual composing the public. So that, as between the plaintiffs and the defendant company there is neither breach of contract, nor breach of duty, and consequently, no right of action. And this case, therefore, so far as it concerns plaintiffs, stands precisely as if they had bought lots and built thereon contiguous to any other public improvement, on the faith of the continuance of such improvement."

(1903) *Asher* v. *Hutchinson W. L. & P. Co.*, 66 Kans., 496, 71 Pac., 813, 61 L. R. A., 52.

HELD, that a contract by ordinance between a city and a water company, that the latter will lay water mains and supply the inhabitants with water on certain streets of the city, may, after such mains are laid, be so modified and changed by the city and water company as to require the water company to remove its mains from certain streets where, in the judgment of the council, public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid, and injunction will not lie at the suit of an individual to prohibit the city and water company from making such change, notwithstanding it may greatly decrease the value of his property and render it practically valueless for the purpose for which it was improved.

GREENE, *J.*:

> "An individual can acquire no vested right as against the public in the continued serv-

ice of a public utility. Such a doctrine, once admitted, would destroy the convenience as a public utility. It would then become hampered, and subject to the control of the individual, and made to subserve such interests, to the detriment of the public welfare."

(1902) Appeal of *New York, N. H. & H. R. Co.*, 53 Atl., 314 (Conn.)

A railroad company having constructed a spur track across a highway at grade, and it being part of its system, and being presumed to have been constructed with due authority, and the company being bound to maintain and operate it till it is legally discontinued, and no steps for discontinuance having been taken, the Court has jurisdiction to order a bridge for support of such track under which highway may be carried.

BALDWIN, *J.*:

"At the hearing in the superior court the appellant claimed that the expense of the change of grade asked for would be so great that no change should be ordered, and included in its estimate of such expense the cost of the bridge for the spur track. Such a bridge will cost about $5,000, and the appellant now claims that the court had no jurisdiction to order one, since this track was laid simply to facilitate business with the owner of a particular warehouse. The finding does not support this claim. It shows that the track is also used for the delivery of goods to other parties, and that it is part of the appellant's railroad system. That it was constructed without due authority of law is not to be presumed; and it

could not have been legally laid on the highway except by virtue of a special franchise, and pursuant to a location duly made by the appellant and approved by the railroad commissioners. Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn., 146, 160; 36 Atl., 1107. Being a part, and apparently a material part, of the appellant's railroad system in the locality in question, it was bound to maintain and operate this track until it should be legally discontinued. State *v.* Hartford & N. H. R. Co., 29 Conn., 538, 547. No step toward its discontinuance had been taken when the cause was heard in the superior court, and the appellant cannot complain that the judgment was not so framed as to provide for a possibility, which it had not suggested, of a discontinuance at some future period."

(1913) *In re Grade Crossing Com'rs of City of Buffalo,* 208 N. Y., 139; 102 N. E., 552.

MILLER, *J.:*

"The railroad company had the right to elevate or depress its tracks without making compensation to abutting owners and irrespective of whether it obtained its right of way by deed or by condemnation. * * * The sum originally paid by the railroad company on the acquisition of its right of way must be deemed to have included compensation for damages occasioned by changes made necessary to meet the increasing demands of the business, or to conform to the requirements of public improvements. The abutting property owners are therefore neither legally nor morally entitled to compensation for changes in the grade of the railroad. * * *"

(1914) *Otis Elevator Co.* v. *City of Chicago,* 263 Ill., 419; 105 N. E., 338.

HELD, that the construction by a property owner of improvements to use in connection with a railroad does not estop the municipality from requiring an elevation of the railroad tracks in the interest of the public welfare, to avoid danger of injury to persons at street crossings, although the result is to destroy the switch connection.

CARTWRIGHT, *J.:*

> "In the exercise of the police power the city had a right, within reasonable limits, to require the railroad company to elevate its tracks so as to avoid grade crossings upon streets, and protect the lives and property of its citizens. Chicago & N. W. R. Co. *v.* Chicago, 140 Ill., 309; 29 N. E., 1109. That power, like other powers of government, when mere property interests are involved, is subject to constitutional limitations. * * * But the power is incapable of alienation, and no valid contract can be made which assumes to surrender or alienate such a power, which is required to continue in existence for the welfare of the public. Chicago *v.* Chicago Union Traction Co., 199 Ill., 259; 59 L. R. A., 666; 65 N. E., 243. So far as requiring elevation of the tracks was an exercise of the police power, no equitable estoppel could operate to prevent its exercise. All that was alleged in the declaration was that the plaintiff constructed improvements upon its own ground for use in connection with the switch. That gave no right against the city to have the railroad maintained at the existing grade."

POINT XVII.

The rights of public utilities in the public highways are subject to the police power of the State.

The exercise of that power in the legislation and order here attacked, does not operate to unconstitutionally take the property of the public utilities without due process of law, or without just compensation.

(1861) *Jersey City* v. *City of Hudson,* 13 N. J. E., 420 (Ch.).

HELD, that the expense incident to the lowering of the water company's pipes to conform to a new grade established by the municipality must be borne by the water company.

It was urged that the right to have the water pipes under the street constituted a right of property which could not be taken without compensation.

To this the Chancellor answered (424):

> "The owner of the soil has a common law right to the use and enjoyment of the soil under the highway. He may open a mine, construct vaults or chambers, erect machinery, lay water pipes, or exercise any other right of ownership in the soil not inconsistent with the public easement. But all these rights are held and must be enjoyed in subordination to the public right of way, including the right of construction, alteration and repair. It cannot be successfully maintained that a mere easement in land, though enjoyed and exercised by legislative sanction, can be a more sacred right of property in the eye of the constitution than the

right of the landholder himself. It must be held (and such must be the construction of the legislative grant) in subordination to the public easement."

(1883) *In re Deering,* 93 N. Y., 361.

Plaintiff, an abutting property owner, complained of the act of the municipality in assuming the expense of relaying gas pipes as part of the cost of grading a street and assessing the same upon abutting owners. The Court modified the assessment so as to exclude such expense, taking the ground that the gas company, in laying its pipes, took the risk of arising from such changes as public convenience or security might require.

DANFORTH, *J.:*

"The learned counsel for the city fails to satisfy us that any authority exists for imposing upon the owners of adjacent property, expenses incurred by the gas company in removing and replacing its pipes. * * * For aught that appears here, although authorized to lay pipes through the public streets (Law 1848, chap. 37, sec. 18), the company took the risk of their location and should be required to make such changes as public convenience or security requires, at its own cost and charge."

(1892) *Stillwater Water Co.* v. *Stillwater,* 50 Minn., 498; 52 N. W., 893.

HELD, that the right to lay water pipes in the highways is subordinate to the power of the municipality to grade the highway, and that the municipality is not liable for the expense of lowering the pipes to conform to the new grade established.

GILFILLAN, *C. J.*:

> "When under this ordinance the plaintiff acquired the right to lay pipes in the streets, that right was subordinate to the power of the city to establish grades and grade the streets, * * * and although the exercise of the power may at times cause plaintiff inconvenience and expense, that is nothing more than it took the risk of in accepting the grant. * * *"

(1892) *City of Detroit* v. *Fort Wayne & E. Ry. Co.*, 90 Mich., 646; 61 N. W., 688.

MCGRATH, *J.*:

> "The charter of the city of Detroit commits the regulation, suspension and control of its streets to the common council. It empowers the council to improve the same and to determine the nature and details of such improvement. It gives to the common council the power to control, prescribe and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit. They cannot be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of streets must be made, not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the powers referred to.
>
> "The permission given respondents to use this street is in subordination to the general power of the municipality over its streets. The city is not under obligation to conform its treatment of its streets to the construction of respondent's road-bed, but on the contrary, respondent must conform the con-

struction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, regulation and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvement of such streets, and subject to such changes in the construction of road-beds as improved and changed conditions may demand."

(1893) *Columbus Gaslight & Coke Co.* v. *Columbus,* 50 Ohio St., 65; 33 N. E., 292.

HELD, that a gas company could not recover from a municipality the expense of relaying its pipes in order to accommodate them to a new grade established by the city, though the pipes were originally laid to conform to an established grade.

SPEAR, *C. J.:*

"The grant by the city must be interpreted in the light of the right and duty of the city to regrade, whenever in its judgment the public interest demands; and whatever easement the gas company can receive, it must accept and enjoy in common with equivalent rights which have been or may be acquired by other public agencies—rights of a like secondary character; and all must give way to the paramount duty of the city to care for the streets, and keep them open, in repair and convenient for the general public. This duty would be seriously interfered with if the city could not change the grade of its streets save upon the condition that it should make compensation to every gas company,

and water company, and telephone company, and electric light company, and street railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets."

(1900) *Natick Gaslight Co.* v. *Inhabitants of Natick,* 175 Mass., 246; 56 N. E., 292.

HELD, that under a statute relating to grade crossings providing that all damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of a public highway, may be determined when occasioned by the taking of land for the locating and laying out of public ways, a gas company was not entitled to compensation for the expense which it incurred in taking up and relaying its gas mains, occasioned by a change in the grade of the streets in which they had theretofore been laid.

HAMMOND, *J.*, said:

"The permission to lay down pipes in the public ways, whether or not, so long as the way remains public, and the pipe does not interfere with the other general public uses, it be revocable, must be held to have been granted originally upon the condition that the pipes, neither at the time of the laying of thereafter, shall interfere with the public travel upon the way as then existing, or as it may thereafter be changed to meet the reasonable exigencies of such travel. To hold, otherwise, and to say that whenever,

> under the statutory permission, a gas pipe is laid in a public way, the pipe cannot be disturbed, even to make such changes as are required by public travel, except under the right of eminent domain is to make what is merely a subordinate use paramount to the great important use for which the land is taken. Such a construction seems to us unreasonable."

(1903) *New England Tel. & Tel. Co.* v. *Boston Terminal Co.,* 182 Mass., 397; 65 N. E., 835.

HELD, that the permission to use the highway must be held to have been granted on condition that the structures neither at the time of their laying or thereafter shall interfere with any other public use to which the Legislature sees fit to devote the way and that when the condition takes effect the privilege ceases to exist and it is not taken or damaged.

The petition in this case was for assessment of land damages.

The one petitioner was a telephone company, the other an electric lighting company.

Each had conduits and wires in certain streets of the City of Boston when these streets were discontinued and taken for a terminal station.

The petitioners contended that they had rights of property in the streets, for which they were entitled to compensation. Denied.

The property in the pipes in the public highways and places is quite different from the franchises under which they are maintained. The former can be taken and put to public use only upon the payment of just compensation. The latter may be impaired in value by the chartering of a competitor.

(1904) *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Mass., 566; 69 N. E., 346.

(1905) *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 U. S., 453.

HELD, that imposing upon a gas company the cost of changes in the location of its pipes and mains, necessitated by the construction of a drainage system, did not impair its contract rights under its exclusive franchise to supply gas to the city through pipes and mains laid in the streets, and that such a gas company had no such property rights in the location of its pipes and mains as to make the imposition upon it of such cost a taking of property without compensation.

Mr. Justice DAY (461):

> "We think whatever right the gas company acquired was subject, so far as the location of its pipes was concerned, to such future regulations as mught be required in the interest of the public health and welfare. These views are fully sustained by the authorities. National Water Works Co. *v.* City of Kansas, 28 Fed. Rep., 921; * * * Chicago, Burlington, &c., R. R. Co. *v.* Chicago, 166 U. S., 226, 254. In the latter case it was held that uncompensated obedience to a regulation created for the public safety under the police power of the state was not taking property without due compensation. In our view that is all there is to this case. The gas company by its grant from the city acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the

location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.*"

(1906) *Anderson* v. *Fuller,* 51 Fla., 380; 41 So., 684.

TAYLOR, *J.:*

"While municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public and all necessary and desirable police ordinances that are reasonable may be enacted and enforced to protect the public health, safety and convenience, notwithstanding the same may interfere with legal franchise rights. A water company, placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets whenever and wherever the public interest demands; and if, in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has

no cause of action against the corporation for reimbursements on account thereof."

(1906) *Scranton Gas & Water Co.*, 214 Pa., 586; 64 Atl., 84.

HELD, that a gas and water company could not hold the city liable for the cost of making the necessary changes in its pipe lines laid in the street under a franchise, upon the raising by the municipality of the street grade to carry it over a railroad crossing.

STEWART, *J.*:

"It is the reasonable discretion of the municipal authorities that determines the extent of the change in streets required to meet public necessities; and to that change, whatever it may be, short of an abrogation or annulment of the company's right to maintain its system of pipes in the public streets, the company must conform at its own cost and expense. The former results from the inherent right of the municipality to the exercise of police power, and the latter from subordinated rights of the gas company in the public streets, under its original grant of privilege, to those of the public."

(1911) *City of Indianapolis* v. *Indianapolis Light & Heat Co.*, Ind., ; 95 N. E., 246.

HELD, that a light and heating company is not entitled to an award for damages caused its property by a change of the grades of streets made by a city in making an improvement under the track elevation statute (Acts 1905, c. 82), since such improvement was made in the lawful and proper exercise of the police power.

(1913) *Walker* v. *North Bergen,* 84 N. J. L., 248 (Supreme Court).

KALISCH, *J.* (250):

> "A further contention of the prosecutor is that the contract as awarded imposes upon the taxpayers an improper burden of expense, in that it saddles the taxpayers with the cost of shifting the water pipes of the Hackensack Water Company and the gas pipes of the Public Service Company. This contention is sound. These companies are private corporations. They exercise functions of a public nature in the distribution of water and gas to the public. This feature of their business, however, does not give them a vested right to have their pipes remain under the public highway undisturbed when the public good or necessity requires that they should be shifted or relocated. For aught that appears in this case these companies are mere licensees. It will therefore be presumed that they laid their pipes under the public highway subject to the paramount use of the highway by the public. Under such conditions a natural sense of justice demands that the expense of shifting and relocating the pipes should be borne by the companies owning them, and not by the taxpayers."

POINT XVIII.

The imposition of not exceeding 10 per cent. of the cost directly chargeable to the elimination of the crossings used by the street railway company upon that company violated no constitutional provision.

Both the railroad and the street railroad have special privileges in the use of the highways occupied and crossed by them, which can only be obtained by legislative grant. Both are operated over fixed tracks.

The danger of elimination of which it is the purpose of the statute to effect is not, in the case in which a railroad crosses the public highway and a street railroad crosses the railroad on such public highway, attributable to the railroad alone nor to the street railroad alone, but to both of them.

Where, as in this case, the electric cars run at frequent intervals across the railroad over which trains are frequently run, a place of unusual danger is created, not only to the passengers in the steam cars, but also to the passengers in the electric cars.

In such circumstances the State can, in the exercise of the police power, require the elimination of the danger and can impose the expense of doing so upon the corporations causing the danger.

In such situation the State is not required to ascertain the exact *quantum* of damage caused by each road, and by that standard assign the cost of protecting the public.

(1861) *Fitchburg Railroad Co.* v. *Grand Junction Railroad and Depot Co.*, 1 Allen, 552.

In this case no question was made as to the validity of Mass. St., 1856, c. 296, "to promote

the public safety and convenience, by a bridge at the intersection of the Boston and Lowell, the Fitchburg and Grand Junction Railroads in Somerville," by which the Fitchburg Railroad Company and the Grand Junction Railroad and Depot Company were authorized to lower their tracks at the junction with the Boston and Lowell Railroad, in Somerville; and the Boston and Lowell Railroad Company were authorized to raise their track, so that the tracks of the former companies might pass under it; and, so far as might be necessary for the purpose, to change the curve and grade of highways and connecting tracks, with the consent of the County Commissioners of the County of Middlesex. The statute required a bridge to be built in a certain manner described; directed what portion should be built by the Boston and Lowell Railroad Company; and further directed that a certain part of the work should be done by the Fitchburg Railroad Company, under the supervision of a commission to be appointed by the Governor, *who should apportion the cost of this part of the work between the Fitchburg and Grand Junction Companies, in such proportions as should by him be deemed equitable;* and provided that if the award to such Commissioners should not be promptly paid, the former company might recover of the latter a fair and just proportion of the cost incurred.

(1895) *People ex rel. Western New York & P. R. Co., et al.,* v. *Adams, et al.,* 88 Hun, 122; 34 N. Y. Supp., 579.

Proceedings to review by certiorari the assessment on a railroad company of all the expense of building over its tracks a new bridge sufficiently strong to bear the weight of street railway cars.

HELD, that Laws of New York, 1880, c. 326, which requires a certain railroad company to depress its tracks in the City of Rochester, and provide overcrossings at streets, does not require the company to maintain a bridge of sufficient strength to support the passage of electric street car trains weighing twenty-three tons.

WARD, *J.*:

> "This statute of 1880, like all other statutes, should receive a reasonable constructon. The legislature certainly did not intend thereby to impose upon the railroad company, in constructing its crossings over the numerous streets in the city that its tracks should intersect, the building of structures that would withstand such enormous weight, and far beyond that of the vehicles that ordinarily pass over the streets and highways."

(1897) *Carolina Cent. R. Co.* v. *Wilmington St. Ry. Co.*, 120 N. C., 520; 26 S. E., 913.

Action for injunction by railroad company against street railway company.

HELD, that the running of cars by a street railway corporation over a bridge already constructed by a railroad company over its tracks within city limits, which bridge is sufficient for ordinary public uses, imposes an additional servitude on the bridge; hence the street railway company must contribute to the maintenance thereof, and provide necessary conveniences at the intersection as required by statute.

MONTGOMERY, *J.*:

> "The law undoubtedly imposed upon the plaintiff company, at the time the bridge

was built, the obligation to put up such a structure as would be sufficient for the then needs of the public as to travel or transportation over the street or highway. It is also well settled by the authorities that the plaintiff company was under the further obligation of maintaining a bridge of such proportions and strength as would meet the continuing demands of the public in reference to travel by foot and horse and the ordinary vehicle transportation over the street. The growth in population, and the building up of cities and trade while probably increasing the expenditures of the plaintiff company in maintaining the bridge to meet changing conditions, also increase the business and profits of the plaintiff company, and thereby compensate it for its additional outlay on account of the added burden of servitude which these things produce. But does the obligation imposed upon the plaintiff extend any further than to maintain a bridge equal to the demands of the public for foot and horse travel and ordinary vehicle transportation? Can the obligation be extended to include the use of the bridge for the running of heavy street cars over it by a corporation formed for the profit of its stockholders and whose chief purpose is private gain, and not the public good? It seems to us that to state the question is to answer it in the negative. Street railways are, in a certain sense, highways, but not in the strict sense are they public ways; for their owners have private rights of property in the franchise, and they are operated for the private benefit of the stockholders. * * * But the plaintiff has received no benefit or compensa-

tion from the defendant company for the use of the bridge by defendant's street cars, nor has the defendant company shared the expense of building or maintaining the bridge; and the plaintiff company therefore owes the defendant no duty to furnish at plaintiff's cost and risk a safe passage for defendant's street cars over the bridge, to the end that the defendant company may conduct its business, profitable only to its own stockholders, without risk or expense. That would simply be an appropriation of the property of one to the benefit of another without compensation; and that could not, of course, be allowed."

(1901) *Detroit, Fort Wayne & Belle Isle Railway* v. *Osborn,* 127 Mich., 219; 86 N. W., 842; 62 L. R. A., 149.

HELD, that under Michigan statute (Act 1893, No. 171, No. 5) authorizing the railroad commission to provide proper safeguards at crossings of railroads and street railroads, and to apportion the expense between the companies affected as he may deem just and reasonable, where a steam railroad has extended its road across an existing street car line, and subsequently, owing to the increase of travel on the street, the erection and maintenance of safeguards at the crossing becomes essential for the protection of the public, the railroad commissioner may require the street railway company to pay a portion of the expense of constructing and maintaining such safety devices.

MOORE, *J.:*

"New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run

at frequent intervals, across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars. This danger is occasioned, not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the state, in the exercise of its police power, can take such steps as will minimize the danger and can impose the expense of doing so upon the corporations causing the danger."

(1903) *Detroit, Fort Wayne & Belle Island Railway* v. *Osborn,* 189 U. S., 383.

HELD, that under the laws of Michigan the commissioner of railroads has power to compel a street railroad to install safety appliances in accordance with law, the cost to be shared between it and a steam railroad occupying the same street, notwithstanding that the steam road is the junior occupier of the street.

Mr. Justice MCKENNA (390):

"The record in this case shows that there are thirty-eight daily passenger trains crossing Clark Avenue, and that the cars of the plaintiff in error pass every few minutes. It is manifest, as the Supreme Court of the State observed, that the crossing 'is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars,' and that the danger is caused by both. In such a situation the city is surely not powerless to act, nor before acting must it ascertain the exact quantum of damage caused by each road, and by that standard assign the cost of pro-

tecting the public. See Railroad Co. *v.* Street Ry. Co., 89 Me., 328."

(1909) *Board of Aldermen of Fitchburg* v. *Boston & M. R. R. Co.*, 203 Mass., 304; 89 N. E., 438.

HELD, that under St. 1906, pp. 488, cp. 463, pt. 1, Secs. 23, 25, authorizing the alteration of railroad grade crossings and providing for the appointment of a special commission to determine whether the municipality, or steam railroad company, or *street railroad company* shall pay the cost thereof, when considered in connection with the legislative policy which seeks to make parties specially benefited by alterations of crossings share in the expense of the improvements, and in connection with St. 1908, p. 504, cp. 542, defining the purpose of the Statute of 1906, a street railway company having tracks on a way is a party interested in an alteration of a railroad crossing on or over the way, and is liable to pay for its proper portion of the expenses of the alteration.

(1914) *New Paltz, H. & P. T. Co.* v. *Central New England Ry. Co.*, 84 Misc. Rep., 528; 147 N. Y. Supp., 624.

HELD, that the public service commission could order a change in the location of trolley tracks upon a turnpike as incident to the execution of a plan for carrying railroad tracks under the turnpike to render more secure and safe the lives of the traveling public, as the right to use a public street in a manner to protect human life cannot be subservient to the right of a quasi-public corporation.

HASBROUCK, *J.*:

"The change in the location of the trolley company's tracks upon the turnpike was ordered to render more secure and safe the lives of the public traveling the highway, trolley and railroad. Interference with the grade of the trolley company's tracks and roads or with their place upon the highway is a mere incident in the execution of the plan. * * *

"The right of the public to the use of the public street in a manner to protect human life cannot be subservient to that of the corporation, whose function is only quasi."

(1914) *Mo. Pac. Ry.* v. *Omaha,* 235 U. S., 121.

Mr. Justice DAY (129):

"It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. Detroit, &c., Railway *v.* Osborn, 189 U. S., 383, 389. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense."

POINT XIX.

The provision of the Fielder Act under which "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," involves, as hereinbefore demonstrated, a legitimate exercise of the police power. The burden imposed by it is neither a tax nor an assessment.

The argument in support of this point cannot be better put than it is in the opinion rendered below:

(1915) *Public Service Railway Co.* v. *Public Utility Commissioners and City of Paterson,* 98 Atl., 28.

GARRISON, *J.:*

> "We agree that this imposition of a part of the expense of abolishing dangerous grade crossings is neither a tax nor an assessment for a public improvement, but we think, that it is a legitimate exercise of the police power. The contention of counsel for the prosecutor is placed squarely upon the proposition that the police power is not legitimately exercised in the present case 'unless the property (of the prosecutor) has become a public nuisance and so lost its right to protection;' and he then proceeds to demonstrate that a street railway is not a public nuisance. We, of course, agree to this, but we entirely dissent from the narrow definition of the police power which would restrain its exercise to the case of property that had become in a legal sense a nuisance.

If such a narrow definition has any place in the doctrine of the police power, it is confined to the appropriatory aspect of that power, *i. e.,* to such appropriation as is incidental to the destruction of property as a nuisance and has no place in the vastly wider scope of such power that is regulative of energies that are curbed, not that they may be impaired or destroyed, but, on the contrary, that they may be of greater service and beneficence to the public.

"Instances of such regulative exercises of the police power are met at every turn and constitute in fact the chief characteristics of modern social life. There are, to use a rough analogy, two aspects of the exercise of the police power, one so to speak in *rem* and the other in *personam;* and it is to the former alone that the proposition of counsel has any possible pertinence, and even in that connection it is of doubtful value as a definition, and of no apparent service as a criterion.

"The distinction between these two aspects of the police power is perfectly patent. The destruction of a pest house would be an illustration of appropriation of property because it was *per se* a nuisance, *i. e.,* a menace to the public health, while the compulsory vaccination of school children would be in order to prevent them from becoming such. The securing of public safety from anticipated dangers rather than the abatement of consummated nuisances is the essence of the police power in its broader scope. That there are such dangers to be anticipated from the operation at a grade crossing of a steam railroad and a trolley

line is not more obvious than that each of these public agencies contributes its element to such danger. The steam road may indeed furnish in greater degree the active element of danger to human life, but the surface road in its operation brings to such place of danger its human freight in extraordinary numbers and under special conditions, which, or so the legislature might determine, greatly increase and accentuate the normal danger and hence justify its elimination by the joint act or at the joint expense of both of the public agencies that contribute in its production. It is matter of common knowledge that during what are termed the rush hours of the day a single surface car of modern construction carries a hundred or more passengers and that the cars thus crowded follow each other in an almost unbroken procession. The stalling of one of these cars upon a grade crossing by the sudden giving out of the electric current, or its propulsion on to the railroad track by the failure of a brake to work properly, or as in the Newark case (State *v.* Young, 56 Atl. Rep., p. 471), by the failure to sand the track, would imperil the lives of scores, who were brought into such position of peculiar peril by reason of being passengers on a street railway. It is not at all a question of the creating of a common nuisance, but solely of the participation in and contribution to a common source of danger arising from the transportation problem in its relation to grade crossings of common carriers of passengers.

The state grants this use of its highways for the convenience of its citizens, and the

incorporators of such companies eagerly seek the privileges thus granted because of the profits to be derived therefrom; hence, if dangers arise from the very success of such enterprises, it is eminently within the exercise of the police power of the state in the elimination of such dangers to place a portion of the expense of so doing upon those who profit by the very success which has contributed to such dangers.

"The fact that by such a collision as we have suggested the lives of the passengers on the steam railroad are also imperiled, so far from demonstrating that the entire expense of eliminating the dangerous condition should be borne by such railroad, merely emphasizes the participation of each carrier in the production of a common source of danger, and hence points to their joint contribution to the expenses of its elimination.

"In support of this obvious conclusion, counsel for the defendant cites a number of pertinent authorities, but the question would seem to be at bottom one of fact, from which, when the fact is once established, the legal result follows as a necessary consequence. The establishment of such fact is, moreover, a part of the legislative function and as such is not subject to review by the judicial department."

And see,

(1915) *Public Service Ry. Co.* v. *Board of Public Utility Com'rs.*, 93 Atl., 585 (Ct. E. & A.).

HELD, that the Legislature had the power to fix the compensation to be paid for the use of a county bridge by a street railway company, and to desig-

nate the Board of Public Utility Commissioners the power to ascertain what is reasonable compensation, *and that such compensation is not a "tax."*

BERGEN, *J.*:

"The only other point requiring consideration is the first, which challenges the right of the county to charge prosecutor for the use of the bridge beyond the ordinary taxes levied to erect and maintain bridges, thus making a discrimination between prosecutor and other members of the public. This proposition overlooks the facts that the use by the public generally, and that by the prosecutor, are very different in their nature, and that a more expensive and substantial structure is required to permit the operation of a street railway as a private enterprise for profit than would answer the ordinary use by the public. This additional cost for prosecutor's benefit is beyond that demanded for the usual convenience of the public, and there is no legal reason why, when a common carrier makes an unusual use of a bridge, it should not be required to contribute towards the additional cost incurred for its private benefit. It is not a public tax in the usual sense, but a charge for a use which the user would have no right to enjoy except by consent of the county. The statute requiring the counties of this state to erect and maintain suitable bridges over streams was not intended to compel municipalities to erect and maintain bridges of sufficient capacity to carry the modern trolley cars, and it must be assumed that the legislature enacted the law with reference to the well known character

of vehicles then in use by the public, and the county is only required to meet such contemplated use, and not to provide a more costly structure suitable to sustain and permit the use of electric or other trolley cars. The prosecutor is a common carrier, bound to serve the public in a reasonable manner and to provide its own structures for such purpose, and when, as in this case, it avails itself of a county bridge built in expectation of such use, the legislature has the power to require it to pay therefor a reasonable compensation.

"The case of Bangor Railway & Electric Co. *v.* Oromo, 109 Me., 292; 84 Atl., 385, is quite similar to the present case."

POINT XX.

The title of the Fielder Act does not contravene the constitutional requirement.

The object of the act is expressed in the title, and the act does not embrace more than one object.

The Fielder Act is a supplement to the Public Utility Act, which is entitled: "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers."

This title fairly indicates the object of the Act.

The Act concerns public utilities and extends the duties and powers of the Board with respect thereto.

That object is expressed in the title.

It is not necessary that the title indicate the means or method of attaining the object.

(1885) *Bumsted* v. *Govern,* 47 N. J. L., 368.

DIXON, *J.* (373):

> "Does the title express the object of the act? The constitutional provision is that every law shall embrace but one object, and that shall be expressed in the title."
>
> "It is not necessary to review the numerous decisions involving the application of this and similar clauses. It is on all hands agreed that its purpose is to require the title of a bill to be such as will inform the public and the members of the legislature of the object of the enactment, and that this purpose is accomplished when the title fairly indicates the general object, although it does not indicate the means or method of attaining this object."
>
> Affirmed, *Govern* v. *Bumsted,* 48 N. J. L., 612.

(1898) *Hickman* v. *State,* 62 N. J. L., 499.

COLLINS, *J.* (503):

> "The degree of particularity to be used in the title of a statute rests in legislative discretion. Provisions incidental to the general object expressed are permissible."
>
> Affirmed, *State* v. *Hickman,* 63 N. J. L., 666.

The act, it is true, contained provisions relating to others than public utilities.

These provisions are, however, essentially incidental to, and grow out of the regulation of public utilities.

They, therefore, too, "concern" public utilities.

The statute has a single object. It enacts, it is true, various matters. All of these, however, including the provisions relating to others than

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public utilities, are properly related to each other and essential to effectuate the single general object.

The statute, therefore, does not embrace more than one object, nor does it intermix such things as have no proper relation to each other.

(1895) *Newark* v. *Mount Pleasant Cemetery Co.*, 58 N. J. L., 168 (Ct. E. & A.).

MAGIE, *J.* (170):

> "It is first argued that the title to the act of April 9th, 1875, is not in conformity to the constitutional requirement that '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 embraced in the title. Const. art. 4, Sec. 7, p. 4.
>
> "It is insisted that the law in question fails to accord with this provision of the constitution—first, because it embraces two objects.
>
> "The constitution itself discloses the reason for the restriction on legislation contained in the provision in question. It is because of the influences which might result from the inclusion in one act of matters not properly related among themselves. So by its obvious construction this constitutional provision justifies and permits legislation by one statute, looking toward a single general object, although it contains and enacts various and multiform matters, if those matters are properly related to each other and tend to effectuate the general object. This is the view of the provision in question taken in this court. Payne *v.* Mahon, 15 Vroom, 214. The

same construction has been repeatedly given it in the Supreme Court and in the Court of Chancery. The cases will be found collected in the able opinion of the learned Chancellor in Stockton *v.* Central Railroad Co., 5 Dick. Ch. Rep., 52.

"It results that when a court is called on to determine whether a statute conforms to this requirement of the constitution the first duty is to scrutinize its provisions to see if they disclose the general object of the legislation. Then if that object be one, and the various provisions of the statute tend to carry it out, and are not incongruous or improperly related, this requirement will have been complied with."

POINT XXI.

The Fielder Act does not unconstitutionally delegate legislative power to the Board of Public Utility Commissioners.

(1877) In *Matter of New York Elevated R. R. Co.*, 70 N. Y., 327, the Court sustained a statute conferring upon commissioners appointed as specified in the Act power to determine upon the necessity of such railways, to fix the routes and prescribe the plan of their construction, and held, that the statute conferred no legislative power upon the commissioners.

EARL, *J.*, said:

"It is objected that the act is unconstitutional, because it delegates legislative power to the Mayor's commissioners. The object of the act was to provide for the construction, etc., of elevated and underground railways. It confers upon the commissioners

the power to determine upon the necessity of such railways, to fix the routes upon which they may be constructed, to prescribe the plan of their construction, and to superintend the organization of companies for their construction. * * * Cannot the legislature confer upon a commission the power, upon the application of individuals, to make the same determination for the individuals which they could make for themselves? The proper answers to these questions are not doubtful. The arguments made to show that the legislature was not competent to devolve upon these commissioners the powers given to them in this act, if sound and logically applied, would nullify every general law found upon our statute books for the formation of corporations, and thus nullify the constitution itself, which commands the passage of such general laws.

"The legislature could not, in a general law, determine the necessity of a railway in any particular locality, nor the routes upon which it was to be constructed, nor the amount of capital, or the name which it was to assume, and there is nothing in any constitutional requirement which imposes upon it the duty, in a general law, to provide the place of construction for any railroad. It may provide the machinery for the determination of these matters, and what that machinery shall be must depend upon its will. It may authorize these determinations to be made by the individuals who desire to incorporate, by the people resident in the locality to be affected, or by the municipal or county government, and it does not thereby abdicate in any proper sense any part of its legislative power."

(1908) *Trustees of Saratoga Springs* v. *Saratoga Gas, E. L. & P. Co.*, 191 N. Y., 123; 83 N. E., 693.

CULLEN, *Ch J.* (146):

"It is contended that, conceding that the legislature may commite to an administrative board the power to determine a tariff of rates, the statute must prescribe some standard by which the action of the board is to be governed, and that otherwise the whole plenary power of the legislature is intrusted to the board, whose action may be arbitrary; and it is urged the statute before us provides no such standard. We think otherwise. The statute provides that the commission shall fix the rates within the limits prescribed by law. This includes both statute law and common law. There may have been companies which had franchises immune from invasion by which they were authorized to charge specific rates. The common law prescribes the rule that the rate shall be reasonable, and I think, even without special mention, the statute would necessarily imply the same limitation. But it is said that, granting this, 'reasonable' is really no standard, but a mere generality. Again we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form. A lawmaker may exhaust reflection and ingenuity in the attempt to state all the elements which affect the reasonableness of a rate only to find that in a particular case he had omitted the factor which controlled the disposition of that case. A very good

instance of such danger is to be found in re Janvrin, 174 Mass., 514; 47 L. R. A., 319; 55 N. E., 381. * * * The case illustrates the wisdom of the legislature in prescribing as the sole standard of maximum rates that they shall be reasonable. Any other standard, unless also 'a mere generality,' would surely be challenged as arbitrary."

(1909) *State ex rel. Northern Pac. Ry. Co.* v. *Railroad Commission of Wisconsin,* 140 Wis., 145; 121 N. W., 919.

HELD, that Wisconsin Laws, 1907, p. 409, cp. 454, providing that the Railroad Commission, upon granting permission for a grade crossing of railroads, shall fix the proportion of the expense of constructing and operating the crossing, was not invalid as a delegation of legislative power or as vesting the commission with judicial power.

(1911) *People* v. *Roth,* 249 Ill., 532; 94 N. E., 953.

VICKERS, *C. J.:*

"The term 'legislative power' is used in section 1 of article 4 of the Constitution, declaring that legislative power shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives, both to be elected by the people, means the power to enact laws or to declare what the law shall be. It is the power to enact new rules for the regulation of future conduct, rights and controversies. It does not mean that every act of officers created by the legislature must be expressly prescribed by the lawmaking power. The

government of a state is not such an exact science that every possible contingency can be foreseen and provided for by legislative enactment. The agencies of government do not act automatically, but to accomplish the ends of government it is necessary to vest in its officers certain general powers, with a discretion in the governmental agents as to their exercise. It would be as impracticable as it is undesirable to attempt to formulate in advance a set of hard and fast rules by which every conceivable public act should be governed. In order to accomplish the ends of local government it has been found expedient to create various boards and commissions, which are charged with the duty of supervising, directing and controlling particular subjects, and to authorize such boards to formulate rules to carry out the object in view, and it has usually been held in this and other states that the granting of such power by the legislature was not a grant either of legislative or judicial power. * * *" (Cases cited and considered).

(1915) *In re Connecticut Company* (Conn.), 94 Atl., 992.

HELD, that the Legislature could constitutionally delegate to the Public Utility Commission authority to determine the number of street railway tracks to be laid on a city bridge used as a public highway, as it involved the adjudication of a matter of an administrative character, and might properly be left for decision to a tribunal exercising administrative and executive functions.

WHEELER, *J.*:

"The general assembly had power to itself determine the number of tracks to be laid across this bridge. And it had power to delegate to the commission the determination of the number of tracks to be laid, for this was the adjudication of a matter of an administrative character and might properly be left for decision to a tribunal such as this commission, administrative and executive in its functions. While undoubtedly the general assembly could not delegate to an administrative tribunal legislative discretion, it might declare its own will and delegate to such tribunal the power to execute its will and carry out its policy. The question of the proper number of tracks to be laid across a bridge which is part of a public highway is one whose solution depends upon an investigation of the conditions surrounding the location at the time of the decision, and the weighing of these in the light of the public or private benefit, or the reverse. Obviously, the lawmaking body cannot know these nor foresee changing conditions, and hence arises in many cases, as did in this case, the propriety, if not the actual public necessity, for committing the decision of the issue of fact to an administrative tribunal.

"Legislation of this character, having established the primary standard, may devolve upon the administrative tribunal the executive duty of carrying out the purpose and policy of the statute."

(1915) *Alton & S. R. R.* v. *Vandalia R. Co.*, 268 Ill., 68; 108 N. E., 800.

CARTER, *J.*:

> "While the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. Fish *v.* McGann, 205 Ill., 179; 68 N. E., 761. To hold that whatever the legislature may do it shall do in every detail, or else the thing shall go undone, would be to practically destroy the government. Necessarily, regarding many things, especially affecting local or individual interests, the legislature may act either mediately or immediately. While the legislature cannot divest itself of its proper function or delegate its legislative authority, it may still designate others to do those things which it can appropriately, yet cannot understandingly or advantageously, do itself. * * * Under the authorities the mode and manner of the regulation of railroad or highway crossings in this state are clearly a matter of legislative discretion. Such regulation may be by legislative action, directly, or may be exercised through boards or commissions or like bodies, such as the Railroad and Warehouse Commission, or Public Utilities Commission."

For a compilation of cases in which like power has been conferred upon and exercised by State Commissioners see Public Utility Reports Annotated, 1915, F. p. 170.

See also:

(1915) *W. J. & S. R. Co.* v. *Board of P. U. C.*, 94 Atlantic, 57-60 (Ct. of E. & A.).

POINT XXII.

The Fielder Act does not unconstitutionally invade the jurisdiction of the Court of Chancery over the regulation of easements.

The provisions of the Constitution appealed to by the prosecutor are paragraph 1 of Article III. which provides that:

> "The powers of the 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,"

and paragraph 1 of Article VI, 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; Circuit Courts, and such inferior courts as now exist and as may be hereafter ordained and established by law, which inferior courts the legislature may alter or abolish, as the public good shall require."

That the subject-matter of the Fielder Act lies within the police power of the State, and that this power may be put forth through legislation cannot admit of question.

In enacting the Fielder Act, the Legislature recognized the fact that a general legislative regulation could not possibly provide for the special emergencies arising at particular crossings, and

it therefore delegated the determination of the facts as to each crossing to a central administrative body of its creation.

The question, therefore, arises:

> Is the power so conferred judicial in the sense in which that term is used in the provisions of the constitution appealed to by the prosecutor, and does it 'properly belong' to the judicial department of the government?

The clauses of the Constitution appealed to by the prosecutor declare a fundamental principle of constitutional jurisprudence, namely, that so far as the requirement of efficient administration will permit, the exercise of the legislative, executive and judicial powers is to be vested in separate and independent departments of government.

The separation of powers effected is, however, not complete.

There are, as our courts have pointed out, a multitude of powers lying outside of the powers "properly belonging to the legislative, executive and judicial departments of the government." These are not peculiarly and distinctively, therefore, not exclusively legislative, executive or judicial, and it lies within the authority of the legislative body, unless restrained by some specific provision of the Constitution, to determine where their exercise shall be vested.

In *Paul* v. *Gloucester County,* 50 N. J. L., 584, the Court of Errors and Appeals, in an opinion by VAN SYCKEL, *J.,* commenting upon the distributive clause of the Constitution, said (610):

> "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 these powers 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.

"For instance: Contracts may be and are made on behalf of the state by the legislature, the executive or the judicial department. Each of these departments appoints the incumbents of statutory offices. The governor and chief justice act together on various commissions; and, in divers other respects, one department exercises authority which might as well have been devolved by statute upon another."

In *Moreau* v. *Freeholders of Monmouth,* 68 N. J. L., 480, DIXON, *J.*, delivering the opinion of the Supreme Court, said:

"To determine how conflicting easements are to be enjoyed (cases cited), to decide a dispute between contending boards of chosen freeholders as to the location of a bridge connecting their counties (case cited), to ascertain the compensation due to an officer of the court appointed to aid the court in performing its functions (case cited), 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 (case cited)."

In *Ross* v. *Freeholders,* 69 N. J. L., 291, the Court of Errors and Appeals, speaking through

DIXON, *J.*, referring to the distributive clause, said (293):

> "The article contains three clauses, a distributive clause—'the powers of the government shall be divided into three distinct departments—the legislative, executive and judicial'; a prohibitive clause—'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'; and an excepting clause—'except as herein expressly provided.'
>
> "The distributive cluase cannot be read as the declaration of an abstract proposition that the powers of government are naturally divided into legislative, executive and judicial departments; for the words indicate not the powers of government generally, but 'the powers of the government,' that is, the government then being formed, and a division not already existing, but one about to be made, 'the powers of the government shall be divided.' Hence, we must seek for the scope of the division primarily in the constitution itself. The intended division is there plainly disclosed.
>
> "By article 4, section 1, paragraph 1, 'the legislative power is vested in a senate and general assembly'; by article 5, section 1, 'the executive power is vested in a governor'; and by article 6, section 1, 'the judicial power is vested in' the courts. The division contemplated by article 3 relates, therefore, only to such powers of the government as are to be exercised by the senate and general assembly, or by the governor, or by the courts. But as was said in Paul *v.* Gloucester County, 21 Vroom, 581,

611, '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.' Clearly the powers appropriate for the discharge of these duties must lie outside of the division intended by this clause of the constitution, * * *

"The prohibitive clause of this article calls for some consideration of 'the powers properly belonging to the several departments into which the powers of our government are divided. * * *

"Here it should be noted that the force of this clause is not to confine the legislature to powers which are legislative, the governor to powers which are executive, and the courts to powers which are judicial, but merely to forbid each department to encroach upon the powers properly belonging to another. The powers properly belonging to each of these departments, and, therefore, forbidden to the others, are those assigned under the general terms legislative power, executive power and judicial power, and also those specifically delegated by the constitution to the senate and general assembly, or to the governor, or to the courts."

It is submitted that the power conferred by the Fielder Act is neither an exclusively legislative, executive nor judicial power, but is a mere power of administration under an act of legislation, and one of the multitude of powers recognized by our courts in the cases before cited and quoted, which lie outside of the powers "properly belonging" to the three departments of the government, and the exercise of which the

legislature may, unless restrained by some specific provision of the Constitution, vest where it chooses.

From the beginning of the construction of railroads in this State the Legislature has by a long line of statutes regulated the crossing of railroads and public highways, and the crossing of one railroad by another, and the protection to be afforded.

It is true that the power conferred involves the exercise of "judicial discretion," and that, therefore, a determination made in its exercise is subject to judicial review. It is not by reason of that fact, however, a judicial power in the sense in which that term is used in the Constitution.

Any other conclusion would sweep away a multitude of legislative acts which clothe administrative bodies, such as the State and Local Boards of Health, and other like bodies, with powers involving "judicial discretion."

It is also true that the power delegated involves, in its exercise, a determination of fact, but clearly it is not on this account a judicial power, unless every duty of ascertainment, which, in its performance, requires the exercise of judgment, is to be called a judicial power.

Considering this proposition, the Court, in *State ex rel. Kenosha Gas & E. Co.,* v. *Kenosha Electric Ry. Co.,* 145 Wis., 129 N. W., 600, said:

> "True, the legislature cannot empower the Railroad Commission to exercise legislative or judicial power, but it may clothe it with authority to administer a law requiring the ascertainment of facts in order to determine whether the law applies, and if so, how, to situations as they arise. The administrative power includes necessarily

> power to determine the facts necessary to application of the law. That is a familiar principle governing numerous instances of grant of quasi-judicial and quasi-legislative power. They do not fall within the field of that strictly judicial or legislative power which is undelegable."

The following cases are also in point.

In *Iowa L. Ins. Co.* v. *Eastern Mut. Life Ins. Co,.* 64 N. J. L., 340, the Court of Errors and Appeals held that the statute providing that it shall not be lawful for any life insurance company to contract for reinsurance of its own risks, or to reinsure the risks of another company, unless two-thirds in number of the holders of the policies proposed to be reinsured shall assent thereto in writing, and that the contract for such reinsurance shall be utterly invalid until it shall have been approved by the Secretary of State, which he shall do only after due inquiry and upon satisfactory evidence that the interests of the policyholders are fully protected, and that the proper consent has been given—was not unconstitutional as attempting to delegate to the Secretary of State a legislative or judicial power.

The Court, by ADAMS, *J.*, said (346):

> "It becomes necessary, then, to examine the constitutional objection. The criticism is this: that the legislature has attempted to delegate to the secretary of state a legislative power. The brief submitted on behalf of the plaintiff-in-error further suggests, somewhat tentatively, that the power may be judicial. We think that it is neither legislative nor judicial, but that it is administrative."

After pointing out the various duties which, under the act, the Secretary of State was called upon to perform as *ex officio* Commissioner of Insurance until the establishment of the Department of Banking and Insurance, when his duties were devolved upon the Commissioner of Banking and Insurance, the Court further said:

> "What section 66 calls upon the commissioner to do is not to legislate by laying down a new rule, but to enforce a prescribed rule; not to adjudicate, unless every exercise of judgment is called a judicial act, but to perform a duty of ascertainment; to determine, by an examination of values and mathematical relations, whether a safe financial situation exists, and whether a certain document has been properly signed. * * * To hold that the acts required of the secretary of state by section 66 and similar enactments are anything but administrative would be at variance with principle and authority. It would certainly paralyze the Department of Banking and Insurance."

In the matter of the application for drainage of lands between Lower Chatham and Little Falls, 35 N. J., L. 497, the Supreme Court considered "An Act to provide for the drainage of lands" (P. L. 1871, p. 25). The Court sustained the act, saying, by BEDLE, *J.* (503):

> "It is also urged against this act that the legislature, in the first section, has delegated to the board of geological survey the discretion of determining the purpose for which the right of eminent domain shall be exercised. This objection comes from those whose lands or property are to be taken for the improvement, and the argument is

based upon the fact that every tract of land (even if five owners of separate lots should apply for its drainage) which is subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, is not sufficiently a matter of public interest to justify the taking of private property for its improvement, and that whether so or not, the board of managers of the geological survey have been entrusted with the power of determining it. It may be assumed that the power of eminent domain belongs to the legislature, and is not judicial in its nature. The power of the courts can be called into action only to see that, under color of its exercise, the right of private property is not interfered with, except for public use, and then upon compensation. And on the question of public use, the legislature should be controlled by the courts only when it is clear that the purpose is not of a public nature.

"That the exercise of the power of eminent domain, speaking generally, may be delegated by the legislature to corporations, commissioners, or individuals, is too well settled for dispute, but a distinction is sought to be drawn between the exercise of the power as to the time and mode of its exercise, and a determination of the public purpose by delegated bodies or persons.

As, for instance, it is conceded that the legislature may authorize the surveyors of highways to be appointed by the court, when certain freeholders think the public road necessary, to lay out the same, on their determination whether the road is necessary or not; but that a public road being in its nature for a public purpose, the

mode by which it may be laid out, and the circumstances when are only delegated, and not the determination of the purpose.

"It may be well questioned whether the legislature could allow an indiscriminate exercise of this power on the mere judgment of others without some reasonable intimation or indication of the subject-matter upon which it was to be exercised; but that need not now be decided.

"There are many subject-matters verging closely upon the line where public interest is to be subserved and where private interest only is to be advanced, and a liberal discretion should be allowed to the legislature as to the means by which it may be decided. The power is eminently practical, and the legislative bodies not always calculated to decide upon the public utility of an improvement. It may be exercised under general laws, as well as by special act, and probably it is as little liable to abuse, to say the least, under the former as the latter. Backus *v.* Lebanon, 1 N. H., 19. It not being a judicial power, but legislative, there is no reason why more should be required as to the purpose, in this class of improvement, than a reasonable indication of legislative will, that certain kinds of lands may be improved whenever selected or designated persons shall determine that the public, as well as the private, interests require it, to run a distinction between what is for a public purpose *per se,* and what may be such purpose according to the actual conditions, in fact, of body of land, as may be ascertained by agents more practical and better able to judge than the legislature itself, is without any solid reason, and will

> conduce to no public good, or the protection of private rights, when it is remembered that the courts are adequate to prevent any abuse of the power by those to whom its exercise is committed. And, besides, in reality, every road applied for is not, *per se*, of a public character. Whether so or not, must be decided by the surveyors, and there is no substational difference between that and the case before us. The legislature has declared, in the act in question, that on application of at least five owners of separate lots within any tract of land subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, the board are authorized to examine the same, and if they shall deem it for the interest of the public and of the land owners to be affected thereby, to make surveys, etc."

That the power delegated is not judicial is indicated by the fact that the board upon which it is conferred may act upon its own initiative, whereas the judiciary may act only when called upon to do so.

The adjudications of our courts considering legislation, conferring upon the judiciary similar powers where application is made for the exercise thereof on behalf of a municipality, support the contention that the power is neither exclusively legislative, executive nor judicial, but is a power of administration.

In *Palmyra* v. *Pennsylvania R. R. Co.*, 62 N. J., E., 601, the Court of Chancery had before it a proceeding under "An Act for the protection of grade crossings" (P. L. 1898, p. 110). By the terms of the act, whenever a condition arises which makes it appear to the satisfaction of the Chancellor, after a hearing upon a petition filed

by the governing body of any municipality, that it is reasonable and necessary for the security of human life, or the protection of the public, that gates or bars should be erected or maintained, or a flagman should be stationed at a crossing, the Court shall make an order to that effect. Before the governing body shall make such application, it is required to adopt an ordinance requiring such application to be made.

The statute was contested upon the ground that in attempting to confer upon the Court of Chancery power to inquire into and determine whether such danger exists at a particular railroad grade crossing of a highway as to be detrimental to safety, and to direct the railroad to place there certain additional safeguards, if found necessary, the Legislature had exceeded its authority, and had imposed upon the judicial department of the government a power properly belonging to the legislative department.

The statute was sustained.

The Vice-Chancellor (GREY) concluded that the power was one not expressly or inherently relating to any one department, and might, therefore, be exercised by that one of them to which it had been referred by the statute, and said (611):

> "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 these 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 Vroom, 611. That court there declared that the clause of the constitution under consideration operates prohibitively only when it related to those powers which, by the constitution itself, are assigned to, or which, in their nature, pertained to, one of the three great departments exclusively. The court cites numerous instances 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 or 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."

This case was affirmed for the reasons stated below in 63 N. J. E., 799.

In *Eckert* v. *Perth Amboy & Woodridge R. R. Co.*, 66 N. J. E., 437, the Court of Errors and Appeals had under consideration "the act for the protection of grade crossings" (P. L., 1898, p. 110), which was also under consideration in *Palmyra* v. *Pennsylvania R. R. Co., supra.*

The statute was attacked upon the ground that it was unconstitutional, and it was claimed to

violate the distributive clause of the Constitution.

The Court sustained the act.

A reading of the opinion clearly indicates that the Court rested its conclusion upon the ground that the power conferred upon the Court of Chancery by the statute was one of that multitude of powers regarded as lying outside of the powers "properly belonging to" the executive, legislative and judicial departments, and not one of those powers which, in their nature, pertained to one of these departments exclusively, and that, therefore, the Legislature might determine where its exercise should be vested, and was not prescribed from vesting it in the Court. (See, too, 65 N. J. E. 437.)

In *West Jersey, &c., R. R. Co.* v. *Atlantic City, &c., Traction Company,* 65 N. J. E., 613, a bill was filed by the railroad company against the traction company, alleging that certain of the tracks of the railroad company crossed a highway in Atlantic City at grade; that the traction company had the right to construct its crossing there, also at grade; that the latter company was proceeding to build its road and crossing; that the City of Atlantic City had, under its charter, the right to regulate the use of the city streets and all crossings; that it had authorized the traction company to cross the tracks at grade, with no other precautions against danger of collision between trains than a direction that the approaching trolley car shall be stopped, the conductor go ahead and signal to the motorman when the trolley may safely cross; that this method is dangerous; and prayed that the traction company might be required to arrange its crossing in such manner as the Court might, under all the circumstances of the case, deem safe and proper.

The jurisdiction of the Court was questioned by the traction company. It contended that the legislative grants of power to it and to Atlantic City, and the action taken under these grants, had conclusively settled the rights of the parties at the crossing in question, so that the Court had no jurisdiction in the matter.

GREY, *V. C.*, (orally), denied this contention, and said (617):

> "The grant of the franchise from the legislature, and the fixing of the mode of its enjoyment by the municipality, are essential incidents to 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,"

and concluded that the only forum in which relief can be sought must be a court of equity.

In substance, this statement, which is the foundation of the conclusion reached, merely lays down the rule that the grant of the franchise by the Legislature to the traction company, and the prescription of the mode of its enjoyment by the municipality, were essential incidents to the defendant corporation's right as between it and the State, but did not conclusively settle as between themselves the right of the two companies at the crossing, and did not, therefore, where the proposed use by the junior corporation threatened the impairment of the easement of the

senior corporation, preclude an application to equity for relief under its jurisdiction over conflicting easements.

Reaching this conclusion, it was unnecessary for the Court to consider the question whether the Legislature possessed the power to lessen or take away its jurisdiction, and what was said in the opinion on this point is *dicta.*

Aside from this, while it is true, as stated in the course of the opinion, that our Court of Chancery exercised jurisdiction in the adjustment of the enjoyment of conflicting easements at the time of the adoption of the Constitution of 1844, it is equally true that at that time the Legislature exercised the power of imposing upon railroads operating under franchises proceeding from it, duties with respect to the protection of crossings at highways.

There is no necessary conflict between these powers. The one is exercised in protection of a right of property; the other is exercised in the protection of the public safety under the police power of the State.

(1915) *Erie R. Co.* v. *Board of Public Utility Com'rs et al.,* 95 Atl., 177 (Sup. Ct.).

HELD, that Public Utilities Act (P. L. 1911, p. 383, par. 22, as amended by P. L. 1912, p. 111), authorizing the Board of Public Utility Commissioners to make an order providing safety devices when a public highway and a railroad cross one another, and when the approaches to any railroad station are obstructed by its tracks or the trains or engines of any other railroad, confers merely administrative powers in aid of public safety, and not judicial power to regulate conflicting easements.

KALISCH, *J.*:

"We now come to a consideration of the claim made by the counsel for the prosecutor that the statute under which the order is 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.

"The argument made to support this contention is that by article 6, par. 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 applied 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.

"A word more may be said on this subject, and that is, that it is difficult to conceive of a statute of police regulation which does not in some way, in its enforcement, affect the private use and enjoyment of property, and oftentimes of individual liberty. In many instances matters pertaining to the public safety, health, morals, etc., have been as a matter of legislative policy,

in the interest of the public, left to be conserved by special statutory tribunals created for that particular purpose, in that, matters affecting life, health, or morals, may be summarily attended to and dealt with. It is quite obvious that it would be of no practical value to make regulations regarding such matters unless the board instrusted with the care of the subject had power to give effect to such regulations."

POINT XXIII.

The Fielder Act does not deprive the Supreme Court of its power of mandamus.

(1901) *Palmyra* v. *Pennsylvania R. R. Co.*, 62 N. J. E., 601.

The statute, P. L. 1898, page 110, authorizing the governing body of a township, when it shall be of opinion that gates, etc., should be erected at a specified grade crossing of a highway, to pass an ordinance directing an application by petition to the *Court of Chancery* for a summary inquiry to decide whether a flagman or gates or bars, etc., should be provided by the railroad company at that particular crossing for the security of human life, etc., *was sustained.*

GREY, *V. C.* (615):

"The defendant further contends that if the statute of 1898 is not an interference with legislative functions, it is still unconstitutional in that it seeks to confer upon this court a power which inherently belongs to the supreme court, exercisable by the writ of *mandamus.*

"In the statute under consideration the procedure contemplated by this court is an inquiry whether the duty to provide an additional safeguard at that crossing exists, and if it is found that it does, to adjudge which remedy is applicable most effectually to fulfill it. The statute affords the railroad company an opportunity to contest as a disputable fact on the hearing in this court, the existence of the duty to provide additional safeguards at the particular crossing in question, and requires this court to decide which particular safeguard is most efficient to relieve against danger at that crossing. While this proceeding is in many respects analogous to the specific enforcement of contracts (a familiar field of equity jurisdiction), wherein the existence of the obligation is triable and its enforcement in the most efficient manner is within the scope of the decree, it is repugnant to the characteristics of a *mandamus* proceeding in the law courts, for in the latter procedure the applicant must show in the first instance a preexisting clear legal right to have the thing which he asks done in the manner sought to be enforced. High Extr. Rem. 13, Sec. 9, and cases there cited. No mandamus would be allowed to try the question of the existence of the duty sought to be enforced by that writ, nor would that mode of procedure enable a decision to be made, determining as this statute contemplates, which of several safeguards will most perfectly protect the crossing. The statute cannot be held to be unconstitutional because it intrudes upon the inherent constitutional power of the supreme court."

This case was affirmed for the reasons given in the opinion below in *Palmyra* v. *Pennsylvania R. R. Co.*, 63 N. J. E., 799.

The order made under the Fielder Act is not self-executing. Enforcement of compliance with the order requires that recourse should be had to an appropriate judicial proceeding.

Section 33 of the Public Utility Act specifically provides that

> "observance of the orders of the board may be enforced by mandamus, or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility."

(1914) *Michigan R. R. Commission et al.* v. *Detroit & M. Ry. Co.* (Mich.), 148 N. W., 385.

STONE, *J.:*

> "It has been decided in the courts of last resort of other states that mandamus is the appropriate remedy to compel compliance by railroad companies with proper commission orders. State ex rel. Skeen *v.* Ogden Rapid Transit Co., 38 Utah, 242, 112 Pac., 120; State ex rel. Railroad Commissioners *v.* Atlantic Coast Line R. Co., 60 Fla., 465, 54 South., 394."

POINT XXIV.

The Fielder Act does not unconstitutionally create a burden upon or interfere with the regulation of interstate commerce.

(1888) *Smith* v. *Alabama,* 124 U. S., 465.

A statute of Alabama provided that it should be unlawful for the engineer of any railroad train in the State to drive or operate or engineer any train of cars or engine upon the main line or roadbed of any railroad in the State which is used for the transportation of persons, passengers or freight, without first undergoing an examination or license as thereinafter provided, and prescribed a penalty for its violation.

An engineer of a railroad, whose sole duty was to "drive, operate and engineer" a locomotive engine drawing a passenger train regularly plying in one continuous trip between Mobile, in Alabama, and Corinth, in Mississippi, and *vice versa,* was proceeded against under the statute.

Statute sustained.

Mr. Justice MATTHEWS (481):

> "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the state. The places where they must be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and

dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations, and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of that law from which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of congress exerted on the same subject, that they can be required to give way to the supreme authority of the constitution.

"In conclusion, we find therefore, first that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the state to regulate the relative rights and duties of persons being and acting with-

> in its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of congress on the subject, nor contrary to any intention of congress to be presumed from its silence."

(1888) *Nashville &c. Ry.* v. *Alabama,* 128 U. S., 96. On error to the Supreme Court of Alabama.

It appeared that the appellant corporation had been indicted and convicted under a State statute for employing a train conductor who had not obtained a certificate from a State Board of Medical Examiners that he was free from color blindness.

In sustaining the judgment of the State Court affirming the conviction FIELD, *J.,* said:

> "It is conceded that the power of congress to regulate interstate commerce is plenary; that as incident to it congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents upon trains whilst within their limits. Indeed *it is a principle fully recognized by decisions of state and federal*

courts, that whenever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business so that the dangers attending it may be guarded against so far as is practicable."

(1896) *Hennington* v. *Georgia,* 163 U. S., 299.

HELD, that an act of the State of Georgia forbidding the running of freight trains on any railroad in the State on Sunday, and providing for the trial and punishment on conviction of the superintendent of a railroad company violating that provision, although it affects interstate commerce in a limited degree, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interestate commerce, but is an ordinary police regulation, designed to secure the well being, and to promote the general welfare of the people within the State, and is not invalid by force alone of the Constitution of the United States.

(1898) *Chicago, M. & C. E. R. Co.* v. *Solan,* 169 U. S., 133.

Mr. Justice GRAY (137):

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of

those engaged in such commerce. So long as congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

"Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons, engaged in the driving or management of all railroads passing through the state, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains."

(1911) *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas,* 219 U. S., 453 (*sustaining* Arkansas Full Crew Act).

Mr. Justice HARLAN (466):

"Undoubtedly, congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one

under our systems of government, federal and state" (cases cited).

(1911) *Chicago, R. I. & P. Co.* v. *Arkansas,* 219 U. S., 452.

HELD, that a State statute prescribing a minimum of three brakemen for freight trains of more than twenty-five cars operated in the State, did not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce.

Mr. Justice HARLAN (465):

"It is not too much to say that the state was under an obligation to establish such regulations as were necessary or reasonable for the *safety of all* engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal Court unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face, it must

be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction of such commerce, and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object."

(1913) *Simpson* v. *Shepard,* 230 U. S., 350.

Mr. Justice HUGHES (402), (after considering the limitations upon State action):

"But within these limitations there necessarily remains to the states until congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of congress, have been controlled by state legislation from the founda-

tion of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power. In such case, congress must be the judge of the necessity of federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to

a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

(1915) *South Covington & C. Street R. Co.* v. *Covington,* 235 U. S., 537.

HELD, that municipal regulation of a street railway company principally engaged in interstate commerce with reference to passengers riding on car platforms, unless the same are provided with suitable rails or barriers and with reference to the cleanliness, ventilation and fumigation of the cars, did not infringe upon the Federal authorities over such commerce, at least until such Federal authority is exerted.

(1916) *St. Louis, I. M. & S. Co.* v. *Arkansas,* 240, U. S., 518.

HELD, that interstate commerce is not unconstitutionally interfered with by a state statute which forbids railway companies with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman and three helpers.

See:

Pittsburgh, C. C. & St. L. R. Co. v. *State,* 172 Ind., 147; 87 N. E., 1034.

POINT XXV.

The fact that the order required the railroad company to make changes in the public highways outside of and beyond the right of way, at its own expense, does not violate any constitutional right of the company, since such changes are fairly incidental to the changes in the crossings at the railroad.

(1894) *In Re Selectmen of Norwood et al.*, 161 Mass., 259; 37 N. E., 199.

KNOWLTON, *J.:*

> "If the statute arbitrarily put upon railroads the expense, or part of the expense, of general improvements in the system of highways of a city or town, not fairly incidental to the changes in the crossing at the railroad, it would be beyond the power of the legislature to enact. The railroad can properly be charged with expenses incident in adapting the public ways and the railroads to each other in such manner as best to promote the safety and convenience of all the people. To do this may, in particular cases, involve changes extending a considerable distance from the railroad. Whether such a change is within the power of the legislature to make at the expense of the railroad company is to be determined by the requirements of public convenience and necessity, having reference to the interests of the railroad company, as well as those of all the people who have occasion to cross the railroad. Whatever is incidental to a reasonable change in the mode of crossing may be included in the work for which the corporation may be charged under the statute. This may include, not only a change in an

existing crossing, which does not destroy the identity of the crossing, but also the abolition of the crossing, and the substitution of another for it on a new way, if the substitution provides no more than a fair equivalent for that which is given up. Davis *v.* Commissioners, 153 Mass., 218; 26 N. E., 848. The fact that, in making the changes in this case, some of the new ways and approaches to the crossing are to be wrought to a greater width than the old ones, and to be of a superior construction, is not, under the findings, a good ground of objection to the proceedings of the commissioners. The work involved in the changes should be done in a proper manner."

See also cases cited under preceding points.

POINT XXVI.

The provisions of the General Railroad Act and of the Fielder Act are applicable alike to corporations created before and after the enactment of the statutes.

(1887) *Boston & Maine R. Co.* v. *County Commissioners of York Co.,* 79 Me., 386; 10 Atl., 113.

HELD, that an act requiring the expense of building and maintaining so much of the highway as lay within the limits of the highway where it crossed the railroad tracks at grade, should be borne by the railroad was constitutional, although the liability was imposed by a statute enacted subsequently to the chartering of the railroad company, and although the charter provided that it was not subject to "amendment, alteration or repeal."

(1900) *City of Yonkers* v. *N. Y. Central & H. R. R. Co.*, 165 N. Y., 142; 58 N. E., 877.

HELD, that Railroad Law, No. 64 (Laws 1897, c. 754), requiring that, "when a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company," though prospective in its operation, and having no application to proceedings in the court pending prior to its enactment, includes bridges constructed before as well as after the law took effect and requires a railroad to maintain and keep the framework of such bridges in repair.

O'BRIEN, *J.*:

> "It is quite clear, however, that it (the statutory provision considered) is not limited in its application to railroads constructed subsequently to its enactment, or to bridges over crossings thereafter constructed. It was manifestly intended to apply to objects in existence at the time of its enactment, and, consequently, to all bridges constituting the highway at railroad crossings, whether constructed after the law went into effect or before. The purpose of the statute was to insure greater safety at such highway crossings, and that object could not be effected without applying the law to all such bridges existing at the time that it went into effect, without regard to the date of their construction."

POINT XXVII.

The provisions of the General Railroad Act and of the Fielder Act are applicable alike to highways existing at the time of the construction of the railroads and to highways subsequently laid out.

(1886) *Worcester, N. & R. R. Co.* v. *City of Nashua,* 63 N. H., 593, 4 Atl., 298.

The statute considered provided that:

> "if any railroad shall intersect or cross any highway in any town in this state, such town may * * * direct that such place of crossing or intersection shall be secured by a bridge over said road, or by the erection of gates on both sides of said highway, as the town may think expedient."

CARPENTER, *J.:*

> "A railway crossing is a crossing of two highways. The purpose of the statute is to protect travelers on both against the dangers arising from the crossing, and to cast the expense of the necessary protection upon the managers of the way which, by the methods of its operation, causes the danger. No distinction is expressed between two highways established by law and constructed, and those so established, but not constructed, and no ground is perceived for implying one. * * * If a new town highway is established and constructed upon the same grade with the railroad at the crossing, it is conceded that the town may then call upon the corporation to build a bridge if the public safety requires it. No good reason is suggested why it may not be directed to build

the bridge before, as well as after, the road is opened to the public. There may be cases in which it is essential to the public safety that the road should not be opened until the bridge is completed. Railroad corporations are protected against capricious and unreasonable requirements on the part of the towns by their right of appeal. Gen. Laws, C. 161, Nos. 5, 6."

(1891) *New York & N. E. R. Co.* v. *City of Waterbury,* 60 Conn., 1; 22 Atl., 439.

HELD, that a statute which imposed upon a railway company one-half of the cost of bridging its railway so as to carry a highway across it, which statute was passed after the incorporation of the company, whose charter imposed no such burden but was subject to amendment, was as to a new highway subsequently established, a valid exercise of the police power.

SEYMOUR, *J.:*

"There can be no doubt of the right of the legislature to require railroad companies to bridge their crossings of existing highways at their own expense. The case of English *v.* Northampton Co., *supra* (32 Conn. 240), fully recognizes that right, and it was expressly held in appeal of New York & N. E. R. Co., 58 Conn., 532, 20 Atl., 670.

"In the latter case this court said: 'that such crossings are public nuisances, dangerous to human life, and no man has a vested interest in the creation or continuance of such a nuisance. In the exercise of the power of protecting human life the legislature may at any time, and without notice, abate it, or prevent its existence. The same

right is strongly affirmed in People *v.* Railroad Co., 70 N. Y., 569."

(1904) *Illinois Cent. R. Co.* v. *Swahn,* 83 Miss., 631; 36 So., 147.

HELD, that a railway company may be required to place a bridge over its road, or to grade approaches thereto for a highway crossing it, though the railroad was in operation for many years before the highway was laid out.

WHITFIELD, *C. J.:*

"The objection that the railroad was constructed and put into operation long before the highway was laid out and opened is settled by the case of I. S. R. R. Co. *v.* Copiah County, 81 Miss., 685; 33 South, 502."

(1908) *Northern Pacific Railway Co.* v. *State of Minnesota ex rel. The City of Duluth,* 208 U. S., 583.

HELD, that an ordinance of a municipality of the State of Minnesota, valid under the laws of that State as construed by its highest court, compelling a railroad to repair a viaduct constructed *after the opening of the railroad* by the city, in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs theron for a term of years, was not void under the contract or the due process clause of the Constitution and affirms 98 Minn., 429.

Mr. Justice DAY (586):

"As the Supreme Court of Minnesota points out in the opinion of 98 *Minnesota,* 380 * * * the state courts are not altogether agreed as to the right to compel rail-

roads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right.

(See cases cited in 98 Minnesota, 380.)

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

See also cases under Point IX, particularly:

Ill. Cent. R. Co. v. *Copiah County,* 81 Miss., 685 (33 Southern, 502).

City of Harriman v. *Southern Ry Co.,* 111 Tenn., 538; 82 S. W., 213.

State v. *St. Paul, M. & M. R. Co.,* 98 Minn., 380; 108 N. W., 261; 28 L. R. A. (N. S.), 298.

Cin., I. & W. R. Co. v. *Connersville,* 218 U. S., 336.

Chi., M. & St. P. R. Co. v. *Minn.,* 232 U. S., 430.

POINT XXVIII.

The question whether a crossing is within the meaning of the Fielder Act "dangerous to public safety, or that public travel on such highway is impeded thereby," is one of fact to be determined according to the circumstances of each case.

The record amply establishes that with respect to the crossings here in question elements exist which makes them peculiarly dangerous, and a serious impediment to public travel.

(1907) *Mayor, etc., of Newark* v. *Central R. R. Co.*, 73 N. J. E., 469.

STEVENS, *V. C.* (470):

> "Under the recent decision of the Chancellor in the case of Newark *v.* Erie Railroad Co., 72 N. J. Eq. (2 Buch.), 447, there can be no doubt that the court of chancery may compel railroad companies, whose roads cross streets at grade, and whose charters contain provisions like those of the defendant, to elevate or depress their tracks or the highways crossing them.
>
> "Under that decision, the question remaining for determination is whether, in the given case, the situation is such that this court should, in the exercise of its power to regulate conflicting easements, compel the change.
>
> "Railroads whose tracks have been laid at grade are lawful structures. The legislature has not as yet seen fit to condemn them. If their tracks are to be elevated or depressed, it must be cause of some peculiarity which makes them especially dangerous."

(1909) *Newark* v. *Erie Railroad Co.*, 76 N. J. E., 317 (Court of Errors and Appeals).

VOORHEES, *J.*, (319):

> "Taking up the appeal of the city, we agree with the learned Vice-Chancellor in his conclusion that the facts of the case do not warrant so drastic a remedy as track elevation or depression, and that therefore, on the merits of the case, the appeal of the city should be dismissed, and the decree affirmed so far as that appeal had questioned it. But in placing our decision upon the ground above stated, it becomes unnecessary to determine whether the court of chancery had jurisdiction to order the tracks to be elevated or depressed, and we therefore do not pass upon or decide that question."

(1908) *Newark* v. *Erie Railroad Co.*, 75 N. J. E., 20 (Ch.).

STEVENS, *V. C.*, after reviewing the development of the legislation of the State relating to grade crossings (29):

> "In view of this legislation it is quite impossible to hold that grade crossings are *per se* illegal structures, even in cities, or that streets are not *safe* in the legislative sense of that word, merely because they are crossed at grade by railroad tracks. There must be something in the situation so peculiar as to compel the court to say that gates will not adequately protect the public; that flagmen will not; that nothing but track elevation will." * * *
>
> (29) "The question then must be, as I have said, whether gates and flagmen and

other expedients are, in the given case, so inefficacious that nothing but track elevation will give to the public in fact as well as in name, the joint use of the highway. It is obvious that a street may be so encumbered with tracks that the public is practically shut out from using it. As neither party is at liberty to destroy the right of the other, the appropriate remedy in such a case would appear to be an injunction restraining the excessive use. Newark *v.* Central Railroad Co., 73 N. J. Eq. (3 Buch.), 469; Newark *v.* Delaware, Lackawanna & Western Railroad Co., 42 N. J. Eq. (15 Stew.), 196. If on the other hand, the number of tracks be not excessive, it is still conceivable that the trains might run over them with such frequency and speed and at such an angle or with such curves that the joint user of the crossing would be practically gone. The question is, then, one of fact, to be determined according to the circumstances of the case.

"In considering the question, it must, however, be remembered that it is no light thing to order a change in the grade of a steam railway. In the language of Chief Justice CHURCH in People *v.* New York Central & Hudson River Railroad Co., 74 N. Y., 302, 'the grade necessarily embraces considerations of convenience, expense and facility of construction and operation and is fixed at a particular point with reference to grades at other points.' The legislature has, therefore, necessarily vested the company with a considerable discretion in determining what and where it shall be."

The rule as to negligence at railroad crossings as laid down by the Courts of this State in a long line of cases are not precedents applicable in the construction of the Fielder Act. This rule was laid down in action for damages in view of the provision in the General Railroad Law requiring the railroad company only to ring a bell or blow a whistle on approach of a train to a grade crossing.

The Courts considered this the standard set by the Legislature which they were bound to follow in such actions.

Chief Justice BEASLEY, in *Pennsylvania* v. *Matthews,* 36 N. J. Law, at page 534, said:

> "They are not called on to keep flagmen, under ordinary circumstances, at cross roads, nor to give any other notice of the approach of their trains than those signals which are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrivances must proceed from the legislative, and not from the judicial power."

In *N. Y., &c., R. R. Co.* v. *Leaman,* 54 N. J. L., at page 206, REED, *J.,* delivering the opinion for the Court of Errors and Appeals, said:

> "The legislature has the right to prescribe the conditions under which these companies shall run their trains. The methods of structure, the location of the tracks, the protection against communication of fire, the signals of the approach of trains, all are within the legislative discretion. When the company and its agents conform to such

> legislative directions, they are within the protection of the law."

The contributory negligence rule laid down in such cases as *Pennsylvania Railroad* v. *Righter*, 42 N. J. L., 180, and *Swanson* v. *Central R. Co.*, 63 N. J. L., 605, does not prescribe a standard of danger applicable to the construction of that term as used in the Fielder Act.

These cases only decided that the traveler guilty of contributory negligence under the particular facts in each particular case. It might well be that the same traveler under other circumstances at the same crossing would have been held not guilty of contributory negligence.

In a number of cases temporary conditions at crossings have made them so dangerous and so confusing to the traveler that he has been held not to be guilty of contributory negligence.

In *N. J. R. ads. West,* 32 N. J. L., 91 (affirmed 33 N. J. L., 430), a pedestrian crossed the railroad track at about the time two trains passed in opposite directions. He was struck by one while he was endeavoring to guard himself against injury from the other. It was held he was not guilty of contributory negligence.

In the case of *Keyley* v. *Central R. R. Co.,* 64 N. J. L., 355, the plaintiff was held to have been guilty of contributory negligence because he trotted his horse over the crossing. The Court said that the crossing was "a dangerous surface crossing."

> "The crossing was made especially dangerous by the large number of railroad tracks at that point, and by the fact that coal and box cars were standing on the second track so as to prevent the plaintiff

from seeing a coal car slowly moving on the third track he was about to cross."

The Court further intimated that the company could have been indicted for maintaining a public nuisance in the crossing at which the accident happened.

Here was a crossing so dangerous that the company could be said to have maintained an indictable nuisance and yet a traveler was prevented from recovering damages because of his contributory negligence.

In the brief for prosecutor below a number of cases were cited in support of the proposition that "Under the decisions highway travelers are held to be in a place of safety and chargeable with the duty of looking at points much nearer than thirty-five feet from the track, and they are guilty of contributory negligence if they fail to look at such points or, in looking, fail to see approaching trains which, under physical conditions that may happen to exist at the crossing, were in plain sight of an observing traveler."

This is in criticism of the classification of the Board of the views obtainable at these crossings from a point thirty-five feet from the nearest rail (Report, Case, p. 1754).

But there are later cases in which verdicts for plaintiffs in grade crossing cases have been sustained where a clear view was obtainable at a greater distance than thirty-five feet from the nearest rail.

In the case of *Corse* v. *Philadelphia & R. Ry. Co.*, decided on November 15, 1915, and reported in 96 Atlantic, 53, the Court of Errors and Appeals sustained the verdict of a jury against a railroad company for injuries received by plaintiff in a grade crossing accident, where plaintiff

at a point fifty-one feet six inches from the nearest rail of the track upon which the train ran had a view of about eight hundred and ninety-five feet in the direction from which the train came which struck him. In this case the plaintiff would have seen the train which struck him had he looked at this point, but his attention was distracted by three or four engines near the crossing which were exhausting steam.

In the case of *Wilson* v. *Central R. Co. of N. J.*, decided November 18, 1915, and reported in 96 Atlantic, 79, the Court of Errors and Appeals sustained a verdict for plaintiff for injuries received in a grade crossing accident where plaintiff could have seen the train which struck his automobile at a point about fifty feet distant from the crossing. An occupant of the automobile driven by plaintiff actually did see the train at a point forty feet from the crossing and warned plaintiff, who was unable to stop the automobile because of its defective brakes.

It must be kept in mind also that there are great numbers of persons who use grade crossings who are not chargeable with contributory negligence, such as the occupants of trolley cars and other vehicles not driven by themselves. *Weber* v. *P. & R. Ry. Co.*, 96 Atlantic 54, and cases there noted.

POINT XXIX.

The order properly ran against the Erie Railroad Company as the company "operating" the railroads.

The Erie Railroad Company is the lessee of the railroads to which the order under review relates.

Its leasehold rights, as indicated in the "Statements of facts," which heads this brief, are in effect perpetual.

As lessee, that company is subject to the continuing duty imposed by the charters of the lessor companies to construct and keep in repair, good and sufficient bridges or passages over and under the said railroads where any public road shall cross the same, so that the passage of carriages, horses and cattle on such roads shall not be prevented thereby (see Points III, IV, VI).

As lessee, that company is by force of Section 26 of the General Railroad Act, further under a continuing duty to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad right of way where any public road, street or avenue shall cross the same, so that public travel on said road shall not be impeded thereby (see Point VII).

The Erie Railroad is operating the said railroads.

That this was the view of the legislature in legalizing the leases of the lines of the several railroads through which the rights of the Erie Railroad Company are derived, is made clear by a reading of the legalizing act (P. L. 1853, p. 480, Case 977, 1021). This statute refers to the New York and Erie Railroad Company *as now in possession of* the Paterson and Hudson River Railroad, and the Paterson and Ramapo Railroad, under certain leases and contracts made by said companies.

It further refers to the New York and Erie Railroad Company, *as now carrying on the business of said roads* under said leases and contracts.

It further enacts that, "the New York and Erie Railroad Company and any other corpora-

tion or individuals *using the aforesaid roads or either of them shall be and they are hereby declared liable for all claims, debts, damages, omissions and delinquencies arising from the running or operating* said railroads and carrying freight and passengers on the same, as fully as the said Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company are now liable by the laws of this State."

It further permits service of summons or subpoena to be made upon the New York and Erie Railroad Company, or any other foreign corporation using said roads, by service thereof, "*on any station agent* of said corporation."

By the terms of the Fielder Act the order made thereunder is to be directed to "*the company operating such railroad.*"

The order consequently cannot be directed to any other company.

This provision of the act is neither arbitrary nor unreasonable.

The dangerous conditions to the elimination of which the act is directed, are the result of the operation of the railroad.

Can it then be said that to impose upon the company operating the railroad the duty of performing the work necessary to eliminate the dangerous conditions resulting from such operation is arbitrary or unreasonable?

In this connection it should be noted that the leases under which the roads are operated provide that at the termination of the leases any erections or improvements upon the demised property that may have been made by the lessees or their assigns at their own expense shall be paid for by the lessors at their appraised and just value (Case, pp. 990, 993, 1027, 1029).

(1884) *Lee* v. *Smith*, 42 Oh. St., 458; 51 Am. Rep., 839.

HELD, that Section 2573 of Revised Statutes, as amended April 19, 1883 (80 O. L., 188), does not impose upon any owner in fee of a building more than two stories high, the duty to provide a convenient exit from the different upper stories of said buildings when such owner is not in possession or control thereof, although his tenant in possession and control of the building may use the same as a factory or workshop.

MCILVAINE, *J.*:

> "We have considered a single proposition in this case, to wit: the true meaning of the phrase 'any owner of any factory or workshop.' * * *
>
> "That a factory or workshop is not synonymous with building must be admitted. * * *
>
> "The owner of a building and the owner of a factory which is conducted in the building may be different persons, and when this is so, the owner of the factory, and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty. * * * If the building were constructed and used for a factory by the owner, who afterwards transfers the building in fee and the business to another, the duty of providing fire escapes thereafter devolves upon the purchaser who continues the business, and the grantor is relieved therefrom. This proposition will not be questioned. We think the same result would follow the transfer of a life estate or an estate for years. *The true test of liability is the possession and right to control the*

factory by one who is owner of the business or agent for such owner, although owner of the building for the time being only."

(1884) *Schott* v. *Harvey,* 105 Pa. St., 222.

HELD, that the provision of P. L. 1879, p. 128, that certain factories, etc., shall be provided with fire escapes by the "owners" or other persons therein designated, does not apply to an owner in fee, not in possession, who has leased the premises to a tenant who occupies the same as such factory and that such tenant in possession, using the premises as such a factory, is the "owner" of the factory within the meaning of said act.

Mr. Justice PAXSON (227):

"But the question which more immediately concerns us is, who is the 'owner' of a factory within the meaning of the act? The plaintiff contends that the owner is the person who holds the fee in the land on which the factory building stands. The word 'factory' is a contraction of manufactory, which Webster defines to be a building, or collection of buildings, appropriated to the manufacture of goods. But a manufactory is something more than a building. It includes not only the building but the machinery necessary to produce the particular goods manufactured, and the engines or other power requisite to propel such machinery. A building with only bare walls and a roof would no more be a manufactory than it would be a hotel. Such a building would be a mere shell and would not impose the duty of erecting fire escapes. It is only when it is completed by the addition of machinery, and operatives are introduced to

assist in the manufacture, that the duty of erecting fire escapes attaches. To whom does that duty attach? Clearly to the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of their services. If he is the lessee of the building, then he is a tenant in possession. For all practical purposes he is the owner until the end of his term, which may be in one year or in one hundred years. There is a large amount of property held in reversion in the city of Philadelphia. Some of the leases are for several hundred years. However long the term, the lessee is but a tenant for years; the fee is in him that hath the reversion. Yet the broad principle contended for would make the reversioner, who has practically parted with all control of the property, responsible for the neglect of the tenant in possession to put up fire escapes. And this would be so even if the property leased had been a vacant lot, and the factory building had been erected, and the machinery placed therein by the tenant subsequent to the lease. We cannot impute to the legislature an intention of doing a thing so palpably unjust and absurd as this. When, therefore, they used the owner 'owner' in this connection, it is plain the owner at the time of the injury was contemplated without regard to the quantity or duration of his estate. * * * This view meets all of the requirements of the act. It places the responsibility where it properly belongs, upon the person in possession and occupancy of the property as owner for the time being and the nature of whose business renders the erection of fire escapes necessary to protect the lives of his employees."

(1888) *Baltimore & Ohio Railroad Co.* v. *Walker,* 45 Ohio St., 577.

HELD, a railroad company which has the possession and control of a railroad in Ohio, and is managing and operating the same as the lessee thereof, is one "owning the tracks" of such railroad within the meaning of Section 3333 of the Revised Statutes, which provides that : "When the tracks of two railroads cross each other, or in any way connect, on a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks."

WILLIAMS, *J.:*

> "The necessity for keeping the crossings in repair and maintaing watchmen thereat, grows out of the use and operation of the railroads whose tracks cross each other at a common grade, and lessee companies having the possession and control of the roads and operating them as such, receive all the advantages and securities resulting from safe crossings, and the services of the watchman, as fully in all respects as companies that are the absolute owners thereof could if they were operating them, and it would appear but reasonable, that while operating the roads they should receive the benefits subject to the burden of their expenses as provided by the statute and we are of the opinion that such lessees are companies 'owning the tracks' of the road operated by them, in the sense in which that phrase is used in the statute."

(1891) *Buffalo Stone & Cement Co.* v. *Delaware, Lackawanna & Western R. Co.*, 130 N. Y., 152.

HELD, that where a railway company organized under the laws of the State leases its property to a foreign company, and by a covenant in that lease the latter agrees to perform all things in connection with the road which the lessor might be required by law to perform, the lessee must maintain farm crossings, as required by Laws 1850, c. 140, Sec. 44.

FOLLETT, *C. J.*:

> "In Jones *v.* Seligman, 81 N. Y., 190, a railroad corporation mortgaged its property to trustees to secure payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage, the trustee entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to build fences and farm crossings, which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties except those mentioned in the statutes. It was held that the trustees being in possession with power to make reparation and additions, they had the right, and it was their duty, to construct fences and necessary farm crossings; that being in possession of the property, and engaged in operating it, they must carry out the provisions of the statutes as the representative of the corporation. In this case the defendant, by a covenant in the lease above quoted, expressly agrees to perform all things in connection with the road which

the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of Jones *v.* Seligman.

"The position that the defendant is not liable because it is not a corporation of this state, or organized under chapter 140, laws 1850, is not tenable. It having the right to operate its leased lines under the statutes of this state, it must be held to have assumed to discharge the same duties to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes."

See, in connection with this point:

(1889) *Appeal of Town of Westbrook,* 57 Conn. 95; 17 Atl., 368.

POINT XXX.

A proceeding under the Fielder Act is not confined to the elimination of one crossing. The Act must be construed with reference to Section 9 of "An Act Relative to Statutes" C. S., 4970.

The paramount purpose of the Fielder Act is to secure the elimination of grade crossings which are "dangerous to public safety" or which "impede public travel."

Under its provisions the Board of Public Utility Commissioners is empowered to act "whenever a public highway and a railroad cross each other at the same level and it shall appear to the Board that such crossing is dangerous to

public safety or that the public travel on such highway is impeded thereby."

There is nothing in this provision to indicate a legislative intent to confine a proceeding thereunder to a single crossing.

The Board is empowered to act whenever it shall appear to it with respect to any such crossing that the conditions referred to by the statute exist.

This requirement that it shall appear to the Board that the conditions referred to exist with respect to a crossing may be satisfied in a single proceeding comprehending several crossings as well as in separate proceedings each relating to a separate crossing.

Where, as in the proceeding under review, the several crossings are so situated that testimony as to conditions at, and methods of eliminating, one of them bears necessarily upon conditions at, and methods of eliminating, the others a requirement of separate proceedings would not only result in futile repetition of testimony but if a separate plan for the elimination of each crossing in each separate proceeding were requisite, would create a situation wholly impossible from a practical point of view, since the elimination of the several crossings must, as is conceded by all, proceed under a general plan.

A purpose fraught with such practical consequences should not be attributed to the Legislature where the statute will reasonably admit of a different construction.

There is no indication of intent to limit the power of the Board to the case in which it shall appear to it with respect to a single crossing that the conditions referred to exist, and that the grades may be separated without affecting any other crossing.

To attribute to the Legislature an intent so to circumscribe and limit the power conferred is to refuse to give effect to the paramount purpose of the act and to render the act inoperative under conditions where, as in the proceeding under review, the maximum of danger exists at a group of crossings, all of which must be considered and provided for if a practicable scheme of elimination is to be worked out.

In enacting the Fielder Act, the Legislature must be taken to have had the provision of section 9 of "An Act Relative to Statutes" (C. S., 4970) in view. This section provides that "whenever in describing or referring to any person, party, matter or thing, any word importing the singular number * * * is used in any statute, the same shall be understood to include and shall apply to several persons and parties, as well as one person or party * * * and several matters and things, as well as one matter or thing, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction."

(1907) *In re Terminal Railway of Buffalo,* 106 N. Y. Supp., 655.

McLennan, *P. J.* (658):

> "Section 62 of the railroad law is very broad and comprehensive. It provides, in substance, that any town within which a street is crossed by a steam surface railroad at grade, or any railroad corporation crossing such street, may make application to the board of railroad commissioners for an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing and discontinu-

ance of a highway crossing, the diversion of the travel thereof to another highway or crossing, etc., practically giving to the board of railroad commissioners in the first instance complete jurisdiction to determine how and in what manner the situation existing should be met, to the end that the interests of the public might be conserved in the premises. We can conceive of no broader power that could be delegated to a governmental agency than that which is delegated to the board of railroad commissioners under section 62 of the railroad law, in so far as it is sought to regulate the manner in which grade crossings of railroad tracks by highways may be eliminated and the methods employed to effect such result. By the language of the section, the board of railroad commissioners has the right to close a highway, to divert its travel to another highway, to change the grade of either, to carry either over or under the railroad, and, so far as we can discover, by the language of the act is given absolute power in the premises, subject only to review by the appellate court and by the Court of Appeals.

"In the case at bar we think the board of railroad commissioners had ample power and authority to make the determination which it did, that it had authority upon the facts alleged in the petition to say that a certain highway should be discontinued, and that the traffic upon it should be diverted to another highway which such commission determined should be carried over all the tracks of the petitioner by means of a viaduct. It would seem absurd to hold that if two, three, or four streets, parallel to each

other, extended across a number of railroad tracks, any and all of which were dangerous to public safety, under the law the board of railroad commissioners must decide that in order to avoid such dangerous situation a viaduct must be constructed over the tracks of such railroad in line with each of such highways. We think the reasonable construction is that the board of railroad commissioners has jurisdiction to determine how many of such viaducts should be constructed, and that the traffic upon the other streets should be diverted into such viaducts or means of crossing the railroad tracks, especially when, as in this case, it is stipulated that the railroad company shall pay all expenses of construction because of such change and also the damages resulting therefrom to any property owners, if any.

"The manner of crossing petitioner's railroad tracks by the highways involved, the width of the viaduct, and the closing of other streets, were all matters properly within the discretion of the board of railroad commissioners, upon all the evidence disclosed by the record, and no situation or circumstance has been pointed out by the able argument of the appellant which leads us to the conclusion that the discretion exercised by the board of railroad commissioners, as evidenced by its determination, is contrary to or against the weight of the evidence, and for that reason should be reversed by this court. The situation was a complicated one. Clearly it was a situation which was dangerous to the public and to public travel. So far as we can discover, the solution arrived at by the board of railroad commissioners

was, all things considered, the best which could have been devised; that at least it cannot be said that there was any abuse of discretion in the premises."

POINT XXXI.

The order under review below was made "after hearing, upon notice."

Notice of the proceeding initiated by the filing of the petition of the municipality under the Fielder Act, and of the time and place fixed for hearing, was given.

This statement is, we assume, uncontroverted.

*The Fielder Act in its sixth section provides that "all powers, supervision, regulation of, jurisdiction and control over public uitlities granted by the act to which this is a supplement (the Public Utility Act), are hereby vested in the Board of Public Utility Commissioners * * * as may be necessary to carry the provisions of this act into effect.*

The Public Utility Act by its seventeenth section confers upon the Board power to require every public utility as therein defined (a) "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."

The section further confers upon the Board power to require such public utility (b) "to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so."

Subdivision (k) of Section 16 empowers the Board to require a railroad company "to construct, maintain and operate upon reasonable terms, a switch connection with any private sidetrack, which may be constructed by any shipper to connect with the railroad where, in the judgment of the Board, such connection is reasonable and practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same."

These powers are to be exercised "after hearing, upon notice."

The objection of the appellant that the order under review below was not made after hearing upon notice rests apparently upon the ground that the order in one or more of its features may involve an exercise of one or more of these powers specifically conferred by the Public Utility Act, and that no specific notice was given or special hearing held on the question of the exercise of these powers.

Assuming for the purpose of argument under this point only that the order in some one or more of its phases involves an exercise of these powers neither specific notice nor special hearing was requisite.

Notice of the initiation of the proceeding under the Fielder Act and of the time and place of the hearing was given as stated.

Such notice was also effective in giving notice that in the proceeding so initiated, and in the hearing, consideration might be given and action taken upon such related matters within the power and jurisdiction of the Board as might be necessary to carry the Fielder Act into effect.

Neither the Fielder Act nor the Public Utility Act prescribes any particular form of notice.

Testimony as to each of the matters embraced within the order under review was taken before the Board.

Full opportunity to meet such testimony was afforded the prosecutor and it availed itself of such opportunity.

The order under review, therefore, was made, as to all of its features, "after hearing, upon notice."

POINT XXXII.

The order under review below does not require the construction by the railroad company of structures upon its lands for the use of Fuller's Express Co. and Nelson, Morris & Co. in substitution for the structures now occupied by them as lessees, and which will be destroyed or rendered incapable of further use as the result of the work of elimination ordered.

The plan adopted by the Board has indicated upon it suggested possible locations upon the lands of the railroad company of substituted structures for Fuller's Express Co. and Nelson, Morris & Co.

The order, however, does not require the railroad company to provide such locations or erect such structures.

The order of the Board directs the railroad company "to alter such crossings, and each of them, according to the plan therefor annexed to and made part hereof * * * and profile of same, also annexed to and made part hereof * * * which said plan and profile are hereby approved; by substituting therefor crossings not at the grade of the public highways known as

Madison Avenue, Straight Street, Clay Street, Market Street and Park Avenue, Ellison Street, Van Houten Street, Broadway, Fair Street, Hamilton Avenue, Lafayette Street, Keen Street, Warren Street, Putnam and River Streets; by changing the lines, width and direction thereof and by carrying so much thereof as so changed under the said railroad, except in the case of Madison Avenue which is carried over the railroad, according to and as shown on said plan and profile for said purpose, and by vacating the remaining parts of said highways within the lines of the right of way of said railroad company, and further by vacating 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; by substituting for the existing crossings at Cedar Street a crossing under the railroad at Taylor Street and for the existing crossing at Franklin Street a crossing under the railroad at Montgomery Street and also by widening and altering the existing highways known as Essex Street, Governor Street and Fulton Street, adjusting the structures spanning them to the proposed grade or grades (which said new highways shall be located, and of the width, length and direction and carried over or under the said railroad where so indicated); by reconstructing said railroad and highways and by performing all other work required according to and as shown on the said plan and profile."

It therefore appears that the order is confined in its direction to the company to the alteration of the crossings in question by changing the highways and by reconstructing the railroad.

The erection of substituted structures for use by Fuller's Express Co., and Nelson, Morris &

Co., as lessees, which would not, as the existing structures do not, constitute part of the railroad is not commanded by the order.

The work commanded to be done in altering the crossings is specifically (a) the changing of the highways and (b) the reconstruction of the railroad.

The erection of the structures concerning which question is raised falls within neither of these classes of work.

The closing words of the order, "and by performing all other work required according to and as shown on the said plan and profile," do not affect this conclusion as to the scope of the order. These general words follow the specific provisions of the order and under an elementary rule of construction are limited thereby. Further, they refer back to the introductory general mandate of the order requiring the company "to alter said crossings and each of them" and are limited thereby.

POINT XXXIII.

The order under review below does not require the Railroad Company to reconstruct private sidings, not its property, and not within the limits of its right of way. Nor does it require the owners thereof to reconstruct the same. It simply suggests a feasible method of reconstruction.

The order relates only to existing private sidings. It does not contemplate the affording of such facilities except where the same have heretofore been furnished.

The work which the Railroad Company is by the order required to perform in altering the crossings is, specifically, (a) the changing of the

highways and (b) the reconstruction of the railroad.

Clearly, the work of reconstructing private sidings upon the land of others than the railroad is not comprehended in the requirements of changes in the highways.

Private sidings, not upon the company's right of way, and not its property, are not part of the railroad; title thereto would not pass under a conveyance of the railroad, nor would a lien be imposed thereon by a mortgage of the railroad.

The work of reconstruction of the railroad which is ordered does not, therefore, include the reconstruction of such private sidings by the Railroad Company. It follows, therefore, that the order does not require the Railroad Company to reconstruct private sidings which form part of the property of others, and lie outside the limits of the railroad.

Neither does the order require the owners of such private sidings to make such changes. The plan which accompanies the order simply suggests to such owners a method by which their property may be conformed to the new conditions so as to admit of a continuance of the siding facilities theretofore enjoyed.

The order only requires others than the company operating the railroads to make such changes in, and removals of, their property and construction as are necessary to carry the order and plan into effect. In this it accords with Section 4 of the statute.

Since the mandate of the order to the Railroad Company is limited to requiring the changing of the highways and the reconstruction of the railroad, the changes in, or removal of, such private sidings cannot be said to be necessary to carry the order to the company into effect.

The plan does indicate a way in which, in part, existing siding facilities may be continued after the ordered changes in the highways, and the ordered reconstruction of the railroad are made. It is appropriate that it should do so, for, in the adoption of a plan, the effect thereof on existing industrial facilities should be taken into account, and this factor should also be taken into consideration in determining whether the plan adopted is reasonable, or is to be attributed to an abuse of discretion.

POINT XXXIV.

(a) The Court below found that the order made did not command the relocation and reconstruction of stations.

(b) If the order did involve the relocation and reconstruction of stations it is not on that account invalid.

(A)

On this subject the Court below in:

(1916) *Erie Railroad Co.* v. *Board of Public Utility Commissioners and City of Paterson,* 98 Atl., 13, said (22):

> "(11) Point IX is that the order is invalid in so far as it requires changes in the construction and location of the station building at Market Street and the station building at River Street.
>
> "We think this point is not well founded in fact. The order (leaving out of account the plan and profile) does not require any change in the construction or location of these station buildings. It does not deal

with them. The plan and profile do display reconstructed stations at new nearby locations. If these changes are fairly incidental to the changing of the highways or the reconstruction of the railroad, they are deemed to be a part of the order and must be made. That some reconstruction of both stations is rendered necessary by the reconstruction of the railroad, and will have to be made some time, either according to the judgment of the railroad managers or as may be lawfully directed by the public utility board, is not questioned.

"But it is contended that the change in the location of the stations was not fairly incidental to the changing of the highways or the reconstruction of the railroad. If so, the reconstruction of the stations at new locations is not required by the present order. Upon full consideration we think that is so. We do not find that the change in the location of the stations was incidental to, or rendered necessary by, the elimination of the grade crossings. Accordingly we hold that the order under review does not require the railroad company to reconstruct these station buildings at the new locations as indicated and suggested upon the plan. No doubt section 17 (b) of the Public Utility Act (P. L. 1911, page 379), conferring upon the board power 'after hearing upon notice,' to require a public utility 'to furnish safe, adequate and proper service, and to keep and maintain its property and equipments in such condition as to enable it to do so,' is ample to authorize the board, in a proper case, to order the relocation of a railroad station. But this was not a proceeding under that section. Aside from the

fact that such relocation was not ordered, it will be noticed that such changes were not asked for in the petition. There was no hearing and no evidence upon the question whether the existing stations at these points were safe, adequate and proper, nor was any notice given to the prosecutor that such question was to be passed upon by the Board in this proceeding, other than such as might be inferred from the 'suggestion' of the city engineer that such changes might be desirable if the tracks were elevated."

(B)

If, however, the order did upon a proper construction, command the relocation and reconstruction of stations, the order was not on this account invalid.

(1897) *In re Selectmen of Westborough et al.*, 169 Mass., 495; 48 N. E., 763.

ALLEN, *J.*:

"The next objection is that the report involves a substantial alteration in the location of the railroad station at Westborough. According to the petition and report of the commissioners, the changes of location would remove the railroad track from the station, and the position of the station would naturally and unnecessarily be charged as an incident of the change of the location of the track. The authority conferred by the statute to make changes of location is not limited to changes which will not affect stations. The fact that the station as well as the track is changed furnishes no reason for declaring the changes invalid in law."

(1910) *Bacon* v. *Boston & M. R. R.*, 83 Vt., 421; 76 Atl., 128.

Appeal from an order for the abolition of a grade crossing made by Public Service Commission.

HASELTON, *J.*:

> "The commissioners' order relates in part to the remodeling of the station itself and there is no suggestion in the argument for the appellants that the commissioners had not jurisdiction to order the changes which it did in the station proper, nor that their jurisdiction in that regard was not wisely exercised. The platforms of the station are properly appurtenant thereto, and the commissioners find that an enlargement of the station platform is 'very much needed for the convenience and safety of the public,' * * * but the order of the commissioners provides for more platform space than the appellants concede to be required; and since this increased platform space involves some, though comparatively slight and inexpensive, change of trackage, the railroad companies urge that such change cannot be ordered except by their consent. * * *
>
> "The difference between the appellants and the commissioners in the matter of platform extension relates to the amount of platform space requisite to the transaction of business with safety and comfort. This difference seems somewhat marked, but it may be more apparent than real, for the nature of the underpass to be ordered, its course, width, grade and place of termination at the station may well affect the requirement as to platform space. But the

existing situation as to platform space is one of undoubted danger and serious discomfort, and it is for the commission to afford a remedy; and, when all matters affecting the platform requirements have been determined by the commissioners in a manner consistent with this opinion, it is for them in the exercise of a sound discretion, since they and the companies agree that the station itself ought not to be moved, to make such orders as the reasonable safety and comfort of travelers and others having business at the station demand; and it is for them to determine what relocation of tracks upon land already held by the railroad companies is essential to the provision of such necessarily enlarged platform space. * * *

"An order for the moving of the rails of a company sidewise, within the limits of land held by the company, for the purpose of remedying a dangerous condition, is in no essential respect different from an order that rails be raised or lowered for the like purpose."

The Public Utility Act (Section 17 [b]), as before noted, empowers the Board to require a railroad company "to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so."

This provision of the statute empowers the Board in appropriate cases to order the reconstruction and relocation of stations.

POINT XXXV.

The petition of the municipality accords with the statute.

If objection was to be made to the form of the petition of the municipality such objection should have been raised specifically at the outset before the Board of Public Utility Commissioners.

(1907) *Newark* v. *Erie Railroad Co.*, 72 N. J. E., 447 (Ch).

MAGIE, *Chancellor* (454):

> "It is next contended that the bill is defective in two respects, *first,* because it fails to show that an overhead or undergrade crossing of Summer Avenue can be practically constructed, and, *second,* because it fails to point out the manner in which defendant should properly construct the crossing of Summer Avenue. With respect to this objection, the complainants, in my judgment, are not compelled to assert that one or the other crossing is capable of being practically constructed. It is sufficient that their bill presents a case for the exercise of the jurisdiction of the court, leaving for its determination what kind of a crossing should be decreed. It would be equally inappropriate, in my judgment, for complainants to set out in the bill the mode of crossing that they think defendants should adopt. If they present a case for the exercise of jurisdiction, they must accept such mode of crossing as the court shall decree, and to seek a decree for a particular mode of crossing might hamper the court and prevent the exercise of its power, whether statutory or equitable,

if the mode which the court is asked to decree is not, in its judgment, practicable or fair."

(1889) *Appeal of Town of Westbrook,* 57 Conn., 95; 17 Atl., 368, 369.

CARPENTER, *J.:*

"Were the applications authorized, and in due form? We do not see how this question can arise under the pleadings. In the appeal the appellant alleges 'that on the 22d day of June, 1887, and on the 5th day of October, 1887, the New York, New Haven and Hartford Railroad Company * * * by its directors, brought its petitions of the above dates, to the board of railroad commissioners of this state, asking for a change of the location of certain public highways in the said Westbrook, in order to avoid a grade crossing,' etc. The answer admits this allegation to be true. We do not see why that does not effectually end that controversy, unless it is competent for a party to deny or contradict in one part of his pleading what he had affirmed in another, and which has been admitted by the adverse party. Besides, this claim and every phase of it, is in the nature of a plea in abatement. The order of the commissioners shows that the selectmen of the town were present and were heard at the hearing before them. They certainly might have interposed this objection as a preliminary one. Being a dilatory plea, which defeats the present proceeding without affecting the merits of the cause, reason would seem to dictate that it should have been interposed *in limine;* thus saving the

parties the expense and delay of a nugatory proceeding."

(1894) In *re Selectmen of Norwood et al.*, 161 Mass., 259; 37 N. E., 199.

KNOWLTON, *J.*:

"It is not necessary that a plan or specifications showing the nature of the alterations prayed for should accompany the petition, or that the alterations desired should be set forth with any greater particularity or precision than was done in these petitions. The precise manner in which the separation of the grades is to be accomplished is to be determined by the commissioners and the court and need not be set forth in the petition."

(1805) *Boston & A. R. Co.* v. *Commissioners of Hampden County,* 164 Mass., 551; 42 N. E., 100.

BARKER, *J.*:

"By preferring their petition, the officials who invoke the action of the county commissioners show that they are of the opinion that some alteration is necessary, and they state the existing circumstances, with reference to the bridge and the way, which make some alteration necessary. This was, in substance, all that was contained in the petition of the selectmen in Norwood *v.* Railroad Co., 161 Mass., 259; 37 N. E., 199, where it was held that it was not necessary that a plan or specification should accompany the petition or that the alteration prayed for should be particularly set out. The reason given in that decision was that the alterations necessary

are to be determined by the commissioners and the court. We think the statute requires only that the officials who apply for an alteration shall have determined that some alteration, the general nature of which is disclosed by the petition, is necessary, and that upon such a petition as the one now under consideration the commissioners have jurisdiction to proceed, and to determine whether any alteration is necessary, and, if so, what alteration, and to prescribe the manner and limits within which it shall be made."

POINT XXXVI.

The order of the Board of Public Utility Commissioners is sufficiently specific.

There is a reasonable presumption in favor of the result arrived at and plan adopted by the Board.

The plan, it should be noticed, was sufficiently specific to permit the engineers of the Railroad Company to base detailed estimates of cost thereon. In the testimony of such engineers before the Board no doubt as to the requirements of the plan was expressed, nor was any suggestion made of necessity for more particular specification.

(1897) In *re Selectmen of Westborough et al.*, 169 Mass., 495; 48 N. E., 763.

(Action under St. 1890, c. 428, which provides a proceeding for the abolition of grade crossings.)

ALLEN, *J.*:

"A reasonable presumption must be made in favor of the plan and result arrived at by the commissioners." * * *

"Finally, it is urged that the report of the commissioners does not specify the general manner of construction, or prescribe the manner or limits within which such alterations shall be made, in such manner as the law prescribes, and that it is vague and indefinite as to bridges and as to the extent of grading. The report calls for three bridges, viz.: a railroad bridge over East Main Street, a bridge for a private way over the railroad track, and a bridge for Milk Street over the railroad track. These are all to be 'suitable' bridges (see Mayor, etc., of Worcester *v.* Railroad Commissioners, 113 Mass., 170, 171), which means that they shall have relation to what is usual, and is ordinarily deemed necessary, under similar circumstances, and details for their construction are given, which are to be taken in connection with the general requirement that the bridges shall be suitable. Looking at all of these specifications, we cannot see that they are open to criticism as vague and indefinite. And the specifications as to the extent of grading appear to us to be sufficiently full and precise. No particulars are pointed out in respect to which they are deemed insufficient."

(1895) *People ex rel. Lockwood & Strickland Co. et al.* v. *Grand Western Ry. Co. et al.*, 232 Ill., 292; 83 N. E., 839.

HELD, that the adoption of any plan for the elevation of railroad tracks in a city and the

making of subways in the streets under the tracks and securing the rights to the public is committed, in the first instance, to the judgment of the council of the city, and, unless the council has acted in bad faith, the courts will not declare the action unauthorized because another plan might, in the judgment of engineers of experience, be thought to be a better one.

CARTER, *J.*:

"In determining the mode of accomplishing the elevation of railroad tracks in the City of Chicago, this court in Summerfield *v.* City of Chicago, 197 Ill., 270, 287; 64 N. E., 490, 496, held: 'The proper discharge of that duty involved the exercise of the judgment and discretion of the members of the council. The general rule is that, where legislative or discretionary powers are conferred upon municipal corporations, the courts will not interfere, unless, in the exercise of such discretion, there is fraud, manifest oppression, a gross abuse. * * * (Further cases cited.) The adoption of any plan for the elevation of tracks and the making of subways in the streets thereunder, and securing, protecting, and preserving the rights to the public, is committed to the judgment and discretion of the city council. Summerfield *v.* City of Chicago, *supra.* Unless the city council has been shown to have acted in bad faith and not for the best interests of the public, the courts will not declare such action unauthorized because another plan might, in the judgment of engineers of experience, be thought to be a better one.

(1891) *Davis* v. *County Commissioners of Hampshire County,* 158 Mass., 218; 26 N. E., 848.

C. ALLEN, *J.:*

"There is no technical and arbitrary limitation of authority such as is contended for. All that can be said is that the county commissioners must not depart unreasonably from the existing highway, or more than is reasonably necessary in order to make a safe and convenient crossing over or under the railroad. *In order to warrant the interference of this court, it must be made to appear that they have ordered a change which is unreasonable and unnecessary.*"

(1900) *Town of Schaghticoke* v. *Fitchburg R. Co.,* 65 N. Y., Supp., 499.

Appeal from an order requiring a highway to be carried under tracks.

SMITH, *J.* (499):

"It is contended that facts do not appear sufficient to justify the order. The courts have now settled the rule by which we are to be guided in reviewing the determination of the railroad commissioners. In re Amsterdam, J. & G. R. Co., 86 Hun., 578; 33 N. Y. Supp., 1009, Justice HERRICK, in writing for the general term of this department, says: 'Unless the court can see that the decision of the board of railroad commissioners was founded upon erroneous legal principles, or that it proceeded contrary to the clear weight of evidence in arriving at its conclusion upon any question of fact, or that it has abused the discretion vested in it, and has arbitrarily refused to issue the necessary certificate, I do not think that the court

should reverse its determination and compel it to issue a certificate.' "

(1901) In *re Boston & A. R. Co.*, 64 App. Div., 257; 72 N. Y. Supp., 32 (affirmed 170 N. Y., 619; 63 N. E., 1115).

CHASE, *J.*:

"The desirability of abolishing grade crossings wherever practicable is generally recognized and requires no argument. The opinion of the railroad commissioners, who are appointed with special reference to their knowledge of matters connected with railroads and their operation, is entitled to weight and consideration. The rule is now well settled that this court should not reverse the determination of the commissioners unless it is clearly made to appear that their decision was founded upon erroneous legal principles, or was contrary to the clear weight of evidence."

City of Belleville v. *Herzler,* 225 Ill., 404; 80 N. E., 269."

(1914) *Mo. Pac. Ry.* v. *Omaha,* 235 U. S., 121, 132.

POINT XXXVII.

The railroad company is vested with power adequate to execute the order under review.

The Fielder Act empowers the Board of Public Utility Commissioners to order the "company operating such railroad * * * to alter such crossing according to plans to be approved by the Board, by substituting therefor a crossing not at the grade of such public highway, either by carrying such public highway under or over said railroad, or by reconstructing such railroad

under or over such public highway, or by vacating, relocating or changing the line, width, direction or location of such highway and the opening of a new highway in place of the one so ordered vacated."

Compliance by the company with such order is required.

From the statute and the order there must necessarily flow to the company power co-extensive with the acts required to be done.

The imposition of the duty must operate to carry with it the power to perform that duty in exact accordance with its prescription.

(1867) *Central R. R. Co. ads. State,* 32 N. J. L., 220.

(1873) *Greenwich* v. *Easton & Amboy R. R. Co.,* 24 N. J. E., 217.

(1874) *Easton & Amboy R. R. Co.* v. *Greenwich,* 25 N. J. E., 565.

(1907) *Borough of Metuchen* v. *Pennsylvania R. R. Co.,* 73 N. J. E., 359.

(1912) *State* v. *Lackawanna R. R. Co.,* 84 N. J. L., 289, 293.

These adjudications show that the vesting in a railroad company of powers similar to those which arise out of the Fielder Act and an order made under that act, is not without precedent.

See in this connection, Sections, 26, 27, 28, 33 of General Railroad Act, and "Roads," Compiled Statutes, Vol. 4, p. 4471,, Sec. 95.

In so far as the execution of such order may require the exercise of the power of eminent domain Section 13 of the General Railroad Act as now amended (P. L., 1914, Ch. 237) confers upon the company power to take by condemnation any land and property required for "all other legi-

timate purposes of the company, *and any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners.*"

(1886) *City of Minneapolis* v. *St. Paul M. & M. Ry. Co.*, 35 Minn., 131; 28 N. W., 3.

MITCHELL, *J.*:

> "We have no doubt of the power of the company under its charter to condemn private property for this purpose. The duty imposed carries with it the power to perform it, and in the exercise of that power all other needful auxiliary powers given by the charter may be exercised; and of these is the power to take lands compulsorily, when necessary for the purposes of the incorporation. When required by its charter, the construction of this viaduct and approaches for the purpose of carrying the street under its railroad is as much a part of the enterprise authorized by the charter as the railroad bed or track itself, and land taken for the former is as much taken for the purposes of the incorporation as land taken for the latter."

No question as to liability for damages resulting from the exercise of any of the powers vested in the railroad company as the result of the Fielder Act, and the order made thereunder, is relevant upon the present issue.

(1895) In *re Directors of Old Colony R. Co.*, 163 Mass., 356; 40 N. E., 198.

HELD, that in a proceeding by the Commissioners under Chapter 428, St. 1890, to abolish a grade crossing, the owner of land liable to be

taken has no right to be made a party, or to demand a hearing.

KNOWLTON, *J.*:

> "But such persons have no constitutional right to a hearing upon the question whether their land shall be taken (cases cited). When charters have been granted to railroad corporations in this commonwealth, landowners along the route have never been made parties to the proceedings for fixing the location; and under our general railroad law when the route is to be fixed the only notice required is by publication and posting, which may or may not reach the individual owners whose land is taken. Pub. St., c. 112, sec 39. In reference to the question what land shall be taken, the interest of landowners is to be considered only as they are a part of the public. The interest of every individual is to be regarded, so far as it is apparent, in determining what is the interest of the general public. Every public measure which has local features affects the interest of some members of the public more than that of others, and all interests should be weighed, in ascertaining the general interest. Landowners whose property is liable to be taken are not made parties by the statute now before us, and they have no legal right to be heard. Where notice of a hearing is given to the public, they may be heard, as a part of the public; and ordinarily, in cases of this kind, a tribunal whose action is liable to affect important interests desires to hear those who will be most affected."

Further than this the Fielder Act in express terms provides that "the entire expense of such alterations, relocation or opening, *including damages to adjacent property,* shall be paid by such railroad."

POINT XXXVIII.

The Fielder Act vests the municipality with plenary power to carry into effect the requirements of the act and of an order made pursuant thereto.

In so far as the Fielder Act and the order made pursuant thereto require any action by the municipality, the governing municipal body thereof is vested with plenary power to carry the same into effect.

See:

(1887) *Dodge* v. *Pennsylvania R. R. Co.,* 43 N. J. E., 351 (Ch.); 45 N. J. E., 366 (Ct. E. & A.).

(1900) *Morris & Cummings Dredg. Co.* v. *Jersey City,* 64 N. J. L., 587 (Ct. E. & A.).

(1912) *Am. Malleable Co.* v. *Bloomfield,* 83 N. J. L., 728 (Ct. E. & A.).

(1905) *Fair Haven & W R. Co.* v. *City of New Haven,* 77 Conn., 494; 59 Atl., 737.

TORRANCE, *C. J.:*

"The work here in question was the elimination of a grade crossing which had become a dangerous one. It was a work which the city, under the provisions of its charter, was not obliged to do. Indeed, it was one which, upon its own initiative, it had no power to do. It was a work of more than

local concern, and for that reason the power to order it to be done did not rest with the city, but almost exclusively with the railroad commissioners. Cullen *v.* R. R. Co., 66 Conn., 211; 33 Atl., 910. It was a work ordered to be done by the state, in the exercise of its police power, through its agent, the board of railroad commissioners, to whom it gave almost plenary power to order what should be done, and how, and by whom, and at whose expense it should be done, and within what time it should be completed. It was ordered to be done by the state, through its agent, the railroad commissioners, and the work was done by the state through its agents, the city and the railroad company. Mooney *v.* Clark, 69 Conn., 241; 37 Atl., 506, 1080. *The city was compelled to do its* part of the work whether its officers and agents voted *to do so or not,* and without regard to the question whether the work would be an improvement to the street, or of the slightest benefit to the city; and, if it had finally refused to do the work, the state might have done it through some other agent, and imposed the cost of so doing it upon the city. It is true that the city ultimately performed its part of this work through the ordinary agencies provided for in its charter; but this did not change the essential nature of the work, or make it any the less a special, limited burden, imposed upon the city for a limited time, outside of its charter duties and obligations."

POINT XXXIX.

The Board's power to modify its order.

If in the course of executing the order, unforseen contingencies arise, or details are found to require change, or if given switch connections shown within the railroad right of way are found to be unnecessary because of changed conditions in the industries whose private sidings are to be served by such connections, or for any other cause, the order made and the plan adopted by the Board may be modified on application.

Section 31 of the Public Utility Act provides that the Board at any time may modify an order made by it.

POINT XL.

The refusal to reopen the proceeding was not arbitrary but was justified.

On this point we rest upon the record originally made before the Board and that made upon the application to reopen, and the comments contained in the statement of facts herein.

It is submitted that such records amply justify the action of the Board.

POINT XLI.

The Public Utility Act, to which the Fielder Act is a supplement, is essentially a remedial statute.

Both the original act, and the supplement, should receive a liberal construction.

(1892) In *Read* v. *Camden,* 54 N. J. L., 347 (Ct. E. & A.), referring to the Statute of 1874 (Rev., p. 944), which authorized the proper mu-

nicipal authorities of cities to enter into contracts with railroad companies to secure greater safety to persons and property therein, DIXON, *J.*, said (373):

> "The avowed object of this statute is highly beneficent, and therefore its provisions tending towards the accomplishment of that object should be liberally construed."

(1900) *Morris & Cummings Dredg. Co.* v. *Jersey City,* 64 N. J. L., 587 (Ct. E. & A.).

The proceeding under review rested upon the Act of March 19th, 1874 (P. L., p. 45), as amended March 9th, 1893 (Gen. Stats., p. 2689, par. 221), the title of which is "An act to authorize any city of this State to enter into contracts with railroad companies whose roads enter their corporate limits, whereby said companies may relocate, change or elevate their railroads, and, where necessary for that purpose, to vacate, change the grade of or alter the lines of any streets or highways therein."

DIXON, *J.* (590):

> "As was said in Read *v.* Camden, 25 Vroom, 347, 373, 'the avowed object of this statute is highly beneficent, and therefore its provisions tending toward the accomplishment of that object should be liberally construed,' and especially is liberality of construction to be adopted when the question is whether the title of a statute is so restrictive as to defeat the body of the law. Johnson *v.* Asbury Park, 31 Id., 427, 431.
>
> "As early as Queen Elizabeth's time it was unanimously resolved by the barons of the exchequer that with regard to remedial statutes 'the office of the judges is always to

> make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico,' Hayden's* Case, 3 Rep., 7; *Magladen College Case,* 11 *Id.,* 66."

(1915) *In re Connecticut Company* (Conn.), 94 Atl., 972.

WHEELER, *J.:*

> "The Public Utilities Act was passed upon the public demand for greater public protection through larger public control of and supervision over public service corporations. The act is broad in its sweep, extensive in the jurisdiction conferred, and far reaching in the supervision of public service corporations and the control over public and private interests. It is essentially a remedial statute, and as such, like the workmen's compensation act, to receive a liberal construction designed to effectuate its cardinal purpose."

POINT XLII.

The adjudication of the Supreme Court on questions of fact is a finality and not open to review here.

The order of the board brought under review below is the order of a "special statutory tribunal."

Section 11 of the *Ceritorari* Act (Comp. Stats. 405) was treated as applicable in the court be-

low, and depositions were taken on behalf of the prosecutor.

The court undertook to determine the disputed questions of fact, as well as of law.

This included a determination that each of the crossings affected is dangerous to public safety, and impedes public safety, and that the relations of the crossings to each other are not such as to admit of separate treatment, but that their elimination requires the adoption of a general plan; and that the times fixed by the order for beginning and completing the work and the progress prescribed are reasonable.

In this situation the adjudication of the court below on the facts is a finality and not open to review here if there were before the court below any facts upon which its adjudication could rest.

(1896) *Moran* v. *Jersey City,* 58 N. J. L., 653 (Ct. E. & A.).

GARRISON, *J.* (653):

> "This writ of error brings up the judgment of the Supreme Court affirming the final assessment for benefits for improvements to lands of the prosecutor. The legislative course prescribed and pursued in the premises (Pamph. L., 1871, p. 1094), includes a report of commissioners of assessment to the board of works and an adjudication thereupon by that body. From this action the prosecutors by writs of *certiorari,* appealed to the Supreme Court where, upon such proofs as the parties saw fit to produce, the judgment was rendered which this court is now asked to review. Upon a writ of error in such a case the findings of the Supreme Court upon questions of fact is a

finality. That court, in the absence of statutory provision is powerless to determine a dispute of this nature. The act of 1871 (Pamph. L., p. 124), conferred such power in certain cases, which, by subsequent enlargement has been extended to 'the proceedings of statutory tribunals.' Rev. Supp., p. 84.

"These statutes do not apply to this court, nor is there any intimation in these acts of a legislative purpose to disturb its purely appellate character. The title of the original act, viz: 'An act relative to writs of *certiorari,* does not in terms apply to writs of error, while it points unerringly to that court whose prerogative the writ of *certiorari* is. The body of the act likewise indicates with entire clearness that the court upon which the additional power is bestowed is one that already possesses the organs necessarily to its proper assimilation, since it is enjoined to institute its inquiry 'by deposition or in such other manner, as is according to its practice,' language that is wholly devoid of application to this court."

(1905) *Yellow Pine Co.* v. *Board of Assessors,* 72 N. J. L., 182 (Ct. E. & A.).

MAGIE, *Chancellor,* said (184):

"Upon writ of error bringing into this court judgments of the Supreme Court in cases in which disputed questions of fact have there settled under the authority of section 9 of the former *Certiorari* Act, this court has uniformly held that the adjudication of the Supreme Court on questions of fact is a finality, and not open to review

here if there were before that court any facts upon which their adjudication could rest. * * *

"The same rule is evidently to be applied to cases in which the Supreme Court has determined, disputed questions of fact under the provisions now applicable and curtained in section 11 of the present *Certiorari* Act."

(1908) *Lehigh & Wilkes-Barre Coal Co.* v. *Borough of Junction,* 68 Atl. Rep., 806 (Ct. E. & A.).

DILL, *J.:*

"The act (P. L. 1906, p. 658) authorizing the court to determine questions of fact has no application to the Court of Errors and Appeals. This proposition has been repeatedly affirmed in cases where the statute, of which the act in question is a revision, has been construed" * * *.

CONCLUSION.

It is submitted that the respective judgments below and order of the Board should be affirmed.

L. EDWARD HERRMANN,
Attorney for and of Counsel with Board of Public Utility Commissioners.

FRANK H. SOMMER,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ERIE RAILROAD COMPANY, *Appellant,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Respondents.*	On Appeal from Supreme Court (Re Belleville Turnpike).

BRIEF IN FAVOR OF ERIE RAILROAD COMPANY, APPELLANT.

(1)

Statement of the Case.

The appeal herein is from a judgment of the Supreme Court whereby that court set aside a certain part of an order made by the Board of Public Utility Commissioners and directed that the record be remitted to the said Board for the purpose of modifying in certain respects the order thus set aside.

The judgment of the Supreme Court was entered in a certiorari sued out by the railroad company for the purpose of reviewing an order of the Board of Public Utility Commissioners dated June 9, 1914, which (inter alia) ordered the prosecutor

> "to keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and the track of

New Jersey State Library

> the new Newark Branch of said Company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamp or lamps during the hours of darkness, of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points" (p. 3, ll. 25-40).

Another part of the said order prescribed certain regulations with respect to the movements of trains and cars over the said Belleville Turnpike at a railroad crossing of the appellant known as the crossing of the *old* Newark Branch. The appellant in its certiorari proceedings made no complaint of the last mentioned part of said order—the objections to the order as presented to the Supreme Court being limited to its directions respecting the two crossings of the Belleville Turnpike known as the *new* Newark Branch and the Greenwood Lake Branch (see Reasons, pp. 86, 87).

The order of the Board of Public Utility Commissioners was made in a proceeding instituted by the Board of Chosen Freeholders of the County of Hudson—the highway in question being owned by Hudson County—and the Board of Freeholders was therefore made a party to the certiorari and is one of the respondents in the present appeal.

The Supreme Court concluded that the order in question was too broad in that it required the railroad company to keep a flagman on duty at each of the crossings in question during twenty-four hours of each day (see Opinion, p. 95, l. 5).

The Supreme Court thereupon adjudged that said part of the order to which objection was made should be set aside. The Supreme Court further adjudged that

"the record be remitted to said Board of Public Utility Commissioners so that said part of said order be modified by providing that the prosecutor be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them" (p. 96, ll. 20-30).

The present appeal is taken by the appellant on the ground that the Supreme Court should have set aside the said order of the Board of Public Utility Commissioners without modification, and without remission of same to said Board for the purpose of modification.

The questions involved are

(a) Whether the Supreme Court, having adjudged that a part of the order under review was illegal, had any power to direct that the record be remitted to the Board of Public Utility Commissioners for the purpose of the modification thereof;

(b) Whether the Supreme Court should have set aside all that part of the order of said Board of Public Utility Commissioners to which objection was made instead of merely that part thereof which required a flagman to be kept on duty during the entire period of twenty-four hours of each day—in other words, whether there was evidence to justify said Board in making an order requiring protection even during that part of the day when trains were passing over said crossings.

(2)

Grounds of Appeal.

1. The Supreme Court adjudged that the record be remitted to said Board of Public Utility Commissioners so that said part of the order of said Board hereinabove quoted be modified by providing that the appellant be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them, whereas for one or more of the Reasons for reversal filed in said Court under the writ of certiorari herein the said Supreme Court should have reversed and set aside the order of said Board of Public Utility Commissioners under review without modification and without remission of same to said Board for the purpose of modification as aforesaid.

2. Said Supreme Court having concluded that the said part of said order under review hereinabove quoted was too broad in that it required the appellant to keep a flagman on duty at each of said crossings, during twenty-four hours of each day, and having adjudged that said part of said order should be set aside, with costs, had no power or jurisdiction to order that the record be remitted to said Board of Public Utility Commissioners so that said part of said order be modified in the manner aforesaid or otherwise.

3. Said Supreme Court should have set aside said order under review in toto without adjudging or directing said Board of Public Utility Commissioners to modify said order in the manner aforesaid or otherwise.

The Reasons assigned by the appellant under the

writ of certiorari, referred to in Ground No. 1, are as follows:

1. Those parts of said order which order the prosecutor to keep on duty, during the twenty-four hours of each day of the week at the crossing of the Belleville Turnpike and the track of the new Newark Branch of the prosecutor, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the prosecutor, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours, and with a lighted lamp or lamps during the hours of darkness, of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points, were not justified by the evidence taken before said Board of Public Utility Commissioners.

2. There was no evidence before said Board of Public Utility Commissioners to support reasonably the said parts of said order or either of them, specified under Reason 1.

3. There was no evidence before said Board of Public Utility Commissioners from which said Board might reasonably infer that in addition to the protection that had been installed before and at the time of the making of said order at the crossing of the Belleville Turnpike and the track of the new Newark Branch of the prosecutor, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the prosecutor, the said crossings, or either of them, should be further protected by flagmen on duty during the twenty-four hours of the day, to give warning of the approach of trains, by flags during the day and lights during the night.

4. The evidence taken before said Board shows that the prosecutor before and at the time of the making of said order had installed protective devices and adopted reasonable provisions for the

protection of the travelling public at both of the crossings specified under Reason 1.

5. The evidence taken before said Board shows that the devices and provisions ordered by said Board for the protection of the crossings specified under Reason 1 were not necessary for the protection of the travelling public at said crossings or either of them.

6. The evidence taken before said Board shows that the conditions at the grade crossings specified under Reason 1, and each of them, were not such as to make it necessary for the protection of the travelling public at such grade crossings or either of them, that the devices and provisions ordered by said Board should be installed or adopted.

7. According to the whole of the evidence taken before said Board, it appears that the parts of said order specified under Reason 1, were unreasonable.

8. The statute, by virtue of which said parts of said order were made, is unconstitutional and void, because it deprives the Court of Chancery of the State of New Jersey of its exclusive jurisdiction over the regulation of the use of easements, contrary to Article VI., Section 1, of the Constitution of the State of New Jersey.

(3)

BRIEF OF THE ARGUMENT.

I.

The Supreme Court, having concluded that a certain part of the order of the Board of Public Utility Commissioners was illegal, had no power to direct that the record be remitted to said Board for the purpose of modification, but should have set aside said order in toto without modification and without remission of same to said Board for modification.

The Supreme Court decided that the order made by the Board of Public Utility Commissioners was "too broad" in that it required the railroad company to keep a flagman on duty at each of the crossings in question during the twenty-four hours of each day. That court came to this conclusion because it was "unable to find any evidence which will reasonably support that part of the order" (p. 92, ll. 21-26). The court further said (italics ours):

> "The duty imposed on the prosecutor and to be performed by it should not be made more onerous than the necessity for the protection of life, limb and property demands.
>
> "There can be no good reason for obligating the prosecutor to keep a flagman at each of the crossings *at periods of time when there are no trains running.*
>
> "The time tables in evidence showing the running of trains on both branches and over the crossings make it manifest that there is no good reason for the presence of a flagman at the crossings during the twenty-four hours of each day. The order should have been *limited* to keep on duty a flagman at the cross-

> ings covering the operations of all trains over such crossings" (p. 92, l. 27—p. 93, l. 3).

The appellant will hereinafter contend that the evidence before the Board did not justify an order that a flagman be kept on duty at the crossings in question or at either of them even at those periods of the day when trains were passing over said crossings, but however that may be, the present contention is that the Supreme Court having concluded that there was no evidence to support a certain part of the order should have set it aside *in toto* without directing the Board of Public Utility Commissioners to revise or modify the order—either in the respect stated by the judgment of the Supreme Court or in any other respect; in other words, that the Supreme Court had no power to set aside the order of the Board in part, but must either affirm or reverse same as a whole.

This point involves the construction of Section 38 of the Act concerning public utilities (Chapter 195, Laws of 1911), which reads as follows:

> "38. Any order made by the Board may be reviewed on the application of any person or public utility affected thereby, by certiorari in appropriate cases, or by petition, to the Supreme Court of the State of New Jersey, within thirty days from the date upon which such order becomes effective, as herein provided; said petition shall be filed with the Clerk of the Supreme Court and a copy thereof served upon the Secretary of the Board either personally or by leaving the same at the office of said Board in the City of Trenton. The Supreme Court is hereby given jurisdiction to review said order of the Board, and to set aside such order when it clearly appears that there was no evidence before the Board to support reasonably such order, or that the same was without the jurisdiction of the Board. The evidence presented to the Board, together with the finding of

> the Board and any order issued thereon shall be certified by the Board to the Supreme Court. The procedure for review, except as herein provided, shall be prescribed by rules of the Supreme Court."

The question for consideration is whether Section 38 of the Public Utility Act contemplates a complete scheme of review of orders made by the Board of Public Utility Commissioners and whether proceedings taken thereunder are limited to the method of procedure prescribed by that section. We contend that such is the effect to be given to the section in question, and that consequently the Supreme Court had no power, upon the proceedings taken thereunder, to do otherwise than affirm the order of the Board or set it aside *in toto*.

Our contention in this respect has already been sustained by this Court in the case of *Public Service Gas Co. v. Board of Public Utility Commissioners,* 87 N. J. L., 581. In that case writs of certiorari had been prosecuted in the Supreme Court by the cities of Paterson and Passaic to review an order of the Board of Public Utility Commissioners fixing the rate for gas at ninety cents per one thousand cubic feet, the claim of the municipalities being that the Board should have fixed a lower rate. The Supreme Court recognized its lack of power to order a modification of the order of the Board of Public Utility Commissioners, and dismissed the writs prosecuted by the cities, saying (84 N. J. L., 463 at 465):

> "The only remedy that could give the cities the relief they seek is a writ of mandamus commanding the Commission to reduce the rate to ninety cents. Under well settled principles, this writ is not available. * * * The question now involved is not whether upon an application to this court for a

> mandamus to compel a public service corporation to furnish gas, we might not determine for ourselves as an original question what would be a reasonable charge, just as the Court of Chancery determined a reasonable charge for water in *Long Branch Commission v. Tintern Manor Water Co.*, 4 Robbins, 71. The parties do not appeal to our original jurisdiction, but very properly have resorted to the new procedure provided by the legislature in the Public Utilities Act of 1911 (P. L., p. 374). Under that act our jurisdiction is appellate, not original, and the power given (Section 38) is the power to set aside the order of the Commissioners not to make or compel them to make a new order. Our original jurisdiction, as it has always existed, is not and cannot be affected by the legislature, but they may provide, as they have in this case, a new method of procedure."

The Court of Errors and Appeals, upon a first hearing of an appeal by the two cities, affirmed the judgment of the Supreme Court dismissing the writs, and said (87 N. J. L., 582):

> "It was held in effect that on certiorari the Supreme Court had simply the alternative of affirming the order of the Commissioners or setting it aside; whereas the relief then sought by the cities would appropriately be given by the Supreme Court, if at all, only on an application for mandamus. The Supreme Court therefore dismissed the two writs prosecuted by the cities. With this conclusion we agree and have nothing to add to the reasoning of the Supreme Court in that regard."

Upon a re-hearing, however, this court came to a different conclusion, not as to the power of the Supreme Court on a certiorari of this character, but as to the propriety of dismissing the writs without adjudicating upon the merits of the question presented. Accordingly, upon re-hearing, this court reversed the judgments of the Supreme Court (95 Atl., 125), and, upon the writs of

certiorari thus prosecuted by the cities, affirmed upon the merits the order of the Board of Public Utility Commissioners. The theory upon which this result was reached was that the cities were entitled to an adjudication as to whether or not the order of the Board should be affirmed or set aside. The final decision of this court, therefore, in no way affected the force of the decision of the Supreme Court and of the first opinion by this court, so far as the same related to the lack of power, upon a certiorari prosecuted under Section 38 of the Public Utilities Act of 1911, to substitute the judgment of the courts for that of the peculiar statutory tribunal to whom the determination of such particular questions had been entrusted by the legislature. In other words, a writ of certiorari prosecuted under the provisions of Section 38 is not an exercise of the original jurisdiction of the Supreme Court to review all proceedings of inferior tribunals by certiorari, but is an appellate proceeding, in which both the procedure and the extent of the appellate power are limited by the terms of the statute creating the same.

That the present writ was prosecuted under the restrictive provisions of Section 38 of the Public Utilities Act of 1911 is evidenced by the fact that the Board returned with the writ the record and proceedings before it, together with all the testimony taken before the Board, and the case was heard in the Supreme Court upon that testimony (see Return, p. 2, ll. 9-25; Testimony, p. 15). The conclusion is that since the writ was thus prosecuted under that section of the statute, the power of the Supreme Court was limited by the terms of the statute. Those terms are defined thus:

> "The Supreme Court is hereby given jurisdiction to review said order of the Board, and to set aside such order when it clearly

> appears that there was no evidence before the Board to support reasonably such order, or that the same was without the jurisdiction of the Board."

The inevitable conclusion is that the Supreme Court had no power to make the order in this case setting aside a part of the order of the Board of Public Utility Commissioners and remitting the record to the Board with directions to modify the order by providing that the Railroad Company should keep a flagman on duty at the crossings in question only during such hours of the day as trains and engines are operated over the crossings and covering the operations of all trains and engines over the crossings. If there was no evidence to support reasonably the order as made by the Board, then the order should have been set aside as prescribed by the statute. As said by Mr. Justice Swayze in the opinion of the Supreme Court in *Public Service Gas Co. vs. Board of Public Utility Commissioners, supra*:

> "The power given (section 38) is the power to set aside the order of the commissioners, not to make or compel them to make a new order."

The judgment of the Supreme Court in the present case seeks to compel the commissioners to make a new order, and for that reason should be reversed and the order of the Board of Public Utility Commissioners be set aside *in toto*.

II.

There was no evidence before the Board of Public Utility Commissioners to show that the conditions at the crossings in question were such as to make it necessary for the protection of the traveling public at such crossings or either of them that the protection specified in said order should be provided.

The Supreme Court found that the order under review was too broad in that it required the railroad company to keep a flagman on duty at each of the crossings during the twenty-four hours of each day. No appeal has been taken by the respondents from that part of the Supreme Court's judgment.

The appellant now contends that there was no evidence before the Board to justify an order requiring the protection specified in said order during the other part of said period of twenty-four hours. That part of the Supreme Court's judgment which in effect operates to modify the Board's order directs that the record be remitted to the Board "so that said part of said order be modified by providing that the proecutor be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them."

The question now presented is whether the situation at these crossings or either of them was such as to require protection by a flagman even during those hours of the day when trains and engines were operated over them. While this

court will not examine into questions of fact determined by the Supreme Court, it will nevertheless determine whether or not there was any evidence at all upon which the judgment of the Supreme Court can be supported. It is now contended that there was no such evidence before the Board, and consequently none before the Supreme Court.

By Section 22 of the Act concerning public utilities (P. L., 1911, p. 374, as amended by Chapter 80 of Laws of 1912, p. 111), it is provided that whenever it appears to the Board that a public highway and a railroad cross one another at the same level, and that conditions at such grade crossing make it necessary for the protection of the traveling public at such grade crossing that gates be erected or that some other reasonable provision for the protection of the traveling public at such grade crossing should be adopted, the Board may order and direct such railroad company to install such protective device or devices or adopt such other reasonable provision as in the discretion of the Board shall be necessary.

The order under review therefore cannot be justified unless it appears that the conditions at the crossings in question made it "necessary" that the devices ordered by the Board be installed or adopted.

In considering this question a brief reference to the papers filed with the Board of Public Utility Commissioners by the Board of Freeholders and by the appellant will be useful in determining the issues that were before the Board and consequently before the Supreme Court.

The petition upon which the order is based was filed by the Board of Chosen Freeholders of the County of Hudson—the turnpike in question being a county road built and maintained by said Freeholders. The petition charges that none of the

three grade crossings therein named (including the two under discussion) is protected by gates, "or other sufficient and reasonable provision for protection of the traveling public," and that the only provision for such protection is a bell situated at the crossing, "and so constructed and operated as to afford no adequate protection to the traveling public on and along the said highway at said crossings" (p. 8, l. 38 to p. 9, l. 7). The petition then charges that the conditions at each of the crossings make it necessary that gates be erected, or that some other sufficient and reasonable provision for the protection of the traveling public, be adopted; that the Erie Railroad Company refused to provide gates or "other adequate and reasonable provision" for such protection; and that "in consequence of the lack of such provision there have been a number of fatal accidents within the past few months at one or another of said crossings, entailing loss of human life and damage to property." The petition then prays that the Board order the Railroad Company to instal gates or such other protective device or devices as in the discretion of the Board shall be necessary (p. 9, ll. 8-40).

The answer of the Company alleged that the tracks at one of the three crossings mentioned in the petition are not used (this is the one described in the Board's order as the old Newark Branch, and is not involved in the present review). The answer further stated that the other two crossings had recently been protected by the installation of crossing alarm bells,—"two bells located at each crossing one on each side of the track a distance of 100 feet along the highway from the right of way of the Railroad Company; that signs have also been erected on the right of way side of the highway at the approach to each of these crossings, reading 'Railroad Crossing 500 Feet'; that former-

ly these two crossings were each protected by a single bell located at the crossing; that, so far as this respondent is informed, no accidents have occurred at either of these crossings since the installation of this double bell and sign protection" (p. 10, ll. 15-30). The answer then said that a fair test should be given the present method of protection before requiring gates or other protective devices.

There was then filed with the Board what was termed a "reply," in which it is said that petitioner believes that the alleged precautions referred to have been taken, but that the same are "entirely inadequate" and "do not constitute or afford the most modern and efficient method of protection" (p. 12, ll. 5-25). This "reply" then proceeds to object to the railroad's suggestion that a fair test be given the present method of protection, although admitting that no accidents had occurred since the installation of the "double bell and sign protection" (p. 12, ll. 35-40). The reply continues that the petitioner "cannot accept this invitation to experiment with human life in the manner suggested by respondent," and concludes with the prayer that the respondent be required to establish "a gate served by a gate-tender, and in addition thereto, at night, a luminous sign warning travellers of the proximity of the crossing, or a conspicuous red light on either side of each of said crossings of sufficient power to be visible at least a thousand feet from said crossings" (p. 14, ll. 5-15). We do not know of any provision in the statute, or in the rules of the Board, relating to the filing of a so-called "reply," but assuming that the reply may be considered as an amendment of the original petition, it will be seen that the question at issue as to both of said crossings, was whether they were sufficiently protected by the two alarm bells, one on each side of the track, a dis-

tance of 100 feet along the highway from the right of way, and by the signs erected at the approach to each crossing reading "Railroad Crossing 500 Feet"; or whether in addition there should be gates, and at night a "luminous sign" or red light powerful enough to be seen a thousand feet from the crossing.

The Board declined to order the erection and maintenance of gates, or of a red light visible a thousand feet, but directed that a flagman be kept continuously on duty to give warning with a flag during daylight and with a lighted lamp at night. The result of this is that at each of these two crossings, there are now not only two crossing bells (one on each side), and two warning signs, one on each side 500 feet from the crossing, as stated in the answer, but also there are two flagmen, one of whom is on duty continuously. The cost of the wages of such flagmen is $2,190 per year (p. 76, l. 30 to p. 77, l. 5). The prosecutor maintains that this is an entirely unnecessary expense, and that the conditions at neither crossing are such as to require this extraordinary precaution in addition to the warning bells and signs.

In considering the question of whether the Board was justified in finding that it was "necessary" for the protection of the traveling public that the prosecutor keep a flagman on duty day and night, certain lines of inquiry were followed by the counsel for Hudson County in the allegations of his petition and reply, and in the evidence produced in support of the alleged necessity. We will consider each of these in order:

1. The nature and extent of the traffic including (a) highway travel; (b) railroad trains. (See Petition, p. 8, ll. 10-15);

2. Physical conditions at crossings. (See Petition, p. 9, l. 10);

3. Accidents. (See Petition, p. 9, l. 25; Reply, p. 13, l. 30);

4. Existing protection. (See Petition, p. 9, ll. 1-5; Answer, p. 10, ll. 5-40; and Reply, p. 13, l. 30 to p. 14, l. 20).

We will take up each crossing separately:

A. Crossing of new Newark Branch.

1. (a) *Highway Traffic.*

The petition alleges that the turnpike is "a much frequented highway used by all manner of vehicles as well as pedestrians, in very large numbers; which said vehicles and pedestrians are constantly passing in either direction on said turnpike during all hours of the day and night" (p. 8, ll. 10-15). The evidence on this subject was given by one Roden, an inspector in the employ of the State Road Department, and by his assistant, Mr. White. There was received in evidence a statement of the traffic for a period of six days, December 10th to December 15th, 1913, inclusive (See Exhibit P-2, p. 35; p. 82). White kept the record from 6 A. M. to 3 P. M., and Roden from 3 P. M. to midnight (p. 21, ll. 30-40). Apparently this traffic record was taken for the entire amount of travel over the highway. Roden says: "It was for the amount went over the road" (p. 30, ll. 30-35), but he does not say at which one of the three crossings he took his record. The first railroad track that crosses the Belleville Turnpike is 1233 feet from the *Newark* Turnpike. This is the *old* Newark Branch. The next crossing of the Belleville Turnpike is 4598 feet further; and the third crossing (which is the Greenwood Lake Branch) is 2579 feet further, (p. 18, ll. 30-45; see blue print, Exhibit P-1 offered at p. 18 and included in printed book opposite p. 82). The traffic record was taken on the theory that every pedestrian and every vehicle that passed over the first crossing would likewise continue over the second one, nearly a mile dis-

tant, and would then continue over the third one, half a mile further on. A record kept on such a theory is not of much value; but examining it for what it may be worth, we find that the "large numbers" of pedestrians alleged in the petition dwindled to 13 on December 10th; 5 on December 11th; 12 on December 12th; 8 on December 13th; 30 on December 14th; and 2 on December 15th (p. 82, l. 15)—a total of 70 in six days, or an average of less than 12 per day—or, on the basis that the observation was made from 6 A. M. until the following midnight, a period of eighteen hours, we have two pedestrians every three hours. The record was kept from hour to hour by Roden during his period of observation—that is from 3 P. M. to midnight, but it does not appear whether his assistant kept a similar hourly record. His detailed report as given on pages 22 to 24 does not refer to any pedestrians as passing over any of the crossings during the period of his observation. Hence it seems that the pedestrians referred to in Exhibit P-2 must have been reported by the other inspector from 6 A. M. to 3 P. M. and if that is so, then there is no proof that a single pedestrians passed over any of these crossings after 3 P. M. on any of the days on which observation was made.

The pedestrian traffic is therefore of practically no importance. The order of the Board of Public Utility Commissioners was based upon the theory that the vehicular traffic was heavy (p. 5, ll. 20-25). The report of the Board refers to the census taken on Sunday, December 14th, showing that on that day "752 vehicles passed over these crossings" (p. 5, l. 25); and the report then continues, "Witnesses testified that the number would be very considerably increased during the summer months." It should be observed that the only "witness" who testified to that effect was the counsel for the Board of Freeholders. During the

course of his argument to the Board at the opening of the hearing, he made certain statements, which of course were not under oath, and were not subject to cross examination (see p. 17, ll. 1-10). But although the report refers to the traffic on a certain Sunday, it omits to call attention to the fact that the traffic on the other days of the week was comparatively small. By reference to Exhibit P-2, we find the following as the total number of vehicles, including automobiles of all kinds, horse-drawn vehicles, motor cycles and bicycles:

Wdenesday,	December	10	202
Thursday	"	11	178
Friday	"	12	182
Saturday	"	13	338
Sunday	"	14	752
Monday	"	15	216

As this summary covers a period of 18 hours' observation on each day, it will be seen that the average per hour was as follows:

Wednesday	11 per hour
Thursday	10 " "
Friday	10 " "
Saturday	19 " "
Sunday	42 " "
Monday	12 " "

It will be further observed that, according to the detailed report of Roden, there were very few vehicles using the highway after 7 P. M. The following is a summary:

			December 10.				Av. for
Hours:	7-8	8-9	9-10	10-11	11-12	Total	5 hrs.
	2	6	1	1	8	18	3.6
			December 11.				
	8	5	5	3	4	25	5.0
			December 12.				
	5	4	6	3	1	19	3.8

		December 13.				
8	3	10	5	1	27	5.4
		December 14.				
14	31	16	11	4	76	15.2
		December 15.				
4	5	6	2	0	17	3.4

It will be seen from the foregoing summary that whatever may be the necessity of a flagman during the daylight hours, there is certainly no occasion for having a flagman on duty after 7 o'clock in the evening. The average number of vehicles using the crossing after that hour varies from 3 to 5 per hour—except on Sunday, when it runs up to 15 per hour. Even during the daylight hours, as reported by Mr. Roden, the number of vehicles using the highway comes very far from justifying the allegation of the petition that the highway is "much frequented" and "vehicles are constantly passing." The following is a summary of his report for the four hours from 3 to 7 P. M.:

						Av. for
		December 10.				
Hours:	3-4	4-5	5-6	6-7	Total	4 hrs.
	8	24	26	16	74	18.5
		December 11.				
	12	16	4	12	44	11.
		December 12.				
	10	0	27	15	52	13.
		December 13.				
	30	49	52	19	150	37.5
		December 14 (Sunday).				
	122	107	89	25	343	85.7
		December 15.				
	21	13	19	15	68	17.

A large majority of these vehicles—almost nine-tenths—were pleasure automobiles (p. 30, ll. 20-30). It is well known that vehicles of this kind

can be more readily controlled than horse-drawn vehicles.

The distinction between automobile traffic and the ordinary highway traffic is pointed out in an emphatic manner by the Circuit Court of Appeals for the Third Circuit, in *N. Y. Central, &c. R. Co. v. Maidment,* 168 Fed., 21, where the court said:

> "With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the

> situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menance his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead, and from the track signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions."

See also *Brommer v. Pennsylvania R. Co.*, 179 Fed., 577.

In *Fort Wayne &c. Traction Co. v. Schoeff*, 105 N. E., 924, the Appellate Court of Indiana said:

> "Owing to the peculiar character of a vehicle, and the noise which it produces, and the fact that it may be stopped close to a railroad track in safety, there may be instances where the exercise of ordinary care would demand that the driver of an automobile stop before crossing, where the exercise of the same care would not require that the driver of a team, whose horses may be frightened by a train, stop before crossing."

In *Chase v. N. Y. &c. R. Co.*, 94 N. E., 377 (Mass.), the Court said:

> "The rules of law applicable to the driver of a horse-drawn vehicle approaching a railroad crossing have been laid down in many cases. He must look and listen in a reasonable way, so as, if possible, to secure his safe-

ty. The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses. As was said in *Hubbard v. Boston & Albany R. R.*, 162 Mass., 132-136, 38 N. E., 366, 368: 'There are very few horses that can safely be stopped within 15 or 20 feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look, so near the track as to expose him to great danger from the fright of his horse, if an approaching train should be near.' The driver of an automobile is in no such danger. If his machine is a good one it can be controlled easily and perfectly and there is no danger from it if he stops to look and listen within six feet of the tracks. The difference between automobiles and vehicles drawn by horses, in the application of the rule, has been recognized by the courts."

Under the law of New Jersey, automobiles of more than 10 H. P. must be provided with at least two brakes (3 Comp. Stats., p. 3428, Sec. 5). The maximum speed permitted by law is twenty-five miles per hour with the proviso that no person is permitted to drive any automobile at any greater speed than is reasonable, having regard to the traffic and use of highways (3 Comp. Stats., p. 3436, Sec. 23).

It must be assumed that the persons using this highway will comply with the laws of the State. No order of the Board could be justified on the theory that the persons using the highway are at liberty to violate the law and must therefore have some special and extraordinary protection in order to save them from injury while so doing. The number of vehicles during the daylight hours of the week days varies from 11 to 37, and during the night from 3 to 5 per hour. There is

nothing in this record to justify the conclusion that the traffic was so great as to require extraordinary precaution—certainly not during the night.

In *McCullough v. Franklin Township,* 59 N. J. L., 106, an ordinance which required a railroad company to erect gates, and operate them day and night, was set aside. GUMMERE, J., speaking for the court said:

> "The ordinance seems to me to be unreasonable; for it not only requires the prosecutors to protect these crossings during those hours when they are used more or less frequently by the public, but also during that portion of the night when the great majority of people have retired to their homes, and travellers upon the highways, as well as trains upon the roalroad, are few and far between."

(1) (b) *Railroad Traffic.*

Exhibit P-4 contains extracts from the time table of trains using the Newark Branch (see p. 84). By reference to same it will be seen that on week days there are 14 westbound trains and 16 eastbound trains; on Sundays there are 9 westbound trains and 10 eastbound trains. On certain holidays the number of westbound trains is reduced from 14 to 12, and the number of eastbound trains is reduced from 16 to 12. If we take the same average day as the inspectors of the highway, to wit, 18 hours, from 6 A. M. to 12 P. M., it will be seen that the average number of trains in each direction on week days is less than one per hour. There is nothing in the amount of railroad traffic which shows that this crossing is of such an unusually dangerous character as to require extraordinary precautions.

(2) *Physical Conditions.*

By reference to the map, Exhibit R-2 (blue

print copy facing p. 84, entitled "Newark Branch. Views and Sights on Belleville Turnpike 3 miles east of Harrison, N. J."), it will be seen that observations made in the center line of the highway at points varying from 5 to 100 feet from the nearest rail in each direction, give a clear view of 5,000 feet along the railroad tracks in each direction and from each approach. This distance of 5,000 feet was noted on the map by the surveyor as indicating as far as a man could see under ordinary circumstances in a flat country; in fact the view was limited only by the extent of one's vision (p. 57, ll. 1-10). The Assistant Engineer of the Company said he knew of no crossing on the railroad where the view was as good (p. 58, ll. 20-30), and in this he was confirmed by the Assistant Superintendent (p. 74, ll. 20-30).

The report of the Board admits that the view of approaching trains was not obstructed by buildings, as the road was not built up along the line of the railroad for more than a mile, and then says that "the view of trains was obstructed by the growth of cat-tails and other rank growth." The testimony on this subject hardly justifies such a statement. Inspector Roden went to the crossing to make some observations of the bell, and he said he could see a train coming when it was two or three thousand feet away (p. 31, ll. 30-35). He was then two or three hundred feet from the crossing (p. 33, ll. 1-10). He then claimed that the view at that time was better than in the summer time because of the cat-tails which grow "very tall" (p. 33, l. 35, to p. 34, l. 1). He admitted, however, that he had not taken particular notice of trains running during the cat-tail season, although he thought that with the cat-tails in their prime, about three feet of the train appeared. Even under such circum-

stances, his judgment was that one could tell a train was coming, although he could not tell which track on account of a bend or turn (p. 34, ll. 10-40). Mr. Armstrong testified that the view was unobstructed, that there was some shrubbery"; but even under those circumstances, he said:

> "Q. How much of the cars could you see? A. I could see about half the cars, half projected above the top of the shrubbery."

He could not say anything about the cat-tail season, as he had not observed conditions (p. 44, ll. 20-40).

The assistant engineer of the Company testified he had been at this crossing in the summer time and had often looked at it. He said:

> "The views are all good in the summer. Of course you have the situation there, you can look up the track and see the train as well as you can see any other time, as the train is higher than the vegetation. The views of the majority of people on the highway are just as good in the summer as any other time. They are up in a high vehicle and their eyes are higher than the vegetation and they can see any obstruction higher than the vegetation, such as a train" (p. 58, ll. 1-15).

The cat-tails grow to a height of about five or six feet (p. 62, l. 30). The cars can be seen above the cat-tails (p. 63, l. 15); provided a person looks for the train. "You can't see anything if you don't look in that direction" (p. 64, l. 1).

We therefore have a situation where it is conceded that for a distance of at least 100 feet before reaching the tracks there is a clear view in both directions as far as the eye can see. The assistant superintendent said there is no place on any railroad he could recall where the view was as good (p. 74, l. 25). The report of the Board

says that one would not be put on his guard unless the location of the tracks was known by the person approaching the highway. Of course if a man were blind, or if he deliberately closed his eyes, he would not know he was approaching a railroad tracks. That would be true of any crossing; but in view of the fact that there is a sign on each side 500 feet distant, together with crossing bell, it is difficult to understand how the ordinary traveler who keeps his eyes and ears, or either of them, open, could fail to ascertain that he was approaching a railroad tracks.

(3) *Accidents.*

The petition alleges that in consequence of the lack of provision for protection of the public, there have been a number of fatal accidents within the past few months at one or another of said crossings, entailing loss of human life and damage to property (p. 9, l. 25). The proofs fails to show that any accidents occurred at any of the crossings *by reason of the lack of proper protection*; in fact, not one of the witnesses who referred to certain accidents, had any personal knowledge whatever of them. Inspector Roden testified about an accident that occurred at one of the crossings. He said that a train struck a commercial automobile about Christmas, 1912, causing certain damage to property but no personal injury (p. 24, l. 30 to p. 25, l. 5); but he admitted that he did not see the accident and knew nothing as to the details of it; in fact, he does not even state at which of the crossings this accident occured (p. 31, ll. 1-10).

The witness White referred to an accident on the Newark Branch on January 20, 1914, when a team truck driven by one Burns, was struck by an eastbound train. The witness did not see this accident (p. 36, ll. 1-15; p. 39, l. 20). This was the same accident referred to by one Davanagh

(p. 46, l. 38). He also admitted that he did not actually see the accident (p. 46, l. 35). The same accident was also referred to by Chief Tolen, but he also admits that he did not witness it (p. 49, ll. 20-40).

It will, therefore, be seen that so far as this crossing is concerned, the number of fatal accidents drops to two; and even as to one of them it is by no means clear whether it happened at this crossing or at one of the other two crossings. Further, none of the witnesses called on this subject had any personal knowledge whatever of the circumstances under which these accidents occurred. If competent evidence had been introduced by the petitioner with respect to either of these accidents, the Railroad Company would then have been in a position to show the real truth about them. It is, of course, obvious that the fact that an accident happens, by no means proves that a crossing is dangerous; nor does it prove that the accident happened because of the lack of proper protection. There are many other causes for grade crossing accidents besides lack of proper protection. The reports of this and other states are full of cases in which it has been decided that such accidents were due to negligence on the part of the highway travelers themselves; for example, so far as these two accidents are concerned, the Company might be able to prove that the drivers of the vehicles that were struck did not look for any trains but drove directly on the tracks despite warning signals.

4. *Existing protection.*

At the time the order under review was made this crossing was protected as follows:

(a) the ordinary crossing sign "Look Out for the Train;"

(b) two signs located one on each side of the

railroad right of way about 500 feet from the track on the right-hand side of the highway as a traveler approaches, reading "Railroad Crossing 500 Feet;"

(c) two bells, one on each side of the track a distance of about 100 feet along the highway from the right of way (p. 10, ll. 15-20; p. 12, l. 15; p. 26, ll. 1-15; p. 27, ll. 1-10; p. 59, ll. 10-30; p. 60, ll. 20-30).

These bells are operated by electric batteries through a circuit on the railroad track which begins about 2600 feet from the crossing (p. 59, l. 35 to p. 60, l. 10).

The assistant engineers of the Company said that he has observed other railroads and he has noticed that crossings outside of towns and villages are not protected by anything other than the ordinary crossing sign on almost all railroads, and that he does not believe there is any highway crossing where the view approaches this one "in excellence" that is protected by a gateman or flagman; the general method of protecting crossings of this character is by the ordinary crossing sign reading "Railroad Crossing, Beware of the Train" on one or the other side of the track (p. 58, l. 30 to p. 59, l. 10). The assistant superintendent also testified that crossings similar to this in the open country are usually protected by nothing more than the ordinary railroad crossing sign (p. 76, ll. 1-15; p. 79, ll. 1-10). The usual length of the track circuit as crossings where bells are installed is about 1300 feet (p. 60, ll. 1-5).

It, therefore, appears that this crossing, before the petition was filed in this proceeding or any order made therein, was already protected to a greater extent than other similar crossings, in that there had been installed not only the ordinary crossing sign on the right of way, but also

two signs placed 500 feet from the track, and two bells, one on each side of the track about 100 feet therefrom, provided with a circuit double the ordinary length, so that the bells would begin to ring when the train was about half a mile from the crossing. Notwithstanding the unusual precautions already existing, the Board by its order imposed upon the appellant the burden of providing a flagman both by day and by night.

The bells were inspected every day by a track-walker and a record kept in a book; and in addition, there was another man who observed the ringing of the bells from the train; and in the event that the bells were not operating properly, a telegraph message to that effect would be sent to the assistant engineer, and repairman sent there immediately; and pending the making of the repairs, a man would be taken out of the section gang and placed at the crossing to flag trains until the bell was put in service again (p. 60, ll. 10-25). The bells were of metal, either brass or brass composition, fastened on a cast-iron frame with an iron grating over it to protect them from stones. The wires used to operate the bells were of copper and insulated with rubber tape (p. 60, l. 40; p. 61, l. 5).

There was some attempt made to show that the bells did not ring very loud, or that at times they were out of order. Witness Roden said he went to the highway "for the purpose of catching these bells" (p. 26, l. 1), and while at the crossing of the Newark Branch a train went by between 12 and 1 o'clock; "I could not hear the bell; just heard a slight tinkle at 500 feet" p. 27, ll. 30-40). He heard it for 38 or 40 seconds before the train reached the crossing (p. 28, ll. 1-5). The train was then about 2,000 feet away (p. 31, ll. 25-35). When he heard it tinkle he

was 500 feet away, but he further said that at 200 feet he could hear it plainly (p. 27, ll. 1-5).

He further said that when he went over the crossing in a commercial automobile, he could not hear the bells on account of the noise of the motor (p. 29, ll. 1-40). He further said:

> "Q. Was the bell ringing each time you observed a train approaching? A. When it struck a certain point, it started to ring, yes" (p. 32, l. 25).

On another occasion he went over the crossing in an automobile and did not hear the bell ringing although the train was in sight, but so far as that observation was concerned, he says he did not know whether the train was within the circuit so as to start the bell (p. 33, ll. 1-15).

Another witnesss, by the name of White also observed the bells and found that on this crossing they rang when the train was 40 seconds in time from the crossing (p. 36, ll. 20-40). The distance that he heard the bell, he said, depended on the wind, but even if the wind was blowing away, he could hear it 50 or 100 feet distant (p. 37, l. 25).

He further said that the bells had been out of order "on occasions." His testimony on this point is not very clear, as he does not state whether he refers to the Newark Branch crossing or to the Greenwood Lake crossing, or to both; nor does he give the dates. In fact, all he knows about it is the fact that he noticed men "repairing" the bells. "I have seen them up there once o rtwice" bells. "I have seen them up there once or twice" (p. 38, l. 10). The probability is that when he says he saw the men working at the bells, he refers to the occasion when the present bells were installed, as he fixes the time by stating it was after an accident to one Baker on January 20th (p. 38, ll. 20-40; p. 39, ll. 20-4). He had never

observed that the old bells were not ringing, and knows nothing about them (p. 40, ll. 1-20).

Mr. Armstrong made a number of tests of the ringing of the bells. His first test on the Newark Branch crossing was a westbound train at 6.43 P. M. "The bell rang as we stood there and we could hear it" (p. 41, l. 35). The second test was with an eastbound train with the automobile moving towards the crossing; and he heard the bell with the engine going when he was about 40 feet from it (p. 42, ll. 1-10). On other dates he also heard the crossing bell ring 48 to 50 seconds (p. 42, ll. 25-35).

Mr. Davanagh said he had passed over the Turnpike in his automobile and heard the bells ring; and then he says he is "very positive" that if he had gone along not expecting to hear the bells ring he could not have done so (p. 47, l. 20). He then added, "In my opinion those bells are absolutely worthless" (p. 47, l. 25). There is nothing in the record to show what the opinion of this witness may be worth, or whether he had ever had any experience which would qualify him to express an opinion. He referred to a crossing on the D. L. & W. R. R. Co., on the Newark Turnpike, which in his opinion was "a good bell" (p. 47, l. 35). In reply to this suggestion, the assistant engineer of the Railroad said that if the Erie bells did not ring as loud as the D. L. & W., he would guarantee to make them ring as loud (p. 61, ll. 10-15).

It will, therefore, be observed that only one of the witnesses called for the appellant said that the bells had ever been out of order, and this one said only that they had been out of order "once or twice", and even as to those occasions he was uncertain as to the date. All the other witnesses admit that they heard the bells ring, but claim they did not ring loud enough. As against that,

the assistant engineer, whose business it is to instal bells of this kind and to observe their operation, not only at this crossing, but at numerous other crossings, said that the bell was standard and that no complaint had ever been made that the bell did not ring loud enough; and that in fact, in towns, many of the bells had to be "muffled" because people complained that they were kept awake (p. 61, ll. 1-10). He further said he had heard the bells in question ring when riding by on a train with the doors and windows closed (p. 61, ll. 20-40). The train at that time was making "the ordinary rattle" (p. 62, ll. 1-10; p. 68, l. 10). The assistant superintendent of the Railroad also said that he had noticed these bells ring as he stood on the rear of a train passing over the crossing (p. 74, l. 40 to p. 75, l. 5).

B. Crossing of Greenwood Lake Branch.

(1) (*a*) *Highway Traffic.*

The records of Roden and White did not specify which observations were made at the Newark Branch and which were made at the Greenwood Lake Branch. If we assume that their record is intended to apply to the Greenwood Lake Branch, then the same remarks apply as in the discussion of the highway traffic at the Newark Branch, as hereinbefore stated.

(1) (*b*) *Railroad Traffic.*

Exhibit P-3 contains extracts of time table of trains using the Greenwood Lake Division. By reference to same it will be seen that on week days there are 24 westbound trains between 7:24 A. M. and 12:45 A. M. of the following day. This number is arrived at by excluding certain trains (4 in number) which run on Saturday only; but as three of the trains that run on other days do not run on Saturdays, it will be seen that the traffic is practically the same on Saturday as

on other week days. The same exhibit shows that the number of eastbound trains is 25. Several of these trains in each direction are cut out on certain holidays.

On Sundays there are 13 westbound trains and 12 eastbound trains. These trains run at infrequent intervals except the westbound trains between about 4 and 7 P. M., and eastbound trains between about 7 and 9 A. M. There is nothing unusual or extraordinary about the railroad traffic which indicates that this crossing is so dangerous as to require extraordinary precautions.

(2) *Physical Conditions.*

By reference to map, Exhibit R-3—blue print entitled "Greenwood Lake Division, views and sights on Belleville Turnpike, 1 mile east of Arlington, N. J.," it will be seen that observations made in the center line of the highways at points varying from 5 up to 100 feet from the nearest rail in each direction give a clear view of 5,000 feet. So far as the extent of the view and the other physical conditions are concerned, the crossing is similar to the Newark Branch; as in the latter case, the assistant engineer said that the view was only limited to one's vision (p. 57, ll. 1-10). The Board in its report and the witnesses who testified, made no distinction between the two crossings so far as relates to the extent of the view; so that what has already been said in discussing conditions at the new Newark Branch applies equally to this crossing.

(3) *Accidents.*

As in the case of the Newark Branch crossing, the petitioner failed to produce any competent evidence of accidents at this crossing. Roden referred to an accident on October 18, 1913, to a wagon of Siegel-Cooper Company (p. 25, l. 8), but he admitted that he did not see it and knew

nothing of the details of it (p. 31, ll. 1-10). The same accident was mentioned by Chief Tolen and Officer Magee, and both of them admitted that they knew nothing about it except from the police records (p. 48, l. 25, to p. 49, l. 40; p. 50, ll. 1-15). If competent evidence as to the circumstances of this accident had been introduced, then the Company would have been in position to show the real course of it, namely, that the driver had fallen asleep on the seat of the wagon.

The witness White referred to an accident on January 31, 1914, to one Lurch, but he did not see the accident. According to his statement he found the automobile ditched about fifty feet north of the track. Apparently the accident did not happen by reason of any collision, but simply because the driver of the automobile was going so fast that he had to drive into the ditch to avoid a collision (p. 35, ll. 35-40). The witness admitted that he personally knew nothing about the accident or how fast Lurch was driving the auto (p. 39, l. 20).

As in the case of the Newark Branch crossing, the number of accidents at this crossing likewise drops to two, and even as to them there is no competent evidence of the circumstances, or any proof that they were in any way due to the lack of proper protection at the crossing.

(4) *Existing Protection.*

The protection at this crossing is the same as at the crossing of the Newark Branch, and the same testimony applies, except that one witness, Mr. Armstrong, in his testimony made a distinction between the two crossings. He made tests of both crossings in both cases and he heard the crossing bells ring; he said that on the Newark Branch the bells rang from 48 to 50 seconds, and on the Greenwood Lake Division they rang from 45 to 50 seconds before the train reached the crossing (pp. 42, 43).

We, therefore, submit that the existing protection at both of these crossings was amply sufficient, and that there was no evidence before the Board to justify an order that the additional protection specified by the Board should be provided whether the question be considered from the standpoint of the nature and extent of the traffic or the physical conditions, or the probability of accidents. It follows that there was no evidence upon which the Supreme Court was justified in doing otherwise than setting aside *in toto* the order of the Board.

If it be claimed that highway travelers at night cannot readily distinguish the light of a locomotive from other lights (as asserted in the Board's report, p. 6, ll. 1-5), the first answer is that both the highway and the railroad traffic at night, is trifling—there only being from three to five automobiles per hour after 7 o'clock in the evening; and only 3 westbound trains and 4 eastbound trains on weekdays, and 2 westbound and 3 eastbound on Sundays on the Newark Branch; and 6 westbound and 4 eastbound on week days, and 5 westbound and 4 eastbound on Sundays, on the Greenwood Lake Branch.

Moreover, these lights are stationary (p. 52, l. 20). A highway traveler in the exercise of reasonable care is bound to observe the difference between lights that are moving and lights that are stationary.

In *Hoopes v. West Jersey, etc., R. R.,* 65 N. J. L., 89, the Supreme Court said:

> "That there was a headlight upon the engine is undisputed, and that this headlight was nat stationary, but was moving toward the crossing, is demonstrated by the happening of the accident. No other danger appears to have been present to distract his attention. His ears were practically useless as a means of warning him of the approach of

a train from the south, on account of the direction and force of the wind, and his eyes were his only efficient means of detecting it. Due care on his part, in the language of the Court of Errors and Appeals in the case of *Central Railroad Co. v. Smalley,* 32 Vroom, 277, required him to so use his eyes 'as to make looking reasonably effective,' under the existing circumstances. If he had done this, he would readily have observed what was a fact, namely, that instead of all the lights which he saw when looking to the south, being stationary, as he thought, one of them was in reality moving toward the crossing. If he had observed this, then ordinary prudence required that he should have waited before attempting to drive over the track, until either the moving light had passed beyond the crossing, or until he had satisfied himself that it was not the headlight of an oncoming train. His failure to detect what careful observation would undoubtedly have disclosed was just as much the result of negligence on his part, as if he had observed the moving light coming toward the crossing, and then had pursued his way, without first taking the precaution to determine if it indicated the approach of a train."

It must also be remembered that under the law of this State laying down the respective rights and duties of highway travelers and railroad companies at grade crossings, there is no obligation upon the companies to take extraordinary care at these crossings in addition to those specified by the Railroad Law, to wit, the ringing of the bell and the blowing of the whistle, except in those cases where the crossing is extra hazardous and such condition has been created by the Company. The leading case is *Pennsylvania R. R. Co. v. Matthews,* 36 N. J. L., 531. There the court charged the jury as follows (italics ours):

"There is no general rule of law by which a railroad company is bound to place a flagman at a particular crossing, and it is only

where, by the configuration of the country, that is, the situation of the adjoining land with respect to the railroad, or *where the travel is so constant and frequent over the railroad,* that the use of ordinary signals would fail to give reasonable notice to the public having occasion to cross the track, that the company is bound to place a flagman at the crossing."

This charge was approved by the Court of Errors and Appeals, the court saying:

"The question is, not whether this enunciation of legal principles is, in the abstract, correct in all its propositions, but whether it is so with respect to the precise legal principle involved in the case then in the course of trial. In this narrow aspect, the rule laid down was this, that if that particular place was so peculiarly dangerous, that prudent persons could not use the public road in safety, unless the company employed a flagman or other extraordinary means to signal the approach of their trains, that then, in such event, it was incumbent on them to employ such extraordinary means. And this proposition seems to me to be, in its application to the case then trying, in all respects correct. It is, in fact, nothing more than saying that a railroad company cannot by the mode in which they choose to construct their road, and its appendant buildings render a public road impassible. * * * *Under usual circumstances, in the open country they can run as many trains, and at as great a rate of speed, as are consistent with the safety of their passengers. They are not called on to keep flagmen, under ordinary circumstances, at cross-roads, nor to give any other notice of the approach of their trains than those signals that are prescribed by statute.* * * * The Companies may by their own conduct, impose such burthens on themselves. If one of them chooses to build its track in such a mode as to unnecessarily make the use of a public road which it crosses, greatly dangerous, I think such com-

pany, by its own action, must be held to have assumed the obligation of compensating the public for safeguards. The reasonable and indispensable implication is, that the railway is to be constructed so as not necessarily to interfere with the safe use of the public roads; and if a railroad, for its own convenience, curves its track as it leaves a deep cut, within a few feet of a highway and also sees fit to put up buildings close along such track and by these means or either of them, heightening the danger in the use of such highway, such company must be held to have taken upon itself the duty of averting such danger, by the employment of every reasonable precaution within its power. * * * If the track is put in a position where the trains, when close to their transit over a public street or road, cannot be seen, this is an extra danger which calls for more than the ordinary precautionary signals."

In that case, the highway crossed the tracks a short distance from a deep cut which shut out from view the engine and the cars and just before the tracks intersected the road they took a sharp curve. A person standing at the point of intersection could not see along the track into the cut. There were two small buildings between the mouth of the cut and the road, so placed as to obstruct the sight of a person who approached close to the place of intersection. The buildings belonged to the railroad. A flagman was usually there, but at the time of the accident, he happened to be away.

Other cases in New Jersey in which the same principles have been applied under varying circumstances, are the following:

D. L. & W. R. R. v. Toffey, 38 N. J. L., 525;

N. Y., L. E. & W. R. R. v. Ramdell, 47 N. J. L., 144;

N. Y., L. E. & W. R. R. v. Leaman, 54 N. J. L., 202;

D. L. & W. R. R. v. Shelton, 55 N. J. L., 342;
Hires v. Atlantic City R. R. Co., 66 N. J. L., 31;
Siracusa v. Atlantic City R. R. Co., 76 N. J. L., 660;
Danskin v. Pennsylvania R. R. Co., 76 N. J. L., 660;
Horandt v. Central R. Co. of N. J., 78 N. J. L., 190; 73 Atl., 93;
Jones v. Pennsylvania R. Co., 78 N. J. L., 571; 75 Atl., 907.

In *Danskin v. Pennsylvania R. R., supra,* this Court said:

> "There is nothing in the mere fact of the existence of brush or woods that renders a crossing so peculiarly dangerous that prudent persons cannot use the public road in safety. In fact, it is probable that such obstructions to the vision occur most frequently in the remoter districts, where trains are infrequent and travelers are few, and we doubt if it has ever been held that it was permissible for a jury to infer the existence of a duty to employ extraordinary precautions upon unfrequented roads merely beacuse of the existence of woods at the point of crossing."

A recent case on this subject is *Kyle v. L. V. R. R. Co.,* 81 N. J. L., 186, where the Supreme Court said:

> "The reasoning of the opinion in the Matthews case was as follows:
> "The Legislature of this state, having granted to railroad companies the right to cross public roads at grade and having prescribed the signals to be given when such crossings are approached, has subjected the public to the risks ordinarily attendant upon the exercise of the right so granted without other protection than that afforded by the signals so prescribed. The obvious presumption

upon which this legislation proceeds is that, if the signals prescribed by the statute are given, prudent persons can use the public roads in safety as far as the dangers ordinarily attendant upon the exercise of the right granted to the railroad company is concerned. This legislative scheme, therefore, does not purport to cover those cases in which the railroad company has created extraordinary dangers that increase the risk to the public beyond the point where prudent persons, if warned by audible signals, can use the public roads in safety. Hence a railroad company that brings about such a situation imposes upon itself the common-law duty of using reasonable care to protect the public from the dangers peculiar to such situation."

In *Grand Trunk Ry. Co. v. Ives,* 144 U. S., 408; 36 L. ed., 485, the Court said:

"It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves, or that the crossing is a much travelled one, and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle or confusion incident to railway or other business or by reason of some such like cause."

There can be no pretense in the present case that either of these two crossings is extra-hazardous within the meaning of the principles laid down in the foregoing cases; the views at both of them are unobstructed in all directions as far as the eye can see—except for the growth of cat-tails at certain seasons of the year, and these are not

high enough to cut off the sight of approaching trains. There is no claim that any of the cattails grow on the railroad right of way, or that the company can be held responsible for them, even admitting, for the sake of argument, that they do at times partially obstruct the view. Before the order under review was made, both crossings were better protected than other similar crossings. We submit that the judgment of the Supreme Court and the order of the Board were not supported by any evidence. The judgment should therefore be reversed and the order of the Board be set aside.

III.

The statute under which the order under review was made is unconstitutional so far as it deprives the Court of Chancery of its exclusive jurisdiction over the regulation of the use of easements.

The order is based upon Section 22, of the Act Concerning Public Utilities (Chap. 95, Laws of 1911) as amended by Chap. 80, Laws of 1912. This reads as follows:

> "22. Whenever it appears to the board that a public highway and a railroad cross one another or that a public highway and a street railway cross one another or that a railroad and a street railway cross one another at the same level, and that conditions at such grade crossing make it necessary for the protection of the traveling public at such grade crossing that gates be erected or that some other reasonable provision for the protection of the traveling public at such grade crossing should be adopted, the board may order and direct such railroad company or such street railway company, or either or both of them to install such protective device or de-

vices or adopt such other reasonable provision for the protection of the traveling public at such crossing as in the discretion of the board shall be necessary, or whenever it shall appear to the board that ingress or egress to any railroad station shall be obstructed by its tracks, trains, or engines, or the tracks, trains or engines of any other railroad company in such a way as to endanger the traveling public, the board shall have power to order the construction or erection of a subway or other protective device in order to afford safe ingress and egress to such railroad station, upon such terms as may appear reasonable to said board."

It will be seen that this section provides for three cases in which the Board of Public Utility Commissioners 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; and (c) when ingress or egress to any railroad station is obstructed by its tracks, trains or engines, or the tracks, trains or engines of any other railroad company.

The section is obviously intended to give to the Board of Public Utility Commissioners power to regulate easements in certain specified cases. That power, we submit, infringes upon the constitutional power of the Court of Chancery.

It is familiar law in New Jersey that the fee of a public highway remains in the abutting owners, and the public has an easement therein, the title of the abutters extending to the middle of the street.

Montclair Military Academy v. North Jersey R. Co., 65 N. J. L., 328;
Friedman v. Snare, etc., Co., 71 N. J. L., 665;
City of Bayonne v. North Arlington, 77 N. J. Eq., 166; 78 N. J. Eq., 283;

Sea Isle City Realty So. v. Lea City, 79 N. J. L., 459; 28 Cyc., 845.

Hence the regulation of the method of protection at grade crossings of a public highway and a railroad is necessarily a regulation of an easement.

We submit that under the Constitution the Court of Chancery has exclusive jurisdiction of the regulation of conflicting easements. This point was expressly ruled in *West Jersey R. Co. v. Atlantic City, etc., Traction Co.,* 65 N. J. Eq., 613. In that case a bill for injunction was filed by a railroad company to restrain a street railway company from crossing its tracks at grade—the right to cross being claimed under an ordinance passed by Atlantic City. It was claimed on behalf of the street railway company that it had a franchise from the State by which it was authorized to cross the railroad tracks at grade, that the City had the right by its charter to regulate grade crossings, and that inasmuch as the City had passed an ordinance prescribing the mode of crossing, that mode, even if it injured or impaired the enjoyment of easements of other parties at the same place, is exclusive, and that the Court of Chancery had no jurisdiction to alter or change the mode prescribed by the city. On this point the Court of Chancery said (italics ours):

> "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 had 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,' &c.

"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.

"This 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 and 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."

Other examples of cases where the Court of Chancery has exercised its general jurisdiction in regulating the enjoyment of conflicting easements are:

National Docks R. Co. v. P. R. R., 54 N. J. Eq., 142; 55 N. J. Eq., 569, at 584;

Jersey City H. & P. Ry. Co. v. New York, &c. R. R. Co., 62 N. J. Eq., 390;

City of Newark v. Central R. R., 73 N. J. Eq., 469.

Another recent illustration of the exercise of this jurisdiction is *Hudson County v. Central R. R. Co.*, 68 N. J. Eq., 500. This was a bill filed in the Court of Chancery by the Freeholders of Hudson County against the Railroad Company and others who obtained an injunction against the company, restraining it from entering upon the Hudson Boulevard at a certain point in the City of Bayonne and laying railroad tracks thereon. The Railroad Company in its answer, among other things agreed to have the Court fix and determine the rights of the parties, concerning the construction of the railroad. The case resulted in a final decree permitting the construction of a grade crossing, and specifying the kind of rails, pavement, construction, and the character of signals, safety gates and derailing switches. In the course of his opinion Garrison, V. C., said:

"If my conclusions are sound, it results in 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. We quote from p. 454, as follows:

"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."

See the same case on final hearing 75 N. J. Eq., 20; reversed as to certain points which do not affect the matter now under consideration, 76 N. J. Eq., 317.

So far as concerns street railways not within the limits of any city or town, the Railroad Law gives to the Chancellor power to determine the manner of crossing. (See P. L. 1895, p. 462; P. L. 1903, Sec. 32, p. 662; Comp. Stats. 1910, p. 4235, Sec. 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. See *Raritan River R. R. v. Middlesex & Somerset Traction Co.*, 70 N. J. L., 732, 739.

So far as relates to gates and flagmen at grade

crossings, the Railroad Law confers upon the Court of Chancery, the power to determine what protection of the crossing is reasonable and necessary. This applies to a crossing in any township or municipality. (See P. L. 1898, p. 110; P. L. 1903, Sec. 36, p. 664; Comp. Stats. 1910, p. 4237, Sec. 36.)

This statute has been held to be constitutional as against a claim that the powers thereby conferred upon the Court of Chancery intruded upon those that inherently belong to the Supreme Court.

Palmyra v. Pennsylvania R. R., 62 N. J. Eq., 601; affirmed, 63 N. J. Eq., 799.

It has also been held constitutional as against a claim that it conferred upon the judiciary, powers that belong to the legislative department of government.

Eckert v. Perth Amboy, etc., R. R. Co., 65 N. J. Eq., 77; 66 N. J. Eq., 437.

In the *Palmyra* case, supra, the Court of Chancery in an opinion (which on appeal was adopted by the Court of Errors and Appeals), said:

> "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 intalling 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."

Under these decisions, we submit that the section of the statute under which the Board made this order is unconstitutional, in that it deprives the Court of Chancery of its exclusive power to regulate the use of conflicting easements; and the Board was therefore without jurisdiction to make the order under review, and the Supreme Court should have set the same aside upon this ground.

IV.

For each of the three reasons hereinbefore advanced, the judgment of the Supreme Court should be reversed and the order of the Board of Public Utility Commissioners be set aside *in toto*.

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Writ of Certiorari.

(Returnable, July 27, 1914.)

New Jersey, ss.:

(Seal.) The State of New Jersey to the Board of Public Utility Commissioners.

We being willing, for certain reasons, to be certified of a certain order of said board, dated June 9, 1914, in a matter wherein the Board of Chosen Freeholders of the County of Hudson was petitioner and Erie Railroad Company was respondent, relative to certain grade crossings of said Erie Railroad ompany on the highway known as the Belleville Turnpike, do command you that the said order, together with the testimony taken before said board, and all other proceedings of said board concerning the same as fully and entirely as before you they remain, or in your custody and control, you do certify and send, together with this writ, to our Judges of our Supreme Court at Trenton, on the twenty-seventh day of July, 1914, that we may cause to be done thereupon what of right and according to law ought to be done.

Witness, William S. Gunmere, Chief Justice of our Supreme Court, at Trenton, the seventh day of July, 1914.

WM. C. GEBHARDT,
Clerk.

COLLINS & CORBIN,
Attorneys.

Allocatur.

I allow this writ. Let it be sealed.

F. J. SWAYZE.

Dated, July 7th, 1914.

Return.

(Filed, July 21, 1914.)

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF JUDICATURE OF NEW JERSEY:

The Board of Public Utility Commissioners herewith sends to the Supreme Court of Judicature of the State of New Jersey a certain order made by said Board the ninth day of June, one thousand nine hundred and fourteen, together with the record and proceedings before said Board, and all things touching and concerning the same, as fully and entirely as before said Board they remain, as it is within commanded.

IN WITNESS WHEREOF the seal of said Board is hereto affixed and certified by the subscriber.

ALFRED N. BARBER,

(Seal.) Secretary of the Board of Public Utility Commissioners of New Jersey.

Order.

(Filed, June 9, 1914.)

State of New Jersey.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

IN THE MATTER. *of* THE COMPLAINT OF THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY VS. ERIE RAILROAD COMPANY.	Order.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, The Board of Public Utility Commissioners

HEREBY ORDERS the Erie Railroad Company to keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and the track of the new Newark Branch of said company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours, and with a lighted lamp or lamps during the hours of darkness of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points.

Order.

The Board further ORDERS that no locomotive, car or train of cars shall pass over the Belleville Turnpike at the crossing of the turnpike and the old Newark Branch of the Erie Railroad Company at a greater speed than six miles per hour, and that before any locomotive, car or train of cars shall pass over said crossing a flagman shall precede said locomotive; or the end of the car, or train of cars, if the same are being backed to the crossing; to give warning of the movement over the same.

This order shall take effect July 1st, 1914.

Dated, June 9th, 1914.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
By
(Signed) Ralph W. E. Donges,
President.

(SEAL.)

ATTEST:

(Signed) Alfred N. Barber,
Secretary.

(SEAL.)

I HEREBY CERTIFY the foregoing to be a true copy of Order adopted by the Board of Public Utility Commissioners at a meeting held Tuesday, June 9th, 1914, and recorded in the minutes of said meeting.

ALFRED N. BARBER,
Secretary.

(Seal.)

Report.

(Filed, June 9, 1914.)

JOSEPH M. NOONAN, for Complainant.

T. H. BURGESS, for Respondent.

The Board of Chosen Freeholders of Hudson County filed a complaint alleging that crossings at grade of the tracks of the Erie Railroad Company, at points where the Belleville Turnpike crosses the old Newark Branch, the new Newark Branch and the Greenwood Lake Branch, in said county, are dangerous, and praying that the railroad company be required to furnish adequate protection at said crossings.

The respondent, in its answer, denied that protection other than that by bells, now in operation, was required.

Hearing on the issue joined was held at Chancery Chambers, Jersey City, on March 20th, 1914. Brief for the County was filed April 18th, 1914.

The testimony shows that the travel over the Belleville Turnpike is heavy. A census taken by the County authorities shows that, on Sunday, December 14th, 1913, 752 vehicles passed over these crossings. Witnesses testified that the number would be very considerably increased during the summer months.

The testimony further showed that although the view of approaching trains was not obstructed by buildings, the territory not being built up along the line of the railroad tracks for more than a mile in either direction, view of trains was obstructed by the growth of cat-tails and other rank growth. It was testified to by witnesses that only the tops of cars approaching the crossing could be seen and that one would not be put on his guard unless the location of the tracks was known by the

person approaching on the highway. It further appeared that a traveler would not be able to readily distinguish the light on an approaching locomotive from the many lights on both sides of the road at various points. While it is true that the country is open, the presence of these things renders crossings used as frequently as these are too hazardous for protection by bell and signs only and requires that some additional measures be taken to warn travelers of the approach of trains at the crossings of Belleville Turnpike over the new Newark Branch and the Greenwood Lake Branch.

As a result of the testimony adduced the Board is of the opinion and therefore finds and determines that in addition to such protection as has been installed, the crossing over the Newark Branch, located approximately 4598 feet from the junction of the Newark Turnpike and said Belleville Turnpike, and the crossing over the Greenwood Lake Branch, located approximately 7177 feet from said junction of roads, should be protected by flagmen on duty during the twenty-four hours of the day, to give warning of the approach of trains by flags during the day and lights during the night.

The testimony disclosed that the railroad company is not now using the tracks of the old Newark Branch. No protection will, therefore, be required at that point. The Board will, however, order that if any train movements are made over the Belleville Turnpike on that branch that such movements be at a speed not to exceed six miles per hour, and that a flagman precede the train over the crossing.

An Order in accordance with the views herein expressed will be entered.

Dated, June 9th, 1914.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
By

(Seal.) (Signed) Ralph W. E. Donges,
President.

ATTEST:

(Signed) Alfred N. Barber,
Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of Report, made and filed by the Board of Public Utility Commissioners, at a meeting held on Tuesday, June 9th, 1914.

ALFRED N. BARBER,
Secretary.

Petition.

(Filed, Jan. 29, 1914.)

TO THE HONORABLE BOARD OF PUBLIC UTILITY COMMISSIONERS:

GENTLEMEN:

Your petitioner, the Board of Chosen Freeholders of the County of Hudson, respectfully shows:

I. That the Belleville Turnpike, which is a county road and public highway, extends from the Newark Turnpike, in the County of Hudson and State of New Jersey, at a point commonly known as the Mosquito Tavern, in a northwesterly direction to the Passaic River where it terminates in the Town of Kearny, in the said County of Hudson; that said Belleville Turnpike is about four miles in length; that the said Belleville Turnpike, from its junction with the Newark Turnpike to Sawmill Creek—a distance of about three miles—lies wholly in Hudson County and from said Sawmill Creek to the Passaic River the median line of the turnpike is the dividing line between the Counties of Hudson and Bergen.

Petition.

II. That so much of the said Belleville Turnpike as lies within the County of Hudson was acquired by your petitioners in the year One thousand nine hundred and two and thereafter was widened and rebuilt and has ever since then been repaired and maintained at a very great expense by your petitioner.

III. That the said Belleville Turnpike is a Telford-Macadamed road with a bituminous binder, and is presently a much frequented highway used by all manner of vehicles as well as pedestrians, in very large numbers; which said vehicles and pedestrians are constantly passing in either direction on said turnpike during all hours of the day and night.

IV. That the said Belleville Turnpike, being as aforesaid a public highway, is crossed at three different points, at grade, by the Erie Railroad between its junction with the Newark Turnpike and Sawmill Creek, which part of the road lies wholly in Hudson County, to wit:

(a) By the Newark Branch of said railroad at a point about twelve hundred and thirty-three feet from the junction of the Newark turnpike;

(b) By the Newark Branch of the Erie Railroad, running through the town of Harrison, in the said County of Hudson, at a point about forty-five hundred and ninety-eight feet from the said last mentioned crossing; and

(c) By the Greenwood Lake Branch of the Erie Railroad to Arlington, at a point about twenty-five hundred and seventy-nine feet from the last mentioned crossing.

V. That none of these crossings is protected by gates, or other sufficient and reasonable provision for protection of the travelling public at such grade crossings, and that the only provision for

the protection of the traveling public, at each of said grade crossings, is a bell situated, in each instance, at the crossing and so constructed and operated as to afford no adequate protection to the traveling public on and along the said highway at said crossings.

VI. That the conditions, at each of said grade crossings, make it necessary for the adequate protection of the traveling public at such grade crossing that gates be erected, or that some other sufficient and reasonable provision, for the protection of the traveling public, at such grade crossing, should be adopted.

VII. That your petitioner has made several efforts to induce and cause the said Erie Railroad Company to establish gates at each of said crossings but that the said company has refused and neglected to provide said gates, or other adequate and reasonable provision, for the protection of the traveling public at such grade crossings.

VIII. Your petitioner further shows that in consequence of the lack of such provision there have been a number of fatal accidents within the past few months at one or another of said crossings entailing loss of human life and damage to property.

IX. Your petitioner therefore humbly prays that your Honorable Board order and direct the said Erie Railroad Company to install gates or such other protective device or devices for the protection of the traveling public, at such grade crossings, as in the discretion of your Board shall be necessary.

And your petitioner will ever pray, &c.

All of which is very respectfully submitted on behalf of the said petitioner by the undersigned acting as counsel for the said petitioner.

Dated, January 26th, 1914.

(Signed) (JOS. M. NOONAN,
Counsel with Petitioner.

Answer.

(Filed, Feb. 13, 1914.)

The Erie Railroad Company, for its answer to the petition in the above entitled matter, respectfully shows:

First: It alleges that the grade crossing of the Belleville Turnpike over the Newark Branch of the Erie Railroad, located at a point about 1233 feet from the junction of the Newark Turnpike with the said Belleville Turnpike, needs no protection for the reason that the tracks of the Newark Branch which cross the Belleville Turnpike at this point are not used.

Second: That the other crossings of the Belleville Turnpike referred to in said petition have been recently protected by the installation of crossing alarm bells, two bells located at each crossing, one on each side of the track a distance of 100 feet along the highway from the right of way of the Railroad Company; that signs have also been erected on the right of way side of the highway at the approach to each of these crossings, reading, "Railroad Crossing 500 Feet"; that formerly these two crossings were each protected by a single bell located at the crossing; that, so far as this respondent is informed, no accidents have occurred at either of these crossings since the installation of this double bell and sign protection; that this respondent believes that, with the devices now installed at these grade crossings, there will be ample protection to the highway traveller, and that a fair test should be given the present method of protection before any requirement is made that gates should be installed or any other protective device located at these crossings.

Dated, New York, N. Y., February 11th, 1914.

ERIE RAILROAD COMPANY,
By A. J. Stone,
General Manager.

T. H. BURGESS,
Attorney for Erie R. R. Co.,
50 Church St.,
New York City.

Reply.

(Filed, Feb. 26, 1914.)

The petitioner, the Board of Chosen Freeholders of the County of Hudson, replies to the answer of the respondent as follows:

First: To the first allegation of the respondent "that the grade crossing of the Belleville Turnpike over the Newark Branch of the Erie Railroad, located at a point about 1233 feet from the junction of the Newark Turnpike with said Belleville Turnpike, needs no protection for the reason that the tracks of the Newark Branch which cross the Belleville Turnpike at this point are not used," the petitioner, replying, says that if it be a fact that the tracks of the Newark Branch of the Erie Railroad which cross the Belleville Turnpike at the point above indicated are not used, it is equally a fact that these tracks may at any time be used by the said respondent and that, therefore, the said respondent should be required and directed either to remove its tracks at this crossing from the Turnpike, or to install the same devices at said crossing for the protection of the traveling public as at its other crossings over the said Belleville Turnpike.

Second: To the second allegation of the respondent "that the other crossings of the Belleville Turnpike referred to in said petition have been recently protected by the installation of crossing alarm bells, two bells located at each crossing, one on each side of the track, a distance of 100 feet along the highway from the right of way of

the Railroad Company; that signs have also been erected on the right of way side of the highway at the approach to each of these crossings, reading, 'Railroad Crossing 500 Feet,' the petitioner replying, says that it believes that these alleged precautions have been taken by the respondent; but the petition avers that these precautions are entirely inadequate for the reasonable and proper protection of the traveling public along said highway, whether by day or by night; that the public are entitled to protection at these crossings by the installation and use of the most modern and efficient methods; and that the 'crossing alarm bells' and the signs, referred to by the respondent, do not constitute or afford the most modern and efficient methods of protection.

Third: To that part of its second allegation of its answer in which the respondent says "that formerly those two crossings were each protected by a single bell located at the crossing; that so far as this respondent is informed, no accidents have occurred at either of these crossings since the installation of this double bell and sign protection; that this respondent believes that with the devices now installed at these grade crossings there will be ample protection to the highway traveller, and that a fair test should be given the present method of protection before any requirement is made that gates should be installed or any other protective device located at these crossings," your petitioner, replying, says (a) that it is true that "formerly these two crossings were each protected by a single bell located at the crossing," (b) that "no accidents have occurred at either of these crossings, since the installation of this double bell and sign protection" but that said protection was installed only "recently" preceding January twenty-ninth, Nineteen hundred and fourteen; (c) that it may

be true that the "respondent believes that, with the devices now installed at these crossings there will be ample protection to the highway traveller" but neither your honorable Board nor the petitioner is concerned with what "this respondent believes" about this matter, especially in view of the fact that the respondent, by its action when "formerly these two crossings were each protected by a single bell located at the crossing" professed to believe that with those devices there was "ample protection to the highway traveller" although, as a matter of fact, those antiquated methods afforded no protection at all and the respondent's professed belief that they would furnish such protection was absolutely and calamitously contradicted by great loss of human life and damage to persons and property.

Fourth: That to the concluding suggestion in the answer of the respondent "that a fair test should be given the present method of protection before any requirement is made that gates should be installed or any other protective devise located at these crossings" the petitioner, replying, says that it cannot accept this invitation to experiment with human life in the manner suggested by the respondent.

Fifth: Your petitioner further says in reply to the answer of your respondent that the said answer is admission that there are more secure, modern and effective methods of protecting these crossings than the methods that are now installed and used at said crossings; that the respondent owes it as a duty to the public to install such modern and effective methods; and that the public is entitled of right to have such methods installed; that it is no answer to this contention to assert, as the respondent does, that your petitioner should be con-

tent with concededly inferior and manifestly inadequate methods until such time as a catastrophe, or a serious of catastrophies, may prove their inadequacy and inefficiency.

Sixth: Your petitioner therefore prays that its petition heretofore presented may be granted by requiring the respondent to establish at either side of each of its several crossings, over the Belleville Turnpike, a gate served by a gate-tender and in addition thereto, at night, a luminous sign warning travellers of the proximity of the crossing, or a conspicuous red light on either side of each of said crossings of sufficient power to be visible at least a thousand feet from said crossings.

And your petitioner will ever pray, etc.

Jos. M. Noonan,
THE BOARD OF FREEHOLDERS
OF THE COUNTY OF HUDSON,
By
Joseph M. Noonan, its Counsel.

Testimony.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
Jersey City, N. J., Friday, March 20, 1914.

BOARD OF CHOSEN FREEHOLDERS,
COUNTY OF HUDSON,

vs.

ERIE RAILROAD COMPANY.

Before:

COMMISSIONER THOMAS HILLERY.

For Petitioner appears J. M. Noonan, Esq.;

For Respondent appears T. H. Burgess, Esq.

MR. NOONAN: May it please Your Honor, this matter comes up on the petition of the Board of Chosen Freeholders of the County of Hudson to require the Erie Railroad Company to establish gates and a proper system of protection for the traveling public of the Belleville Turnpike. They have three crossings there; originally these crossings were protected—(I hand your Honor a sketch of the situation: I think the distances are marked on that sketch)—they were protected by bells, each of them stationed at the crossing. The result of that, of course, was an inadequate method of protecting the public. There were a number of casualties there, a number of persons killed and wagons and other vehicles were damaged and the Board of Chosen Freeholders filed the petition which is here in connection with a general public complaint

of persons using that highway of the insufficiency of the protection. After the petition was filed the Railroad Company installed a slightly different system; they established bells on either side of each crossing at one hundred feet from the crossing and a sign five hundred feet from the crossing and a post containing a square board with a painted inscription: "Look out for the railroad," something of that kind. Of course, this sign is of no use at all at night time. We shall endeavor to show your Honor that the bells is of practically no use in the night time or day time. The answer to the petition admits that these are not the best and not the modern precautions taken at such a road with such traffic, but they suggest we might give the present system a test, as they call it, before being called upon to furnish modern and up-to-date appliances. Our petition is that they be required to establish gates, a gate on each side of each crossing, these gates served by a man and set up a luminous sign of a conspicuous red light visible at least one thousand feet from the crossing. I will undertake to prove now these bells are really of no avail. Of course, a man going along in an automobile, or other vehicle, looking for a bell, he would probably find this bell, but if he were running along the road at an ordinary rate of speed, anticipating nothing in the way of an obstruction, a railroad crossing or anything else, without receiving proper notice, he would never catch these bells, or not until too late. They are only one hundred feet from the crossing and he would catch the bell immediately after he passed and it is

almost impossible to avoid an accident. We took a census of it, but I wish to call Your Honor's attention to the fact the census was taken in December when the traffic was only about twenty per cent. of what it is in the summer, spring and fall.

CHARLES R. MOHN, sworn on behalf of petitioner.

DIRECT EXAMINATION BY MR. NOONAN:

Q. Where are you employed? A. At the Court House, Hudson County, Jersey. City.

Q. In the civil engineer's office? A. Yes, sir.

Q. You are a draftsman and engineer? A. Yes, sir.

Q. I call your attention to this sketch and ask you if that sketch is made by you. A. It is a print of the sketch made by me.

Q. You made the original? A. I made the original.

Q. This print is a copy? A. I didn't print this copy. It is a print.

Q. Have you the original with you? A. Yes, sir.

Q. Just produce the original, please. A. (Complies).

Q. Is that a fac-simile of the other one, the printed one? A. Yes, sir.

Q. It shows the distances of the crossing? A. Yes, sir. The original one has got the crossing in lead pencil.

Q. Does it show the distances as the print does? A. Yes. It shows the scaled distances.

Q. The distances in feet of the first crossing from the Newark Turnpike? A. Yes.

Q. The same figure as on the sketch? A. Yes, sir.

COMMISSIONER HILLERY: The difference

being that on the original map the distances are marked in lead pencil, while on the print they are made from the one marked?

WITNESS: The map is drawn to scale, that scale is the same thing.

COMMISSIONER HILLERY: The scale is marked on the map?

WITNESS: No, sir.

Q. It is scaled on the original? A. Yes, in lead pencil.

MR. NOONAN: We offer the original.

COMMISSIONER HILLERY: No objections?

MR. BURGESS: No, I think not.

(Same is marked Ex. P-1.)

MR. SOMMER: What is the scale to which the map is drawn?

WITNESS: One thousand feet to the inch.

MR. BURGESS: You didn't take the views at these crossings; you didn't ascertain how far you could see at either one of thse crossings along the right of way of the railroad?

WITNESS: No. I have travelled on the road, though.

Q. Will you state how near to the Newark Turnpike is the first track crossing the Belleville Turnpike? A. 1233 feet.

Q. What do they call that track of the Erie? A. That is the Erie Railroad, Newark Branch.

Q. How far is the second crossing of the Belleville Turnpike from the first crossing? A. That is the Newark branch; that is 4598 feet.

Q. From the first crossing from the Newark Turnpike? A. Yes, sir.

Q. How far is the third crossing from the second crossing over the Belleville Turnpike? A. The third crossing, which is the Greenwood Lake Branch, is 2579 feet from the Newark branch; that is the Newark branch A, second crossing.

Q. Do you know anything about the use of those tracks? A. Well, I know the Newark branch; that is, the first one from the Newark Turnpike, I believe that is abandoned. They didn't use it as much as they do the other two.

Q. The tracks are drawn on that first one though? A. Yes.

CROSS EXAMINATION BY MR. BURGESS:

Q. Do you know whether that first crossing, which you have spoken of as Newark Branch A, is used at all for train movement? A. Yes, sir.

Q. You do know it is? A. Yes.

Q. Have you seen trains move over the crossing located 1233 feet from the Newark Turnpike crossing the Belleville Turnpike at the time you took this map? A. Not at the time I drew the map, no sir.

Q. When did you ever observe train movement over that crossing? A. About one year ago.

Q. What day? A. It was in the morning, around half past eight.

Q. What kind of a train moved over that crossing? A. It was a freight car, sort of a coal car.

Q. Was there an engine attached to the coal car? A. Surely, yes, sir.

Q. Just one car? A. Yes, sir.

Q. In which direction was it moving, towards Jersey City or away from Jersey City? A. Away from Jersey City.

Q. You are sure it was over that first crossing? A. Yes, sir.

Q. You are absolutely confident of that? A. Yes, sir.

Q. Where were you when you observed the movement? A. I was on the Newark Turnpike.

Q. You were not on the Belleville Turnpike at the time? A. No, sir.

Q. How far were you from the crossing? A. About 1200 feet, 1233 feet; I was about at the intersection of the two roads.

Q. Was anyone with you at the time? A. No, sir.

RE-DIRECT EXAMINATION BY MR. NOONAN:

Q. Have you traversed the entire length of that Belleville Turnpike? A. Yes, sir.

Q. You know it runs up from the Newark Turnpike in Hudson County to the Bergen County line, don't you? A. Yes, sir.

Q. And from the point where it comes into contact with Bergen County it continues to the Passaic River? A. To the Passaic River, yes, sir.

Q. The medium line of the roads contact to the Passaic River is the dividing line between the counties of Hudson and Bergen? A. Yes, sir.

Q. Do you know the Board of Freeholders is about to build a bridge connecting the end of it just at the boundary line between Bergen and Hudson Counties, with the Essex County side of the River? A. Yes, sir.

Q. So that it will be a thoroughfare of great traffic when that bridge is finished? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. BURGESS:

Q. How far toward Jersey City do those tracks of the Newark Branch A extend? A. How far?

Q. Toward Jersey City from this crossing? A. Well, I don't know the exact distance.

Q. They don't run all the way to Jersey City? A. That is, branch A?

Q. Yes, Branch A, 1233 feet from the intersection of the two turnpikes? A. You mean Newark Branch A don't run through to Jersey City?

Q. No, I mean how far do the tracks run without any interruption to the tracks? A. I don't know.

Q. Isn't there a bridge out there about half a mile to the east? A. Well, there must be a bridge to get over the Hackensack River.

Q. You don't know whether there is a bridge or not; whether there is a bridge there or not? A. I don't know.

CHARLES F. RODEN sworn on behalf of Petitioner.

DIRECT EXAMINATION BY MR. NOONAN:

Q. Where are you employed? A. The State Road Department.

Q. How long have you been so employed? A. Going on three years.

Q. Where are you assigned to duty? A. The Newark Turnpike and Belleville Turnpike.

Q. The Belleville Turnpike? A. I was on the Belleville Turnpike. We have a new inspector there now.

Q. At the direction of the County Engineer of Hudson County, did you make a census of the traffic on the Belleville Turnpike? A. Yes, sir.

Q. Have you got your figures with you? A. Yes, sir.

Q. When did you begin to take your census? A. Wednesday, December 10th, at three o'clock.

Q. How long did you continue it? A. Till Monday, the fifteenth.

Q. Taking it daily? A. Yes, sir.

Q. Of all the traffic over the Belleville Turnpike during those days? A. I had to take it from three to twelve P. M.

Q. Then somebody else took it after you went off? A. No, sir. Another man took it from 6:00 in the morning till three.

Q. You took it from 3 in the afternoon until 12 midnight? A. Yes, sir.

COMMISSIONER HILLERY: Did you state the year?

WITNESS: 1913.

Q. Will you please read your census report? A. Wednesday, December 10, 1913, three P. M. to four P. M., single vehicles, one; passenger autos, seven; total, eight in that hour. Four to five P. M., three road teams, eighteen passenger motors and three commercial motors. From five to six, one single team (one single wagon), two loaded teams, twenty-two passenger autos, one commercial. Six to seven P. M., one loaded team, fifteen passenger autos. Seven to eight P. M., one loaded team, one passenger auto. Eight to nine, P. M., five passenger autos, one commercial. Nine to ten P. M., one passenger auto; ten to eleven P. M., one passenger auto; 11 to 12 P. M., two loaded teams, six motor autos. That is all on the Tenth. You want them all?

Q. Yes, I wish all you have got. A. Thursday December 11, 1913, 3 to 12 P. M.; 3 to 4 P. M., ten passenger autos, two commercial trucks; 4 to 5 P. M., one single, twelve passenger autos, three commercial; 5 to 6 P. M., two loaded teams, seventeen passenger autos, two commercial; 6 to 7 P. M., ten passenger, two commercial; 7 to 8 P. M., two loaded teams, five passenger autos, one commercial; 8 to 9 P. M., 4 passenger autos, one commercial; 9 to 10 P. M., five passenger autos; ten to eleven P. M., three passenger autos; 11 to 12 P. M., two loaded teams, two passenger autos. The twelfth, 1913; three to four P. M., two singles, one loaded team, five passengers, two commercial.

Q. Five passenger automobiles? A. Yes. I thought maybe cutting the name on those, I would

try to hurry it up a little. Five to six P. M., two single horse wagons, one team loaded, one empty and three loaded; that is, teams. Seventeen passenger autos, four commercial trucks; 7 to 8 P. M., two loaded wagons, one loaded team, eight passenger autos, four commercial autos; 7 to 8 P. M., one loaded team, three passenger autos, one commercial; 8 to 9 P. M., one loaded team, three passenger autos; 9 to 10 P. M., four passenger autos, two commercial; ten to eleven P. M., two passenger autos, one commercial; 11 to 12 P. M., one passenger.

Q. What do you mean by one passenger, do you mean one pedestrian? A. That is a touring car.

Q. Then say a car. A. I might state on the tenth day I had eleven pedestrians, on that day, on the eleventh eight pedestrians, on the twelfth three pedestrians.

COMMISSIONER HILLERY: Covering the whole period you watched?

WITNESS: Yes, sir.

The thirteenth, 1913: 3 to 4 P. M., twenty-eight passenger autos, two commercial; 4 to 5 P. M., one loaded team, forty-five passenger autos, three commercial; 5 to 6 P. M., one single wagon, three loaded teams, forty-eight passenger autos; 6 to 7 P. M., nineteen passenger autos; 7 to 8 P. M., eight passenger autos; 8 to 9 P. M., two passenger autos, one commercial; 9 to 10 P. M., ten passenger autos; 10 to 11 P. M., five passenger autos; 11 to 12 P. M., one passenger auto.

Sunday, December 14, 1913: 3 to 4 P. M., two singles, those were carriages, they are not wagons, carriages. 120 passenger autos. 4 to 5 P. M., two single carriages; 105 passenger autos; 5 to 6 P. M., one single car-

riage, 88 passenger autos; 6 to 7 P. M., twenty-five passenger autos; 7 to 8 P. M., fourteen passenger autos; 8 to 9 P. M., thirty-one passenger autos; 9 to 10 P. M., sixteen passenger autos; 10 to 11 P. M., eleven passenger autos; 11 to 11:30, four passengers.

Monday, December 15, 1913: 2 single wagons, two loaded wagons, fifteen passengers, two commercial; 4 to 5 P. M., one loaded team, 11 passenger autos, one commercial; 5 to 6 P. M., one single, eighteen passenger autos; 6 to 7 P. M., two loaded teams, eleven passenger autos; two commercial. 7 to 8 P. M., four passenger autos; 8 to 9 P. M., five passenger autos; 9 to 10 P. M., six passenger autos; 10 to 11 P. M., two passenger autos.

Q. Have you got that totalized? A. Yes, sir.

Q. Perhaps you better read your totals. I don't mean the total for each day, but the grand total. For instance, what would be the total number in six days? A. This may tell you, 945 for the fifty-three hours.

Q. That is the whole period covered by your inspection? A. Yes, fifty-three hours.

Q. Go on. A. What else do you wish?

Q. What were those 943? A. That is the whole amount.

Q. You mean all kinds of vehicles? A Yes, 945 vehicles; that includes motor cycles.

Q. Now, Mr. Roden, you remember an accident that occurred there at one of those crossings a year ago last Christmas about that time? A. Yes, there was a farmer struck there, a commercial auto truck about that time.

Q. What was the result? A. It drove the man across the road, hit the tail end and drove it across

the road, split a pole and had the pole leaning over the road; it didn't allow of moving, I imagine, the pole being across the road—

Q. Was anybody hurt? A. No, I believe the chauffeur jumped off.

Q. October 18th, 1913, you remember an accident to a wagon of Siegel & Cooper's? A. Yes, sir.

Q. What was that? A. A driver was killed and two horses killed.

Q. At which crossing? A. The Greenwood Lake.

Q. The driver was killed, you say? A. Yes.

Q. And two horses killed? A. Yes.

Q. What become of the truck, was that wrecked? A. It laid out for some time, it had been removed later.

Q. January 20th of this year, do you remember an accident to a Mr. Baker's wagon? A. I don't know as I know any too much about that. I remember hearing about it, that is all. I was over on the Newark Turnpike at that time. The other inspector covered that road.

Q. Was there any other accidents you have personal knowledge of besides those you mentioned? A. Yes, but I have no record now. It is down at the State Department. I have no record. I turned in a report.

Q. Was there fatal casualties, men, women or children killed? A. There were automobiles that skidded, went over in the ditch right about at that crossing.

Q. That had nothing to do with the crossing? A. They were accidents. No one was hurt.

Q. I mean accidents of coming in contact with the railroad tracks. A. No sir, not that I know of.

Q. You don't remember any? A. No, sir.

Q. You have been out on that road the last few days? A. Yes, sir.

Q. For the purpose of catching these bells? A. Yes.

Q. That are now installed there? A. Yes, sir.

Q. I understand from the railroad company, and I believe it to be the fact, they have a bell one hundred feet distant on either side of each crossing, is that right? A. Yes.

Q. About 500 feet from each crossing they have a pole with a square sign up on the road reading what? A. "Crossing, 500 feet, railroad crossing."

Q. When did you go out there to time these bells? A. To find out about te bells?

Q. Yes. A. They have been out there now—I guess it was—

Q. When did you make a memoranda? A. Yesterday I did that.

Q. Did you make a memoranda in regard to the result of your investigation? A. Yes, sir.

Q. Have you got that memorandum with you? A. Yes, sir.

Q. Produce it please, and read it. A. From the Newark Turnpike. Salty Creek, I didn't measure the distances of those, there is a dead track there, supposed to be a dead track, they run in amesite and things like that once in a while.

Q. That is the first crossing north of the Newark Turnpike? A. Yes, north of the Newark Turnpike.

Q. What did you find out? A. There is nothing goes over that except what they ship in. That is a dead track.

Q. There is no bell on that track? A. No, no bell there.

Q. No protection of any sort there? A. No, they sometimes run in material, amesite. The second is the Newark Branch.

Q. What did you find about that? A. I found a bell; I may not be accurate about the figure, we figured 119 feet.

COMMISSIONER HILLERY: Measuring from what?

WITNESS: On one side 122 feet from the crossing; those bells give a signal.

Q. One bell 119 feet and one 122 feet? A. One 119 and one 122.

Q. That is the second crossing as you come west on the Belleville Turnpike, the second crossing from the Newark Turnpike? A. Yes.

COMMISSIONER HILLERY: Marked on the map Newark Branch?

MR. NOONAN: Yes.

COMMISSIONER HILLERY: The dead line is the Newark Branch too; it is distinguished from the Greenwood Lake, it is marked Newark Branch.

Q. How did you find those? A. I found two signs there. They are 500 feet; one on each side of the road.

Q. That is from the railroad crossing 500 feet? A. Yes.

Q. You heard a bell ring; how long did it ring before the train arrived at the crossing? A. I timed it about one train—

Q. Have you got the time it went by? A. No, No, sir.

Q. Have you got the time it went by? A. No, sir, I haven't got the time.

Q. About what time was it? A. One was around two o'clock.

Q. The one you are talking about now; what time was it? A. That was around noon time. It was after noon. I think it was a quarter of one.

Q. Between twelve and one? A. Yes.

Q. What did you find in regard to the bell for that train? A. I timed the train going thirty eight to forty seconds. I couldn't hear the bell, just hear a slight tinkle at 500 feet.

Q. But from the time you first heard it until the train got on the crossing, you say was how many seconds? A. Thirty-eight or forty.

Q. Now, then, the next train? A. The next track?

Q. The next train on that track. Have you got any other train on that track? A. No, I had Mr. White with me.

Q. Go to the next track. A. I found the condition the same on the bells, they vary a little, the length of one was 104 feet and the other 107.

Q. Vary in length from the track? A. Yes.

Q. I want to know how long that bell was heard by you to ring before the train got on the crossing of the third track? A. The eastbound train comes down crowded there; thirty seconds. I didn't get anything going west.

Q. How many trains did you get there? A. I only got one.

Q. Only got two trains altogether? A. Yes, sir, that is all I got.

Q. What is the character of this bell as to loudness? A. Pardon me?

Q. How loud was this bell; give us some idea. A. I could hardly hear it. It is a cast iron bell.

Q. How near to it were you when you say you couldn't hardly hear it? A. Right at the 500 foot sign.

Q. You were 400 feet away from the bell? A. Yes. When it first struck I took count of the time; for instance, the train hit this point where there is a battery. It is a connection, I was at the bell, I went back to the sign to see if I could hear the bell. I couldn't hear it at the 500 foot sign. I could hear it when I was standing by it.

Q. You were on foot during all of this time? A. Yes.

Q. How large a bell is it? A. About an eight-inch bell.

Q. Can you give us any idea how far from the bell you could hear it? A. I could hear it 200 feet plain enough. If I was walking. I went over in a machine and couldn't hear it at all.

Q. You have been over there in a machine? A. Yes, sir.

Q. And couldn't hear it at all? A. I suppose on account of the motor of the car.

Q. The noise of the traveling car was such that you couldn't hear the bell at all, is that right? A. Yes.

Q. And you went right by it? A. Yes, sir.

Q. What kind of a car was that? A. Different times I went over on commercial trucks. Other times people have been going over that way and I got acquainted and would ride over.

Q. You have travelled that way in an ordinary pleasure car? A. Yes.

Q. Could you hear the bell then? A. No, I couldn't.

Q. At that time the bells were closer? A. At that time they were closer to the railroad. Now they are moved down further.

Q. Have you made experiments since they were moved away? A. Yes.

Q. Can you hear them now? A. Right alongside I can if I am standing there.

Q. I mean travelling in an auto? A. No, I could not.

Q. Have you tried travelling in a commercial auto since the bells have been put in their present condition? A. Yes.

Q. Could you hear them then? A. No, sir.

Q. The noise of the big commercial auto truck was so great you couldn't hear the bell, is that the idea? A. Yes, sir.

Q. Did you notice any considerable difference as to hearing the bells when the wind is blowing

in your direction from the bell or blowing in the opposite direction or blowing straight across the road? A. Yes; that had a good deal to do with the hearing yesterday with me.

Q. What did you notice about it? A. When I was walking up the road the wind was blowing into my ear.

Q. You couldn't hear the bell? A. No, sir.

Q. The wind was blowing across the road? A. Yes, sir.

Q. Is there anything else you know about this matter you can tell the Commissioner? A. No, sir.

CROSS EXAMINATION BY MR. BURGESS:

Q. Did you take this record of traffic yourself, personally? A. Yes, sir.

Q. The bulk of the highway traffic apparently consisted of pleasure automobiles during this time you took the record, isn't that so? A. Yes, sir.

Q. Almost nine-tenths of the traffic over there was pleasure automobiles. You don't know of an accident to a pleasure automobile on either one of those crossings, do you? Personally know of any accident? A. Being struck by a train?

Q. Yes. A. Well, I am not positive if they have; they have a record at Trenton.

Q. Doesn't that come within your personal knowledge? A. No.

Q. How did you arrive at the traffic record for each one of these crossings? A. How did I arrive?

Q. Yes; the record that you gave of the street crossings, or each one? A. It was for the amount went over the road.

Q. You didn't multiply the traffic over the road by three to get what the amount of traffic was over all the crossings? A. I tallied everything that went over the road. There is nothing going over

that road that will go around and come back again very well.

Q. Did you personally observe the two accidents about which you told, December 1912 and October 1913? A. No, I did not.

Q. You do not know anything as to the details of those accidents? A. Only they were struck. I saw them the morning after. One happened at night and the other in the afternoon. I didn't happen to be on there, I was at lunch. The truck happened in the daytime and the other happened at night.

COMMISSIONER HILLERY: In your census you didn't note the number of trains that passed over any of the crossings?

WITNESS: Not in this census.

MR. NOONAN: We have a time table.

WITNESS: This was done right after the road was opened. The road was closed for a while.

Q. You testified about hearing the bell within thirty-eight or forty seconds at the Newark crossing B, before the train arrived? A. Yes.

Q. Could you see the train when the bell began to ring? A. Yes, I saw the train coming out under the span, the Pennsylvania span. It was a little cold weather and we wanted to get them as soon as we could and get out from there.

Q. How far away was the train? A. I should judge about 2,000 feet. There is a turn in Hackensack.

Q. Three thousand feet? A. Yes. You cannot tell whether they are going on the Newark Branch or the Greenwood Lake.

Q. Where were you standing when you saw it? A. At the crossing of the Belleville Turnpike and the railroad crossing.

Q. There is a pretty good view there then? A. Right there, yes; a better view now than in the summer time.

Q. Do you know anything about railroad cross ing alarm bells? A. Do you know anything about them?

Q. Yes. A. In what way do you mean?

Q. As to whether these bells used on these crossings are the usual kind used, or smaller or larger? A. I have seen others used. I have seen large brass bells, I saw a large brass bell. The other you can hear much plainer than you can cast iron.

Q. (By Mr. Noonan) This is a cast iron bell on the Belleville Turnpike? A. Those are cast iron bells.

Q. (By Mr. Burgess) Was the bell ringing each time you observed a train approaching? A. When it struck a certain point, it started to ring, yes.

Q. When you were going by in an automobile for instance, these bells had been located one hundred feet or so each side of the crossing? A. Well, about two weeks ago—no, three weeks ago; that was before the storm.

Q. You say you couldn't hear the bells? A. Not with the action of the motor; no, you couldn't hear the bells.

Q. Was the bell ringing? A. Not at that time.

Q. Then, of course, you couldn't hear it, could you? A. Not at the time I spoke of when I went by, the bell was ringing, we couldn't hear it. We observed it; observed a train coming.

Q. Which time was that? A. Over one month ago.

Q. Were these bells located as they are today, or did they have the bell located right at the crossing at that time? A. I am not sure. Mr. White could tell you about that.

Q. Do you remember where you were in respect

to the crossing when you listened for the bell? A. I should say 300 feet, something like that, maybe 200 feet.

Q. You say you couldn't hear the bell ringing? A. No, sir.

Q. How do you know it was ringing? A. I couldn't say it was ringing. I couldn't hear it ringing.

Q. You know the train was in sight? A. I saw the train, yes.

Q. Do you know whether it had come into the circuit so as to start the bell ringing? A. No. I didn't know at that time; I hadn't measured the distance.

RE-DIRECT EXAMINATION BY MR. NOONAN:

Q. These bells are operated by overhead wires? A. No, sir. There is a battery down the road and a connection is made along the track.

Q. What kind of wire is it? A. Galvanized wire, telegraph wire, connects with each rail. I didn't take tee box off to see what the wire was under the box.

Q. It is not a copper wire? A. I am not sure; I didn't look under to see. The connections at the track are galvanized.

Q. It runs along the ground from the track to the bell? A. Yes.

Q. Exposed? A. No, it is covered with a box; there is a little box over it.

Q. You say you can get a better view of approaching trains at this time than in the summer time? Why can you get a better view at this time than in the summer time? A. The weeds are not grown; in the summer time there is cat tails.

Q. All that area is covered with cat tails? A. Yes.

Q. They grow very tall? A. Yes, they do.

Q. Have you observed the trains running in the summer time, the cat tail season? A. I haven't taken particular notice of it.

Q. I mean with reference—how much of the train appears above the cat tails when the cat tails are in their prime? A. I should judge about three feet above the road.

Q. Can you tell, or are you able to tell, looking at a moving train passing through a field of cat tails so that only two or three feet of the cars can be seen, in what direction that train is moving? A. You could tell it was coming, you couldn't tell which track it was coming up. Down this there is a bend, there is a turn.

Q. You could tell whether it was going in a westerly direction or an easterly direction, but you can't tell whether it is going northeast or southeast? A. Yes, you could tell that.

Q. Could you tell what part of the Belleville Turnpike it is going to cross if you saw it 2000 feet away? A. No, I could not.

RE-CROSS EXAMINATION BY MR. BURGESS:

Q. How far do you suppose you could see it away when the cat tails are in their prime? A. I am always looking for them.

Q. How far away? A. I suppose I could see it 2,000 or 3,000 feet. If I was a stranger and I wasn't looking for them, though—

Q. You never had any near-accidents at any of these crossings? A. Have I?

Q. Yes. A. In what way?

Q. As to the train almost running you down before you observed it. A. No, I don't think so. I am always looking for those things the same as you are.

EDWARD J. WHITE sworn on behalf of petitioner.

MR. NOONAN: I offer now this tabulated statement of traffic on Belleville Turnpike, addressed to me.

COMMISSIONER HILLERY: It will be received.

(Same is marked Ex. P-2.)

DIRECT EXAMINATION BY MR. NOONAN:

Q. You assisted Mr. Roden in the census traffic? A. Yes.

Q. You turned in the figures to the chief engineer, Mr. Wasser? A. Yes, sir. I have them.

Q. It is not necessary to read them, because they are tabulated. What is your proposition? A. State Road Inspector on the Belleville Road at the present time. I have been there since November 17, 1913.

Q. You remember an accident at that road January 31st, where two men, one Mr. Lurch and another man, I think Lawrence, had to ditch their car to avoid being run over by the train? A. Yes.

Q. Tell the Commissioner about that briefly? A. It was about 10 A. M. I heard about it. I went over there to the Greenwood Lake track and found an automobile ditched about fifty feet north of the track. The car was all broken up and Mr. Lawrence was there and negotiating with a man by the name of Mulvey, to mind the car, and he went over to Newark and engaged an automobile to take it away.

Q. What got the car in the ditch; why did they put it in the ditch? A. He claimed in order to avoid a collision with the train going west on the Greenwood Lake track he had to ditch his car.

Q. Do you remember an accident on January 20th? A. Yes, sir.

Q. 1913? A. Yes, sir.

Q. Both of these accidents were in the year 1913, weren't they? A. Yes.

Q. What about the second accident, January 20th—it is really the first one in point of date. A. A big truck team drawn by Burns, returning from making the last load, about 3:45, he started to cross the Newark Branch of the Erie Railroad; he was struck by an eastbound train; the wagon and horses were carried about 115 feet down the track. Burns was picked up on the roadway, it is claimed. I didn't see the accident.

Q. What became of Burns? A. He was taken to the hospital and died the next morning.

Q. Did you go out on the road yesterday to see how the bells worked? A. Yes, sir, I have been out there every day.

Q. What did you find to be the elapsed time between the ringing of the bell and the crossing of the Belleville Turnpike by the train? A. At the Greenwood Lake Branch the train going east forty minutes from the time it rung in and the train going west, forty minutes.

COMMISSIONER HILLERY: Forty minutes?

WITNESS: The train going east forty seconds and going west, thirty seconds.

Q. That was on which track? A. The Greenwood Lake.

Q. The second track from the Newark Turnpike? A. The third track.

Q. Did you time any of the trains on the second track from the Newark Turnpike? A. Yes, forty seconds.

Q. That was the only train? A. Then I timed it the day after that.

Q. What did you find as a result of that day, after the present bells were installed? A. It takes

about forty seconds for the train to cross the road from the time it rang.

Q. One got on the crossing in thirty seconds? A. That is the Greenwood Lake track.

Q. I included that track in the question. Did you find more than one case when there was a thirty second interval? A. Yes.

Q. So that some of the trains came along within thirty seconds after the bell began to ring? A. Yes.

Q. All the trains you observed came along within forty seconds after the bell began to ring? A. Yes, sir.

Q. Did you make any experiments in automobiles of any kind, either commercial or pleasure? A. No, sir.

Q. How far away from the track did you get from the bell? A. I could hear the bell sometimes —it all depends on the kind of weather.

Q. It depends on the wind? A. Yes, depends on the wind.

Q. If the wind was blowing away from you, within what distance from the bell could you get the sound? A. Might get it within fifty feet or one hundred feet.

Q. Of course, if the wind was blowing in your direction then you could get it a greater distance? A. Yes.

Q. Is there anything more you have to add for our information about this case? A. I might testify as to the bells, they have been out of order on occasions.

Q. These present bells? A. Yes, sir.

Q. What was the cause of that? A. I don't know, it is out of my line, I know they had men to fix them and a man up there to watch them.

Q. The railroad? A. They have been repaired since they were erected.

Q. Of course, as long as they were out of order they wouldn't ring? A. I have seen them so they wouldn't ring.

Q. You don't know what caused that? A. No.

Q. How many times do you know that to have occurred? A. I have seen it happen two or three times. My attention was called to it by laborers on the road.

Q. How many times have you noticed men there working and repairing these bells? A. I have seen them up there once or twice?

CROSS EXAMINATION BY MR. BURGESS:

Q. When have you personally observed these present bells wouldn't ring when the train came in or out? A. After they were erected. They were erected after the big team, and this man Burns was killed; they asked me if they could put up the bells. They asked me and I had to get permission from the County Engineer.

Q. When was it you personally observed these present bells did not ring when the train came into the circuit? A. I didn't take a record of the date, but it was after the date of the accident of January 20th of this year.

Q. (By Mr. Noonan) And those bells you spoke of were the bells now installed? A. Yes. I notified the track walker and he said he would attend to it. I think the Erie Railroad have a man stationed by the river there.

Q. (By Mr. Burgess) How long ago was that? A. In the month of January.

Q. Wasn't it before the installation of the bells had been completed? A. No, sir.

Q. (By Mr. Noonan) Wasn't that accident the 31st of January? A. Yes, but the—they put the bells up immediately after the Baker accident.

Q. Did they put them up before the accident of the 31st, before or after? A. Before that.

Q. Between the twentieth and the thirty-first? A. Yes.

Q. (By Mr. Burgess) As a matter of fact, the so-called accident to Lurch was January 27th? A. No, sir.

Q. Are you sure of that? A. Pretty sure.

Q. How do you know? A. I made a memoranda and I looked it up last night. January 31st I have it.

Q. How do you know about the accident? A. I didn't see the accident. I was working up the road. The road is being at present inspected and I am up there every day.

Q. Do you know anything personally about this accident? A. I didn't see it.

Q. Or about the other accident? A. No.

Q. You don't know how fast Mr. Lynch was driving his car? A. No, sir.

Q. You are sure these bells wouldn't ring? A. Yes, positive.

Q. Wait a minute—wouldn't ring after January 21st? A. I didn't say that. It was after the accident to the big truck—

Q. Those bells were not finally—

MR. NOONAN: Let him finish his answer.

(Question and answer read.)

WITNESS: It was immediately after the accident to the big truck the bells were installed, the present bells, and then they became defective and wouldn't ring.

Q. Those bells were not finally installed until the twenty-eighth of January; the men were working the twenty-eight of January? A. I don't know when they were put in. I am taking this basis of figuring, the Baker accident.

Q. As soon as the bells are out of order, the bells on these crossings, is a man put on the crossing? A. The old bells?

Q. Yes. A. To guard the crossing?

Q. Yes. A. I never saw a man to guard the crossing.

Q. Are you sure the old bells were out of order? A. I was talking of the present bells.

Q. I am talking of the old bells, we will talk about the old ones. A. I don't know anything about the old ones.

Q. The old ones were there prior to January 27th? A. Yes, I believe they were.

Q. You haven't observed those bells when they weren't ringing? A. No, sir, I have not.

Q. (By Mr. Noonan) You never heard any ringing from the old bells? A. Probably I didn't have occasion to be there.

Q. (By Mr. Burgess) You don't know whether they were ringing or not? A. No.

Q. Or any reason for their not ringing? A. We three are working all over.

Thomas R. Armstrong—Direct.

THOMAS R. ARMSTRONG sworn on behalf of petitioner.

DIRECT EXAMINATION BY MR. NOONAN:

Q. You are a member of the Bar of New Jersey? A. Yes, sir.

Q. You are now private secretary for the supervisor of the County? A. Yes, sir.

Q. Did you, at my request, make an inspection of the working of the bell system on the Belleville Turnpike at the Erie Railroad crossings? A. I did.

Q. Yesterday? A. I did.

Q. You went out in an automobile? A. Yes, sir.

Q. It was a limousine, wasn't it? A. Yes, sir.

Q. You had all the windows open in making these tests? A. I did, with the exception of one test closed.

Q. Did you make a memoranda of the several tests and results? A. Yes, sir.

Q. Have you it with you? A. I have it before me now. Taking up the first crossing, which I call the southerly crossing, which I have learned is the Newark branch, train, engine 833, going westerly, passing the crossing at 6:43 P. M., a bell on the train was ringing, but no whistle was blown as they approached the crossing. My observation in this case was passing westerly right directly opposite the bell, and I observed whether the bell was properly rung and how loud.

The second test was made—

Q. What did you find as to the ringing of the bell? A. The bell rang as we stood there and we could hear it. The second train, engine number 473 going east, passed at 3:47 P. M., blew the whistle and rang bell, and with the test we made

what we called the approach test, that is, we went back about where the 500 foot sign was and got the automobile going toward the crossing. This was the southerly side next the turnpike and we went until we first heard the bell with the engine going in the machine, just as soon as we heard the bell at all we stopped the machine at once. We found that was about forty feet from the bell. That was made with engine 473, train 473.

Q. We were then trying to detect the bell? A. Yes.

Q. You knew it was there and were trying to catch it? A. Yes, exactly.

Q. (By Mr. Burgess) You were going at what rate of speed? A. Probably twelve miles an hour; ten or twelve miles an hour. The third test was train 475, passing at 4:49 going west, bell on train rang, but blew no whistle as they approached the crossing. This test was made on the northerly side of the track, by what we call the approach. I might add on that other test—the first test, I should say—

Q. That is what you call the approaching test? A. No, the standing test. Also we timed the train from the time she first struck the battery until she crossed the road and found the bell rang forty-eight to fifty seconds. Train 475, passing at 4:49, going west, bell on train rang, but no whistle; bell on road rang. We could not hear the bell until about forty-five feet, as near as we could determine, from the bell. We made the approach test on the other side. This was all the tests made on that particular crossing. On the Belleville Branch, or the Greenwood Lake Division, as I have just learned, train 809, going west, passing the crossing at 3:12 P. M., bell on the north side of the crossing rang about forty-five or fifty seconds before the train crossed; engine did not ring bell or blow whistle. Engine 848 passed at 3:19 P. M.

going easterly; we approached the crossing from the northerly side but could not hear the bell until about forty-five or fifty feet from it.

Q. From the bell? A. Yes. Train blew no whistle but did ring the bell. We couldn't hear the engine's bell, but we could see it turn. The road bell is about 100 feet from the track. Engine 911, passing at 3:56 P. M., going westerly, approched it on the southerly side and could not hear bell until about fifty feet from it. We found the bell very inaudible. The train blew no whistle, but it did ring a bell. Engine 807, passed at 4:03 P. M., going easterly, did not carry any passenger cars, but a caboose, rang and blew whistle. Engine 781, passed 4:11 P. M., going east, blew whistle and rang bell. Road bell rang about fifty seconds before crossing. Engine 918, passed 4:31 P. M., going west. We approached from the southerly side; bell on road rings. Bell on train rang, but blew no whistle. Bell rings forty-five to fifty seconds before reaching crossing. Could not hear bell ring, on account of the puffing of the engine, but could see train. Bell very inaudible. Those are the tests I made.

Q. When you say the bell on the road was very inaudible would you be able in your opinion, if you hadn't been looking for the bell and hadn't known of it, and had not tried to catch the sound, would you be able to hear it at all? A. In the automobile I don't believe I would.

Q. Did you examine those bells? A. Simply observed them.

Q. Do you know anything about the wiring of them? A. One of the bells I noticed had a little wire coming suspended on the pole. I didn't take particular notice; it was connected with the top of the bell. The bell is a eight or ten inch bell on a pole stuck in the ground and was exposed and seemed to me to be completely rusted.

Q. The bell? A. Yes, it didn't have a tingling sound.

Q. They are all exposed to the wind? A. I didn't observe them closely. I observed one particularly as to that.

Q. In your judgment, after your experiments, you believe a limousine going along there at an ordinary rate of speed, twelve miles an hour, without any knowledge on your part of any railroad crossing or any bells, you would not have heard any bell signal at the crossing, road bells, I mean? A. From my tests, I feel I woudn't, if my mind wasn't on the fact a crossing was there.

Q. You spoke of one bell you say was rather dull and rusty, were the other bells in the same condition? A. They were all exposed, somewhat dull. As to the rust, I can't say that particularly of all of them, but this particular one was rusty.

Q. Is there anything else, Mr. Armstrong, you can give his Honor in regard to this matter? A. With the exception, as each of these trains approached from either end, the view, while unobstructed, yet even looking at it yesterday there was quite some shrubbery grown to a height, yesterday.

Q. Rank grass and cat tails? A. Yes. Making it deceptive when a train is approaching where it is going.

Q. How much of the cars could you see? A. I should say about half the cars, half projected above the top of the shrubbery.

Q. This isn't the cat tail season? A. No, sir.

Q. These cat tails grow much taller then; about how much more you can't say? A. I couldn't say until I observed it.

CROSS EXAMINATION BY MR. BURGESS:

Q. Could you see the train before the road bells began to ring? A. Yes, I watched for it.

Q. Have you any idea how far the train was from the crossing? A. When the bell first began to ring?

Q. Yes. A. I wouldn't like to measure the distance in my mind, because I don't believe I would be accurate about it. We observed on one track, the Greenwood Lake track, there is a signal. You can see it when it hits the signal. Whatever the distance would be, I don't know just exactly what the distance would be.

Q. Have you ever ridden over this road except the time you took the tests in the automobile? A. Yes, several times. Twice in an automobile.

Q. Have you ever ridden over there when a train was coming? A. I never have.

Q. You knew there were railroad crossings there? A. I did know, yes.

Q. How was that, your knowledge of the vicinity? A. My common knowledge of that particular locality.

Walter Martin—Direct.
Charles P. Davanagh—Direct.

WALTER MARTIN, sworn on behalf of petitioner, testifies as follows:

DIRECT EXAMINATION BY MR. NOONAN:

Q. Mr. Martin, you are employed in the County Supervisor's office, are you not? A. Yes, sir.

Q. You accompanied Mr. Armstrong yesterday during the inspection? A. Yes.

Q. You heard his testimony? A. Yes, sir.

Q. Does your own observation of yesterday confirm what he said? A. It does.

Q. Have you got anything to add to what he said? A. No, I have not.

Q. Do you corroborate what he said? A. I do.

Q. In every particular? A. Yes.

MR. NOONAN: Cross examine.

MR. BURGESS: No cross examination.

CHARLES P. DAVANAGH, sworn on behalf of petitioner, testifies as follows:

DIRECT EXAMINATION BY MR. NOONAN:

Q. Where do you live? A. Bayonne.

Q. Have you had occasion to use the Belleville Turnpike? A. Daily.

Q. Have you seen any accidents on the Turnpike? A. I never saw the actual accidents happen. I have seen the results of accidents.

Q. About what time was that? A. In a period of ten or twelve years, a great many of them.

Q. Say within the last year? A. The very last one, as I recall it, was the truck belonging to William Baker; that, I believe, was on the Newark Branch. The one just previous to that, I think, was the result of the accident that was an automobile we saw in the meadow; that I learned, was run overboard to avoid being hit by the train.

Q. That was Lurch? A. I don't know what the name was.

Q. You go over on foot or drive? A. I go over in a machine.

Q. Since the new bells have been installed some time between January 20th and January 28th of this year, have you been over the road? A. Yes.

Q. In your car? A. Yes.

Q. Is it a business car or a pleasure car? A. A pleasure car used for business.

Q. You noticed these bells? A. I have seen the bells there.

Q. Have you heard them ring? A. I have heard them ring by standing at the bell to hear it ring.

Q. But if you are going along not expecting to hear any bells ring, not knowing any bells were there, would you have heard them, do you think? A. I am very positive I couldn't have.

Q. Is that your opinion of all these bells, road bells on the Belleville Turnpike? A. In my opinion those bells are absolutely useless.

Q. I am calling your attention to the bells as they are to-day. A. Yes, as they were yesterday.

CROSS EXAMINATION BY MR. BURGESS:

Q. Do you think that railroad bells are of any avail? A. Yes, sir.

Q. What kind of bell? A. The one at the Lackawanna Crossing, twelve hundred or fifteen hundred feet south of your nearest bell is a good bell.

Q. What kind of a bell is there? A. I couldn't tell you; the kind you hear.

Q. It differs in what respect from these? A. I don't know; I know you can hear it.

Q. What size is it? A. I couldn't say; I never saw it.

Q. You think that bell is all right? A. I know you can hear it.

New Jersey State Library

Q. How far can you hear that bell? A. Plenty long enough to stop, and it rings long after you have stopped. I never timed it, but I would imagine that bell rings upwards of three or four minutes before a train actually goes by.

Q. You are not positive of the length of time it rings? A. I never made any test.

Q. You think that kind of a bell would be a good signal? A. I think that kind of a bell would warn you. I don't think the bell is any good at all on the Belleville Turnpike.

Q. That bell on the D. L. & W. would be a good signal, a good warning? A. good warning; let you know something is there.

COMMISSIONER HILLERY: Are there gates on the Lackawanna?

WITNESS: Yes.

COMMISSIONER HILLERY: And a bell?

WITNESS: Yes.

BY MR. NOONAN:

Q. On what crossing? A. The Lackawanna crossing, known as the Sandford crossing over the Newark Turnpike, just before you reach the Belleville turnpike.

WILLIAM TOLEN, sworn on behalf of petitioner, testifies as follows:

DIRECT EXAMINATION BY MR. NOONAN:

Q. You are chief of the Police of Kearney? A. Yes, sir.

Q. And have been a good many years? A. Yes, sir, fifteen years.

Q. As chief of police have you had your attention called to accidents that have occurred on the Erie Railroad Crossing on the Belleville turnpike? A. I have.

Q. Within the last year, say? A. I have.

Q. Have you a list of those accidents? A. I have, yes, sir.

Q. Will you kindly read it to His Honor? A. I have only memorized it. I have reported one accident the twentieth of October.

Q. Have you a list here? A. No.

Q. Tell us from memory as well as you can? A. October 20, 1913; driver; he was driving the wagon of Siegel and Greenhut, killed at the Greenwood Lake tract, he and two horses were killed, the police records will show that. January 20 there was a man killed on the Newark & Paterson branch, a man named Burns, who afterwards died at St. Francis Hospital, Jersey City.

Q. Were there any other fatal accidents there? A. That is all inside of a year.

Q. Have you made any personal inspection around there since the new bells were installed? A. I have not.

CROSS EXAMINATION BY MR. BURGESS:

Q. I don't suppose you know anything about the details of these two accidents? A. No. I was not there; I did not witness them.

WILLIAM MAGEE, sworn on behalf of petitioner, testified as follows:

DIRECT EXAMINATION BY MR. NOONAN:

Q. You are a police officer of the town of Kearney? A. Yes, sir.

Q. What, if anything, do you know about the accidents on the Erie Railroad crossing over the Belleville Turnpike? A. October 10, 1913; Oliver Chew, driver for Greenhut-Siegel.

Q. That was the same accident the chief testified to? A. Yes.

Q. Do you know of any other accidents? A. No, sir.

Q. Have you had any occasion to inspect the new bells? A. No, sir.

CROSS EXAMINATION BY MR. BURGESS:

Q. I don't suppose you know any more about these accidents than the chief? A. No, sir.

COMMISSIONER HILLERY: You weren't on the ground?

WITNESS: No, sir.

MR. NOONAN: We will offer Erie Railroad, Greenwood Lake Division, Orange Branch, Caldwell Branch, timetable.

COMMISSIONER HILLERY: It will be admitted if there is no objection.

Same is marked Ex. P-3.

MR. NOONAN: Also Erie Main Line and Newark Division between New York and Suffern and Bergen County Railroad Branch, in effect October 19, 1913.

COMMISSIONER HILLERY: It will be admitted and marked.

Same is marked Ex. P-4.

CHARLES P. DAVANAGH, recalled on behalf of petitioner.

DIRECT EXAMINATION BY MR. NOONAN:

Q. Have you been over the Belleville Turnpike at night time? A. Yes, sir.

Q. Have you been able to distinguish the headlight of an approaching locomotive of the Erie Railroad at any of the crossings over the Belleville Turnpike from other lights? A. No, sir.

Q. Why not? A. Because of the large number of lights along the west slope of the Bergen section, west slope of the hill on one end, all the lights along the Newark Turnpike in the other direction.

Q. If you are moving northwesterly from the Newark Turnpike along the Belleville Turnpike, just before you strike the Bergen County line the ground rises, doesn't it? A. Yes.

Q. Quite an assent? A. Yes, sir.

Q. Isn't that so? A. Yes.

Q. There are houses built there, around there. What lights do you refer to? A. The lights that confuse you. This is a person knowing the railroad is there and expecting a train, watching for a train. A person that doesn't know wouldn't look.

Q. What lights do you find on this rise of ground? A. The lights going northwest toward Arlington on the D. L. & W.; the lights that confuse you would be the lights on the Newark Turnpike, off to your left, and in the same general direction that the train expected would come as well. In coming from the other direction, from Arlington to Jersey City, other lights in the direction you would expect a train to come, from the lights along west of the crossing, Hudson County Hill, Bergen, or

the lights of the bridges that cross the Hackensack River. There is a lot of them.

Q. When you go from Newark Turnpike along the Belleville Turnpike northwest? A. Yes.

Q. You say you see the lights on the Newark Turnpike? A. Yes.

Q. You would have to look over your left shoulder? A. You would have to look over your left shoulder to see the train.

Q. So the train is in the same line of vision as some of the lights on the Newark Turnpike? A. As it crosses the Belleville Turnpike, yes.

CROSS EXAMINATION BY MR. BURGESS:

Q. What kind of lights? A. Electric lights?

Q. Stationery lights? A. On the Turnpike?

Q. Yes? A. Yes.

Q. This light from the engine moves right along? A. It doesn't move right along, as you see it coming. It moves, of course; it appears a stationary light, except when you are close enough, then you see the shiver.

Q. How close do you have to get before you detect the stationary light? A. I can't say how close in feet.

Q. It gives you ample warning to avoid the cars? A. Provided there is no train coming. We have had men killed on that road, and very careful ones.

Q. If there were lights at these crossings how would you distinguish them from other light in the meadows? A. By having it red.

Q. Aren't there any other red lights there? A. I think there are.

RECESS FROM ONE TO TWO O'CLOCK P. M.

AFTER RECESS.

CHARLES R. MOHN, recalled on behalf of petitioner, testifies as follows:

DIRECT EXAMINATION BY MR. NOONAN:

Q. Are you familiar with the modern devices for protecting the travelling public over the highways? A. I couldn't say I am really familiar, but from what I have seen; I have looked at them very carefully. I have watched them.

Q. What do you consider the best? A. Gates and bells in the daytime, and lights and gates in the night time, with a flagman's station standing near the crossing with a sort of dial inside with a semaphore shown on the dial.

CROSS EXAMINATION BY MR. BURGESS:

Q. Mr. Mohn, have you ever observed protection by lights at any of the crossings on the Erie Railroad? A. No.

Q. Or the Pennsylvania Railroad? A. No.

Q. The D. L. & W.? A. Yes.

Q. Where? A. On the Newark Turnpike.

Q. What kind of a light is that? A. It is an arc light with a red globe on it.

Q. Where is that light located on the railroad crossing right of way? A. I don't know whether it is on the railroad company's right of way or not.

Q. Do you know whether the railroad company located the light or somebody else? A. I don't know who located the light.

Q. You don't know whether it was provided by the railroad company as a railroad signal or not? A. I don't know about that.

Q. Do you know whether the New York Central has any? A. I don't know about the New York Central, no.

Q. Aren't there many crossings, Mr. Mohn, that are protected by signal bells alone? A. I know more of those have the gates.

Q. Aren't the crossings which are protected by gates generally located in cities or towns or villages where there is a rather thickly settled population? A. Oh, no; there are two places right here in Jersey City that aren't travelled half as much as the Belleville Turnpike, that have gates.

Q. Do you know what the view is there? A. I don't know what the view is, no.

Q. Have you noticed the view to ascertain whether it is as good as the Belleville Turnpike or not at these particular crossings? A. What is that?

Q. Have you observed the views at these two points in Jersey City where you say they have gates? A. I have looked around that locality.

Q. What crossings are those? A. We will take the Pacific Avenue crossing on the New Jersey Central.

Q. The Pacific Avenue crossing, Newark Branch? A. Yes, Newark Branch.

Q. That crossing is right in a section that is built up with houses and manufacturing plants, is it not? A. To the south of the crossing I know of about four manufacturing plants; they do the majority of the shipping by railroad siding to the east of Pacific Avenue.

Q. As a matter of fact, at that particular place you can't see in either direction up and down the track coming in either direction on the highway until you are pretty near to the track? A. Yes, coming from the south and going towards the north on Pacific Avenue you can see a westbound train and can see an eastbound train; but going south on Pacific Avenue you can see an eastbound but can't see a westbound train.

Q. What is the other one you refer to? A. The other one is Seaman Street, or Avenue.

Q. What is that? A. Lafayette is about four blocks east.

Q. That is on the Newark Branch? A. On the Newark Branch.

Q. Manufacturing plants and other buildings are located around that crossing? A. Yes; I don't believe the manufacturing plants have to travel over the railroad to ship their goods.

Q. I am not asking you to argue the case. The view on that highway, how far can you see a train coming in either direction, coming in either direction on the highway? A. At Seaman Avenue?

Q. Yes. A. That is about in the same position as Pacific Avenue, exactly.

Q. A man coming on one direction and looking in one dierction, the view is very slight, is it not? A. Yes.

Q. In both places? A. Yes.

MR. NOONAN: That is our case.

IRVING H. SCHRAM, sworn on behalf of respondent, testifies as follows:

DIRECT EXAMINATION BY MR. BURGESS:

Q. What is your position with the Erie Railroad? A. Assistant Engineer of the Erie Railroad and associated lines.

Q. Have you prepared a view map showing the views of the property at each crossing in question on the Belleville Turnpike? A. I have had that done, yes.

Q. Will you describe the views and the crossings shown on the blue prints you have, indicating which crossing you are considering? A. This is the old Newark Branch, the one abandoned and no longer operated, the one across the Newark Turnpike.

Q. What is the character of the view there at that crossing? A. In general, they are excellent; up to about forty feet from the rail one can see just about as far as the eye will reach. In other words, the view is limited by a man's vision almost entirely.

Q. And looking in the other direction? A. Approaching the track from either direction.

Q. Practically the same view? A. Yes.

Q. And that is as far as you can see? A. Yes.

MR. BURGESS: I offer that blue print in evidence.

COMMISSIONER HILLERY: If there is no objection it will be admitted.

Same is marked Ex. R-1.

COMMISSIONER HILLERY: Are you proposing to show by this witness that this crossing is abandoned? He said it had been abandoned.

MR. BURGESS: Either through him or the assistant superintendent.

Q. Will you describe the views shown on the blue print which I have just handed you, and indicate which of the three crossings it is? A. This is what we call the new Newark Branch, the one operated now. This is the second one from the Newark Turnpike. Very excellent view; only limited by a man's vision, that is all, in either direction along the track approaching the track from either direction on the highway.

MR. BURGESS: I will offer that.

COMMISSIONER HILLERY: No objection.

MR. NOONAN: No.

Same is marked Ex. R-2.

Q. I hand you a third blue print and ask you to state which crossing this represents and also the views at the crossing? A. This represents the crossing of the Greenwood Lake Division, the one that run through Arlington and is the third one from Newark Turnpike.

Q. And how are the views at this crossing? A. The views are excellent; as in the other crossings, they are limited by a man's vision; that is about all.

Q. I note on this blue print, and I think on the other ones, 5,000 feet is marked as the view in all directions? A. That is about as far as a man can see under ordinary circumstances in a flat country and have any perceptible image of what he sees.

MR. BURGESS: I offer that.

COMMISSIONER HILLERY: If there is no objection it will be received.

Same is marked Ex. R-3.

Q. Mr. Schram, have you been out in the locality of these crossings in the summer time? A. Yes; probably over the track in my motor car last summer and I have often looked at the crossing and

inspected the view and other things about them.

Q. What can you say of the views obtaining during the summer or fall? A. The views are all good in the summer. Of course, you have the situation there you can look up the track and see the train as well as you can see any other time, because the train is higher than the vegetation. The views of the majority of the people on the highway are just as good in the summer as any other time, they are up in a high vehicle and their eyes are higher than the vegetation and they can see any obstruction higher than the vegetation, such as a train.

Q. Do you know of any crossing on the Erie Railroad where the views are as good as these crossings where there is protection by gates?

MR. NOONAN: I object to that; the practice of the Pennsylvania Railroad.

MR. BURGESS: I said the Erie.

MR. NOONAN: I mean, the Erie. You can't cite your own bad practice to justify this.

COMMISSIONER HILLERY: It will be received for what it is worth.

A. No; in fact, I know of no railroad crossing on the Erie Railroad where the view is as good as the Belleville Turnpike crossing; therefore I know of none where the view is as good, where they are protected.

Q. By gates? A. By gates, yes.

Q. Have you any familiarity with other railroads and their protection at grade crossings? A. Yes; I never worked for any other railroad in this vicinity. I have observed them. I ride other railroads quite frequently and I always look out because it is my habit to do so. I notice generally that crossings outside of towns and villages aren't

protected by anything other than the ordinary crossing sign on almost all railroads—all railroads I have ridden on. I don't believe there is any highway crossing where the view approaches Belleville Turnpike in excellence that are protected by a gateman or a flagman.

Q. What has been your observation as to the usual method of protecting crossings of a character similar to this? A. Generally protected by ordinary crossing signs which read, "Railroad crossing beware of the train", something of that nature.

Q. Where is that sign located, generally? A. Generally on the right of way of the railroad company on one or the other side of the track.

Q. What method of protection obtains at these particular crossings? A. There is at the present time the general method of protection, the ordinary crossing sign at each of the crossings. There are two additional signs located on the railroad right of way approximately 500 feet from the track on the right hand side of the road as the driver approaches the crossing. Those read "Railroad Crossing, 500 feet."

Q. What other protection have you besides that? A. In addition to that, one crossing bell at each of the present crossing in use; that is located approximately 100 feet from the track.

Q. Do you have charge of the men who do the work of installing the signals of this character? A. Yes, sir, they report to me.

Q. Do you know about the installation of the bells at these particular crossings? A. Yes, it was done by my direction.

Q. Will you state how these bells are operated? A. They are electric crossing bells. They are operated by batteries located in boxes near the bells. They are controlled through a track circuit working through a relay.

Q. What is the usual length of the track circuit? A. About 1300 feet, approximately one-quarter of a mile.

Q. On either side of the crossing? A. On either side of the crossing.

Q. What is the track circuit at these particular crossings? A. About 2600 feet on either side of the crossing at each of these crossings.

Q. What inspection is given to these bells? A. The track walker inspect them every day and make a record in a book which is standard, it is a blank we have printed. He makes that entry every day after inspecting the bell. In addition to that we have a man who investigates each division and observes the ringing of the bell from the train. Either one of these telegraph to my office if he observe the bell not operating properly and the repairman is immediately sent there. In addition to that the track walker immediately has a man taken out of the section gang and placed at the crossing to flag the crossing until the bell is put in service again.

Q. What is the character of the four bells that are located at these two crossings? A. They are our standard bell, made by one of the signal companies. They are a metal bell, either brass or some composition like brass, or that same naturel on a cast iron frame which has an iron grating over the bell to protect it from boys or other people of that kind who throw stones at it. The bell is brass or some such metal.

Q. Is it made out of some kind of metal ordinarily used? A. Yes.

Q. It is not made of cast iron? A. No.

Q. The cast iron is just the grating that protects it? A. That is all.

Q. What is the character of wire that is used in connection with the operation of these bells? A.

The wire is copper wire. It is insulated, covered with a rubber tape.

Q. Have you ever had any complaint before as to your signal bells at crossings not ringing loud enough? A. A lot of them we have to muffle, through towns, because people complain that they are kept awake. We have never had a complaint that the bell didn't ring loud enough. Just the other way. It is our standard bell.

Q. You have heard the testimony about the D. L. & W. bell? A. Yes.

Q. Will you guarantee to make these four bells at the two crossings ring as loud as the D. L. & W. bell, if they don't ring as loud now? A. If they don't ring as loud now, I will make them ring as loud as the D. L. & W. bells.

Q. Have you ever noticed the ringing of these bells when riding by on the train? A. Yes, I have heard them ring when I was riding by on the train with the doors and windows closed.

Q. You have heard those bells when they were located 100 feet from the crossing, have you? A. Yes.

Q. Is there anything more you want to say about this bell end of it? A. It was a great surprise to hear the bells were not ringing properly. I have made an inspection to make ours ring properly. If they are not ringing properly they certainly will be to-morrow.

CROSS EXAMINATION BY MR. NOONAN:

Q. You have been travelling on the Erie Railroad trains across the Belleville Turnpike and you say you heard this bell 100 feet from the track? A. The bells are 100 feet from the tracks.

Q. I know they are. Answer the question. A. I was on the train and heard the bell ringing, the bell being located 100 feet from the track.

Q. And the windows of the cars closed? A. Yes, sir.

Q. And how far away from the crossing did you hear these bells? A. Approximately at the crossing.

Q. The train you were travelling in, was it making any noise? A. Yes, the ordinary rattle of a railroad train.

Q. Over and above the rattle, vibration and noise of the train, you could distinctly hear this bell 100 feet away from the crossing? A. I could.

Q. You say the view is excellent? A. Yes, sir.

Q. In your experience as a railroad man do you know of any view any more unobstructed than at these crossings? A. I do not.

Q. Don't you know the vegetation there, what they call cat tails grow very high? A. I don't know what you call very high.

Q. Seven or eight feet; from six to eight feet? A. I don't believe I ever saw it eight feet.

Q. You never saw cat tails eight feet high? A. No, sir.

Q. Haven't you seen them ten feet high? A. No, sir.

Q. Were you ever out there in the fall, August, or September? A. Yes.

Q. Did you ever see cat tails then? A. Yes.

Q. How tall were they then, according to your estimation of cat tails? A. I don't know; maybe five or six feet.

Q. Don't you know they are much taller than the average man? A. No, I do not.

Q. How much of a car can you see from the Belleville Turnpike as the train goes through the cat tails? A. I should say about three feet.

Q. That is the most excellent view you ever saw? A. It certainly is.

Q. You never heard or saw of a crossing where

you could see the whole train coming along one thousand feet or two thousand feet in either direction? A. You can see a good deal further on the Belleville Turnpike.

Q. You can't see if the cat tails are there? A. You certainly can.

Q. All you can see is the top of the train? A. That is the whole train.

Q. You think the top of the train is the whole train? A. I can see every car in the train, that is the whole train.

Q. You can see the top of the cars two and a half feet or three feet above the cat tails? A. Yes.

Q. That corresponds to about the same color as the cat tails? A. The cars?

Q. Yes. A. No, sir.

Q. A dun color? A. The tip of the car is black.

Q. You say you can look up the track and see the train coming? A. Yes.

Q. You can always do that on almost any track, If there is no bend, see the train coming? A. Certainly.

Q. By that you mean, if you stand on the track and look up the track and the train is coming down the track, you can see the train coming down the track, is that what you mean? A. Your question isn't very distinct to me. Where are you supposed to be standing in your question? A. I don't know. I am trying to find out where you are standing. You say you can look up the track and see the train coming down the track? A. From a point on the highway. When I looked I was about fifty feet from the track.

Q. There is no dispute about the ability of a person to see a train coming if he looks in the direction in which the train is coming and is stationary, but the point is what can you see of a train coming when you are not looking for trains? A.

You can't see anything if you don't look in that direction. I couldn't see you if I were turned around.

Q. I mean taking a general view before you? A. You have to look in the direction the train is coming to see it.

Q. Assume you didn't know any railroad crossing was there and proceeded on that assumption and was driving a car over that highway, what would attract your attention to the train as the situation now exists? A. In the first place I don't believe that is a fair question.

Q. I am not asking you whether it is a fair question; I am putting it to you.

MR. BURGESS: Don't you want to ask fair questions.

A. My attention to the railroad would be attracted by two of my senses; sound or sight, I assume.

Q. Which did you, in this case, assume? A. In this case?

MR. BURGESS: Assuming you are blind.

Q. Assuming you are not blind. A. In this case I would probably see a sign 500 feet from the crossing.

Q. In daytime, not at night time? A. No; I wouldn't.

Q. Let us assume, in addition, it is night time. A. Then I would hear the crossing bell several hundred feet before I got to it.

Q. Several hundred feet? A. Yes.

Q. You say these bells are made of copper? A. I believe they are made of brass, some composition metal.

Q. Do you know anything about it at all? A. Yes, sir.

Q. What do you know about it? A. I know they are made of some composition resembling brass.

Q. Do you know what the composition is? A. I can't say what the chemical constituents are.

Q. It is covered with cast iron? A. A grating.

Q. The grating, to some extent, destroys the sound of the bell? A. I don't believe it would.

Q. Don't you know all sounds are waves in motion? A. Yes, sound is made by waves in the air.

Q. Don't you know the cribbing of cast iron, or any other metal would obstruct the sound? A. I don't believe it would obstruct the sound.

Q. So if, instead of barred cribbing, you had a solid cover, the sound would be just as distinct? A. No, sir.

Q. Why not? A. Because the solid covering would cause such a contraction of the waves that they would probably be destroyed entirely.

Q. A solid covering would completely destroy the waves, but a barred covering would partially destroy the waves? A. I don't believe it would destroy it at all.

Q. What would it do? A. Simply change the course slightly, but you would still get the condition.

Q. You were asked the question about what ordinary precautionary methods were adopted in case of railroad companies in villages or small towns; you said signs, didn't you? A. Yes, sir. I didn't make that reference to villages. I said railroad crossings in general.

Q. Railroad crossings in general include not only villages but cities? A. Yes, sir.

MR. BURGESS: He was testifying to crossings in open country.

MR. NOONAN: He said he was testifying to railroad crossings in general.

Q. What do you mean when you say the signs are the usual methods? A. I mean that the usual method, the one adopted in a majority of cases is to put signs located on the railroad right of way at the crossing which read generally, "Danger, Look out for the cars", or "Danger, Railroad Crossing".

Q. That method if generally adopted? A. Yes.

Q. Without any respect to the locality, whether town, village, city or wild country? A. I didn't say it was without respect to whether it was in a city or village.

Q. You said generally? A. It is generally so, because the majority are like that. Of course, they are modified by the—the conditions modify the rule. If a special condition exists it is generally handled in that way.

Q. Do you know the Erie Railroad Crossing at Monroe? A. Where do you mean, New York?

Q. Orange County, New York State. A. Yes.

Q. How is it protected? A. A crossing flagman.

Q. And a bell? A. Yes, sir, there is a bell there.

Q. A flagman and a bell? A. Yes, sir.

Q. Do you know there is not one-quarter of the traffic goes across that crossing that goes across the Belleville Turnpike? A. There is considerable traffic goes over there.

Q. I know. I ask you if you don't know it is one-quarter as much? A. No, sir, I do not.

Q. Assume 1800 vehicles a day, something like that, according to this census, go up or down the Belleville Turnpike—

MR. BURGESS: That is a wrong assumption. The six days, for the entire period, had about 1800.

MR. NOONAN: No, 600 or 700 in that Sunday.

COMMISSIONER HILLERY: The record will show.

Q. Do you mean to say the traffic over the crossing at Monroe is anything like the traffic over the crossing over the Belleville Turnpike? A. I have never seen a census of the crossing at Monroe, but I believe the traffic over that crossing in the summertime is practically as heavy as that over the Belleville Turnpike.

Q. Where is this place you had to muffle the bells because they were so noisy they kept the inhabitants awake? A. The city of Passaic.

Q. How gentle do the muffled bells become when they are muffled? A. I never made any test.

Q. Can anybody hear them? A. They certainly could, hear them from the train.

Q. Is the protection so afforded to give quiet to the people or to protect the travelling public? A. We muffle bells only under protest.

Q. Who protests, the people living around there? A. Yes. We protest against muffling them.

Q. Although you protest, yet you yield? A. Yes; agencies make us yield.

Q. When you put that in, that was your best judgment of the kind of bell to be put there? A. When we put it in it is a loud sounding bell.

Q. You thought that was the proper kind of a bell to put there? A. Yes.

Q. You found your judgment so entirely wrong you proceed to muffle the bell? A. We never changed our judgment.

Q. You surrendered your judgment to the judgment of the people around there? A. Somebody's judgment anyway.

Q. Your road in Passaic goes through the main street there? A. Yes, sir.

Q. You have gates there, too, don't you? A. We have gates at a number of crossings in Passaic.

Q. At every crossing of that street? A. No, sir.

Q. That main street? A. No, sir.

Q. A great majority of them? A. Yes, sir.

Q. You keep the gates and muffle the bells? A. Yes.

Q. You keep them muffled in the day time, too? A. They are muffled all the time.

Q. That is to enable people to sleep in the daytime as well as night time; everybody sleeps in Passaic twenty-four hours? A. That might be. We don't send a man twice a day to change the bells.

Q. There isn't any real necessity to put bells there? A. The gates aren't operated twenty-four hours. The bell is a protection.

Q. There are some crossings where they are operated twenty-four hours? A. Yes; those crossings there is no bells.

Q. The crossings which have gates are the most used crossings? A. As a general rule.

Q. You recognize the gates as being a more secure protection than any bell contrivance? A. In my judgment—

Q. That calls for a yes or no answer. A. In my judgment, crossing gates aren't any better protection than a crossing bell.

Q. If a man comes and finds the gates—if he is driving a horse that isn't a steeple chase performer, he don't jump the gates? A. They do very often.

Q. Very often jump over the gates? A. Drive through them.

Q. Don't you think a gate is more secure than a bell? A. No, sir.

Q. Why don't you put a bell instead of gates at the more used crossings? A. Our judgment doesn't always govern.

Q. Whose judgment governs it? A. The Utility Commission's.

Q. Do you mean to say the Utility Commission tells you or your railroad company that a bell is better protection than gates? A. I don't think they put it that way.

Q. Where did you get it that way? A. They order us to put gates at the crossing sometimes.

Q. Wouldn't you infer from that fact that you were ordered to put gates at the more used crossings that they thought gates would be more protection than a bell? A. I wouldn't infer.

Q. Won't you try and get your mind on it now? A. My judgment isn't changed about that.

Q. You think the Utility Commission is wrong about that? A. I don't know what they think.

Q. You say you were ordered to put gates where you thought bells were better? A. Yes.

Q. You don't agree with them? A. No.

Q. What is the most modern way of protecting traffic on a highway over a railroad crossing? A. By eliminating the crossing.

Q. That is modern method of doing it? A. It sure is.

Q. Do you really mean that? The crossing would not be in that place, would it? A. It would be a crossing.

Q. If you eliminate the crossing there isn't any crossing? A. You eliminate a grade crossing.

Q. What do you think is the most modern, up-to-date method of protecting the travelling public where there is a railroad crossing? A. To my mind the best method of protecting a grade crossing is by a flagman on the ground.

Q. The flagman is furnished with a red flag and

Q. A flagman on the ground? A. Yes.

a white flag? A. Yes.

Q. The white flag waved by the flagman indi-

to a pedestrian it may indicate whatever a pedestrian takes it to mean.

Q. That leaves it to the conjecture of the pedestrian and you think that better than a gate. If a gate is down the pedestrian or ignorant traveler who never saw a railroad before, coming along in a vehicle knows there is some obstruction or railroad when the gates are down? A. I suppose there are people who never saw a railroad.

Q. He would know that when he saw the gates down. A. He might stop.

Q. He certainly would, wouldn't he? A. I don't know what he would do.

Q. Your best judgment on the subject is he would? A. Yes.

Q. Seeing a flagman waving a white flag, a great many men wouldn't know anything at all about what he meant; it might be a signal to an approaching train? A. No; if a man was there and a highway traveler didn't stop, he would be in a position to yell at him, tell him to stop.

Q. Yell at him? A. Yes. Or where it was a pedestrian, catch hold and hold him or catch hold of the horse.

Q. Don't you think that an inefficient way of protecting the public; one flagman yelling at the people and catching hold of them? A. No, it is very good.

Q. Don't you think that is inefficient on the part of the railroad company? A. No, I think it is good protection.

Q. Better than by gate? A. A good deal better.

Q. Wouldn't any rational human being, if the gates were down, know there was some obstruction; wouldn't there be a barrier? A. There would. Some of them couldn't stop.

Q. Why not? A. Take an automobile going at sixty miles an hour.

Q. I am not talking of an automobile going sixty miles an hour. I am talking of an automobile going at the legal rate of speed.

MR. BURGESS: He might state how they they go across the meadows.

WITNESS: I have observed them going sixty miles an hour.

Q. Do you mean to tell His Honor that in your judgment a flagman waving an unintelligible flag and shouting and grabbing people is more protection to the travelling public over a highway than gates would be? A. I think it is.

RE-DIRECT EXAMINATION BY MR. BURGESS:

Q. Do you know anything about the view that can be obtained at the crossing at Monroe? A. The views are exceedingly bad at that crossing at Monroe.

Q. How far do you suppose you can see coming from either direction, do you remember what the views are? A. Coming from the south toward the railroad track you can't see up the track at all until you get within about 20 feet, then there is a sharp turn in each direction in front of the crossing. You can't see over four hundred feet or five hundred feet around the curve.

Q. Isn't it customary to put these covered gratings over signal bells at crossings? A. Yes, sir, it is always done.

Q. This railroad is the only railroad that had adopted that practice? A. No, I have noticed them on other railroads. In fact the signal companies make them that way.

Q. How many kinds of bells do you use at crossings? Is there one standard or are there other different kinds that give a moderate or slight sound according to how people like the sound of it? A. Only one kind of a bell.

Q. That is the reason why you muffle them? A. Yes.

Q. When some municipality gets after you. These crossings in Passaic, as I understand you, there are some of these crossings in the city of Passaic now protected by gates? A. Yes, sir, there are.

Q. Are they protected by bells? A. I think they all are.

Q. Some of them are protected by gates during the daytime, I understand you to say? A. Yes.

Q. During the night how; are there bells at these crossings? A. Yes. Of course, the bell is operating twenty-four hours.

Q. The gates are not operated during the night hours? A. Yes.

Q. And then the bell has to be relied on? A. Yes.

Q. Haven't we had cases on the New York division where automobiles have run right through gates? A. Yes, we have had a number of them.

Q. We have also had occasion where pedestrians have walked under gates? A. We had a number of them.

Q. It is quite a common occurrence in cities to see people walk right under the gates? A. Yes, sir.

Q. It was for that reason you stated you thought a flagman was to be preferred to gates? A. Yes, because the man on the gates is removed, is in a tower.

Q. People don't pay attention to the gates and the man in the tower can't stop them? A. No.

RE-CROSS EXAMINATION BY MR. NOONAN:

Q. You say some people prefer going under gates? A. Yes.

Q. I suppose you have seen at some time where

gates were down and two or three people getting under the gates? A. Yes, sir.

Q. You think the flagman would be a great improvement by the gates? A. He would in a good many cases.

Q. I mean under those circumstances you have described? A. With two or three people?

Q. Yes. A. If there were only two or three people he wouldn't be worth while there.

Q. He couldn't go around and grab the first one and take him with him and grab the second one getting under the gates when they were all trying to get across the track. A. The second man would probably see him grab the first one and stop.

Q. Each one that dodged under the gates knew what the gates were for and knew that meant danger? A. They don't seem to.

Q. Isn't it obvious to everybody who saw the gates down that that meant danger? A. It should mean that.

Q. To every rational person, wouldn't that be so? A. That is a matter of opinion. I think I am rational: I think I would regard it as a danger sign.

Q. You have a bell at Crystal Lake on the Susquehanna. I suppose you have jurisdiction of that? A. No, I have nothing to do with that.

Q. Nothing to do with anything except the Erie? A. That is all.

A. E. RUFFER, sworn on behalf of respondent.

DIRECT EXAMINATION BY MR. BURGESS:

Q. What is your position with the Erie Railroad? A. Assistant superintendent.

Q. What division? A. New York division and side lines; Erie, Greenwood Lake, and New York & Northern.

Q. Your jurisdiction extends over the two roads that cross over the Belleville Turnpike at the three points mentioned in the complaint? A. It does.

Q. Have you been out on the Belleville Turnpike during the summer or fall and observed the views obtaining at these several crossings? A. A number of times while making inspections going from one place to another and also over the highway in an automobile.

Q. What has been your observation as to the views? A. The views as explained by Mr. Schram, are very good. In fact, I don't know of any place on our territory, or the territory of which I am in charge, or in fact any railroad I can recall to mind, where the view is as good as in this particular territory. Last summer, while making a trip over these crossings in an automobile, I mentioned to the superintendent that if the views at all crossings were as good as at these particular ones, the railroad in general could save considerable, hundreds of thousands of dollars per annum, as they wouldn't be required to furnish any protection other than the ordinary railroad signs.

Q. Have you noticed these particular bells that are now located at these crossings ringing when the trains passed over the crossing or approached the crossing? A. I noticed it only last Thursday.

Q. Where were you? A. Coming down the Newark Branch train from Paterson. I stood on the

rear of the car, as I usually ride going over the road to observe conditions, and found—and heard the bells ringing on the Newark Branch crossing. I have also heard the crossing bells ringing on the Greenwood Lake crossing since they have been installed, about two weeks.

Q. What were you doing then? A. On a passenger train, on the rear end, outside on the platform.

Q. Are the tracks at all three of these crossings being used at the present time? A. No, the old Newark Branch has been abandoned.

Q. How long since there hasn't been any train movement over that branch? A. The track was abandoned, its general use, I think in October, 1908. As to what movement has been made over that crossing since then I am unable to state definitely. But there is very little of it.

Q. What movement could there be? A. Simply storage of cars, possibly. It hasn't been necessary for some little time.

Q. Where would those cars be stored, east or west of the crossing? A. West of the crossing usually. In fact I don't know since I have been connected with that division, which was in May, 1912, of our having used that portion of the railroad over that particular crossing; that is, shoving cars over that particular crossing.

Q. Is there any present intention of using that branch for the movement of trains? A. There is no definite plan I know of.

Q. Are you familiar with the method of protecting the two crossings which are used? A. Yes, sir.

Q. Considering the views that are obtained at the two crossings and the location of these crossings and the open country, and the traffic over the crossings, what can you say as to the method of protection that is at present given on those cross-

ings as compared with crossings of a similar character either on our railroad or other railroads with which you are familiar? A. The protection given on this particular crossing is much better than similar crossings in the open country. In fact, when we had an order to instal the second bell on these crossings we felt a hardship was being imposed on us. That similar crossing in the open country, used as often as these crossings are, from my observation, there was nothing more than an ordinary railroad crossing sign located on the railroad company's right of way.

Q. Do you know what it would cost, Mr. Ruffer, to provide gates at each one of these crossings? A. Approximately $800 other than the maintenance. The maintenance—we figured the average cost of maintenance of crossing gates is about $58. per year. I wouldn't quote that as the maintenance for that particular crossing; from my observation I should probably put it twenty times as much, as they would be carried down practically every day.

Q. What leads you to that idea? A. The speed automobiles make over that crossing.

Q. Why should the speed of automobiles over the crossing affect the gates if we had them there? A. They would never stop; go right through them.

Q. So you think we would be continually erecting gates? A. I believe so.

Q. You make that statement, I assume, from the observations of automobile traffic on that highway? A. Yes, sir.

Q. Then to erect gates, you assume the cost of erecting gates at three crossings $2400? A. Yes.

Q. How much have you considered it would cost to maintain a man to operate the gates per year? A. Days would cost $547.50, based on what we pay our flagmen at the average crossing of that kind,

away from the city or in a city. And day and night would be double, of course, that amount, $1095.

Q. And three times that amount for the three crossings? A. Yes. Of course, that was for one crossing.

Q. Assuming, of course, we will protect the crossing that isn't used the same as we protect the crossings that are used by trains. Now, Mr. Ruffer, you have heard about this luminous sign or conspicuous red lights placed on either side of the crossing that would be seen 1,000 feet; is that a standard device for protecting grade crossings? A. No, sir. We do not use any such sign on our railroad; in fact, we don't consider it safe.

Q. Why don't you consider it safe? A. Because in foggy weather it can't be seen until you are right on top of it. I understand there are two railroads in the east who have signs similar to these, one of which is the Lehigh Valley and one of which is the Central Railroad of New Jersey, who are making experiments and tests with them. The officers of those railroads don't think very much of them; for the reason just mentioned by me; although I have had no personal experience with those particular lights.

Q. Would there be any danger or any interference with the operation of trains caused by red lights placed on the right of way? A. Yes; they might be taken by the engineer as a stop signal, approaching them on a curve; if he run across this signal he would apply his air in emergency and cause personal injury. It is generally the practice to keep red lights away from railroad crossings; where a light is required of any kind to select some other color.

Q. How much do these crossings, with lights that the Central and Lehigh Valley use, cost? A. I have heard between $600 and $800.

Q. How many lights would be necessary at these three crossings? A. Six; one on each side of each crossing.

Q. Have you any further observations you would like to make with respect to the protection of these crossings and the character of the protection desired? A. No.

CROSS EXAMINATION BY MR. NOONAN:

Q. Mr. Ruffer, you think that the lights are not quite as good as signs because in foggy weather you can't see the lights? A. Yes, sir. You cannot see the signs either.

Q. Don't you know, when you come to think of it, if you can't see the light you can't see the sign? A. You cannot see the sign.

Q. What is the advantage of the signs over the light in the night time? A. None.

Q. In a clear night you can't read the signs as far away as you can see the lights, can you? A. Pretty near. You said a clear night.

Q. I mean a dark night, not a bright night. A. You might see the light a little further.

Q. Don't you know you can see the light ten times as far? A. I do not.

Q. Do you mean to say you can read the railroad sign within anything like the distance you can see the light? A. Yes.

Q. What do you make the difference to be? A. Very little; possibly longer on account of my being a railroad man. You are asking my opinion; I can see the signs because I know the shape.

Q. You couldn't see it on a dark night? A. Yes. I wouldn't be so sure on a light that it was railroad crossing light; it might be some light near the crossing.

Q. You would know it was a light? A. Yes.

Q. You could see that much further than the sign? A. Yes.

A. E. Ruffer—Cross.

Q. You think that this sign on the right of way is quite adequate protection at these crossings from the Belleville Turpike? A. No, sir, I wouldn't say that.

Q. Didn't you say the view was so spacious there you remarked to your superior officer the view was so spacious that if you had that kind of a view on all crossings you wouldn't need any protection except the ordinary railroad kind at the crossing? A. Yes.

Q. You think that placing ordinary railroad signs on the railroad right of way would be entirely adequate? A. Yes, to the ordinary man.

Q. Why put bells on the right of way? A. Because we are forced to.

Q. Who forces you? A. I couldn't say.

Q. Who determines that method of precaution that you adopt; I mean in the company? A. Sometimes even the officer of the company hasn't.

Q. Who has? Some wayfarer? A. Usually the Public Utility Commission.

Q. I am talking of the time before there was any Public Utility Commission? A. Then I would say ourselves.

Q. Then you would say before the Public Utility Commission was created you kept a bell on the right of way? A. Some rights of way.

Q. This Belleville Turnpike? A. No, sir.

Q. You had no bell? A. No.

Q. You installed a bell on the right of way because the Public Utility Commission required you to do it? A. I couldn't tell you.

Q. You don't know how it got there? A. No.

Q. You surely thought, with a bell on the right of way and a sign on the right of way, you have more than abundant protection for the travelling public? A. Yes.

Q. Why did you put the bell 100 feet from the right of way? A. That was our instructions.

Q. From whom? A. From our general officer. I don't know where that originated.

Q. You don't say the Public Utility Commission adjudged you to do that? A. I couldn't say.

Q. In the judgment of your general officer these protections which you consider more than abundant were inadequate? A. I don't know that was the case.

Q. It must have been so. A. They were probably ordered to do it.

Q. Why do you say probably if you don't know? A. That is the only reason I know. I know the general practice is not to put that protection.

Q. What is your position? A. Assistant superintendent.

Q. The superintendent has general control of the entire division? A. Yes.

Q. You come next to him? A. Yes.

Q. If there is a question of putting more protection at railroad crossings, to whom is that question left; who determines? A. The superintendent.

Q. Or you? A. Or myself in his absence. Then the—

Q. Neither the superintendent nor you determines about a bell on the right of way nor a bell 100 feet from the right of way?. A. We are usually asked for our recommendation.

Q. Did you recommend the 100-foot away bell? A. No.

Q. Did you advise against them? A. We weren't even asked; they didn't even ask our opinion. The first we knew we got an order in a certain way; it had gone out, they should be installed.

Q. In your company's answer to the petition of the Board of Freeholders they say what they have done is to instal these bells 100 feet away from the track on each and the sign on the railroad crossing 500 feet away and they say they deem their

precautions are adequate and they ought not to be required to instal more effective precautions until the present ones have had a test; do you agree with that? A. I should say personally we should not change until the test is over.

Q. Until the test is over? A. Personally I don't think there is any more protection at that particular point needed while the views are as good as they are to-day.

Q. What further protection could you have? A. I should say personally none is necessary.

Q. What further protection could you have? A. We sometimes put a flagman on the crossing.

Q. Sometimes you are forced to put a gate at the crossing? A. And a gate.

Q. Those are the further protections which you, as a railroad man, understand your company to refer when they say they should not be required to put further protection until they test the efficiency of the present protection?

MR. NOONAN: That is all.

MR. BURGESS: That is all I have.

COMMISSIONER HILLERY: Do you want to make an argument?

MR. NOONAN: I don't think there is any occasion to trouble your Honor.

MR. BURGESS: No.

COMMISSIONER HILLERY: Do you desire to submit anything in writing?

MR. NOONAN: I would like to have a copy of the testimony of what has occurred to-day and will submit a brief.

COMMISSIONER HILLERY: You will both have an opportunity to submit any memorandum in writing you choose.

MR. BURGESS: I don't care to.

(Matter sent to conference and briefs to be furnished by petitioner ten days after receipt of transcript of testimony.)

Stipulation as to Exhibits P-3 and P-4.

Exhibit P-2.

Office of

COUNTY ENGINEER,

HUDSON COUNTY COURT HOUSE,

Jersey City, N. J.

TRAFFIC ON BELLEVILLE TURNPIKE.

	Wednesday, Dec. 10.	Thursday, Dec. 11.	Friday, Dec. 12.	Saturday, Dec. 13.	Sunday, Dec. 14.	Monday, Dec. 15.	Total.
Automobiles	145	113	122	295	688	173	1536
Comm. trucks	25	36	38	23		22	144
3-horse veh. or over	2						2
2-horse veh.	17	19	16	8	1	18	73
1-horse veh.	9	8	5	5	9	9	45
Motor cycles	2	2	1	2	33		40
Bicycles	2			5	21		28
Pedestrians	13	5	12	8	30	2	70
Total	215	183	194	346	782	218	1938

(Signed) T. J. WASSER,
County Engineer.

New Jersey Supreme Court.

ERIE RAILROAD COMPANY,

Prosecutor,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,

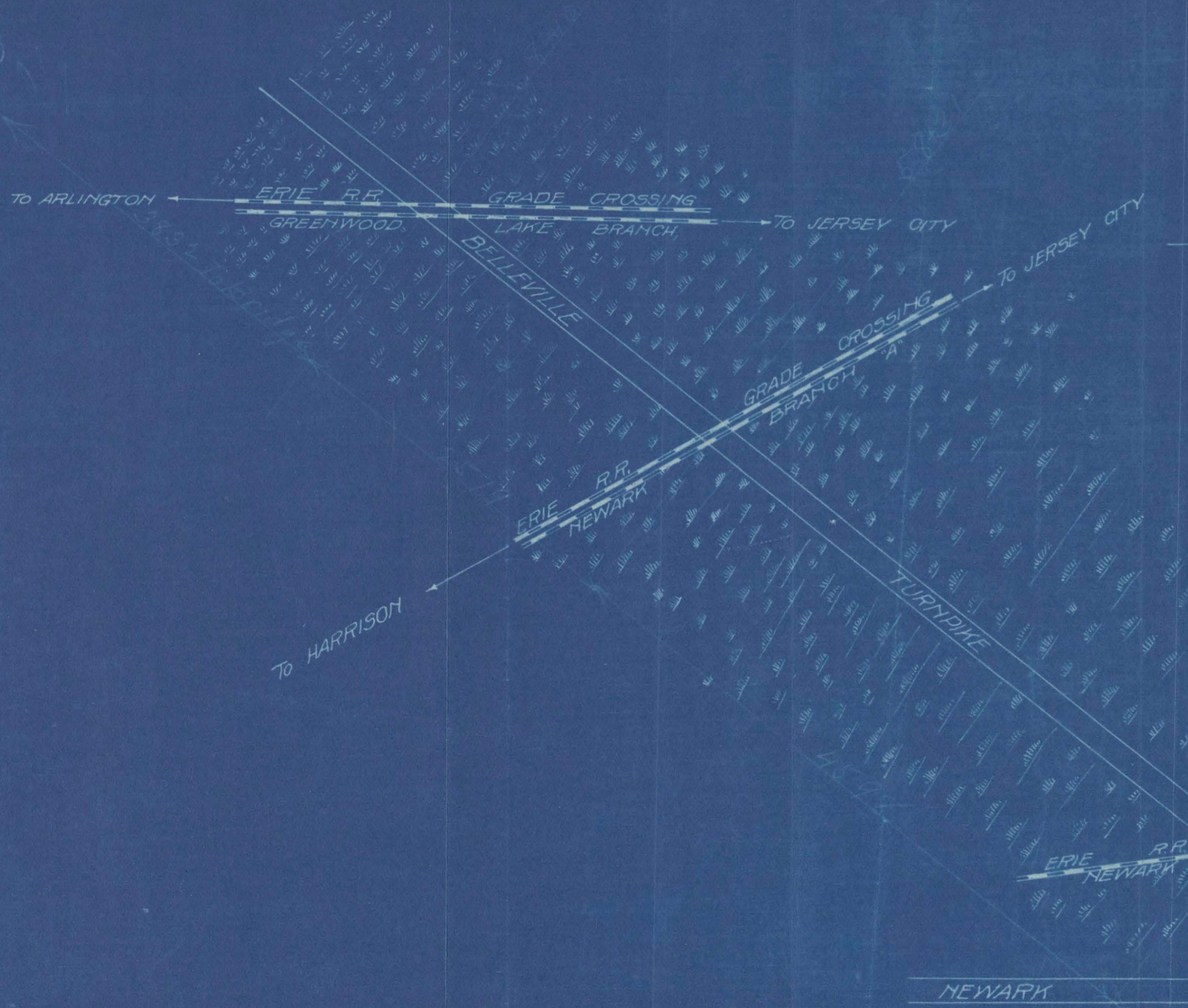
Defendants.

The parties hereto consent that the attached portions of Exhibits P-3 and P-4 may be printed in lieu of the entire copy of said exhibits.

COLLINS & CORBIN,
Attorneys of Prosecutor.

FRANK H. SOMMER,
Attorney, Board of Public Utility Commissioners.

JOHN A. DENNIN,
Attorney, Board of Chosen Freeholders of the County of Hudson.



SKETCH SHOWING
ERIE RAILROAD CROSSINGS
OVER
THE BELLEVILLE TURNPIKE
KEARNY,
HUDSON COUNTY
N.J.

Dec. 18, 1913.

Drawing No. 46

J. Haeser
County Engr. C.A.M.

Ex P-1

Exhibit P-3.

ERIE RAILROAD TIMETABLE, Greenwood Lake Division, Orange Branch and Caldwell Branch, dated September 28, 1913, revised December 1, 1913.

This shows certain passenger trains passed over the crossing described as the crossing of the Belleville Turnpike and the Greenwood Lake Branch. Following is a list of westbound trains showing the leaving time at Jersey City:

WEEK DAYS.

				Except Sat.			Saturdays Only.					
507	509	511	513	515	593	569	563	461	517	519	521	523
A.M.	A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
7.24	9.08	10.14	11.30	12.47	12.44	12.50	1.34	1.37	2.00	3.00	3.44	4.22

Ex.	Ex.	Ex.Sat.	Ex.				Ex.	Ex.	Ex.Sat.			
573	527	577	525	425	529	585	531	427	533	535	537	
Hols.	Hols.	&Hols.	Hols.				Hols.	Hols.	& Hols.			
P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	
4.44	4.46	5.14	5.17	5.27	5.34	5.45	5.52	6.04	6.14	6.24	6.52	

539	541	543	545	501	503
P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
7.24	8.29	9.44	10.46	11.45	12.45

Following is a list of eastbound trains showing arrival time at Jersey City:

WEEK DAYS.

			Ex.	Ex.	Ex.		Ex.	Ex.		Ex.		
500	502	504	506	406	508	510	468	512	410	530	514	412
			Hols.	Hols.	Hols.		Hols.	Hols.		Hols.		
A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.
5.54	6.56	7.21	7.41	7.51	8.08	8.11	8.19	8.29	8.37	8.41	8.56	9.11

								Ex.	Sat.				
518	520	522	524	526	528	516	532	534	580	536	538	540	542
								Sat. Only.					
A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
9.28	10.31	11.40	1.11	2.40	3.30	3.49	4.21	5.28	5.57	7.21	9.01	10.40	11.56

HOLIDAYS.—The term Holidays used in this time table applies to Nov. 27, Dec. 25, 1913, Jan. 1, Feb. 12 and Feb. 23, 1914.

Following is a list of westbound trains showing leaving time at Jersey City:

SUNDAYS.

547	441	549	567	551	561	553	555	405	455	557	459	559
A.M.	A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
9.00	10.00	10.30	11.46	1.15	3.00	4.45	6.35	7.30	8.15	9.45	10.45	11.15

Following is a list of eastbound trains showing arrival time at Jersey City:

SUNDAYS.

544	440	546	548	524	560	552	554	496	562	456	556
A.M.	A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
8.09	9.11	9.39	11.26	1.11	2.39	4.56	6.52	7.11	8.11	10.00	10.25

HOLIDAYS.—The term Holidays used in this time table applies to Nov. 27, Dec. 25, 1913, Jan. 1, Feb. 12 and Feb. 23, 1914.

Exhibit P-4.

ERIE RAILROAD TIMETABLE, Main Line and Newark Branch between New York and Suffern, and Bergen County Railroad Branch, dated October 19, 1913, revised November 6, 1913.

This shows certain passenger trains pass over the crossing described as the crossing of the Belleville Turnpike and the track of the new Newark Branch.

Following is a list of the westbound trains showing leaving time at Jersey City:

NEWARK BRANCH.

Week Days.

				Sat.	Sat.	Ex.		k	Ex. Sat.		k	
303	307	311	313	333	339	3.15	317	319	321	323	325	327
				Only.	Only.	Sat.			k			
A.M.	A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
6.44	8.30	10.00	11.59	1.24	2.05	1.45	3.35	4.37	5.24	5.42	6.16	6.49

329	331	301
P.M.	P.M.	P.M.
7.55	10.29	12.29

Following is a list of eastbound trains showing arrival time at Jersey City:

NEWARK BRANCH.

Week Days.

k	k			k	k							
300	302	304	308	310	316	312	314	318	320	322	324	328
A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.
6.26	6.53	7.31	8.03	8.21	8.31	9.01	10.11	12.26	1.56	3.58	5.39	7.30

330	332	334
P.M.	P.M.	P.M.
7.56	10.11	11.26

Following is a list of westbound trains showing leaving time at Jersey City:

NEWARK BRANCH.

Sundays.

761	775	763	765	777	767	769	771	331
A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
8.29	9.44	11.44	2.00	3.30	5.14	6.49	8.30	10.29

Following is a list of eastbound trains showing arrival time at Jersey City:

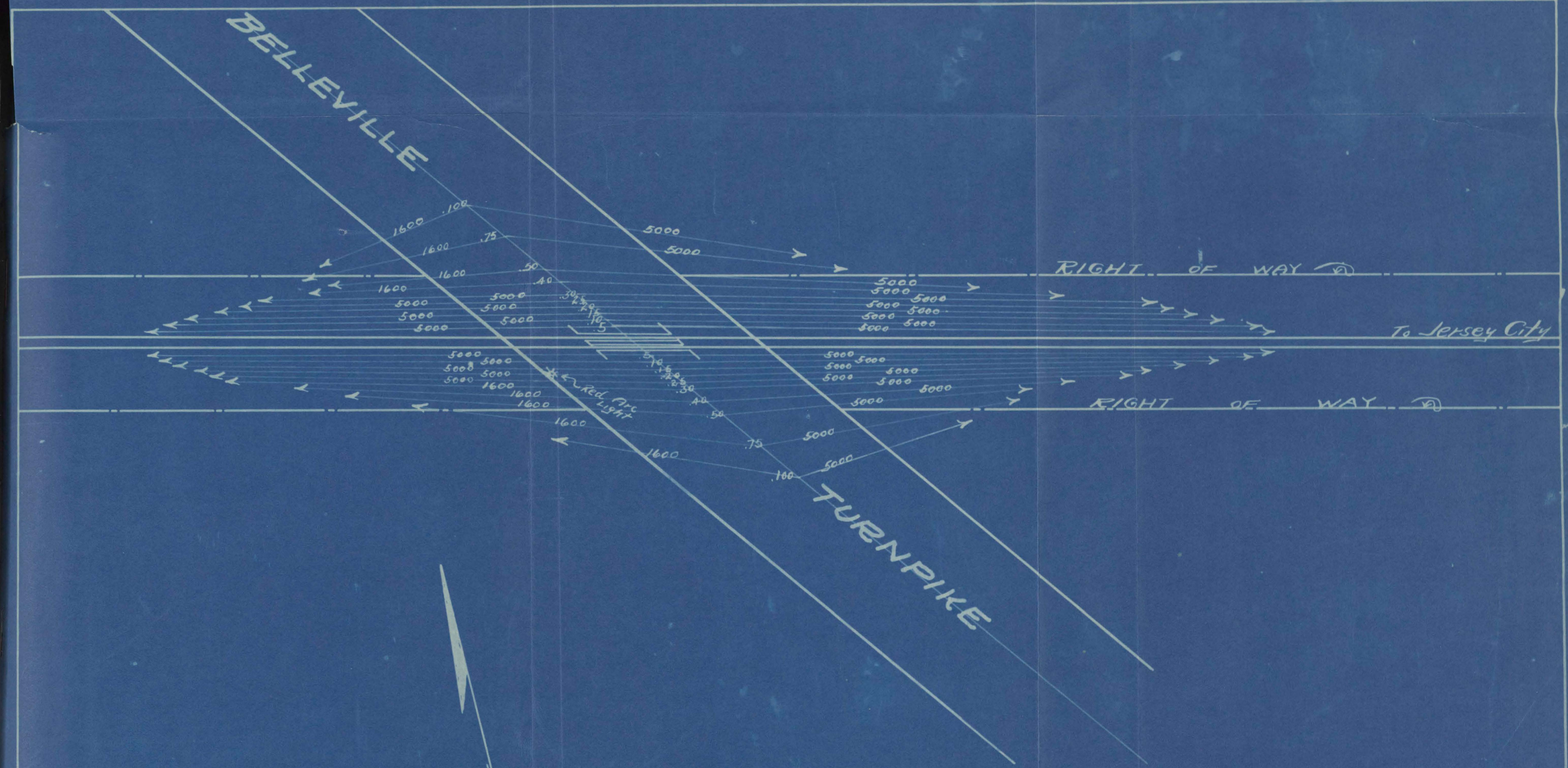
NEWARK BRANCH.

Sundays.

762	764	760	766	768	770	778	772	774	334
A.M.	A.M.	A.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.	P.M.
8.11	9.26	10.56	12.11	2.26	4.11	5.41	7.48	10.10	11.26

k Will not run on holidays.

HOLIDAYS.—Nov. 27, Dec. 25, 1913, Jan. 1, Feb. 12, Feb. 23, May 30, 1914.



ERIE RAILROAD CO
Newark Branch (abandoned)

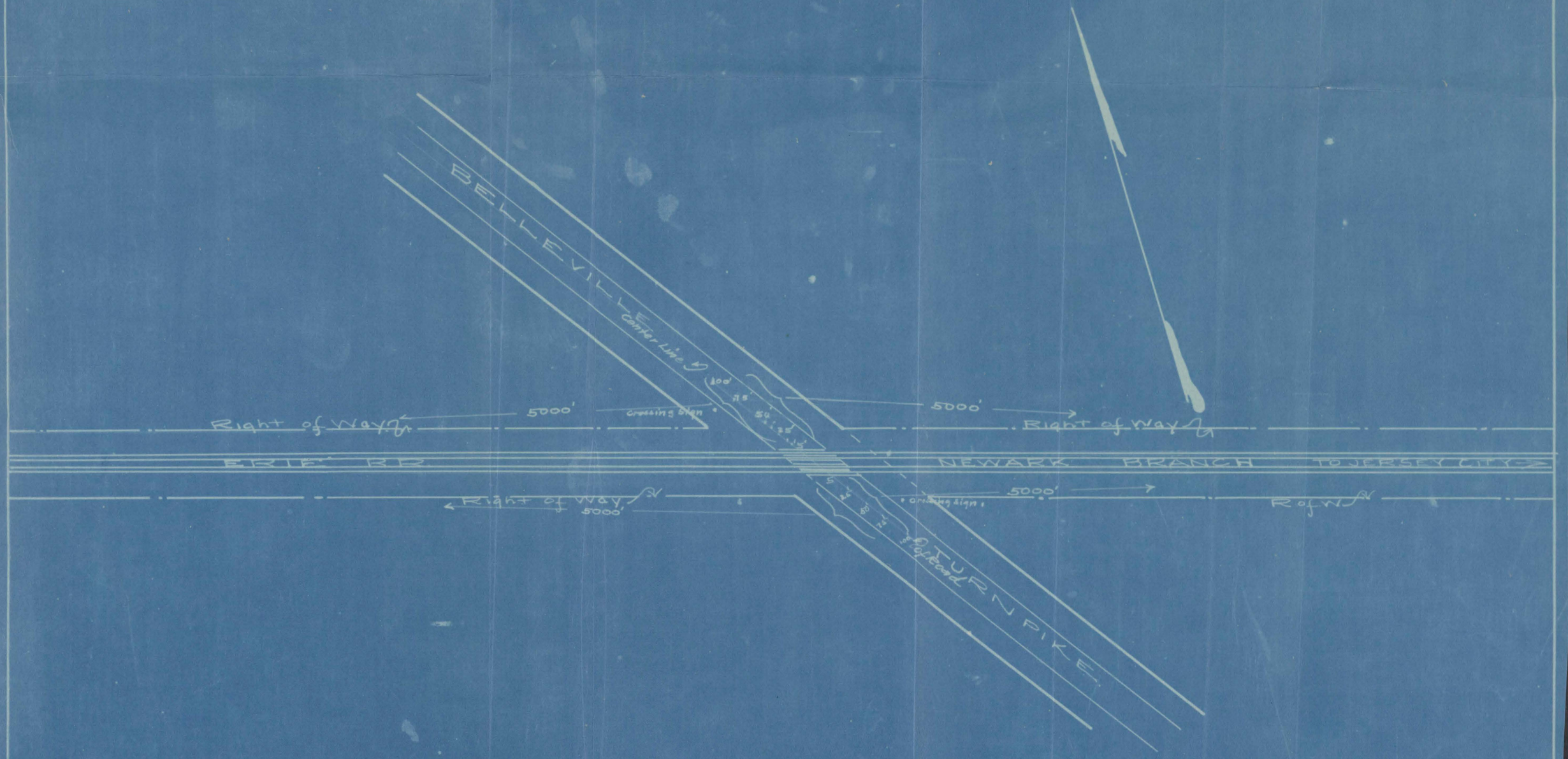
VIEWS AND SIGHTS ON BELLEVILLE TURNPIKE ON NEWARK & HUDSON R.R.

Office of Asst Engr
Scale 1" = 50'

Jersey City N.J.
March 10 - 1914

D.V.

B423



ERIE RAILROAD CO.

NEW YORK DIV.

NEWARK BRANCH

VIEWS AND SIGHTS ON BELLEVILLE TURNPIKE. 3 MILES EAST OF HARRISON, N.J.

SCALE 100'=1" MARCH 12, 1913.

OFFICE OF ENG'R. M. OF W. JERSEY CITY.

A-127

BELLEVILLE

RIGHT OF WAY

GREENWOOD LAKE DIVISION

TO JERSEY CITY →

RIGHT OF WAY

TURNPIKE

PIPE LINE HERE

RIGHT OF WAY

ERIE RAILROAD CO.

GREENWOOD LAKE DIVISION

VIEWS AND SIGHTS ON BELLEVILLE TURN'P

ONE MILE EAST OF ARLINGTON N.J.

SCALE 50'-1" MARCH 12 1913

OFFICE OF ENG'R M OF W JERSEY CITY

A 193

Stipulation.

(Filed Aug. 5, 1914.)

It is hereby stipulated and agreed by and between the parties hereto that the time of the prosecutor for filing the reasons for the writ of certiorari in the above entitled matter be and the same is hereby extended to September 5th, 1914.

Dated, July 30th, 1914.

COLLINS & CORBIN,
Attorneys of Prosecutor

FRANK H. SOMMER,
Attorney of Defendant, Board of Public Utility Commissioners.

JAMES J. MURPHY,
Attorney of Defendant, Board of Chosen Freeholders of the County of Hudson.

New Jersey State Library

Reasons.

(Filed Sept. 9, 1914.)

The Prosecutor assigns the following reasons on which it will rely to set aside the order in this case:

1. Those parts of said order which order the prosecutor to keep on duty, during the twenty-four hours of each day of the week at the crossing of the Belleville Turnpike and the track of the new Newark Branch of the prosecutor, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the prosecutor, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours, and with a lighted lamp or lamps during the hours of darkness, of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points, were not justified by the evidence taken before said Board of Public Utility Commissioners.

2. There was no evidence before said Board of Public Utility Commissioners to support reasonably the said parts of said order or either of them, specified under Reason 1.

3. There was no evidence before said Board of Public Utility Commissioners from which said Board might reasonably infer that in addition to the protection that had been installed before and at the time of the making of said order at the crossing of the Belleville Turnpike and the track of the new Newark Branch of the prosecutor, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the prosecutor, the said crossings, or either of them, should be further protected by flagmen on duty during the twenty-four hours of the day, to give warning of the approach of trains, by flags during the day and lights during the night.

Reasons.

4. The evidence taken before said Board shows that the prosecutor before and at the time of the making of said order had installed protective devices and adopted reasonable provisions for the protection of the travelling public at both of the crossings specified under Reason 1.

5. The evidence taken before said Board shows that the devices and provisions ordered by said Board for the protection of the crossings specified under Reason 1 were not necessary for the protection of the travelling public at said crossings or either of them.

6. The evidence taken before said Board shows that the conditions at the grade crossings specified under Reason 1, and each of them, were not such as to make it necessary for the protection of the travelling public at such grade crossings or either of them, that the devices and provisions ordered by said Board should be installed or adopted.

7. According to the whole of the evidence taken before said Board, it appears that the parts of said order specified under Reason 1, were unreasonable.

8. The statute, by virtue of which said parts of said order were made, is unconstitutional and void, because it deprives the Court of Chancery of the State of New Jersey of its exclusive jurisdiction over the regulation of the use of easements, contrary to Article VI., Section 1, of the Constitution of the State of New Jersey.

COLLINS & CORBIN,
Attorneys of Prosecutor.

Opinion of Supreme Court.

(Filed, Aug. 12, 1915.)

NEW JERSEY SUPREME COURT.

November Term, 1914.

ERIE RAILROAD COMPANY, *Prosecutor,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS AND BOARD OF CHOSEN FREEHOLDERS OF HUDSON, *Defendants.*	On Certiorari.

Submitted November Term, 1914. Decided, July, 1915.

Before

JUSTICES SWAYZE, PARKER and KALISCH.

For the Prosecutor, Collins & Corbin; Geo. S. Hobart, of Counsel.

For the Defendants, Frank H. Sommer, Attorney of Board of Utility Commissioners. John A. Dennin, Attorney of Board of Chosen Freeholders of Hudson County.

James J. Murphy & Joseph M. Noonan, of Counsel.

The opinion of the Court was delivered by KALISCH, J.

The Board of Public Utility Commissioners upon a petition filed by the Board of Chosen Freeholders of the County of Hudson and after a hearing made an order, which among other things, commanded the prosecutor "to keep on duty, dur-

ing the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and the track of the Newark Branch of said company, and at the crossing of the said Branch of said Company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamp or lamps during the hours of darkness of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points."

This part of the order is complained of by the prosecutor, as being, under the evidence and the safe guards then existing at the crossing mentioned in the order, unreasonable.

The other objection raised and argued in the brief of counsel for the prosecutor against the validity of the order is that the statute under which the order was made is unconstitutional, in so far as it deprives the Court of Chancery of jurisdiction over the regulation of the use of easements.

Under the first objection levelled against the validity of the order upon the ground that it is unreasonable, it is contended by counsel for the prosecutor that in view of the undisputed proof in the case establishing the condition of the crossings prior to and at the time the order was made, as to the number of running trains, the amount of vehicular and pedestrian traffic, and the safe guards in use, over and at the crossings, and the opportunity of observing approaching trains, in either direction, nevertheless, the situation developed, regarded most strongly against the prosecutor, did not warrant an order for the maintaining of a flagman by the prosecutor, during the twenty-four hours of the day, at each crossing.

The proof established that at each of the cross-

ings there was the ordinary crossing sign warning the traveler of the presence of the railroad tracks; then on the right hand of the road about 500 feet from the crossing there was a sign, "Railroad Crossing, 500 feet". Of course, these signs could not be of much service in the night time.

In addition there was located on either side of the tracks, at a distance of one hundred feet therefrom, a bell operated by electricity and controlled through a track circuit working through a relay. At the crossings the track circuit is 2600 feet on either side of the crossing, which would start the bell ringing when the train was that distance from the crossing. There was testimony, however, on this point before the board which tended to establish that the bells did not always ring at the approach of a train, and also that there had been several accidents at the crossings.

The testimony, as to the extent of view that may be had and the facility with which it can be made, in either direction, by a traveler approaching the crossings in the day or night time, is conflicting, but since there is evidence which will reasonably support the finding of the Board against the contention of the prosecutor, such finding will not be disturbed.

From the testimony it appears that the condition which prevails at the crossings is, that on the Newark branch on week days there are fourteen west-bound and sixteen east-bound trains; on Sundays nine west and ten east-bound trains; on holidays the number of west-bound trains is reduced from fourteen to twelve, and the east-bound from sixteen to twelve. A similar condition exists at the Greenwood Lake Branch crossing, with more trains running over the crossing in either direction.

The traffic by wagons and automobiles and on foot over the crossings is much greater on Sundays than on week days, as appears from actual observation and count made. But after all the amount of traffic over these crossings bears only relatively on the nature of the protection to be provided. It is not the number of or character of the vehicles, or the number of persons, or the amount of property that may be subject to peril that is to be considered by the Board, but whether there is any peril at all, and if there be any, do the safe guards afforded measure up to the danger to be encounted. It will be at once recognized that these matters are peculiarly within the province of the Board to determine and their judgment will not be interfered with, if there is any testimony upon which its determination of fact can rest.

And viewing the case in this light we have been unable to find any evidence which will reasonably support that part of the order of the Board which directs the prosecutor to keep on duty a flagman during the twenty-four hours of each day of the week at the crossings in question. We think the order in that respect is too broad. The duty imposed on the prosecutor and to be performed by it should not be made more onerous than the necessity for the protection of life, limb and property demands.

There can be no good reason for obligating the prosecutor to keep a flagman at each of the crossings at periods of time when there are no trains running.

The time tables in evidence showing the running of trains on both branches and over the crossings make it manifest that there is no good reason for the presence of a flagman at the crossings during the twenty-four hours of each day. The order

should have been limited to keep on duty a flagman at the crossings covering the operations of all trains over such crossings.

We now come to a consideration of the claim made by the counsel for the prosecutor that the statute under which the order is 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.

The argument made to support this contention is that by Article 6, Section 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 exclusively jurisdiction over the regulation of easements, and that therefore Section 22 of the Act concerning Public Utilities (Chap. 195, P. L. 1911, p. 383), as amended by Chap. 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 assumption that Section 2 confers upon the Board judicial power to regulate conflicting ease-

ments. 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 applied, 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 2 of the statute under consideration that in any way attempts to oust the Court of Chancery of its jurisdiction to deal with conflicting easements.

A word more may be said on this subject, and that is, that it is difficult to conceive of a statute of police regulation which does not in some way, in its enforcement, effect the private use and enjoyment of property, and oftentimes, of individual liberty.

In many instances matters pertaining to the public safety, health, morals, etc., have been, as a matter of legislative policy, in the interest of the public, left to be conserved by special statutory tribunals created for that particular purpose, in that, matters affecting life, health or morals may be summarily attended to and dealt with.

It is quite obvious that it would be of no prac-

tical value to make regulations regarding such matters unless the Board entrusted with the care of the subject had power to give effect to such regulations.

For the reason that the order made by the Board is too broad in that it requires the prosecutor to keep a flagman on duty at each of the crossings during twenty-four hours of each day, as has been pointed out, that part of the order will be set aside so that it can be modified by the Board in conformity with the views herein expressed.

Rule for Judgment.

(Filed Nov. 6, 1915.)

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY, *Prosecutor,* *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Defendants.*	On Certiorari. Order.

This cause having been argued at the November Term, 1914, of this Court, and the Court having considered the matter and having inspected the record and proceedings, and being of the opinion that that part of the order under review dated June 9, 1914, made by the defendant Board of Public Utility Commissioners, which, among other things, commanded the prosecutor "to keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turn-

pike and the track of the new Newark Branch of said Company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamp or lamps during the hours of darkness, of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points," is too broad in that it requires the prosecutor to keep a flagman on duty at each of said crossings during twenty-four hours of each day:

ORDERED, that said part of said order be and the same is hereby set aside with costs to the prosecutor as against Board of Chosen Freeholders of the County of Hudson.

FURTHER ORDERED that the record be remitted to said Board of Public Utility Commissioners so that said part of said order be modified by providing that the prosecutor be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them.

Rule entered this sixth day of November, A. D. 1915, on motion of

COLLINS & CORBIN,
Attorneys of Prosecutor.

Let this Rule be entered.

By the Court,

C. W. PARKER,
J. S. C.

Notice and Grounds of Appeal.

(Filed Sept. 11, 1916.)

To L. EDWARD HERRMANN,

Attorney of Board of Public Utility Commissioners,

JOHN A. DENNIN,

Attorney of Board of Chosen Freeholders of the County of Hudson,

TAKE NOTICE that the appellant appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as adjudges that the record herein be remitted to the Board of Public Utility Commissioners so that a certain part of the order of said Board of Public Utility Commissioners under review dated June 9, 1914, to wit, that part thereof which, among other things, commanded the appellant "to keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and the track of the new Newark Branch of said company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamp or lamps during the hours of darkness, of the approach of any and all locomotives, cars or trains of cars to cross the Belleville Turnpike at said points", be modified by providing that the appellant be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them —on the following grounds:

Notice and Grounds of Appeal.

1. The Supreme Court adjudged that the record be remitted to said Board of Public Utility Commissioners so that said part of the order of said Board hereinabove quoted be modified by providing that the appellant be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings and each of them, and covering the operations of all trains and engines over said crossings and each of them, whereas for one or more of the Reasons for reversal filed in said Court under the writ of certiorari herein, which Reasons are hereby stated as grounds of appeal in this Court, the said Supreme Court should have reversed and set aside the order of said Board of Public Utility Commissioners under review without modification and without remission of same to said Board for the purpose of modification as aforesaid.

2. Said Supreme Court having concluded that the said part of said order under review hereinabove quoted was too broad in that it required the appellant to keep a flagman on duty at each of said crossings, during twenty-four hours of each day, and having adjudged that said part of said order should be set aside, with costs, had no power or jurisdiction to order that the record be remitted to said Board of Public Utility Commissioners so that said part of said order be modified in the manner aforesaid or otherwise.

3. Said Supreme Court should have set aside said order under review in toto without adjudging or directing said Board of Public Utility Commissioners to modify said order in the manner aforesaid or otherwise.

COLLINS & CORBIN,
Attorneys of Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, CITY OF PATERSON, and BOARD OF FINANCE of said City,
Defendants-Respondents.

On Appeal from Supreme Court.

Copies of Recent Opinions Referred to at Oral Argument But Not Cited in Briefs.

At the oral argument of this cause on January 4 and 5, 1917, leave was given to counsel for the prosecutor to print for the information of the court copies of the opinions, in two recent cases, namely, opinion of the Superior Court of Pennsylvania in *Pennsylvania Railroad Co.* v. *Public Service Commission and Kift Milling Co.*, 4 Pennsylvania Corporation Reporter, 227, and the opinions of the Appellate Division, Third Department of New York, in case of *People, ex rel. Erie Railroad Co.* v. *Public Service Commission,* Second District.

The prosecutor conceives that these opinions will be helpful to the court in deciding certain questions relative to side tracks, which were discussed in the prosecutor's brief under Point V., pp. 137-158, and Point XXII, pp. 414-438.

In the *Pennsylvania* case it is held that the railroad company cannot be required to construct at its own expense and upon *its own right of way* a switch or side track for the use of an individual shipper.

Filed after the Oral Argume
by leave of Court.

In the *New York* case it is held that the railroad company cannot be required to operate a switch connection and side track on the *property of such a shipper.*

Under these cases and the other cases cited in its brief the prosecutor contends that the order under review requires it to make changes in sidings that are not within the limits of its right of way, and that such construction or reconstruction cannot lawfully be required. The Supreme Court held that the order did not require the prosecutor to make these changes, but the prosecutor contends that this construction of the order was erroneous.

As to changes *in its own side tracks,* the Supreme Court construed the order to require the prosecutor to make such changes. The prosecutor agrees with this construction of the order, but contends that it cannot be lawfully required to make such changes—particularly in view of the fact that the side tracks in question (even though located on the prosecutor's own right of way) are maintained and operated for the benefit of the several industries adjoining the same, and the changes in such side tracks, as required to be made by the order under review, would be for the benefit of such industries.

Copies of the Pennsylvania and New York decisions above referred to, follow:

PENNSYLVANIA RAILROAD COMPANY, *Appellant,* v. PUBLIC SERVICE COMMISSION, *Appellee,* AND KIFT MILLING CO., *Intervenor.*

4 Pennsylvania Corporation Reporter, 227, Issue of November, 1916.

Side Tracks—Construction of on railroad property—Power of Public Service Commission—

Act of July 26, 1913, P. L. 1374, Art. II, Sec. 10, and Art. V., Sec. 17.

The Public Service Commission has no authority to require a railroad company to construct at its own expense and upon its own right of way a switch or side track for the use of an individual shipper.

In the Superior Court. No. 352, October Term, 1915. Appeal from Order of the Public Service Commission in the case of *Kift Milling Co.* v. *Pennsylvania Railroad Co.* For Report and Order of the Commission, see 3 P. C. R. 141.

Stacy B. Lloyd, for Pennsylvania Railroad Co.

William N. Trinkle, for Public Service Commission.

HENDERSON, *J.*, October 9, 1916:

> This is an appeal from an order of the Public Service Commission. The Kift Milling Company filed a complaint against the Pennsylvania Railroad Company setting forth that the milling company had a flour and feed mill in the Borough of Sunbury adjoining the right of way of the railroad company; that it needed a switch or side-track on the right of way of the railroad and in proximity to the mill to be used in the unloading and loading of grain, flour and other commodities dealt in by the company; that there had existed for a long time a switch or siding on the right of way in front of the property on which the complainant's mill was erected; that this siding was abandoned and torn up by the railroad company and that it has refused to replace it except at the expense of the complainants. It is admitted by the appellant that a siding existed as alleged up to 1902 at which time the frog and switch and all of the lead tracks and one rail along the line of the frog were taken

out and removed because the switch had become dangerous through the decay of the trestle on which it was in part built. In 1910 the balance of the siding was removed. The switch had been used in connection with a lime kiln which was long ago abandoned. The milling company acquired title to their property after the switch had ceased to be used by the railroad company. The building of the mill was commenced in the latter part of 1913 and completed in August or September, 1914. The complainants demanded the restoration of the switch for the accommodation of their business and the refusal of the railroad company to build it at its own expense was the inducement to the order made by the Public Service Commission. There is no allegation that the complainant has been in default in furnishing suitable shipping facilities at the station in Sunbury. It is admitted that the freight station is about two hundred feet from the mill and so far as appears in the case the public requirements are well met by the railroad service at that place. The milling company contends that it has a right to require the railroad company to furnish it a private switch on the right of way of the railroad company at the expense of the company for the use of the milling company in the prosecution of its business and the order of the Commission impliedly affirms that position. It is not alleged that the switch or sidetrack was ever used by the milling company or that it was built for the use of a mill, nor does it appear in any aspect of the case that it was appurtenant to the property now owned by the milling company. Conceding that the track was laid at the expense of the owners of the lime works that was a matter of private contract with respect to which the proprietors of

the mill had no interest. The construction of the sidetrack did not give to the then adjoining owners a vested interest in the right of way nor any right to the maintenance of such sidetrack except as assured to them by a contract under which it may have been constructed. As the milling company was not privy to such contract, it has no enforceable right by reason thereof. *The question is therefore whether a railroad company may be compelled to construct a switch or sidetrack on its own ground and at its own cost for the special use of a shipper.* That such company holds its right of way and tracks as its private property but subject to the public use for which it was incorporated is well established and it may therefore permit its grounds to be occupied by other parties for the receipt and delivery of freight on its railroad so long as the public service in the carriage of freight and passengers is not interfered with: Grand Trunk R. R. *v.* Richardson, 91 U. S., 454; but whether it can be compelled to do so at its own expense and against its will is a different question. Its obligation to furnish to the public adequate facilities for the transaction of business is undoubted but to provide special facilities on its own property to an individual shipper and at its own charge involves a different liability. Resort must be had to some statute which imposes this obligation and support for the order of the Commission is supposed to exist in Section 17, of Article V, of the act of July 26, 1913, P. L. 1374, which section provides as follows: "If the Commission shall find it necessary and proper to the rendering of reasonably safe and adequate or sufficient service, it may, and shall after hearing had upon its own motion or upon complaint, make an order, to be served as hereinafter

provided upon every common carrier to be affected thereby, requiring all such common carriers to revise and change the time schedules of such common carriers; to alter the running time of trains, cars, vehicles, or boats, or changes in the routes of street railway lines or systems; or regulating or requiring the furnishing and distribution of cars, trains, vehicles, boats, motive power, or other facilities, without undue or unreasonable discrimination or preference between shippers and the switching, loading, and unloading of said trains, cars, vehicles, boats or other facilities; the weighing or billing of cars and of property offered for shipment; or regulating demurrage charges, track storage charges, package-room or baggage-room charges, and package or baggage transfer rates and charges; and generally, to make such other arrangements and improvements in service and facilities as shall be just and reasonable, having due regard to the needs of the public under all the circumstances presented." When, however, this section is read in connection with paragraph "o," of the first section of Article II, we think it evident that Section 17 so far as it relates to railroad companies was intended to apply to the manner of conducting the business with reference to the convenience of the public rather than to the construction of tracks or the affording of switch connections. The latter subject is provided for by the paragraph of Article II above referred to which gives the right under certain conditions to any owner or operator of any lateral railroad or any private sidetrack or of any shipper tendering property or traffic for transportation or of any consignees to have a switch connection with any railroad. This provision makes it practicable for any shipper to connect his place of business with

the railroad on which he wishes to transport his merchandise if such connection be reasonably practicable and the traffic will be sufficient to justify the construction and maintenance of the switch connection. But there is a distinction between a switch connection and a sidetrack or switch on the right of way of the railroad company. What was intended to be provided for by this legislation was an opportunity for a company or individual to connect its or his property with the tracks of the railroad company to facilitate the shipment of freight, but nothing in the paragraph requires the railroad company to do more than provide the devices and tracks which permit the shipper to connect his track with that of the railroad company. If one shipper may demand a private switch on the right of way of the railroad company, every other shipper is in like favorable situation, and it is easy to see to what an extent the personal property and land of the railroad company may be appropriated without compensation to the private use of companies or individuals desiring to transport goods. It was held in Mo. Pac. Ry. *v.* Neb., 217 U. S. 196, that an act of assembly which required every railroad company operating a railroad in the state of Nebraska to erect, equip and maintain a sidetrack or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected adjacent to their right of way for the purpose of loading grain into cars from the elevator was unconstitutional because it required the railroad company to pay for what was a private connection and that without compensation to the railroad company. The same principle was enforced

in Missouri Pacific Ry. *v.* Nebraska, 164 U. S., 403, and in St. Louis, etc., R. R. Co. *v.* Oklahoma, 27 Okla. Rep. 424. If there were express authority in our staute for the order complained of the constitutional question would therefore arise, but we are unable to find any provision of the act of 1913 which subjects the appellant to the obligation of building the contemplated track on its right of way. The power of the state to modify property rights to a limited degree in the public interest without compensation is not to be disputed but there are limits to the exactions to be made on owners of property under the police power or any other alleged justification in taking private property.

It cannot be asserted that the appellee is subjected to a hardship with respect to the denial of the switch for switching connection has been tendered and the owners of the property had notice before the mill was built that a switch could not be provided on the right of way because the owner had in contemplation the improvement of its property by laying an additional track. The order made by the commission is by its terms revocable at the pleasure of the commission, but the cost of constructing the siding is considerable and if lawful authority is not shown to support the order the appellee is not bound to bear the expense of construction even if it is not permanent in character. Our opinions is that the statute does not authorize the order filed by the commission. It is therefore reversed.

SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT.

THE PEOPLE, *ex rel.*,
ERIE RAILROAD COMPANY,
Relator,

against

PUBLIC SERVICE COMMISSION,
Second District,
Defendant.

Argued November, 1916.

Decided December, 1916.

Proceeding by certiorari to review a determination of the Public Service Commission, Second District, requiring the relator to operate a switch connection and side-track on the property of the Lancaster Machine and Knife Works.

APPEARANCES.

For the relator, Lewis E. Carr.

For the Public Service Commission, Ledyard P. Hale.

COCHRANE, *J.*

The Lancaster Machine and Knife Works owns and operates a manufacturing plant about one-fourth of a mile easterly from the station of the relator at Lancaster, N. Y., and adjacent to its railroad. Prior to the year 1896, when the Machine and Knife Works became the owner of its said premises a side-track was constructed from the main track of the relator to the factory of the Machine and Knife Works with a switch connection with said main track and such side track has been continuously operated

since the year 1896 by the relator in the transportation of freight for the Machine & Knife Works it does not appear by whom or under what circumstances the side track was constructed. It is 479 feet in length from the switch connection. It does not clearly appear how much of this side track is on the property of the Machine and Knife Works, but it is stated in the brief of the counsel for the Public Service Commission that it is 220 feet long after leaving the relator's right of way.

The order of the commission complained of recites that there has been no express agreement concerning the operation and maintenance of the track and switch connection and that the relator has continuously operated the same, moving cars thereon for the benefit of the Machine and Knife Works.

The cause of the present controversy was that the relator finally exacted of the Machine and Knife Works an agreement relating to the future operation of the side track, which agreement contained a provision that the Machine and Knife Works would assume certain risks of injury to its property and to the persons of its officers and employees by reason of the operation of said side track by the relator and threatened to discontinue the operation of the side track unless such agreement was accepted by the Machine and Knife Works. The commission held that such provision in the agreement was unreasonable and ordered that the relator might tender the Machine and Knife Works the proposed agreement modified as to the risks which were to be assumed by it and held that until such agreement be tendered and until the Machine and Knife Works should fail or refuse to execute the same, the relator

should continue to operate such switch connection and side track as heretofore and that if the Machine and Knife Works should fail or refuse to execute such modified agreement within fifteen days the relator might then discontinue the switch connection and operation of the side track. This order or determination of the commission is now before this court for review.

It is the contention of the relator that the commission is without power to order the operation by a railroad company of a side track not constructed on its own property. If that contention be well founded the operation of this side track in question is necessarily a matter of private agreement between the parties and the commission had no right to assume the regulation of the proposed agreement between the relator and the Machine and Knife Works and to order the relator to continue the operation of the side track on any terms or conditions whatever.

The power of the commission to make such an order must be found in the statute and the only statute which it is claimed confers such power is section 27 of the Public Service Commissions Law, which provides as follows: "A railroad corpora-
"tion, upon the application of any shipper
"tendering traffic for transportation, shall
"construct, maintain and operate upon rea-
"sonable terms a switch connection or con-
"nections with a lateral line of railroad
"or private side track owned, operated or
"controlled by such shipper, and shall,
"upon the application of any shipper, pro-
"vide upon its own property a side track
"and switch connection with its line of
"railroad whenever such side track and
"switch connection is reasonable practica-

"ble, can be put in with safety and the "business therefor is sufficient to justify "the same."

Under this statute all that a railroad company can be required to do with reference to a private side track of a shipper is to construct, maintain and operate a proper switch connection or connections therewith. The operation of such side track cannot be exacted of the railroad. This is emphasized by the subsequent provision in the statute that a side track for the benefit of a shipper may be required under certain circumstances to be constructed by a railroad company "upon its own property." The reason for the distinction between a side track of a shipper and one of a railroad is a sound one and was manifestly intended by the Legislature for reasons to it satisfactory. This controversy illustrates the ground of the distinction and emphasizes its importance. A railroad company cannot control the property of the shipper and if it operates a railroad on the property of the latter it is powerless to take such precautionary measures or establish such rules and regulations as it may think advisable to minimize the possibility of accident and lessen its liability therefor. This side track in question being on the property of the Machine and Knife Works is not within the control of the railroad company and accidents and liabilities may arise which could be obviated if the railroad company had the sole control and possession thereof.

This question was in a measure involved in The People, *ex rel.* The Long Island Railroad Company *v.* The Public Service Commission, 170 App. Div. 429, in which Mr. Justice Laughlin after calling attention to the fact that in other jurisdictions

it has been held that a railroad company may be required to construct sidings on private property, observes that the statutory provisions in such jurisdictions are much broader than those of our statutes and continues as follows: "The learned counsel for the Public Service Commission, appreciating that the express provisions of section 27 of the Public Service Commissions Law do not authorize the commission to require the railroad company to do anything beyond the line of its own property, attempts to sustain the actions of the commission under a general provision of section 4 of the Public Service Commissions Law, which reads as follows: 'There shall be a public service commission for each district, and each commission shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter.' We are of opinion, however, that said section 27, construed in the light of said section 4, does not show that the Legislature intended to empower the commission to require the railroad company to do anything that could not be done on its own property."

There may be cases perhaps where proper or reasonable delivery of a car of freight as an incident to the termination of the transportation may involve the placing of such car for a short space beyond the line of the railroad right of way. But the present controversy involves more than that. Whereas here a subtantial question exists as to the possibility of liability arising from accidents to the property of the shipper and also to the persons of its numerous employees by reason of the operation of such side track and such question is deemed by both parties of sufficient importance to justify an investigation and the commis-

sion also considers such question of sufficient importance to make it an essential feature of its order. It cannot be said that the operation of such a side track is a mere incident to delivery.

It is claimed by the learned counsel for the commission that the determination in question is justified by the recent case of New York Central and Hudson River Railroad Company *v.* General Electric Company, 219 N. Y., 227. There is nothing in the opinion in that case which militates against the views here expressed. That case involved the validity of an agreement for the operation of cars within the plant of a vastly intricate and complicated manufacturing system, and what was there said which is claimed to bear on the present case was said incidentally with reference to the fact that a railroad company may operate switches or spurs or side tracks but without any reference whatever to the question as to whether such operation is voluntary or compulsory and that is the point here. This relator, for instance, has voluntarily operated this side track for twenty years or more and its right to do so is unquestioned, but the question now arises as to its duty to do so and as to the power of the commission under section 27 of the Public Service Commission Law to require such operation. The meaning or effect of said section 27 or the powers of the commission thereunder was not involved or considered in the case cited.

After reaching the conclusion for the reasons stated that the determination of the commission is erroneous, it is unnecessary to consider the other reasons urged against it by the relator.

The determination should be annulled with $50.00 costs and disbursements and the matter remitted to the commission.

KELLOGG, *P. J.* (dissenting).

The Knife Works has occupied its plant since 1896. When it took possession it found the spur track connecting its plant with the railroad track, and deliveries of cars were being made by the company at the plant as a part of the transportation. That such practice was reasonable and customary would therefore seem to be beyond question. It is a matter of common knowledge that it is the same kind of service that is being furnished through the country to every plant of any considerable importance. With reference to when delivery at a plant is made Cardoza, *J.*, wrote in New York Central R. R. Co. *v.* General Electric 219 N. Y., 227: 235: "In the nature of things no inflexible formula can furnish a solution of that problem. The limits of place within which delivery is due, will vary with varying conditions (Mitchell Coal & Coke Co. *v.* Penn. R. R. Co., 230 U. S., 247, 263). All that we can safely say is that there must be such a delivery as is customary and reasonable. There was a time, before the days of railroads, when a carrier by land was expected to make delivery at the consignee's home or place of business. That was because he could go there with his wagons (Fenner *v.* Buffalo & State Line R. R. Co., 44 N. Y., 505, 510). With the days of railroads delivery came to be expected at freight houses or other terminals. They are still the place of delivery where the factories and warehouses of shippers and consignees do not connect with the tracks. In our own time, however, private sidings have become common, and freight is carried over them between the railroad and the plant. Such carriage is commonly a part of the work of transportation (Vincent *v.* Chicago & Alton R. R. Co., 49 Ill. 33; Coe *v.* L. &. M. R. R.

Co., 3 Fed. Rep., 775). In most cases the distances are short and the carrier's burden remains substantially the same whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The practice of hauling cars to points along the spur convenient to shipper or consignee is known as 'spotting' and is commonly and fairly regarded as part of the work of carriage."

We conclude, therefore, that the delivery of a carload of freight at, or the taking of it from, the platform on the spur track at the knife works, is a part of the transportation for which the company is paid and which it is its duty to perform. That duty, until this controversy arose, has been recognized. We do not understand that the company now questions the duty to deliver, but seeks to make the delivery conditional upon certain exemptions which a common carrier has not ordinarily the right to exact. Of course, if the spur track becomes dangerous and unfit for use, another question arises which then must be met. The question here is the power of the commission to require the company to operate such spur track without imposing conditions which seem to the commission to be unusual and unreasonable. It is not disputed that in some respects the service is special and that a proper agreement covering it and providing for the maintenance of the spur may be made. Whether the agreement in terms is proper or improper is not for us to determine: that rested in the sound discretion of the commission and we are not to review

that discretion when we conclude that it has acted fairly within its powers. I favor an affirmance of the order.

COLLINS & CORBIN,
Attorneys of Prosecutor.

GILBERT COLLINS,
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HERBERT A. TAYLOR (of N. Y.),
Of Counsel.

New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY, *Appellant,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Respondents.*	*On Appeal from Supreme Court.* *(re Belleville Turnpike)*

Brief of Respondents.

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Of Counsel.

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New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY, *Appellant,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Respondents.*	*On Appeal from Supreme Court.* (Belleville Turnpike).

Brief of the Respondents.

Point I.

The Supreme Court having concluded that a certain part of an Order of the Board of Public Utility Commissioners should be set aside has power to direct that the record be remitted to said Board for the purpose of modification.

The order made by the Board of Public Utility Commissioners contains two mandates to the Erie Railroad Company.

The first, requiring it "to keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and track of the new Newark branch of said Company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said Company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamps or lamps during the hours of darkness, of the approach of any and all cars, or

train of cars, or locomotives, to cross the Belleville Turnpike at said points."

The other, requiring "that no locomotive, car or train of cars shall pass over the Belleville Turnpike, at the crossing of the turnpike and of the Old Newark Branch of the Erie Railroad Company, at a greater speed than six miles per hour, and that before any locomotive, car or train of cars shall pass over said crossing, a flagman shall precede said locomotive; on the end of the car or train of cars, if the same are being backed to the crossing, to give warning of the movement over the same."

That part of said order containing the second of these two mandates was not disturbed by the action of the court below, and remains in full force and effect.

The rule for judgment entered in pursuance of the opinion is special in its form. It finds that the first of the two mandates contained in order of the Board "is too broad in that it requires the prosecutor to keep a flagman on duty at each of said crossings during twenty-four hours of each day." It, therefore, orders that the part of the order of the Board embodying the first of these two mandates be set aside. It further orders that the record be remitted to the Board so that said parts of said order be modified by providing that the prosecutor be required to keep a flagman on duty at said crossings, and each of them, only during such hours of the day as trains are operated over said crossings and each of them and covering the operation of all trains and engines over said tracks and each of them.

If the order contained in the rule for judgment must be construed as the mandate of the Court to the Board, that it modify its order

specifically in accordance with the opinion and the rule, we can find no authority in its support. It would seem to be clear that it was without the power of a court to substitute its judgment with respect to a matter of administration involving the exercise of discretion, for the judgment of the administrative tribunal, to the discretion of which the legislature has submitted the disposition of the matter.

Further than this, if the opinion and the rule for judgment must be so construed it would violate a principle that is well settled. Courts do not assume in advance to dictate to an inferior tribunal what judgment or determination such tribunal shall reach, and what judgment it shall pronounce. To do so would involve the drawing to the court, in the first instance, the final determination on the merits of a question upon which the parties are entitled to take first, the opinion of the inferior tribunal.

Public Service Company v. *Public Utility Board,* 84 N. J. Law, 463.

It is only fair to presume that the court below had knowledge of the limitation of its power and unless it is manifest from the reading of the opinion and the rule together, that the court transcended its power, it ought not to be concluded that in its order the court exceeded its powers and invaded the powers of the Board. Reading the opinion and the rule for judgment together it is apparent that the conclusions of the court was, that the record established the existence of a dangerous situation which might reasonably require the provision of additional protection to that then existing at the crossings; but that the additional protection required by the order of the Board was too broad, in that it extended over a period

of twenty-four hours, during which period there were times when there were no train movements for long intervals at the crossings. Both the opinion and the rule clearly indicate that in its judgment an order for the additional protection at the crossings was justified, and therefore remitted the record to the Board of Public Utility Commissioners, so that the part of the order found by the court to be too broad, might be modified by the Board of Public Utility Commissioners, to accord with the opinion of the court.

The question therefore resolves itself, did the Supreme Court have the power to set aside a part of an order of the Board of Public Utility Commissioners, and remit the record to the said Board for further proceeding thereon, without the necessity of inaugurating a new proceeding? This question has frequently been raised before the Supreme Court as well as in this Court, but has never been determined.

Section 38, of the Act creating the Board of Public Utility Commissioners (Chapter 195, Laws 1911):

> "Any order made by the Board may be reviewed on the application of any person or Public Utility affirmed thereby, by certiorari in appropriate cases, or by petition to the Supreme Court of the State of New Jersey, &c."

There are, therefore, two methods for review, the appellant proceeded by certiorari. Sec. 11 of the Certiorari Act provides:

> "The court may reverse or affirm, in whole or in part, such tax or assessment, or other order or proceeding, finding or determination, &c." Comp. Stat., Vol. 1, p. 406.

> "There are many cases upon certiorari, in which the court may reverse in part and affirm the residue. An order of removal of two or more persons may be considered as so many distinct orders; and if either is illegal, it may be quashed as to that, and the others affirmed. But where the several parts of the proceeding are connected together and dependent on each other so that one part cannot be quashed without leaving the other incomplete or more extensive than it should be, the whole must be set aside. *N. J. R. R. & Tr. Co.* v. *Suydam,* 17 N. J. Law, p. 32.

The order made by the Board of Public Utility Commissioners consists of two parts, each interdependent of the other. The first part requires the appellant,

> "To keep on duty, during the twenty-four hours of each day of the week, at the crossing of the Belleville Turnpike and track of the new Newark Branch of said company, and at the crossing of the said Belleville Turnpike and the Greenwood Lake Branch of the said company, and at each of said crossings, a flagman to give warning with a flag or flags during the daylight hours and with a lighted lamp or lamps during the hours of darkness of the approach of any and all cars, train of cars, or locomotive to cross the Belleville Turnpike at said points."

And the other requires,

> "That no locomotive, car or train of cars shall pass over the Belleville Turnpike, at the crossing of the turnpike and of the old Newark Branch of the Erie Railroad Company, at a greater speed than six miles per

hour, and that before any locomotive, car or train of cars shall pass over said crossing, a flagman shall precede said locomotive; on the end of the car or train of cars, if the same are being backed to the crossing, to give warning of the movement over the same."

The Supreme Court could properly find either requirement was unreasonable and not supported by the evidence, and yet find that the other was reasonable and supported by the evidence.

Point II.

The facts are not reviewable in this court.

The appellant admits that it is not within the province of this Court to examine into questions of fact determined by the Supreme Court. (Brief, pp. 13-14.) But while admitting this, seeks to have a review of the facts to determine whether or not there was any evidence at all upon which the judgment of the Supreme Court can be supported. The Supreme Court finds from the facts that the order of the Board of Public Utility Commissioners was too broad; the appellant presents no reason for a review of the facts in this Court to differentiate this case from the well settled rules.

The findings of the Supreme Court on questions of fact are conclusive in the Court of Errors and Appeals.

Coal Company v. *Junction,* 68 Atl., p. 806.

Pine Company v. *Assessor,* 72 N. J. Law, 182.

Point III.

The section of the statute upon which the order is based is constitutional.

(a) *Argument based on the course of legislation.*

The section of the statute under which the order was made may be paraphrased as follows:

At every point where a public highway and a railroad cross one another at the same level and conditions at such crossing make it necessary for the protection of the travelling public that gates be erected or that some other reasonable provision for protection of the travelling public should be adopted, such protection shall be provided, and the Board of Public Utility Commissioners shall, with respect to each such crossing, determine the fact as to whether the conditions make such protection necessary and if so, shall determine the form of the protection to be provided.

Paraphrasing the section in this manner it becomes apparent that the legislature has by it imposed a duty upon the railroad companies with respect to protection at grade crossings, and has delegated to the Board of Public Utility Commissioners the power to determine the facts necessary to the application of the law.

In imposing this duty the law-making body exercised a legislative power and did not invade the province of the judiciary. In delegating to the Board the determination of the facts upon which the application of the section depends it delegated a power which is not "judicial" but is essentially administrative.

An examination of the legislation of the State will show that the jurisdiction of the legislature

over the subject matter of the section has been repeatedly asserted.

From the beginning of the development of the steam railroad in our State the prescribing conditions as to the crossing of highways and the imposing requirements for protection at such crossings has been regarded as falling within the proper sphere of legislation.

The special acts of incorporation are many which like, "An act to incorporate the Camden and Amboy Railroad and Transportation Company" (P. L., 1830, p. 83), provide "that it shall be the duty of the company to construct and keep in repair, good and sufficient bridges or passages over the said railroad or roads where any public or other roads shall cross the same; so that the passage of carriages, horses and cattle on said roads shall not be prevented thereby, and also where the said railroad shall intersect the farm or lands of any individual, to provide and keep in repair suitable wagonways so that the owners and others may pass the same."

Section 14 of the original "General Railroad Act" (P. L., 1873, p. 88), relating to the same subject, provided: "that it shall be the duty of any company incorporated under this act to construct and keep in repair, good and sufficient bridges and passages over, under and across the said railroad where any public road now or hereafter laid, shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby; and also where the road shall intersect any farm or lands of any individual, to provide and keep in repair suitable and convenient wagon ways over, under and across the said railroad, and shall also construct and maintain suitable and proper cattle

guards at all road crossings; *provided,* that in case said railroad shall cross any street or highway in any city, it shall be either above or below the grade thereof, at such distance as shall not interfere with the free and uninterrupted use of said streets or highways; *provided further,* that the common council of any city may grant permission to said company to cross such streets or highways at grade, if they shall deem it to be for the best interest of the city."

The existing provisions on this subject are found in sections 26, 27, 28, 29 of "An act concerning railroads (Revision of 1903)," (P. L., 1903, p. 645), as amended by P. L., 1906, p. 663.

As early as 1839, "An act to prevent accidents from the use of locomotive engines on railroads" (P. L., 1839, p. 171), enacted specific provisions for protection at highway crossings, by requiring that there be placed on some part of every locomotive engine a bell of a specified weight which should be rung at the distance of at least 300 yards from the place where any such railroad crosses a turnpike road or highway upon the same level with the railroad, and be kept ringing until the engine had cross the turnpike or highway, or had stopped, and by further requiring that a board with the inscription "Look out for the Locomotive" be erected and maintained so as to be easily seen by travellers, wherever the road was crossed by any turnpike or highway.

A supplement to this act (P. L., 1852, p. 532), permitted the substitution of a steam whistle for the bell.

These statutory provisions, in somewhat altered form, were subsequently embodied in sections 29 and 30 of the original General Railroad Act (P. L., 1873, p. 88).

The existing related provisions are now found in section 35 of the revision of the General Railroad Act (P. L. 1903, p. 257).

Section 21 of the revision of the General Railroad Act, 1903, also enacts that every railroad company shall provide, in any city where its roadway may adjoin a public highway, a fence or embankment four feet high, sufficient close and strong to prevent children and horses from going through the same and shall provide on each side of the track at every highway crossing in such city a gate of like height and sufficiency and shall cause the same to be closed at least half a minute before any train may cross such highway and until such train shall have passed, and authorizes the company to run its trains over the portions of its railroad so protected at such rate of speed as it deems proper and further provides that in the absence of such protection and safeguard "the company shall be bound by lawful and reasonable municipal ordinances regulating the speed of its trains along streets and at highway crossings."

A supplement to the revision of 1903 (P. L., 1908, p. 208), requires that where the cars on a railroad are operated by means of electric energy or current conveyed along the right of way by means of a third rail laid at or near grade, such electrified rail shall be securely covered with wood or some other non-conducting material for a distance of seventy-five feet on each side of all grade crossings over the right of way.

A supplement to the Public Utility Act (P. L., 1914, Ch. 181), defining the words "public roads" as meaning "all roads or streets which have been improved by joint action of the state and a municipality, county or township, under laws of this state relating to the improvement of public

roads," provides that "within one year after the act shall become a law every corporation operating on a fixed track or tracks, freight or passenger trains or cars propelled by steam or electric power, within the state, except street car lines and tracks used principally for street car purposes, shall provide protection to pedestrians and the travelling public at every road or street crossing of its tracks at grade; *provided,* that when several crossings upon any line of tracks lie so close together that an audible signal at one crossing may be sufficiently heard at the others near it, such crossings may be arranged into groups, and each group protected by such device or signals as will sufficiently protect all crossings in the group; and *provided,* further, that when on any line as part thereof all traffic is discontinued for any part of the night, no crossing guards need be operated during such time as traffic is discontinued. Such protection may be in the form of safety gates, flagman, electric bell, electric signs or other recognized system of alarm or protection which shall receive the approval of the Board of Public Utility Commissioners of this state."

This line of legislation extending from 1830, and so from a time prior to the constitution of 1844, to the present time, constitutes a continued assertion by the legislative department of the Government of power to prescribe conditions under which steam railroads may cross highways and impose requirements for protection.

To this legislative assertion of power our courts have given recognition.

Pennsylvania R. R. Co. v. *Matthews,* 36 N. J. L., 531 (Ct. E. & A.).

New York etc. R. R. Co. v. *Leaman,* 54 N. J. L., 202 (Ct. E. & A.).

Hackett v. *N. Y., L. E. & W. R. R. Co.*, 58 N. J. L., 4 (Sup. Ct.).

West Jersey R. R. Co. v. *Abbott*, 60 N. J. L., 150, 153 (Ct. E. & A.).

If we conclude in view of the legislative history of the State, that the subject matter of the section lies within the legislative power and that in so far as it requires the protection of grade crossings under certain conditions the enactment of the section was a proper exercise of the law-making function, the question remains, whether it was within the legislative power to vest in the Board of Public Utility Commissioners the powers conferred upon it by the section.

In this connection, too, the course of legislation is illuminating.

Instances are not wanting of the conferring of powers over the subject-matter, by the legislature, upon the governing bodies of municipalities.

Of these statutes, taking the form of charter grants, the following are illustrative.

The act incorporating the City of Camden (P. L., 1850, p. 208), conferred upon the city council power to pass such ordinances "as they shall judge proper" for regulating the speed of locomotives and railroad cars within the limits of the city.

The act to revise and amend the charter of the City of Camden (P. L., 1871, p. 210), conferred upon the city council power to make, establish, publish, modify, amend or repeal ordinances, rules, regulations and by-laws "to regulate the speed and running of locomotive engines and railroad cars through the said city, and designate the crossings at which any roalroad company shall be required by the city council to station flagmen or signals to warn travellers of

the approach of locomotive engines or railroad cars."

The act creating the Township of East Orange (P. L., 1873, p. 324), provided, that the township committee shall have power to pass, alter and repeal ordinances to compel any railroad company to station and maintain flagmen wherever such railroad may cross the street or highways in the township and to maintain a fence and gates wherever said railroad may cross Main street in the township.

An act to provide for the more efficient government of the City of Trenton (P. L., 1874, p. 331), empowered the common council to make, establish, publish and modify, amend or repeal ordinances, rules, regulations and by-laws to regulate the speed and running of locomotive engines and railroad cars through said city and designate the crossings at which any railroad company shall be required, by the common council, to station flagmen or signals to warn travellers of the approach of locomotive engines or railroad cars.

The delegation of power made by these charter provisions has been uniformly sustained.

In *Del., Lack. & West. R. R. Co.* v. *East Orange*, 41 N. J. L., 127, the Supreme Court considering an ordinance adopted by the township committee of the Township of East Orange under the charter provision before referred to, said, through Scudder, *J.* (132):

> "It is evident that the legislature may thus require additional precautions of railway companies, involving expense to them, to prevent injuries to persons and property within and without their cars, while exercising their franchises under their charter. *Such requirements are in the nature of police*

regulations. * * * It will be found that while, in some cases, the legislatures have imposed these additional burdens on all the railway corporations by general laws, they have, in others, empowered commissioners, or municipal bodies, to apply them in their discretion."

In *Eckert* v. *Perth Amboy and Woodbridge R. R. Co.*, 66 N. J. E., 437, the Court of Errors and Appeals, by Fort, *J.*, said (439):

"Railway corporations, without any express reservation of the powers over them by the legislature in their charter, are subject, like individuals, to be restrained, limited and controlled in the exercise of their powers by such laws as the legislature may pass, based on the principles of safety to the public. (Cases cited.)

"Our own Supreme Court has held it within the power of the legislature to confer upon municipalities authority to require a railroad company to place a flagman at a crossing. (Case cited.) Indiana and Georgia have likewise so held. (Cases cited.) * * *

"We have seen that it has been held by our Supreme Court to be within the power of the legislature to confer upon a local municipality, acting upon reasonable cause, power to require a railroad company to station a flagman at a dangerous crossing. It would be equally within its authority to confer the power to require the erection of gates or bars at such a crossing. These powers are within the police power of the state for the protection of the lives or safety of its citizens. * * *

"The state itself could, by statute, take into its own hands, without using the munici-

pal agency, the protection of railway crossings, and when it confers this power upon its agent it can condition or limit it, as it chooses."

Of general statutes, the following is illustrative.

The act entitled "An act authorizing the governing bodies of towns, townships, boroughs and villages in counties of the first-class to pass, alter and repeal ordinances for the protection of railroad grade crossings by the companies operating said railroads." (P. L., 1895, p. 765), provided that the governing bodies of the designated municipalities should have the power to pass, alter or repeal ordinances requiring railroad companies whose lines pass through said municipalities to protect any and all grade crossings or places where the tracks of said company or companies cross a public street or highway at grade, which street is in daily use by vehicles, by the erection and maintenance of arms or gates or the placing and maintaining of a flagman or flagmen at such crossings, or of both, for such times or hours as the said governing body shall deem reasonable.

The power delegated by these statutes to the municipalities is in one aspect a power of local legislation since the statutes making the delegation establish no general rule of public policy within which the municipalities must act.

In another aspect the power so delegated is, because of the limitations which the courts have placed upon its exercise by the municipalities, a power of administration, since its effective exercise is, by the adjudications, made to depend upon the existence of a condition of danger requiring the protection prescribed.

McCullough v. *Franklin,* 59 N. J. L., 106 (Sup. Ct.).

Railway Co. v. *Bloomfield,* 59 N. J. L., 109 (Sup. Ct.).

The contention of the prosecutor is that the power conferred by the section considered is judicial and inherent in our Court of Chancery and cannot be conferred upon any other body.

If the statutory provisions just referred to, so sustained by our courts, conferring the power upon governing bodies of municipalities do not in violation of the constitution vest in such bodies a judicial power inherent in the Court of Chancery, then, it follows logically, that the section considered conferring similar power upon the Board of Public Utility Commissioners does not violate the constitution.

If the power conferred is, as contended by the prosecutor, judicial and inherent in our Court of Chancery the fact would be equally fatal whether the legislative attempt was to vest it in the governing body of a municipality or in a central "administrative body."

The consideration of the question might well be rested on the uninterrupted course of legislation in our state, which has had judicial assent.

The grave consequences which would follow upon acceptance of the prosecutor's view, however, justify giving the consideration of the question a broader scope.

If the section considered is invalid for the reason assigned by the prosecutor then the act (P. L., 1914, ch. 181), requiring the protection of specified grade crossings and leaving the designation of the form of protection to the Board and the act (P. L., 1913, ch. 57), providing for the elimination of grade crossings on a proceeding before the Board must both, for like reasons, fall.

(b) *Argument based upon the adjudications applying the distributive clause of the constitution to legislation.*

The provisions of the constitution appealed to by the prosecutor are paragraph 1 of article III, which provides that: "The powers of the 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," and paragraph 1 of Article VI, 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; Circuit Courts and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

That the subject matter of the section lies within the police power of the State and that this power may be put forth through legislation cannot admit of question.

M. & E. R. R. Co. v. *Orange,* 63 N. J. L., 252, 258 (Ct. E. & A.).

If, then, the section had enacted a rule thereafter to be observed requiring railroad companies to provide specified forms of protection at grade crossings where specified conditions exist no one would assert that its enactment involved the exercise of other than an exclusively legislative power.

In the section considered, however, the legislature recognized the fact that a general legislative regulation 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, and it therefore delegated the determination of the facts as to each crossing, and of the form of protection to be provided, to a central administrative body of its creation.

The question therefore arises: "Is the power so conferred judicial in the sense in which that term is used in the provisions of the constitution appealed to by the prosecutor and does it 'properly belong' to the judicial department of the government?"

The clauses of the constitution appealed to by the prosecutor, declare a fundamental principle of constitutional jurisprudence, namely, that so far as the requirement of efficient administration will permit, the exercise of the legislative, executive and judicial powers is to be vested in separate and independent departments of government.

The separation of powers effected is, however, not complete.

There are, as our courts have pointed out, a multitude of powers lying outside of the powers "properly belonging to the legislative, executive and judicial departments of the government." These are not peculiarly and distinctively, therefore, not exclusively legislative, executive or judicial, and it lies within the authority of the legislative body, unless restrained by some specific provision of the constitution, to determine where their exercise shall be vested.

In *Paul* v. *Gloucester County,* 50 N. J. L., 584, the Court of Errors and Appeals in an opinion

by Van Syckel, *J.*, commenting upon the distributive clause of the constitution, said (610):

"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 these powers, incates 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.

"For instance: Contracts may be and are made on behalf of the state by the legislature, the executive or the judicial department. Each of these departments appoints the incumbents of statutory offices. The governor and chief justice act together on various commissions; and, in divers other respects, one department exercises authority which might as well have been devolved by statute upon another."

In *Moreau* v. *Freeholders of Monmouth,* 68 N. J. L., 480, Dixon, *J.,* delivering the opinion of the Supreme Court, said:

"To determine how conflicting easements are to be enjoyed (cases cited) to decide a dispute between contending boards of chosen freeholders as to the location of a bridge connecting their counties (case cited), to ascertain the compensation due to an officer of the court appointed to aid the court in performing its functions (case cited), 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 classifications, which do not *properly belong,* in the constitutional sense, to any one department exclusively, and may be brought, either by statute or circumstances, within the province of any of the departments (case cited)."

In *Ross* v. *Freeholders,* 69 N. J. L., 291, the Court of Errors and Appeals, speaking through

Dixon, *J.*, referring to the distributive clause, said (293):

"This article contains three clauses, a distributive clause—'The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial;' a prohibitive clause, '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'; and an excepting clause, 'except as herein expressly provided.'

"The distributive clause cannot be read as the declaration of an abstract proposition, that the powers of government are naturally divided into legislative, executive and judicial departments; for the words indicate not the powers of government generally, but 'the *powers of the government,*' that is the government then being formed, and a division not already existing, but one about to be made, 'the powers of the government *shall be* divided.' Hence, we must seek for the scope of the division primarily in the constitution itself. The intended division is there plainly disclosed.

"By article 4, section I, paragraph 1, 'the legislative power is vested in a senate and general assembly'; by article 5, section 1, 'the executive power is vested in a governor'; and by article 6, section 1, 'the judicial power is vested in' the courts. The division contemplated by article 3, relates, therefore, only to such powers of the government as are to be exercised by the senate and general assembly, or by the governor, or by the courts. But as was said in *Paul* v. *Gloucester County,* 21 Vroom, 581, 611, 'there is a

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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.' Clearly the powers appropriate for the discharge of these duties must lie outside of the division intended by this clause of the constitution. * * *

"The prohibitive clause of this article calls for some consideration of '*the powers properly belonging* to the several departments into which the powers of our government are divided.' * * *

"Here it should be noted that the force of this clause is, not to confine the legislature to powers which are legislative, the governor to powers which are executive and the courts to powers which are judicial, but merely to forbid each department to encroach upon the powers properly belonging to another. The powers properly belonging to each of these departments, and therefore, forbidden to the others, are those assigned under the general terms, legislative power, executive power and judicial power, and also those specifically delegated by the constitution to the senate and general assembly, or to the governor or to the courts."

It is submitted that the power conferred by the section in question is neither an exclusively legislative, executive or judicial power, but is a mere power of administration, under an act of legislation, and one of the multitude of powers, recognized by our courts in the cases before cited and quoted, which lie outside of the powers "properly belonging" to the three departments to the government, and the exercise of which the

legislature may, unless restrained by some specific provision of the constitution, vest where it chooses.

It is true that the power conferred involves the exercise of "judicial discretion" and that therefore a determination made in its exercise is subject to judicial review. It is not by reason of that fact, however, a judicial power in the sense in which that term is used in the constitution.

Any other conclusion would sweep away a multitude of legislative acts which clothe administrative bodies, such as the State and Local Boards of Health, and other like bodies, with powers involving "judicial discretion."

It is also true that the power delegated involves, in its exercise, a determination of fact, but clearly it is not on this account a judicial power, unless every duty of ascertainment which in its performance requires the exercise of judgment is to be called a judicial power.

Considering this proportion the court in *State ex rel. Kenosha Gas & E. Co.* v. *Kenosha Electric Ry. Co.,* 145 Wis., 337; 129 N. W., 600, said:

> "True, the legislature cannot empower the Railroad Commission to exercise legislative or judicial power; but it may clothe it with authority to administer a law requiring the ascertainment of facts in order to determine whether the law applies, and if so, how, to situations as they arise. The administrative power includes necessarily, power to determine the facts necessary to application of the law. That is a familiar principle governing numerous instances of grant of *quasi* judicial and *quasi* legislative power. They do not fall within the field of that strictly

judicial or legislative power which is undelegable."

The following cases are also in point.

In *Iowa L. Ins. Co.* v. *Eastern Mut. Life Ins. Co.*, 64 N. J. L., 340, the Court of Errors and Appeals held that the statute providing that it shall not be lawful for any life insurance company to contract for reinsurance of its own risks, or to reinsure the risks of another company, unless two-thirds in number of the holders of the policies proposed to be reinsured shall assent thereto in writing; and that the contract for such reinsurance shall be utterly invalid *until it shall have been approved by the Secretary of State, which he shall do only after due inquiry and upon satisfactory evidence that the interests of the policyholders are fully protected, and that the proper consent has been given*—was not unconstitutional as attempting to delegate to the Secretary of State a legislative judicial power.

The court, by Adams, *J.*, said (346):

> 'It becomes necessary, then, to examine the constitutional objection. The criticism is this—that the legislature has attempted to delegate to the Secretary of State a legislative power. The brief submitted on behalf of the plaintiff in error further suggests, somewhat tentatively, that the power may be judicial. We think that it is neither legislative nor judicial, but that it is administrative."

After pointing out the various duties which under the act the Secretary of State was called upon to perform as *ex officio* commissioner of insurance until the establishment of the Department of Banking and Insurance when his duties

were devolved upon the Commissioner of Banking and Insurance, the court further said:

> "What section 66 calls upon the commissioner to do is not to legislate by laying down a new rule, but to enforce a prescribed rule; not to adjudicate unless every exercise of judgment is called a judicial act, but to perform a duty of ascertainment; to determine, by an examination of values and mathematical relations, whether a safe financial situation exists and whether a certain document has been properly signed. * * * To hold that the acts required of the Secretary of State by section 66 and similar enactments are anything but administrative, would be at variance with principle and authority. It would certainly paralyze the Department of Banking and Insurance."

In the matter of the application for drainage of lands between Lower Chatham and Little Falls 35 N. J. L., 497, the Supreme Court considered, "An act to provide for the drainage of lands" (P. L., 1871, p. 25). The court sustained the act, saying, by Bedle, *J.*, (503):

> "It is also urged against this act, that the legislature, in the first section has delegated to the board of geological survey the discretion of determining the purpose for which the right of eminent domain shall be exercised. This objection comes from those whose lands or property are to be taken for the improvement, and the argument is based upon the fact that every tract of land (even if five owners of separate lots should apply for its drainage), which is subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, is not sufficiently a matter of public interest to

justify the taking of private property for its improvement, and that whether so or not, the board of managers of the geological survey have been entrusted with the power of determining it. It may be assumed that the power of eminent domain belongs to the legislature, and is not judicial in its nature. The power of the courts can be called into action only to see that, under color of its exercise, the right of private property is not interfered with, except for public use, and then upon compensation. And on the question of public use, the legislature should be controlled by the courts only when it is clear that the purpose is not of a public nature.

"That the exercise of the power of eminent domain, speaking generally, may be delegated by the legislature to corporations, commissioners, or individuals, is too well settled for dispute; but a distinction is sought to be drawn between the exercise of the power as to the time and mode of its exercise, and a determination of the public purpose by delegated bodies or persons. As, for instance, it is conceded that the legislature may authorize surveyors of highways to be appointed by the court, when certain freeholders think a public road necessary, to lay out the same, on their determination whether the road is necessary or not; but that a public road being in its nature for a public purpose, the mode by which it may be laid out, and the circumstances when are only delegated, and not the determination of the purpose.

"It might well be questioned whether the legislature could allow an indiscriminate ex-

ercise of this power on the mere judgment of others, without some reasonable limitation or indictation of the subject matter upon which it was to be exercised; but that need not now be decided.

"There are many subject matters verging closely upon the line where public interest is to be advanced, and a liberal discretion should be allowed to the legislature as to the means by which it may be decided. The power is eminently practical, and the legislative body not always calculated to decide upon the public utility of an improvement. It may be exercised under general laws, as well as by special act, and probably it is as little liable to abuse, to say the least, under the former as the latter. Backus *v.* Lebanon, 1 N. H., 19. It not being a judicial power, but legislative, there is no reason why more should be required as to the purpose, in this class of improvements, than a reasonable indication of legislative will, that certain kinds of lands may be improved whenever selected or designated persons shall determine that the public as well as the private interest, require it, and to run a distinction between what is for a public purpose, *per se,* and what may be such purpose according to the actual condition, in fact, of body of land, as it may be ascertained by agents more practical and better able to judge than the legislature itself, is without any solid reason, and will conduce to no public good, or the protection of private rights, when it is remembered that the courts are adequate to prevent any abuse of the power by those to whom its exercise is committed. And, besides, in reality, every road applied for is not, *per se,* of

a public character. Whether so or not, must be decided by the surveyors, and there is no substantial difference between that and the case before us. The legislature has declared, in the act in question, that on application of at least five owners of separate lots within any tract of land subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, the board are authorized to examine the same, and if they shall deem it *for the interest of the public and of the landowners to be affected thereby,* to make surveys, etc."

That the power delegated is not judicial is indicated by the fact, that the Board upon which it is conferred may act upon its own initiative, whereas the judiciary may act only when called upon to do so.

The adjudications of our courts considering legislation conferring upon the judiciary similar powers where application is made for the exercise thereof on behalf of a municipality, support the contention that the power is neither exclusively legislative, executive or judicial, but is a power of administration.

In *Palmyra* v. *Pennsylvania R. R. Co.,* 62 N. J. E., 601, the Court of Chancery had before it a proceeding under "An act for the protection of grade crossings" (P. L., 1898, p. 110). By the terms of the act whenever a condition arises which makes it appear to the satisfaction of the chancellor, after a hearing upon a petition filed by the governing body of any municipality that it is reasonable and necessary for the security of human life, or the protection of the public, that gates or bars should be erected or maintained, or a flagman should be stationed at a crossing, the court shall make an order to that effect. Be-

fore the governing body shall make such application it is required to adopt an ordinance requiring such application to be made.

The statute was contested upon the ground that, in attempting to confer upon the Court of Chancery power to inquire into and determine whether such danger exists at a particular railroad grade crossing of a highway, as to be detrimental to safety, and to direct the railroad to place there certain additional safeguards, if found necessary, the legislature had exceeded its authority and had imposed upon the judicial department of the government a power properly belonging to the legislative department.

The statute was sustained.

The vice-chancellor (Grey) concluded that the power was one not expressly or inherently related to any one department and might therefore be exercised by that one of them to which it had been referred by the statute, and said (611):

> "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 these 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 Vroom, 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 instances 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."

This case was affirmed for the reasons stated below in 63 N. J. E., 799.

In *Eckert* v. *Perth Amboy and Woodbridge R. R. Co.,* 66 N. J. E., 437, the Court of Errors and Appeals had under consideration, "The act for the protection of grade crossings" (P. L., 1898, p. 110), which was also under consideration in *Palmyra* v. *Pennsylvania R. R. Co., supra.*

The statute was attacked upon the ground that it was unconstitutional in that it was claimed to violate the distributive clause of the constitution.

The court sustained the act.

A reading of the opinion clearly indicates that the court rested its conclusion upon the ground that the power conferred upon the Court of Chancery by the statute was one of that multitude of powers regarded as lying outside of the

powers "properly belonging to" the executive, legislative and judicial departments and not one of the powers which in their nature pertain to one of these departments *exclusively,* and that therefore the legislature might determine where its exercise should be vested and was not prescribed from vesting it in the court.

(See, too, 65 N. J. E., 437.)

In *West Jersey, &c. R. R. Co.* v. *Atlantic City, &c. Traction Company,* 65 N. J. E., 613, a bill was filed by the railroad company against the traction company alleging that certain of the tracks of the railroad company crossed a highway in Atlantic City at grade; that the traction company had the right to construct its crossing there, also at grade; that the latter company was proceeding to build its road and crossing; that the city of Atlantic City had under its charter the right to regulate the use of the city streets, and all crossings; that it had authorized the traction company to cross the railroad tracks at grade, with no other precautions against danger of collision between trains that a direction that the approaching trolley car shall be stopped, the conductor go ahead and signal to the motorman when the trolley may safely cross; that this method is dangerous and prayed that the traction company might be required to arrange its crossings in such manner as the court might under all the circumstances of the case deem safe and proper.

The jurisdiction of the court was questioned by the traction company. It contended that the legislative grants of power to it and to Atlantic City, and the action taken under these grants, had conclusively settled the rights of the parties at the crossing in question, so that the court had no jurisdiction in the matter.

Grey, *V. C.* (orally) denied this contention and said (617):

> "The grant of the franchise from the legislature, and the fixing of the mode of its enjoyment by the municipality, are essential incidents to 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," and concluded that the only forum in which relief can be sought must be a court of equity.

In substance this statement, which is the foundation of the conclusion reached, merely lays down the rule that the grant of the franchise by the legislature to the traction company and the prescription of the mode of its enjoyment by the municipality were essential incidents to the defendant corporation's right *as between it and the state,* but did not conclusively settle *as between themselves,* the right of the two companies at the crossing, and did not, therefore, where the proposed use by the junior corporation threatened the impairment of the easement of the senior corporation, preclude an application to equity for relief under its jurisdiction over conflicting easements.

Reaching this conclusion it was unnecessary for the court to consider the question, whether the legislature possessed the power to lessen or take away its jurisdiction, and what was said in the opinion on this point is *dicta.*

Aside from this, while it is true, as stated in the course of the opinion, that our Court of Chancery exercised jurisdiction in the adjustment of the enjoyment of conflicting easements, at the time of the adoption of the constitution of 1844, it is equally true that at that time the legislature exercised the power of imposing upon railroads, operating under franchises proceeding from it, duties with respect to the protection of crossings at highways.

There is no necessary conflict between these powers. The one is exercised in protection of a right of property; the other is exercised in the protection of the public safety under the police power of the state.

It is therefore respectfully submitted:

That the evidence before the Board reasonably supported the order under review.

That the statute conferring the power to make such order is constitutional; that it determines the rule of public policy and the circumstances under which the specified administrative action is to be taken.

That what is left by it to the administrative body is simply the ascertainment of what the facts require to be done according to the terms of the law so legislatively declared.

That this power is neither exclusively legislative, executive nor judicial; that it is administrative.

That this power is not an inherent and exclusive power of the Court of Chancery.

That the legislature might therefore vest it in a central administrative tribunal created by it.

The writ should be dismissed and the order affirmed.

Respectfully submitted.

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New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, CITY OF PATERSON and BOARD OF FINANCE OF SAID CITY,
Defendants-Respondents.

On Appeal from Supreme Court.

Key to Briefs.

For the purpose of convenient reference to the several briefs filed in this matter, the prosecutor has prepared a key in the form of two tables, as follows:

Table I contains in the first and second columns the points and pages in the brief filed in behalf of the Erie Railroad Company, with the points arranged in the order in which they appear in said brief; the third and fourth columns give a list of the corresponding points and pages in the brief of the defendants.

Table II contains in the first and second columns the points and pages in the brief filed in behalf of the defendants, with the points arranged in the order in which they appear in said brief; the third and fourth columns give a list of the corresponding points and pages in the brief of Erie Railroad Company, together with appropriate references to the briefs filed in behalf of Public Service Railway Company, Passaic Water Company, Western Union Tel. Co., D.

Fullerton & Co., Meyer & DeVogel and Morris & Company, with a note giving references to the brief filed in behalf of Paterson & Hudson River Railroad and Paterson & Ramapo Railroad, intervening parties.

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