

New Jersey Court of Errors and Appeals

THE PENNSYLVANIA RAILROAD
COMPANY,
Plaintiff-Appellant,

vs.

L. EDWARD HERRMANN,
Defendant-Respondent.

On Appeal
from
New Jersey
Supreme
Court. 10

BRIEF FOR PLAINTIFF-APPELLANT.

This case was tried on an agreed state of facts before the First District Court of Jersey City without a jury. 20

Judgment was rendered for defendant, the memorandum of Judge Carrick concluding as follows:

“A court of first instance ought not to declare an act of the Legislature unconstitutional unless its invalidity is entirely clear or the personal liberty of a citizen is in question. I must therefore recognize the act of 1914 as a valid exercise of legislative power until otherwise decided by a superior court.” 30

(Case, p. 19.)

Plaintiff appealed to the Supreme Court which affirmed the judgment of the District Court. The opinion of the Supreme Court is printed in the case, page 30.

Plaintiff then appealed to this court specifying the grounds of appeal, which are set forth on page 3 of the case. 40

Facts.

The agreed state of facts (Case, p. 14) sets forth that Mr. Herrmann, the defendant, rode as a passenger on trains of the Railroad Company at the times, to, and from the places named in the bill of particulars annexed to the State of Demand, and that the regular fare was duly demanded and refused.

- 10 The cause of Mr. Herrmann's refusal to pay fare is that he was the regularly appointed Secretary to the Governor and that he held a certificate issued by the Secretary of State pursuant to Chapter 194 of the Laws of 1914, which he believed entitled him to pass without paying fare over the railroad in question within the state.

The certificate is printed on p. 13 of Case.

- 20 The question to be decided is whether the Legislature had the power to authorize the defendant, by the law in question, to ride without payment of fare on the plaintiff's railroad.

- 30 The appellant denies this power of the Legislature on the ground that the Act of 1914, page 358, (See Grounds of Appeal, page 3) under which the defendant's certificate was issued by the Secretary of State, was violative of the Fourteenth Amendment of the Federal Constitution in that it took property without due process of law, and of Article I., paragraph 16 of the State Constitution in that it took private property for public use without just compensation, both of which grounds were considered by the court in the D., L. & W. case (85 L. 28).

- 40 Section 40 of the Railroad Act of 1903, as amended in 1914, Page 358, contains a list of the officers which the State seeks to authorize to ride without payment of fare on the railroads. It appears that it was not until 1907 that the Secretary to the Governor was included in the category of those entitled to free transportation. Nearly

every year Section 40 has been amended and enlarged. The provisions in the old special charters of the constituent companies of the plaintiff-appellant, when they dealt with the matter, were similar to that found in the laws of 1854, Page 387, Section 5, which provides that the Governor, Chancellor, the Justices of the Supreme Court, the Judges of the Court of Errors, Attorney-General, Treasurer, Secretary of State, and the members of the Legislature shall pass free of charge when travelling for the purpose of discharging their official duties. 10

The scope of the duties of the Secretary to the Governor must be gathered from the Statute of 1866, found in C. S. page 3792.

Those duties are "to keep a correct record of all executive proceedings and decisions and do all other acts appertaining to his office which shall be required of him by the Governor."

Pursuant to the first paragraph of the agreed state of fact (p. 14 Case), the plaintiff offered 20

An Act to incorporate the New Jersey Railroad & Transportation Company, Laws of 1832, Page 96;

An Act to incorporate the Camden & Amboy Railroad & Transportation Company, Laws of 1830, Page 83;

An Act to enable the United Railway & Canal Companies to consolidate their stock, &c., Laws of 1870, Page 916; 30

An Act to amend an act entitled "An Act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia, Laws of 1872, Page 567;

Certificate of Organization and Adoption of Corporate name of United New Jersey Railroad & Canal Company, Laws of 1872, Page 1042;

An Act ratifying the lease between the United New Jersey Railroad & Canal Company and the 40

Pennsylvania Railroad, Laws of 1873, Page 1298;
And the Lease dated June 30th, 1871.

Argument.

I.

10 The Act of 1914 (P. L. 1914 Chap. 194) amend-
ing Section 40 of the Railroad Act of 1903 is un-
constitutional because it violates the 14th Amend-
ment to the Constitution of the United States in
that it deprives the plaintiff-appellant of its prop-
erty without due process of law.

20 In *D., L. & W. RR. Co. v. Public Utilities
Board*, 85 N. J. Law, 28, the Supreme Court dealt
with this question and held that so far as a
member of the State Water Supply Commission
was concerned, the attempt of the Legislature to
authorize such an official to pass without paying
for transportation, was an attempt to take the
property of the stockholders without due process
of law; and also that when in the years subse-
quent to 1907, the Legislature made the provision
of Section 40 as amended, apply to persons to
whom its long continued policy had no possible
application, it departed from the exercise of its
reserved right to regulate railroads for the public
good and provided in effect for the taking of the
30 property of such corporations without due process
of law.

In that case the brief for the railroad company
as prosecutor, pointed out that the act not only
took the company's property without just compen-
sation, but took it without the payment of any
compensation whatever, and that the company
was deprived not merely without due process of
law, but without any process of law whatever, and
that the act was a confiscation of the company's
40 franchises by enactment.

The Legislature has no right to single out certain classes of individuals whose characteristic is state employment and order the railroad companies to carry these persons free of charge.

Since 1907 nearly every succeeding legislature has made additions to the fortieth section of the Railroad Act of 1903. Laws of 1908, Ch. 43; Laws of 1909, Ch. 196; 1910, Ch. 100; 1911, Ch. 129; 1914, Ch. 194.

The opinion of the Supreme Court in the D., L. & W. case (*supra*) at p. 36, says: 10

“The right of a railroad company to receive pay for the transportation of passengers, is its property, as much as gas, or water, or electricity is the property of the corporations authorized to deal in those commodities.

“Once eliminate the element of public policy as the legal justification of the railroad provision in question and nothing is left but the bare fact that the subjects of free transportation are public officials, and I know of no principle of law or rule of property that will justify the taking of the property of any one of these public service corporations, or for that matter of any corporation, and handing it over to public office-holders merely because they are holders of public office. Something more is required to turn such a taking into a regulation for the public good, something that smacks of public policy or the police power. 20 30

“It is one thing, for instance, to say to the railroad companies, ‘For reasons of public policy you must carry free of charge the members of the Legislature by whom the laws affecting you and your interests are made;’ and quite a different thing to say to such companies, ‘You must carry free of charge the members of the State Water Sup- 40

“ply Commission, whose activities in no wise
“affect you or your affairs.’ ”

“The first is an exercise of both the police
“power and the reserve right. The second
“takes the property of the stockholders with-
“out due process of law.”

The Supreme Court in the case at bar (96 Atl.
at p. 666; Case p. 34 ll. 20-40), says:

10 “The test adopted by the court in deciding
“that case (the D., L. & W. case *supra*) was
“whether the members of the State Water
“Supply Commission belonged to that class
“of public officials whose favor might be ad-
“vantageous, or whose disfavor detrimental,
“to the interests of railroad corporations in
“their dealings with the state. * * * That
20 “the good will of such an official (secretary to
“the governor) might well be deemed advan-
“tageous to the railroads, and his ill will
“something to be deprecated, is a proposition
“that we think needs no argument; and it
“therefore follows that he is within the class
“of state officials that the legislature in the
“exercise of its reserved power, and as a mat-
“ter of public policy, was constitutionally
“entitled to require should be carried free.”

30 We respectfully submit that the opinion of Jus-
tice Garrison in *D., L. & W. RR. Co. v. Public
Utility Board*, 85 N. J. L. 28, does not rest on the
theory of the favor or disfavor of a public official
as stated in the foregoing explanation of his
opinion.

Is not the public policy which Justice Garrison’s
opinion refers to, a policy which rests on some
such consideration as that the time of the public
official is taken up with matters that have to do
with railroads, and it is proper that in such a case
40 he be carried free; that the traffic should bear an

expense which is incident to it? Such a public policy would be somewhat analogous to the theory on which railroads are permitted to issue passes to their attorneys although the attorneys may not be exclusively engaged in the company's business. But certainly these distinguishing inquiries propounded by the opinion of Justice Garrison in the D., L. & W. case contain no intimation that the public policy referred to is in any way connected with the power of the official to help or harm the company. It is fundamental that the exercise of favor or disfavor toward a railroad company in the discharge of his public duties, cannot be a compliance with his official trust. Again, such a construction robs the D., L. & W. decision of its value as a guide, because it would be for the advantage of a railroad company to have the favor of every public official. The State Water Supply Commission, although their ordinary duties like those of the Secretary to the Governor, are not intimately concerned with the railroads, can easily be imagined as occupying a position where their disfavor could be used with injurious consequences to a railroad company. 10

The duties and activities of the Secretary to the Governor do not play any part directly in railroad matters. The statute says (C. S. 3792) that he shall "keep a correct record of all the executive proceedings and decisions and do all other acts appertaining to his office which shall be required of him by the Governor." In what way, so far as the railroads are concerned, do such activities differ from those of the clerk who files the records which the Secretary keeps? What discretion does the Secretary exercise in respect of railroad matters? When we compare his duties with those of a member of the Assembly, called on to legislate concerning railroad affairs and to give considerable time, if his duties are zealously performed, to the understanding of highly delicate and technical 20 30 40

matters, we submit that the Secretary to the Governor is not such an official as comes within the class defined by the court in the D., L. & W. case, and the public policy or reserve right of the Legislature can have no fair application to him.

Again, we insist that the basis of the opinion in the D., L. & W. case, to wit, that public policy would justify the forcing of the railroad company to issue passes, is unsound. The limit of the engagement of the railroad company is not to be

10 determined by so-called public policy.
In *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, (59 Law Ed. 735-741), Justice Hughes, in March 1915, said:

20 “The general principles to be applied are
“not open to controversy. The railroad
“property is private property devoted to a
“public use. As a corporation the owner is
“subject to the obligations of its charter. As
30 “the holder of special franchises, it is subject
“to the conditions upon which they were
“granted. Aside from specific requirements
“of this sort, the common carrier must dis-
“charge the obligations which inhere in the
“nature of its business. It must supply facil-
“ities that are reasonably adequate; it must
“carry upon reasonable terms; and it must
“serve without unjust discrimination. These
“duties are properly called public duties, and
30 “the state, within the limits of its jurisdic-
“tion, may enforce them. The state may pre-
“scribe rules to insure fair remuneration and
“to prevent extortion, to secure substantial
“equality of treatment in like cases, and to
“promote safety, good order and convenience.
“But, broad as is the power of regulation,
“the state does not enjoy the freedom of an
“owner. The fact that the property is de-
40 “voted to a public use on certain terms does
“not justify the requirement that it shall be

“devoted to other public purposes, or to the
 “same use on other terms, or the imposition
 “of restrictions that are not reasonably con-
 “cerned with the proper conduct of the busi-
 “ness according to the undertaking which the
 “carrier has expressly or impliedly assumed.
 “If it has held itself out as a carrier of pas-
 “sengers only, it cannot be compelled to carry
 “freight. As a carrier for hire, it cannot be
 “required to carry persons or goods gratui- 10
 “tously. The case would not be altered by
 “the assertion that the public interest de-
 “manded such carriage. The public interest
 “cannot be invoked as a justification for de-
 “mands which pass the limits of reasonable
 “protection, and seek to impose upon the
 “carrier and its property burdens that are
 “not incident to its engagement. In such a
 “case, it would be no answer to say that the
 “carrier obtains from its entire intrastate 20
 “business a return as to the sufficiency of
 “which in the aggregate, it is not entitled to
 “complain.”

That case had to do with the statute of North
 Dakota fixing maximum intrastate rates gradu-
 ated according to distance for the transportation
 of coal in carload lots. The statutory rates cov-
 ered all coal shipments but their practical appli-
 cation was almost solely to lignite coal. The stat- 30
 ute was sought to be upheld as a declaration of
 public policy, the rate being imposed to aid in the
 development of a local industry and so benefit the
 people of the state. Justice Hughes in writing the
 opinion, said: (Page 742)

“But while local interests serve as a mo-
 “tive for enforcing reasonable rates, it would
 “be a very different matter to say that the
 “state may compel the carrier to maintain a
 “rate upon a particular commodity that is 40

10 “less than reasonable, or—as might equally
 “well be asserted—to carry gratuitously in
 “order to build up local enterprise, that would
 “be to go outside the carrier’s undertaking
 “and outside the field of reasonable super-
 “vision of the conduct of its business and
 “would be equivalent to an appropriation of
 “the property to public uses upon terms to
 “which the carrier had in no way agreed. It
 “does not aid the argument to urge that the
 “state may permit the carrier to make good
 “its loss by charges for other transportation.
 “If other rates are exorbitant, they may be
 “reduced. Certainly it could not be said that
 “the carrier may be required to charge ex-
 “cessive rates to some in order that others
 “might be served at a rate unreasonably low.
 “That would be but arbitrary action. We
 20 “cannot reach the conclusion that the rate in
 “question is to be supported upon the ground
 “of public policy if upon the facts found it
 “should be deemed to be less than reason-
 “able.”

As in the Lignite case, the statute here is confiscatory, unremunerative and unreasonable, and so contrary to the Fourteenth Amendment.

30 In the case of a pass, the railroad receives no remuneration whatever, and if the theory of the D., L. & W. case be correct and the state, by the creation of a public policy, as evidenced by enactment can enlarge the class of persons to whom passes may be issued, what limit is there to the power of the Legislature to force the railroad companies to employ their property in unremunerative carriage?

40 The Lignite case is authority for the proposition that it will not suffice to say that the company can make it up in some other way. We are confronted with an attempt of the Legislature to take the property of the company contrary to its en-

gagement. The greater number of the trips involved in the present case were over roads subject to the terms of the underlying special charters of the companies mentioned on Page 16 of the Case, some of which, like the New Jersey Railroad & Transportation Company (incorporated 1832) and the Camden & Amboy, &c. Company (incorporated 1830) antedate the Constitution of 1844, which in "Amendments" Article IV., Sec. 7, Paragraph 11, provided for the reserve power of the Legislature to repeal or alter general laws under which corporate power is obtained, and antedate also the Statute of 1846, page 16. 10

Will it be held that on an assertion of public policy of this character the court will ignore the provisions of these special charters passed many years before the statute providing for the reserve power of alteration and repeal?

The result is that all the trips which come within the special charters are covered by special charter provisions as the Secretary to the Governor is not one of the officers to whom the companies, under the terms of those charters, agreed to issue passes. The trips which are not covered by the provisions of special charters must necessarily be paid for by the holder of a state pass unless the public policy, as adverted to above, or the police power is sufficient warrant to uphold the statute granting the Secretary of State power to issue such certificates. We have already dealt with the question of public policy as the basis for the assertion of such right in the Legislature. 20 30

As to police power, the opinion in the D., L. & W. case deals with a situation which had arisen and which, in brief, is that the Legislature was opposed to the issue to public officials of railroad passes by the railroads and there probably was ample justification in the police power for a statute forbidding a practice of granting or withholding passes on the idea that it was subversive of good 40

One of the notes to the University of Pennsylvania Law Review for June 1916, page 834, deals with the case at bar and reaches the conclusion that the means adopted by the Legislature in casting upon the railways the duty of carrying about four hundred persons without compensation, whether in pursuance of their official duty or pleasure, approaches very closely to an arbitrary abuse of discretion and consequently is not a valid exercise of the police power.

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II.

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above the court in the D., L. & W.
the right to receive pay for the

government; but the 1914 act is of a different character.

How can the bases of the police power, viz.: the protection of lives, health, morals and public interest of the state, be concerned in the question whether Mr. Herrmann's fare between Jersey City and Trenton shall be paid by himself, his employer, the State, or by the railroad company which maintains the line between these two points?

10 To say that a railroad shall not be allowed to give gratuities to the employes of the public, is one thing; but it is distinctly a different thing to say that the employes of the public shall be carried free.

20 The case of *State v. Sutton*, 87 Law 192, is pertinent. That case dealt with the act requiring street railway companies to grant free transportation to police officers when in uniform or on duty, and this court held that that was a constitutional exercise by the Legislature of its police power; and the decision was based on the theory that the statutory provision had a direct tendency to secure the presence of police officers upon street railway cars and thus prevent disorderly conduct and afford protection to passengers.

30 It can fairly be argued from the decision that if it rested simply on the question of making the carrier pay the fare, this court would not have held that the police power was legitimately exercised.

II.

The act is violative of Article I Paragraph 16 of the Constitution of New Jersey in that it takes private property for public use without compensation.

40 As set forth above the court in the D., L. & W. case held that the right to receive pay for the

transportation of passengers is the property of the railroad company.

The court in that case, at p. 38, further said:

“It is believed that apart from the police
 “power or some principle of public policy no
 “court has decided that legislative donations
 “of free transportation are within its re-
 “served right, and if such a decision were
 “found it is difficult to conceive by what prin-
 “ciple of law it would be justified.”

10

The legislature has taken the property of the company here and given it to various public officials and has done so without making compensation to the company. Its acts can not be sustained on the ground that they were a proper exercise of the police power or reserved right as shown in I.

Neither is provision made for compensating the railroad in an indirect way. The secretary to the Governor is not like the policeman in the case of *State v. Sutton*, 83 L. 46, whose presence tends to prevent injury to the passengers.

20

As was held in the case of *Wilson v. Union Traction Co.*, 76 N. Y. Supp. 203, the effect of granting free transportation to the state officials not coming within the class as explained, is to make the railroad company pay the fares instead of the state. It amounts to a public convenience but no court has held that the state has the right to take the property of an individual without compensation for the sole reason that the proceeds of it would be convenient to aid the state in defraying its general expenses.

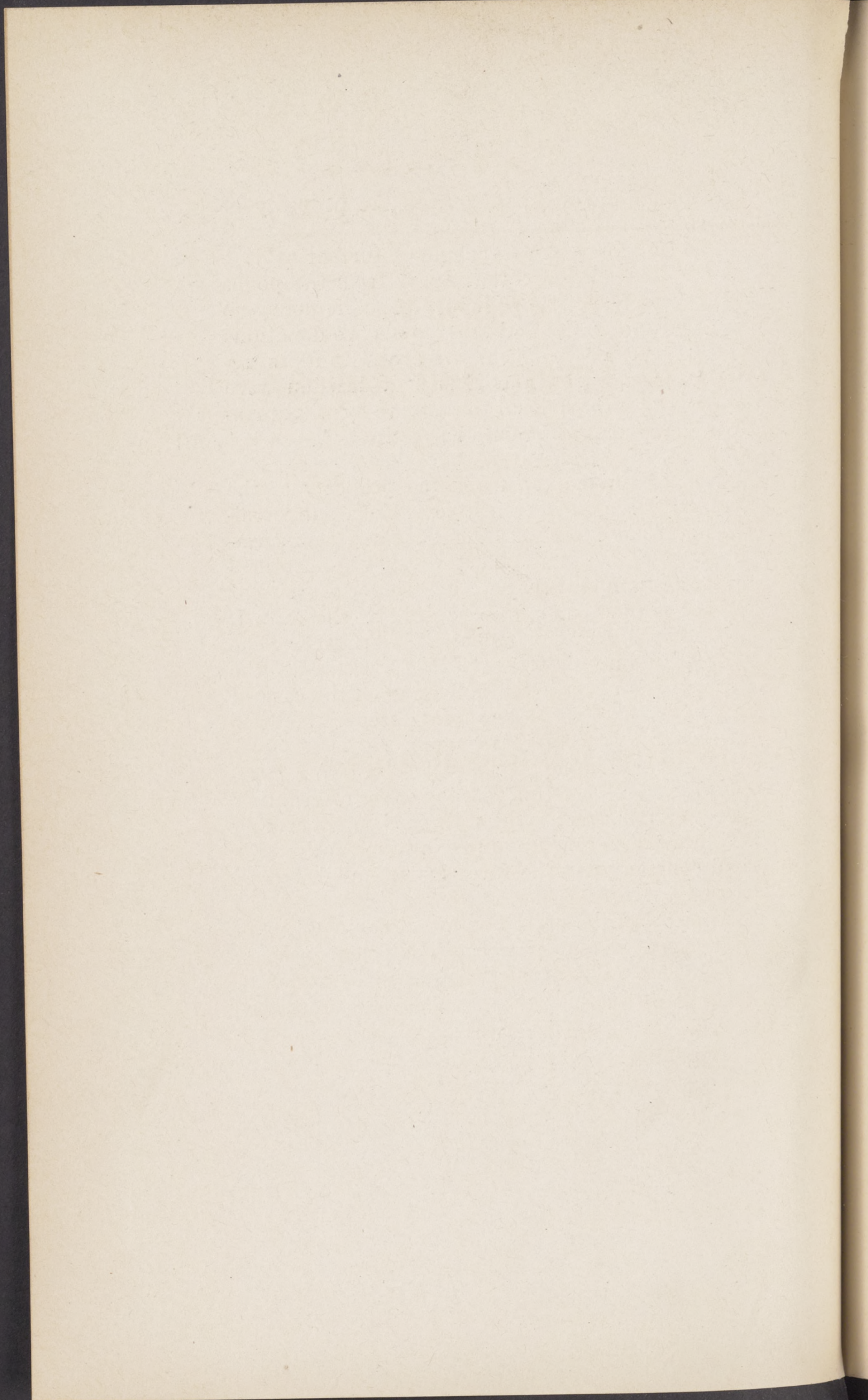
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III.

The judgment of the Supreme Court in favor of defendant-respondent should be set aside and judgment entered in favor of plaintiff-appellant for the amount sued for.

40

Respectively submitted,
 VREDENBURGH, WALL & CAREY,
 Attorneys for Plaintiff-Appellant.



MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

PENNSYLVANIA RAILROAD COMPANY,

Plaintiff, Appellant,

vs.

L. EDWARD HERRMANN,

Defendant, Respondent.

} On Appeal
} from Supreme
} Court.

Brief on Behalf of Defendant-Respondent.

The defendant boarded the trains of the plaintiff railroad company at the times mentioned in the bill of particulars annexed to the state of demand, and rode thereon from and to the several places named in said bill. The defendant was, at the times named in the said bill, and now is, the Secretary to the Governor of the State. Upon each of the times and occasions named in said bill, when his fare was demanded, he presented to the conductor or person in charge of the train on which he was riding a certificate issued and signed by the Secretary of State of New Jersey, pursuant to Chapter 194 of the Laws of 1914, entitling him to pass and repass without payment of fare upon the railroads of said company within the borders of the State. Upon

each of said occasions, defendant was traveling upon official business of the State, as Secretary to the Governor. Upon each of said occasions, the conductor, or person in charge of the train, and to whom said certificate was presented, refused to accept the same as entitling the defendant to ride free of charge upon said train, and demanded payment of the regular fare, which payment was refused by defendant, who claimed that he was entitled to ride free, under said certificate, and defendant was carried to his destination without actual payment of the fare. It is admitted that the conductor, or person in charge of the train, in permitting the defendant to ride to his destination after demand of fare and refusal to pay the same by defendant, was acting under express instructions of the plaintiff railroad company.

This action was brought in the First District Court of Jersey City to recover from the defendant the amount of these fares, which the defendant refused to pay. The District Court gave judgment for defendant, and the Supreme Court affirmed this judgment.

Two questions are involved in this case, and will be discussed in this brief.

First, is the certificate, issued by the Secretary of State, entitling defendant to pass and repass without charge upon the railroads of plaintiff, within this State, when traveling upon official business, valid?

Second, if the certificate is invalid, can the plaintiff recover the amount of the fares so demanded and refused by the defendant, as set out in the bill of particulars?

AS TO THE FIRST POINT.

THE CERTIFICATE IN QUESTION IS VALID, AND IT WAS WITHIN THE POWER OF THE LEGISLATURE TO COMPEL THE PLAINTIFF RAILROAD COMPANY TO CARRY DEFENDANT AND OTHER STATE OFFICIALS, FREE OF CHARGE, WHEN TRAVELING UPON OFFICIAL BUSINESS.

Chapter 194 of the Laws of 1914 (p. 358), under and by virtue of which the said certificate was issued to defendant by the Secretary of State, is an amendment to section 40 of the "Act concerning railroads (Revision of 1903)." It provides that various State officers named therein (*including the Secretary to the Governor*), during their respective terms of office or employment, shall pass and repass, free of charge, over any and all railroads operated in this State, within the borders of this State. It further provides that the Secretary of State shall issue, in card form, under the Seal of the State of New Jersey, to each and every person designated in the section as amended by this act, a certificate. The certificate bears the title of such person's office, or states the capacity in which the said person is employed by the State, the date of issuance to such person, and the date of expiration of such person's office or employment. It is signed by the Secretary of State, and the holder thereof endorses his name on the back. The act further provides that the certificate shall be produced and shown, on request of the conductor or person in charge of the train on which such person is riding, and such presentation, as aforesaid, shall entitle the person to which it is issued to pass and repass, without payment of fare over any and all railroads in the State of New Jersey, within the borders of said State.

It is not denied that the certificate held by defendant and presented, as above stated, was in due form, and strictly in accordance with the requirements of the act.

A.

It is contended by plaintiff that, under the decision of this Court in *D., L. & W. R. R. Co. v. Public Utilities Board*, 85 N. J. L. 28, this act is only applicable and valid as to those State officers whose duties or activities affect railroads and their interests, and that the Secretary to the Governor is not such an officer.

In that case, the Court held that a member of the State Water Supply Commission was not within this class, because his activities in nowise affected railroads or their affairs.

The principle of the decision is this:

Where the activities of the officers or of the body of which he is a member, affect the railroads or their interests, then the State may require that they be carried free, and as to such officers, the act is valid and applies, but if their activities (their duties) do not so affect the railroads, then this obligation cannot be imposed, and the act, as to such officers, is invalid and does not apply.

It may be difficult to draw the strict line of demarcation between these two classes of officers, and where the line of cleavage is doubtful (where it is difficult to say to what class the particular officer is assignable), the doubt should be resolved in favor of the power of the Legislature, and of the applicability of the act to such officer.

The duties of the Secretary to the Governor are defined by the statute creating the office, as follows: "To keep a correct record of all executive proceedings and decisions, and to do all other acts appertaining to his office, which shall be required of him by the Governor." (*Compiled Statutes*, p. 3792, Sec. 40.)

By Chapter 50, p. 200, Laws of 1902, the title was changed from that of "Private Secretary to the Governor" to "Secretary to the Governor," and the salary increased from fifteen hundred to three thousand dol-

lars. By the act of 1906 (p. 322), the salary was raised to four thousand dollars, and the incumbent prohibited from pursuing any other occupation that would interfere with the *daily discharge* of the duties of the office.

This increase in salary and prohibition of other occupation illustrates the increasing importance of the office, and of the necessity for prompt discharge of its duties.

It will be admitted that the Governor is an officer within the class as to whom the act in question is valid and would apply, and that he would be entitled, under said act, to free passage upon the trains of the company, when upon official business.

It will be admitted, we presume, that the activities and duties of the Governor directly affect railroads or their affairs, and that the State, under this decision, has the power to say to railroads, "For reasons of policy, you must carry, free of charge, the Governor of the State, when traveling on public business," just as it can say, "You must carry, free, the members of the Legislature, by whom the laws affecting your interest are made."

The Secretary to the Governor, whose duty it is to keep a correct record of *all* the Governor's proceedings and decisions, and to do *all other acts*, appertaining to his office, *which shall be required of him by the Governor*, may well be regarded as a State officer whose duties (activities) affect railroads, or their interests, and to whom, therefore, this act would apply and be valid. If the Legislature can say to the railroads, "For reasons of public policy you must carry the Governor free, whose official acts and decisions, or some of them, affect you and your interests," why may not public policy equally demand the free transportation of the official who records those proceedings and decisions? If the first is an exercise of both the police power and the reserved right, why is not the second, also, an exercise of those powers? The *one officer* acts and decides upon matters affecting the plaintiff's interests; the

other, equally affecting them, records and preserves these acts and decisions. If public policy may demand that the Governor be carried free when upon official business, why should not it also demand that his Secretary should also travel free, when upon the business of recording and preserving these acts and decisions, and performing other services required of him by the Governor, any of which may affect the railroads and their interests?

It is submitted that the Secretary to the Governor comes within the class of State officers whom the Legislature could, for reasons of public policy, require to be carried free; that this act of 1914, as to him, is valid, and the conductors of plaintiff upon the several occasions named in said act should have accepted his certificate as entitling him to ride free upon their respective trains.

Defendant, as Secretary to the Governor, traveling upon all these occasions upon official business, was *in law*, entitled to travel free of charge, and this action must, therefore, fail.

It was on this ground that the Supreme Court based its affirmance of the judgment of the District Court.

B.

THE ACT IN QUESTION, CHAPTER 194 OF THE LAWS OF 1914, UNDER AND BY VIRTUE OF WHICH THE CERTIFICATE TO THE DEFENDANT WAS ISSUED, IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE. THE STATE MAY, IN EXERCISE OF ITS POLICE POWER, ENACT THAT STATE OFFICIALS SHALL BE CARRIED FREE ON THE RAILROADS OF THE STATE WHEN IN DISCHARGE OF OFFICIAL DUTIES.

While the courts have deemed it unwise to attempt to frame a definition of the police power which shall absolutely indicate its limits, yet it may be said that it

is an attribute of sovereignty and exists without any reservation in the Constitution, being founded upon the duty of the State to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly government, because necessary to the proper maintenance of the government and the general welfare of the community.

Amer. & Eng. Encyc., Police Power, Vol. 22, p. 918, and cases cited in notes.

The police power is inherent in the several States, and may always be exercised by the State Legislature.

In *Barbier v. Connolly*, 113 U. S. 27, Mr. Justice Field, speaking for the Court, and discussing the Fourteenth Amendment, and its effect and restriction upon the police power of the States, said that this amendment, in declaring that no State should "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary spoliation of property, but also that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. But he further says (p. 31):

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

And again (on p. 32):

"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere

of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Commonwealth v. Interstate, &c., Street Rwy.*, 187 Mass. 436, the Supreme Court of Massachusetts held a statute requiring street railways to carry pupils of the public schools to and from school at rates not exceeding half the regular fare charged other passengers between the same points to be a valid exercise of the police power, although the statute did not apply to a particular company excepted, and the privilege was extended only to pupils of the public schools. It was held that the statute was not a violation of the Fourteenth Amendment, in that it did not apply to all street railways of the commonwealth, did not apply to all persons using street railways, nor even to all pupils, but only to pupils of the public schools. It was also held that the statute was not repugnant to the tenth article of the Massachusetts Declaration of Rights, nor to the Fifth and Fourteenth Amendments of the United States Constitution, in that it did not deprive the railway company of its property without just compensation, nor without due process of law. The Court, in the very able and interesting opinion of Chief Justice Knowlton, holds that as a police regulation in the interest of popular education, the law may well require street railway companies to permit public school children to ride upon their cars without profit, provided it can be done without causing the companies loss. The learned judge concedes that if such requirement requires expense, the cost can only be put upon the general taxpayers; that it cannot be put upon the street railway companies, or upon that part of the public which pays fares. "If, therefore," says the learned judge, "it plainly appeared that the enforcement of this section would cause expense to street railway corporations which they must bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school chil-

dren at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination." The Court holds, however, that the selection of public school pupils as a class is not arbitrary, that it was possible for the Legislature to conclude that the requirement of the statute would not entail loss upon the street railway companies. And the learned Chief Justice concludes that "nothing less than a certainty that the provision would cause loss to the railway companies or some of them would enable us to hold that the Legislature was powerless to make the requirement. * * * It involves the consideration of facts which primarily are for the law-making power. All presumptions are in favor of the validity of legislation. * * * The evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half the regular rates."

This decision of the Massachusetts Supreme Court was affirmed by the Supreme Court of the United States in *Interstate Railway Co. v. Mass.*, 207 U. S. 79. It is true that the statute was sustained upon the ground that the charter of the objecting company was taken subject to all the restrictions imposed by laws then in existence, and this law was in existence at the time. But the Court did not qualify or dissent from the view of the Massachusetts Court. It refrained from expressing any opinion upon the question of the police power and due process upon which the Massachusetts Court had decided the case, and rested its affirmance upon the other ground. The weight and reasoning and authority of the Massachusetts decision and the opinion of Chief Justice Knowlton are not, therefore, in anywise discredited, and Mr. Justice Holmes, in writing the opinion of the Supreme Court of the United States, states that in his opinion, aside from the fact that the charter of the street railway company had been granted subsequent to the passing

of the law requiring the carriage of school children for half fare, the law in his judgment was a valid law enacted under the police power. He says, at p. 86:

“Notwithstanding the foregoing considerations, I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights, like others, are matters of degree, and that the great constitutional provisions for the protection of property cannot be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation. *Martin v. Dist. of Columbia*, 205 U. S. 135, 139; *Camfield v. United States*, 167 U. S. 518, 524.

“If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the State in common with other governments, than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.”

After pointing out that education was a purpose for which the police power might be exercised, he continues:

“Thus the question narrows itself to the magnitude of the burden imposed—to whether the tax is so great as to exceed the limits of the police power. Looking at the law without regard to its special operation, I should hesitate to assume that its total effect, direct and indirect upon the roads outside of Boston, amounted

to a more serious burden than a change in the law of nuisances, for example, might be. See, further, *Williams v. Parker*, 188 U. S. 491. Turning to the specific effect, the offer of proof was cautious. It was simply that a 'considerable percentage' of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the Legislature and of the highest Court of Massachusetts, that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt the law must be sustained."

Mr. Justice Harlan concurred with Justice Holmes in the portion of the opinion which upheld the validity of the law.

In *State, ex rel. Simpson, v. Chicago, M. & St. P. Ry. Co.* (Sup. Ct. Minn. 1912), 137 M. W. 2, the Supreme Court of Minnesota determined that an act of the Legislature which required the railroads of Minnesota to carry officers and enlisted men of the National Guard, traveling under orders from competent authority, to perform military duty, at the rate of one cent per mile, was valid. It was claimed that the act violated section one of Art. 14 of the Amendment to the Federal Constitution because the railway company was denied the equal protection of the laws, its property rights were invaded without compensation, and that it contravened sections two, seven and thirteen of Article I of the State Constitution on the same ground. The argument proceeded along the line that the two-cent passenger fare provided a reasonable rate for the carriage of passengers, and hence that one-half of that rate must be less than a fair com-

compensation for the service. The company took no testimony to support the claim that its property would be taken without due process of law under the amendment, and abandoned that ground. The Court said:

“But in the case at bar, we may take knowledge of the fact that the military force of the State is limited, and the reduction in the earnings of the railways by being compelled to transport this force at the rate provided must be considered so small as not to be appreciable, and as to the chief contention of illegal discrimination, the Supreme Court, in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, *supra*, held, although in brief of counsel cited in the Smith case, *supra* (the opinion in both cases being by Justice Peckham), that a discrimination in favor of a municipality is not illegal, and further that the act here in question established a rate for State troops which is conceded to be not unreasonable. With all due respect to the opinion of the Supreme Court of Kansas *In re Gardner*, *supra*, we are inclined to believe that the basis for classifying the State militia was not there given the consideration it merits. The principle announced in *Willcox v. Consolidated Gas Co.*, *supra*, that discrimination in favor of a State is not illegal, was overlooked, and the utterances in the Smith case apply to facts not similar in important particulars. We hold, therefore, that the rate established to be paid by the State for transporting its troops is not an illegal discrimination.”

San Antonio Traction Co. v. Altgelt, 200 U. S. 304, was an application by Altgelt for preliminary mandamus against the traction company, a Texas corporation, operating a street railway system, commanding it to issue to the plaintiff twenty half-fare street car tickets upon the payment of fifty cents, same being at the rate

of two and one-half cents per ticket. The mandamus was granted by the District Court and the action of the District Court was affirmed by the Court of Civil Appeals and taken to the Supreme Court of the United States on writ of error. This claim was made under a statute which required the company to sell tickets to school children not more than seventeen years of age in lots of twenty for a half dollar, the regular fare being five cents. The Court sustained the statute as a constitutional exercise of legislative power. It was also held that nothing appeared in the case to show that the rate of fare claimed by appellee under the act of 1903 was not such as to leave the company a sufficient income to pay for repairs and a fair amount on its investment.

In *Commonwealth v. Boston & Northern St. Ry. Co.*, 212 *Mass.* 82, the defendant company was indicted for violation of the provisions of a statute of 1910, Chapter 567, in refusing to sell to one Barker, a boy fifteen years of age, who was a pupil of the Lawrence Industrial School, tickets in lots of ten for his transportation between the schoolhouse of that school and his home, at a rate of fare not exceeding one-half the regular fare charged by the defendant for the transportation of passengers between those points. The defendant claimed that the statute requiring the sale of these tickets at this rate was unconstitutional.

Speaking on this subject, the Supreme Court of Massachusetts said in part:

"The statute does not impair in contravention of Article one, sec. 10, of the Constitution of the United States the obligation of the contract set forth in the charter of the Lynn and Boston Ry. Co. (St. 1859, c. 202, sec. 4), to which it is said that the defendant has succeeded. That charter, when granted, was liable by general law to alteration or repeal, and was, therefore, taken by consent, subject to this condition, of

which it cannot now be heard to complain. *Parker v. Metropolitan R. R. Co.*, 109 Mass. 506; *Selectmen of Clinton v. Worcester Consolidated St. Ry. Co.*, 199 Mass. 279. This reserved power of amendment is not exceeded so long as the object of the grant is not defeated or essentially impaired, and property rights acquired upon the faith of the charter are not taken away. The charter right to fix fares is subject to amendment within this limitation. Moreover, no charter contract can prevent the Legislature from a valid exercise of the police power. *Texas & N. O. v. Miller*, 221 U. S. 408, 414."

Speaking of the contention that the act operated to deprive the railroad of its property without due process of law, the Court said:

"The governing principle of law in its general statement is well settled. The restrictive rate must be so small as to occasion a loss to the carrier if it performs the service required for the price permitted before it can be held unconstitutional, provided the total net earnings are such as to yield a reasonable return upon the value of the corporation as a whole, having regard to the fact that this is a burden imposed by a police regulation in the interest of education. It may be that a particular rate for a given carriage, taken by itself, would yield little or no profit, but taken in conjunction with the entire transportation would not be unreasonable. The circumstance that the defendant has earned and paid reasonable dividends (5 per cent. per annum since 1905, as stated by the defendant its brief) while of weight, is by no means decisive.

"This case does not involve a general scheme of rates, but only that for a particular service. The inquiry is confined to the point whether a

performance of a specified duty at the rate fixed is so inherently unjust and unreasonable as to amount to deprivation of property without due process of law. It is not enough to show that no profit may come from the particular service, it must appear that in conjunction with all the service of the corporation the rate is unreasonable and is equivalent to spoliation."

It will be noted that the statutes in these cases were justified as a proper exercise of the police power.

The proper administration of the government of the State is as much an exercise of the police power as the education of its children. If the State can, in furtherance of education, enact that common carriers shall transport the pupils of the public schools at a reduced rate or free, it is difficult to see why the State cannot, in the exercise of the same power, enact that the common carriers of the State shall transport State officials free when engaged in public duty in carrying on the administration of the State government and in generally promoting the welfare of the State and of all its citizens.

The railroad companies are public instrumentalities. They exercise certain rights and privileges given them for the public good and are also subjected to public duties imposed upon them for the public convenience. They are semi-public corporations. Their franchises are given them not for their own advancement or aggrandizement, but in furtherance of the public needs and the public convenience. The State in requiring the railroad companies to carry free, while in discharge of their public duty, the State officers or officials who are charged with the general administration of the government, in exercising its sovereignty. It is regulating and legislating in the interests of the health, peace, morals and good order of the people. It is not an arbitrary spoliation of the property of the railways. An equal burden is laid upon all of the class affected, namely, the railways of the State, the great and convenient

arteries of travel of the State. Its operation affects alike all of the class entitled to its benefit, namely, State officials, and the free transportation is given not for the benefit of the individual, but for that of the public—that the public duties with which State officials are charged may be promptly and efficiently performed. It does not appear that this requirement of free transportation will entail any loss upon the railroad companies. The mere fact that they may be deprived of some minute profit or earning for the carrying of these few State officials where no loss, no actual increased cost is entailed, is not a deprivation of property without due process and is no hardship. The railway companies are not required to incur any increased expense by reason of the free transportation of these State officials. The law merely entitles these men to free transportation upon the trains of the company.

It may be argued that the right of a railroad company to receive pay for the transportation of passengers is its property, and that the requirement that certain persons be carried free is, therefore, a taking of property. The same argument would apply to an enactment requiring transportation at a reduced rate. If the right to charge established fares is a property, then the reduction in fares would be an interference with such property and a taking of it *pro tanto*. Nor can it be conceded that the right to receive pay for transportation is property protected by the Fourteenth Amendment. The right of the State to regulate fares and to reduce charges, freights and toll is not denied so long as a fair return is received upon the property invested.

The reduction of the receipts of any one railroad system resulting from the transportation of State officials in discharge of their duties must be so small as not to be appreciable.

AS TO THE SECOND POINT.

A.

CONCEDING THAT THE CONDUCTOR, IN EACH CASE, WHEN HE REFUSED TO ACCEPT THE CERTIFICATE DEMANDED OF DEFENDANT THE REGULAR ONE-WAY FARE, THAT DEFENDANT REFUSED TO PAY, AND STILL ASSERTED THE VALIDITY OF THE CERTIFICATE AND HIS RIGHT TO FREE TRANSPORTATION THEREUNDER, IT IS SUBMITTED THERE CAN BE NO RECOVERY AGAINST DEFENDANT.

Plaintiff, in permitting defendant to ride after refusal to pay the fare demanded, and the continued assertion of the validity of the certificate and the right of defendant to free transportation thereunder, must be regarded as having waived its first refusal to receive the certificate, and to have acquiesced in defendant's claim. The situation, in effect, is this:

Defendant boarded plaintiff's train under claim of right to free transportation. He presented to plaintiff's agent the certificate, on its face entitling him to transportation, a certificate authorized by an act of the Legislature, valid and binding upon plaintiff until declared invalid by the proper tribunal. *Lang v. Bayonne*, 74 N. J. L. 455.

Plaintiff's agent refused the certificate and demanded the fare. Defendant refused to pay, for the reason that the certificate was valid, and that he was entitled to free transportation thereunder. Plaintiff's agent, acting under express instructions of plaintiff, then permitted defendant to ride to his destination without further demand or molestation. Here was a direct acceptance of and acquiescence in defendant's claim of right to free transportation. Defendant demanded free transportation under claim of right; plaintiff denied the right and demanded fare. Defendant again asserted his right and refused to pay. Plaintiff then permitted

defendant to complete his ride. Was not defendant justified in assuming that plaintiff finally acquiesced in his claim and permitted him to ride free upon his certificate? In any view of the case, defendant was entitled to exercise a choice; either to pay his fare or to leave the train. But this choice was not given him. The train was not stopped and the choice offered to pay or leave the train. He could not leave the train while in motion, nor was he bound to demand that the train be stopped that he might leave. Demand for payment having been refused, no liability for payment would arise until the choice was offered. Plaintiff's agent did not say: "Either pay or leave the train." Demand having been made and refused, and no opportunity to leave being then afforded, defendant had a right to conclude that payment was waived and his right to free transportation conceded.

The situation is analogous to that of a person boarding a train holding a ticket issued by the company entitling the bearer to passage, but which may have expired or may not be valid on that train, the holder honestly supposing it to be valid. So soon as the ticket is refused, does the holder of the invalid ticket then become a passenger upon an implied contract entitling the company to recover for the fare, and obligating it as a common carrier? If he refuse to pay and is permitted to remain on the train to his destination without payment of fare, is the company liable in case of injury, as in the case of a passenger holding a valid ticket? When the ticket is refused, and payment of fare refused, the holder becomes a trespasser and may be ejected if he refuse to leave, but until an opportunity to leave is afforded, he cannot be treated either as a trespasser or as a passenger under implied promise to pay. He was not permitted to exercise his right to leave the train, nor, without his assent or acquiescence, can his condition be turned into that of a passenger liable to payment of fare.

Defendant was not a trespasser when he boarded the train and presented his certificate. Assuming the certificate to be invalid, he only became a trespasser after refusal to pay the fare when demanded. The remedy of the company was to eject him. He had a right to leave the train without payment, and no opportunity being given him to leave, his remaining upon the train cannot be regarded as raising an implied agreement to become a passenger and to pay the fare.

The plaintiff's contention seems to be that the mere refusal to pay the fare when demanded made the defendant a passenger under an implied promise to pay the fare. If this be the true situation, then plaintiff immediately upon refusal to pay became liable to the defendant to the same extent as to any other passenger upon the train, and, in case of accident, to all the liability of a common carrier. The defendant became at once a passenger, legitimately on the train with all the rights of a passenger.

Chapter 195 of the Laws of 1911, creating the Board of Public Utility Commissioners, referred to in plaintiff's brief, is not in point. We do not contend that plaintiff's officials or conductors had the right to grant free transportation, but that the plaintiff's agent, acting under direct instructions, by permitting the defendant to remain on the train without giving him an opportunity to leave, accepted the certificate and acquiesced in defendant's claim to free transportation thereunder. The agent did not say to defendant, "I will carry you to your destination, but you must agree to pay your fare." Nor was this implied. No choice was given.

"A passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as the equivalent therefor.

"The relation of carrier and passenger is dependent upon the existence of a contract of car-

riage between the carrier and the passenger made by themselves or by their respective agents." 5 *Am. & Eng. Encyc. Law*, 2d Ed. p. 486.

"One rightfully on the train is a passenger, and not in default until demand made upon him for fare, and his refusal to pay. After such refusal, he ceases to sustain the relation of passenger." *Hurt v. Southern R. R. Co.*, 40 *Miss.* 391.

"Where a holder of a thousand-mile ticket to be 'good for six months only,' after that period had elapsed, having first obtained legal advice that the ticket was good until the one thousand miles were traveled, took his seat in a train and refused to pay fare otherwise than by offering his ticket, and was ejected from the train, it was held that the ticket was void; *that the holder* was not a passenger, and became a trespasser on his refusal to pay, and that he might be ejected." *Lillis v. St. Louis, etc., R. R. Co.*, 64 *Mo.* 464; 27 *Am. Rep.* 255.

B.

This action is an action of debt. Recovery can only be had upon proof of a contract, express or implied. It must be conceded that, in this case, there was no contract, either express or implied, to pay the fare. The defendant having absolutely refused to pay the fare when demanded, and having insisted upon his right of free transportation under his certificate, how can an agreement be implied to do something which he has absolutely refused to do? If the defendant had remained upon the train after opportunity had been afforded him to leave the train, *possibly* there might have been an implied agreement on his part to pay the fare, the certificate being invalid. But from the fact that the defendant remained on the train, in this case,

no such agreement can arise, because, as already pointed out, the defendant could not leave the train, and his remaining on the train, from necessity, cannot be assumed to be an agreement to pay the fare. The plaintiff assumes an implied agreement on the part of the defendant. He assumes that immediately upon the demand by its agent for the fare the defendant agreed to pay it, but, in fact, the defendant absolutely refused to pay.

As appears from the authorities cited in Division A, above, the defendant was not and never became, in fact, a passenger. The relation of passenger and carrier never existed. The defendant was either entitled to free transportation under his certificate or became a trespasser when he refused to pay the fare.

It is respectfully submitted, then, that this action cannot be maintained, and that recovery cannot be had against defendant in this suit, even though it may be found by the Court that the certificate in question was invalid and did not entitle defendant to free transportation.

C.

The defendant further contends that the plaintiff should be nonsuited for the reason that the action is improperly brought. The action is brought against the defendant individually for acts done by him in his official capacity. The pass was issued to the defendant in his official capacity, viz., "L. Edward Herrmann," Secretary to the Governor. The trips taken by him were on official business (see agreed state of facts). Under these circumstances, any claim for fare should properly be against the State, rather than the individual. The State is the real party in interest.

"An action will not lie against an officer of the State on account of his acts done in his

official capacity under valid authority from the State, as such action is a suit against the State." *Salem Mills Co. v. Lord*, 42 Oregon 82; 69 Pacific 1033; 70 Pacific 832.

Judgment should be for the defendant for the following reasons: *first*, the certificate in question was valid, and should have been received by plaintiff's agent; *second*, if the certificate was invalid, defendant became a trespasser upon refusal to pay fare, and no obligation or implied promise to pay fare could arise until defendant had an opportunity to leave the train, if he so desired, instead of paying fare; *third*, the action should have been brought against the defendant in his official capacity. He is not responsible, individually, for acts done in his official capacity.

The defendant having boarded the train in good faith, in honest belief that his certificate entitled him to free transportation, did not, in any event, become a trespasser until demand for fare and refusal to pay.

So far as this case is concerned, the defendant must be regarded as having been carried to his destination either without his consent, if the certificate was, in fact, invalid, no opportunity have been given him to exercise a choice and to leave the train rather than to pay fare, or the company waived its objection and accepted the certificate as valid.

We submit that judgment of the Supreme Court in favor of the defendant-respondent should be affirmed and the appeal dismissed.

Respectfully submitted,

HERBERT BOGGS,

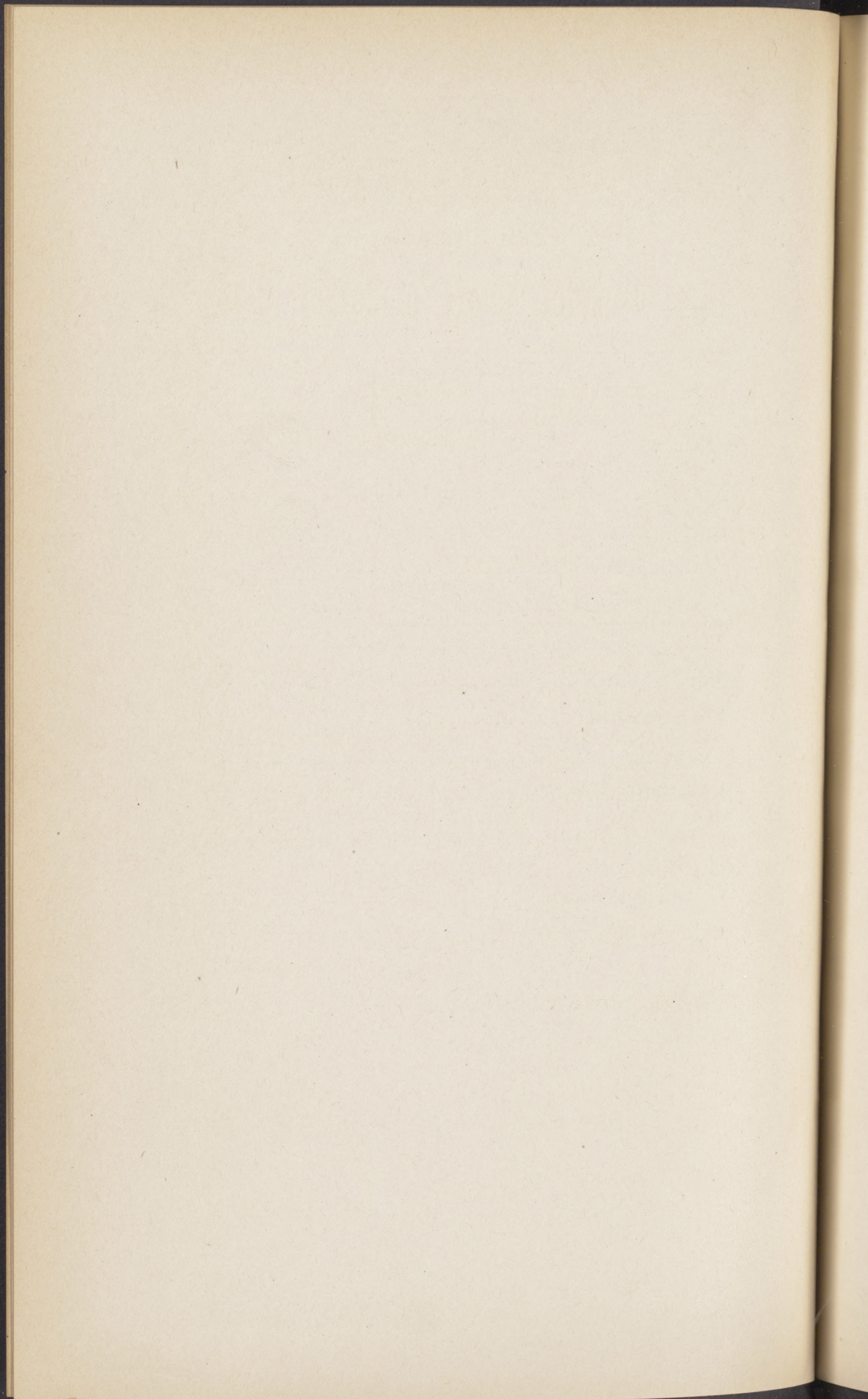
Counsel for Defendant-Respondent.

L. EDWARD HERRMANN,

Counsel pro se.

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Notice of Appeal.

First District Court of Jersey City.

THE PENNSYLVANIA RAILROAD
COMPANY,
Plaintiff,

vs.

L. EDWARD HERRMANN,
Defendant.

10

On Contract.
Notice of Appeal.

To L. EDWARD HERRMANN,
Defendant.

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SIR:

PLEASE TAKE NOTICE that the plaintiff, The Pennsylvania Railroad Company hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Jersey City, rendered in the above stated cause on the 3rd day of August, 1915.

Yours respectfully,

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VREDENBURGH, WALL & CAREY,
Attorneys for Plaintiff.

Dated August 13, 1915.

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Notice of Appeal

STATE OF NEW JERSEY,)
 County of Hudson,) ss.:

GROVER J. CAREY, of full age, being duly sworn on his oath says: I am a clerk in the office of Vredenburgh, Wall & Carey, attorneys of the plaintiff in the action above mentioned. On the
 10 13th day of August, 1915, at 2:45 P. M. I served the foregoing notice of appeal on the defendant L. Edward Herrmann, by leaving the same with the person in charge of his office at No. 15 Exchange Place, Jersey City.

GROVER J. CAREY.

Subscribed and sworn to before me)
 this 14th day of August, 1915.)

20 CHAS. J. GORMLEY,
 Notary Public,
 of New Jersey.

(Endorsed)

FIRST DISTRICT COURT OF JERSEY
 CITY.

30 THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff,

vs.

L. EDWARD HERRMANN,
Defendant.

40 On Contract.
 NOTICE OF APPEAL.

VREDENBURGH, WALL & CAREY,
Attorneys,
 1 Exchange Place,
 Jersey City, N. J.

Specification of Causes of Error.

NEW JERSEY SUPREME COURT.

THE PENNSYLVANIA RAILROAD
COMPANY,
Plaintiff-Appellant,

vs.

L. EDWARD HERRMANN,
Defendant-Appellee.

On Contract.
On Appeal from
First District
Court of Jersey
City. 10
Specification of
Causes of Error.

THE PENNSYLVANIA RAILROAD COMPANY, the above named appellant, specifies the following determination or directions of the First District Court of Jersey City, in the above entitled cause with which it is dissatisfied in point of law. 20

(1) Because the judgment directed by the trial judge was in favor of the defendant, whereas it should have been in favor of the plaintiff.

(2) Because the court should have found The Act of 1914, page 358, amending Section 40 of the Railroad Act of 1903, is unconstitutional in that it violates—

(a) The 14th amendment of the Constitution of the United States. 30

(b) Article 1, paragraph 16 of the Constitution of New Jersey.

(3) Because the trial judge found that the defendant had a right to ride upon trains of the plaintiff by virtue of a certificate issued in conformity to Chapter 194 of the Laws of 1914, whereas he should have found that the attempt of the legislature in Section 40, as 40

Specification of Causes of Error

amended in 1914, to authorize the defendant to pass on plaintiff's trains without paying for transportation was an attempt to take the property of the stockholders of plaintiff without due process of law.

10 (4) Because the trial court refused to apply the principles laid down by this court in Delaware, Lackawanna & Western Railroad Co. v. Public Utilities Board, 85 N. J. p. 28, to the defendant.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff-Appellant.

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State of Demand.

FIRST DISTRICT COURT OF JERSEY
CITY.

<p style="text-align: center;">THE PENNSYLVANIA RAILROAD COMPANY, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">J. EDWARD HERRMANN, <i>Defendant.</i></p>	}	<p>State of Demand.</p>	10
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The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, says:

That it is a carrier of passengers between the States of New York, New Jersey and Pennsylvania; that it is a railroad corporation operating a railroad in the State of New Jersey between the places named on the annexed bill of particulars, and that it sues for transportation service rendered to the defendant on the dates named in said bill of particulars and at the regular published one-way tariff as detailed therein, on the trains numbered as therein set forth, from and to the places therein mentioned in the amounts therein specified, aggregating One hundred and forty-one Dollars and thirty-eight Cents (\$141.38), the whole of which is due and unpaid, although frequently demanded from the said defendant by this plaintiff,

Each of said amounts in said bill of particulars named was the fare due by the said defendant for transportation as a first-class passenger on a train engaged in interstate commerce, and said fare was, at the time of each journey, and previ-

State of Demand

ous to the conclusion thereof, demanded by the plaintiff from the defendant and by the defendant refused to be paid.

Plaintiff demands as damages the amount due, being the sum of \$141.38 with interest and costs of suit.

VREDENBURGH, WALL & CAREY,
Attorneys for Plaintiff.

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State of Demand

SCHEDULE "A."

7-40

Philadelphia, Pa., May 28th, 1914.

Mr. L. E. HERRMANN,
 Secretary to Governor,
 Trenton, N. J.
 To Pennsylvania Railroad Company, Dr.

10

To transportation service rendered between the points and at the regular published one way tariff as detailed below.

Month	Date	Train No.	From	To	Rate	Amount
1914						
Feb'y.	3rd	111	Man. Trans.	Trenton	\$1.23	1.23
	3rd	126	Trenton	Man. Trans.	1.23	1.23
	10th	494	do.	Newark	1.23	1.23
	10th	0494	Man. Trans.	Jersey City	.17	.17
	11th	75	Newark	Trenton	1.23	1.23
	11th	0147	Summit Ave.	Man. Trans.	.15	.15
	11th	0220	Man. Trans.	Exchange Place	.17	.17
	17th	0494	do.	Jersey City	.17	.17
	17th	494	Trenton	Man. Trans.	1.23	1.23
	18th	051	Jersey City	do.	.17	.17
	18th	0132	Man. Trans.	Jersey City	.17	.17
	20th	51	Newark	Trenton	1.23	1.23
	24th	8	Trenton	Man. Trans.	1.23	1.23
	24th	492	Haddonfield Jc.	Trenton	.85	.85
	25th	0132	Man. Trans.	Grove St.	.17	.17
	26th	0111	Summit Ave.	Man. Trans.	.15	.15
	26th	Ex. 1416	Trenton	Do.	1.23	1.23
	26th	111	Newark	Trenton	1.23	1.23
March	6th	494	Trenton	Man. Trans.	1.23	1.23
	6th	111	Newark	Trenton	1.23	1.23
	6th	0111	Summit Ave.	Man. Trans.	.15	.15
	9th	024	Man. Trans.	Summit Ave.	.15	.15
	9th	24	Trenton	Man. Trans.	1.23	1.23
	10th	0111	Grove St.	do.	.17	.17
	10th	8	Trenton	Newark	1.23	1.23
	10th	111	Newark	Trenton	1.23	1.23
	11th	111	do.	do.	1.23	1.23
	11th	494	Trenton	Man. Trans.	1.23	1.23
	11th	0111	Exchange place	do.	.17	.17
	12th	1100	Park Place, Newark	Summit Ave.	.15	.15
	13th	111	Newark	Trenton	1.23	1.23
	13th	34	Trenton	Newark	1.23	1.23
	16th	0147	Jersey City	Man. Trans.	.17	.17
	18th	111	Newark	Trenton	1.23	1.23
	18th	24	Trenton	Man. Trans.	1.23	1.23
	18th	0111	Summit Ave.	do.	.15	.15
	18th	024	Man. Trans.	Summit Ave.	.15	.15
	20th	111	Newark	Trenton	1.23	1.23
	23rd	0147	Jersey City	Man. Trans.	.17	.17
	23rd	75	Newark	Trenton	1.23	1.23
	24th	148	Trenton	Newark	1.23	1.23
	25th	111	Newark	Trenton	1.23	1.23
	25th	0111	Summit Ave.	Man. Trans.	.15	.15
	26th	0111	Jersey City	do.	.17	.17
	26th	111	Newark	Trenton	1.23	1.23
	26th	64	Trenton	Man. Trans.	1.23	1.23
	30th	111	Newark	Trenton	1.23	1.23
	31st	08	Man. Trans.	Jersey City	.17	.17
			Amount	carried forward		37.30

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State of Demand

7-40

Philadelphia, Pa., May 28th, 1914.

Mr. L. E. HERRMANN,
 Secretary to Governor,
 Trenton, N. J.
 To Pennsylvania Railroad Company, Dr.

10 To transportation service rendered between the points and at the regular published one way tariff as detailed below.

Month	Date	Train No.	From	To	Rate	Amount
				Amount		37.30
1914				brought forward		
April	3rd	138	Trenton	New Brunswick	\$0.64	.64
	3rd	75	Man. Trans.	Trenton	1.23	1.23
	3rd	152	New Brunswick	Man. Trans.	.59	.59
	4th	064	Man. Trans.	Grove St.	.17	.17
	8th	111	Newark	Trenton	1.23	1.23
	8th	64	Trenton	Newark	1.23	1.23
20	9th	111	Newark	Trenton	1.23	1.23
	9th	8	Trenton	Newark	1.23	1.23
	14th	77	Newark	Trenton	1.23	1.23
	14th	08	Man. Trans.	Jersey City	.17	.17
				Total		46.25

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State of Demand

No. 7-169

Philadelphia, Pa. August 27th 1914.

MR. L. EDWARD HERRMANN,
Secretary to Governor,
Trenton, N. J.

To Pennsylvania Railroad Company, Dr.

To transportation service rendered between the points and at the regular published one way tariff as detailed below.

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Month	Date	Train No.	From	To	Rate	Amount
1914						
April	15th	111	Newark	Trenton	\$1.23	\$1.23
	15th	0111	Jersey City	Man. Trans.	.17	.17
	15th	1940	Man. Trans.	Summit Ave.	.15	.15
	17th	111	Newark	Trenton	1.23	1.23
	17th	0111	Summit Ave.	Man. Trans.	.15	.15
	20th	0111	Jersey City	do.	.17	.17
	20th	68	Trenton	Newark	1.23	1.23
	20th	1174	Man. Trans.	Summit Ave.	.15	.15
	21st	024	do.	Jersey City	.17	.17
	21st	111	Newark	Trenton	1.23	1.23
	21st	124	Trenton	Newark	1.23	1.23
	24th	0130	Man. Trans.	Jersey City	.17	.17
	24th	111	Newark	Trenton	1.23	1.23
	24th	0111	Summit Ave.	Man. Trans.	.15	.15
	27th	75	Man. Trans.	Trenton	1.23	1.23
	27th	0147	Jersey City	Man. Trans.	.17	.17
	28th	494	Trenton	Newark	1.23	1.23
	28th	0111	Summit Ave.	Man. Trans.	.15	.15
	28th	1244	Man. Trans.	Summit Ave.	.15	.15
May	1st	0494	do.	do.	.15	.15
	1st	0111	Summit Ave.	Man. Trans.	.15	.15
	1st	494	Trenton	do.	1.23	1.23
	1st	111	Newark	Trenton	1.23	1.23
	8th	111	do.	do.	1.23	1.23
	8th	68	Trenton	Man. Trans.	1.23	1.23
	12th	111	Newark	Trenton	1.23	1.23
	14th	111	do.	do.	1.23	1.23
	14th	68	Trenton	Man. Trans.	1.23	1.23
	14th	0111	Summit Ave.	do.	.15	.15
	19th	0111	Exchange Place	do.	.17	.17
	19th	111	Newark	Trenton	1.23	1.23
	19th	78	Trenton	Man. Trans.	1.23	1.23
	22nd	78	do.	do.	1.23	1.23
	22nd	0132	Man. Trans.	Summit Ave.	.15	.15
	25th	130	Rahway	Man. Trans.	.27	.27
	25th	317	Jersey City	Rahway	.44	.44
	26th	494	Trenton	Newark	1.23	1.23
	26th	111	Newark	Trenton	1.23	1.23
June	1st	111	do.	do.	1.23	1.23
	1st	0111	Exchange Place	Man. Trans.	.17	.17
	1st	494	Trenton	do.	1.23	1.23
	3rd	111	Newark	Trenton	1.23	1.23
	4th	1197	Jersey City	Park Place	.17	.17
	5th	77	Newark	Trenton	1.23	1.23
	5th	124	Trenton	Man. Trans.	1.23	1.23
	5th	0124	Man. Trans.	Jersey City	.17	.17
	9th	0111	Summit Ave.	Man. Trans.	.15	.15
	9th	136	Trenton	do.	1.23	1.23
	9th	111	Newark	Trenton	1.23	1.23
	15th	0111	Exchange Place	Man. Trans.	.17	.17
	15th	111	Man. Trans.	Trenton	1.23	1.23
	15th	494	Trenton	Man. Trans.	1.23	1.23
	15th	0494	Man. Trans.	Exchange Place	.17	.17

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Amount carried forward

\$39.90

State of Demand

No. 7-169

Philadelphia, Pa. August 27th 1914.

Mr. L. EDWARD HERRMANN,
Secretary to Governor,
 Trenton, N. J.
 To Pennsylvania Railroad Company, Dr.

10 To transportation service rendered between the points and at the regular published one way tariff as detailed below.

Month	Date	Train No.	From	To	Rate	Amount
1914				Amount	brought forward.....	\$39.90
June	22nd	208	Sea Girt	Jersey City	1.30	1.30
	23rd	494	Trenton	Newark	1.23	1.23
	23rd	0111	Exchange Place	Man. Trans.	.17	.17
	23rd	111	Newark	Trenton	1.23	1.23
	27th	0111	Exchange Place	Man. Trans.	.17	.17
	27th	222	Sea Girt	Man. Trans.	1.30	1.30
	30th	494	Trenton	Man. Trans.	1.23	1.23
20	30th	111	Newark	Trenton	1.23	1.23
	30th	0111	Exchange Place	Man. Trans.	.17	.17
					Total	\$47.93

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State of Demand

MEMORANDUM BILL

Philadelphia, Pa., October 23rd, 1914.

Mr. L. E. HERRMANN,
 Secy. to Governor,
 Trenton, N. J.
 To Pennsylvania Railroad Company, Dr.

To transportation service rendered between the points and at the regular published one way tariff as detailed below.

Month	Date	Train No.	From	To	Rate	Amount
1914						
July	14th	111	Newark	Trenton	\$1.23	1.23
	14th	494	Trenton	Man. Trans.	1.23	1.23
	16th	225	Jersey City	Sea Girt	1.30	1.30
	17th	423	Sea Girt	Barnegat Pier	.46	.46
	17th	398	Barnegat Pier	Sea Girt	.46	.46
	20th	208	Sea Girt	Jersey City	1.30	1.30
	21st	111	Newark	Trenton	1.23	1.23
	21st	494	Trenton	Man. Trans.	1.23	1.23
	24th	0109	Jersey City	Man. Trans.	.17	.17
	24th	203	Newark	Sea Girt	1.30	1.30
	27th	208	Sea Girt	Jersey City	1.30	1.30
	28th	111	Newark	Trenton	1.23	1.23
	28th	494	Trenton	Man. Trans.	1.23	1.23
	31st	203	Newark	Sea Girt	1.30	1.30
	31st	0109	Jersey City	Man. Trans.	.17	.17
August	3rd	208	Sea Girt	Jersey City	1.30	1.30
	4th	494	Trenton	Newark	1.23	1.23
	4th	111	Newark	Trenton	1.23	1.23
	11th	111	do.	do.	1.23	1.23
	11th	494	Trenton	Man. Trans.	1.23	1.23
	11th	0111	Summit Ave.	do	.15	.15
	17th	208	Sea Girt	Jersey City	1.30	1.30
	18th	111	Newark	Trenton	1.23	1.23
	18th	494	Trenton	Man. Trans.	1.23	1.23
	20th	0111	Summit Ave.	do	.15	.15
Total						25.42

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State of Demand

MEMORANDUM BILL

Philadelphia, Pa.,
October 23rd, 1914.

Mr. L. E. HERRMANN,
Secy. to Governor,
Trenton, N. J.

10 To Pennsylvania Railroad Company, Dr.

To transportation service rendered between the points and at the regular published one way tariff as detailed below.

Month	Date	Train No.	From	To	Rate	Amount
1914						
Sept.	8th	0111	Summit Ave.	Man. Trans.	\$0.15	.15
	8th	111	Newark	Trenton	1.23	1.23
	14th	208	Sea Girt	Jersey City	1.30	1.30
20	15th	0132	Man. Trans.	Jersey City	.17	.17
	15th	0111	Summit Ave.	Man. Trans.	.15	.15
	15th	111	Newark	Trenton	1.23	1.23
	22nd	111	do.	do.	1.23	1.23
	22nd	0132	Man. Trans.	Jersey City	.17	.17
	22nd	0111	Summit Ave.	Man. Trans.	.15	.15
	23rd	130	Elizabeth	do	.13	.13
	25th	111	Newark	Trenton	1.23	1.23
	25th	0124	Man. Trans.	Jersey City	.17	.17
	25th	124	Trenton	Newark	1.23	1.23
	25th	0111	Summit Ave.	Man. Trans.	.15	.15
	29th	8	Trenton	do.	1.23	1.23
	29th	0145	Summit Ave.	do	.15	.15
	29th	77	Newark	Trenton	1.23	1.23
30	Oct. 1st	8	Trenton	Man. Trans.	1.23	1.23
	1st	0145	Summit Ave.	do	.15	.15
	5th	0111	Jersey City	do	.17	.17
	6th	111	Newark	Trenton	1.23	1.23
	8th	122	Trenton	Newark	1.23	1.23
	13th	78	do	Man. Trans.	1.23	1.23
	13th	111	Newark	Trenton	1.23	1.23
	16th	111	do	do.	1.23	1.23
	16th	0122	Man. Trans.	Jersey City	.17	.17
	16th	122	Trenton	Newark	1.23	1.23
	20th	111	Newark	Trenton	1.23	1.23
	20th	0132	Man. Trans.	Summit Ave.	.15	.15
				Total		21.78

Summary of foregoing: \$141.38

State of Demand

SCHEDULE "B."

(Obverse)

STATE OF NEW JERSEY,
Office of Secretary of State.

No. 705

I, DAVID S. CRATER, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that in accordance with the provisions of Chapter 194 of the Laws of 1914, L. EDWARD HERRMANN, Secretary to the Governor, whose term of office expires January 8th, 1917, is entitled to pass and repass, without payment of fare, over any and all railroads in the State of New Jersey, within the borders of said State. 10

IN TESTIMONY WHEREOF, I have set my hand and seal this 15th day of April, A. D. 1914. 20

DAVID S. CRATER,
Secretary of State.

(Reverse)

CONDITIONS.

Not transferable. If presented by a person not named therein, Railroad Company is authorized to take up the certificate. 30

Not good in connection with any other form of transportation for inter-state trips.

All the conditions as stated on this certificate and in accordance with Chapter 194 of the Laws of 1914 are hereby accepted and attested to by

(sign in ink)

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Agreed State of Fact.

FIRST DISTRICT COURT OF JERSEY
CITY.

10	<p style="text-align: center;">THE PENNSYLVANIA RAILROAD COMPANY, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">L. EDWARD HERRMANN, <i>Defendant.</i></p>	} Agreed State of Fact.
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The attorneys of the above stated parties stipulate and agree as follows:

20 1. That plaintiff is a carrier of passengers in the States of New York, New Jersey and Pennsylvania, and operates lines of railroad in New Jersey, as lessee of certain railroad companies incorporated under the Laws of this State, the several charters of which, or printed copies thereof, may be offered without formal proof, provided that where any copy is offered, the defendant may, if he so desires, insist upon the production of

30 original or certified copies.

2. That the defendant, on the dates named in the Bill of Particulars annexed to the State of Demand herein, boarded the trains numbered as therein set forth, and rode thereon from and to the places therein mentioned. That on each of said trips the conductor or ticket collector of the plaintiff demanded of the defendant his ticket entitling him to a ride on said train, and there-

40 upon the defendant in each case tendered a cer-

Agreed State of Fact

tificate issued in conformity to Chapter 194 of the Laws of 1914, a true copy of which certificate is annexed to the State of Demand herein, marked Schedule B; that thereupon the conductor or ticket collector of the plaintiff stated that said pass or certificate was not valid and did not entitle the defendant to ride on the train, and demanded the fare at the regular published one-way tariff as detailed in said bill, which was refused by the defendant, and the conductor thereupon handed to the defendant a slip (a copy of which is hereto annexed marked Schedule X), and the defendant continued his ride to the destination mentioned without further demand for fare or objection from the agent of the plaintiff; that each of said trips designated in the bill of particulars was in and about the duties appertaining to the office of the said defendant. 10

4. That the defendant is now and was during the year 1914, Secretary to the Governor, duly appointed and qualified pursuant to the provisions of "An Act relative to the Private Secretary of the Governor" (P.L. 1866, p. 530); (C. S., p. 3792) and the acts supplemental thereto and amendatory thereof. 20

5. That the trains except those numbered 208, 317, 225, 423, 398 on said bill of particulars, the regular fares for riding upon which aggregate \$9.16 were trains engaged in journeys or trips to points beyond the State of New Jersey. 30

6. This action shall be entered without process.

VREDENBURGH, WALL & CAREY,
Attorneys for Plaintiff. 40

L. EDWARD HERRMANN,
Attorney pro se.

Dated February 1st, 1915.

Agreed State of Fact

X

THE PENNSYLVANIA RAILROAD COMPANY
WEST JERSEY & SEASHORE RAILROAD COMPANY.

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NOTICE.

To the holders of New Jersey State Certificates, bearing numbers as shown on back hereof:
The Company is advised by its Legal Department that you are not entitled to ride free on its trains, and you are therefore requested to pay the proper fare.

S. C. LONG,
General Manager.

20 Note:—The numbers shown on the back thereof includes 705.

30 Pursuant to the first paragraph of the agreed state of fact or stipulation, the plaintiff offered an Act to incorporate the New Jersey Railroad & Transportation Company, Laws of 1832, page 96; an Act to incorporate the Camden & Amboy Railroad & Transportation Company, Laws of 1830, page 83; an Act to enable the United Rail-
way & Canal Companies to consolidate their stock, &c., Laws of 1870, page 916; an Act to amend an act entitled "An Act to validate and confirm cer-
tain agreements between the companies owning the railroad lines between New York and Phila-
delphia, Laws of 1872, page 567; Certification of Organization and Adoption of Corporate name of
40 United New Jersey Railroad & Canal Company, Laws of 1872, page 1042; an Act ratifying the lease between the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad, Laws of 1873, page 1298; and the Lease dated June 30th, 1871.

Memorandum.

FIRST DISTRICT COURT OF JERSEY
CITY.

THE PENNSYLVANIA RAILROAD
COMPANY,

Plaintiff,

vs.

L. EDWARD HERRMANN,
Defendant.

On Contract
Case No. 95046
Memorandum.

10

The defendant is, and was during 1914, Secretary to the Governor, and in the execution of his official duties, rode from time to time upon the passenger trains of the plaintiff, claiming the right under a certificate issued to him by the Secretary of State, pursuant to P. L. 1914, Chap. 194, to travel within the state, without payment of fare. On each occasion he exhibited to the conductor or ticket collector the certificate issued by the Secretary of State, and in each case, the conductor or ticket collector stated that the pass or certificate was not valid, and did not entitle the defendant to ride on the train, and demanded the fare at the regular published one way tariff, which was refused by the defendant. The conductor or ticket collector thereupon handed to the defendant a slip notifying him that the plaintiff was advised by its legal department that the defendant was not entitled to ride free on its trains, and he was therefore requested to pay the proper fare. The fare was never paid, and defendant continued to ride to his destination without further demand for fare, or objection from the agent of the plaintiff. The plaintiff's counsel contends that the Act

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Memorandum

of 1914 under which the certificate was issued by the Secretary of State is constitutional, in that the defendant was not such a state official as the legislature might authorize to pass over railroads in the State, without paying for transportation and that the legislative act in question was an attempt to take the property of the plaintiff without due process of law. To support this contention, the plaintiff relies upon *D., L. & W. R. R. Co. vs. Public Utilities Board*, 85 N. J. (56 Vr.) 28 (S. C. 1913), Garrison, J.

The defendant answers (1) that the act in question was a proper exercise of legislative authority; that even if the act be unconstitutional, the plaintiff's action cannot be maintained because,

(2) The transaction raised no implied promise on the part of the defendant to pay for his transportation, the conductor not having offered to the defendant the alternative of paying or leaving the train, or having offered to stop the train in order that the defendant might get off; and

(3) As the defendant was travelling in his official capacity, the action could not be maintained against him individually.

In the view which I take of the case, it is unnecessary to consider the 2nd and 3rd defenses suggested. The action can only be maintained upon a finding in this court that the act of 1914 under which the certificate of the Secretary of State was issued, was unconstitutional.

The case invoked by the plaintiff to support its contention of the invalidity of the Act of 1914, was a certiorari proceeding which questioned an order made by the Public Utilities Commission, which required the Railroad Company to recognize as valid a certificate from the Secretary of State permitting one Hoagland, a member of the New Jersey State Water Supply Commission, to

Memorandum

pass and re-pass without payment of fare, over the railroad in New Jersey. The order removed by certiorari in form concerned many officials who were not before the court, but in the decision, the court carefully restricted its finding to members of the State Water Supply Commission. It expressly refrained from expressing any opinion as to the rights of other officials. While it is quite possible that the Supreme Court, on the question being presented to it, might hold the pass issued by the Secretary of State to the defendant invalid, that inference cannot be drawn with certainty from the former decision. This, I think, indicates what the action here should be. A court of first instance ought not to declare an act of the legislature unconstitutional, unless its invalidity is entirely clear, or the personal liberty of a citizen is in question. I must therefore recognize the Act of 1914 as a valid exercise of legislative power, until otherwise decided by a superior court.

There will be a judgment for the defendant.

CHARLES L. CARRICK,
Judge.

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Memorandum

(Endorsed)

FIRST DISTRICT COURT OF JERSEY
CITY.

10 THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff,

vs.

L. EDWARD HERRMANN,
Defendant.

20 On Contract.
Case No. 95046.
MEMORANDUM.

Filed August 3, 1915.

JAMES N. BRADEN,
Clerk.

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Transcript of Judgment.

FIRST DISTRICT COURT OF JERSEY CITY.

Before—

CHARLES L. CARRICK, Esquire,
Judge.

STATE OF NEW JERSEY, }
Hudon County, } ss.:
City of Jersey City, }

10

Case No. 95046

THE PENNSYLVANIA RAILROAD COMPANY,		
		<i>Plaintiff,</i>
<i>vs.</i>		
J. EDWARD HERRMANN,		
		<i>Defendant.</i>
COSTS	CITY	ALL
Summons	1.50	
Trial Fee	1.50	
6	3.00	

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Upon Contract, Demand \$500.

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Vredenburgh, Wall & Carey, Plff's Atty's.

Plaintiff's demand was filed March 4, A. D. 1915.

March 4, A. D. 1915, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:

On the part of the plaintiff—Agreed State of Facts were filed.

Whereupon it is on this third day of August, A. D. 1915, by this court considered and adjudged

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Transcript of Judgment

that judgment be rendered in favor of L. EDWARD HERRMANN, defendant, and against THE PENNSYLVANIA RAILROAD COMPANY.

10 I, JAMES N. BRADEN, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esquire, Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of this Court.

[SEAL.]

IN WITNESS WHEREOF, I do hereby set my hand as Clerk of the said Court and affix the seal of the said Court this thirteenth day of August, nineteen hundred and fifteen.

JAMES N. BRADEN,
Clerk.

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August 14, 1915, Notice of Appeal filed and service of said Notice also filed.

JAMES N. BRADEN,
Clerk.

Appeal Bond filed Aug. 17, 1915. Approved Aug. 17, 1915.

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*Transcript of Judgment**(Endorsed)*

#95046

FIRST DISTRICT COURT OF JERSEY CITY.

THE PENNSYLVANIA RAILROAD COMPANY, 10
Plaintiff,

vs.

L. EDWARD HERRMANN,
Defendant.

TRANSCRIPT OF JUDGMENT. 20

Time to settle case extended Aug. 17th, '15, by
order of acting Judge of First District Court of
Jersey City, to Sept. 7th, 1915.

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Stipulation.

FIRST DISTRICT COURT OF JERSEY CITY.

10	<p style="text-align: center;">THE PENNSYLVANIA RAILROAD COMPANY, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">L. EDWARD HERRMANN, <i>Defendant.</i></p>	<p>On Contract. Stipulation. (Settling Case.)</p>
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20 IT IS HEREBY STIPULATED AND AGREED that the foregoing is the State of the Case between the Pennsylvania Railroad Company, plaintiff, and L. Edward Herrmann, defendant, as the same was tried before Judge Carrick, in the First District Court of Jersey City.

Aug. 28, 1915.

L. EDWARD HERRMANN,
Attorney pro se.

VREDENBURGH WALL & CAREY,
Attorneys for Plaintiff.

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Stipulation

(Endorsed)

FIRST DISTRICT COURT OF JERSEY
CITY.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff,

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vs.

L. EDWARD HERRMANN,
Defendant.

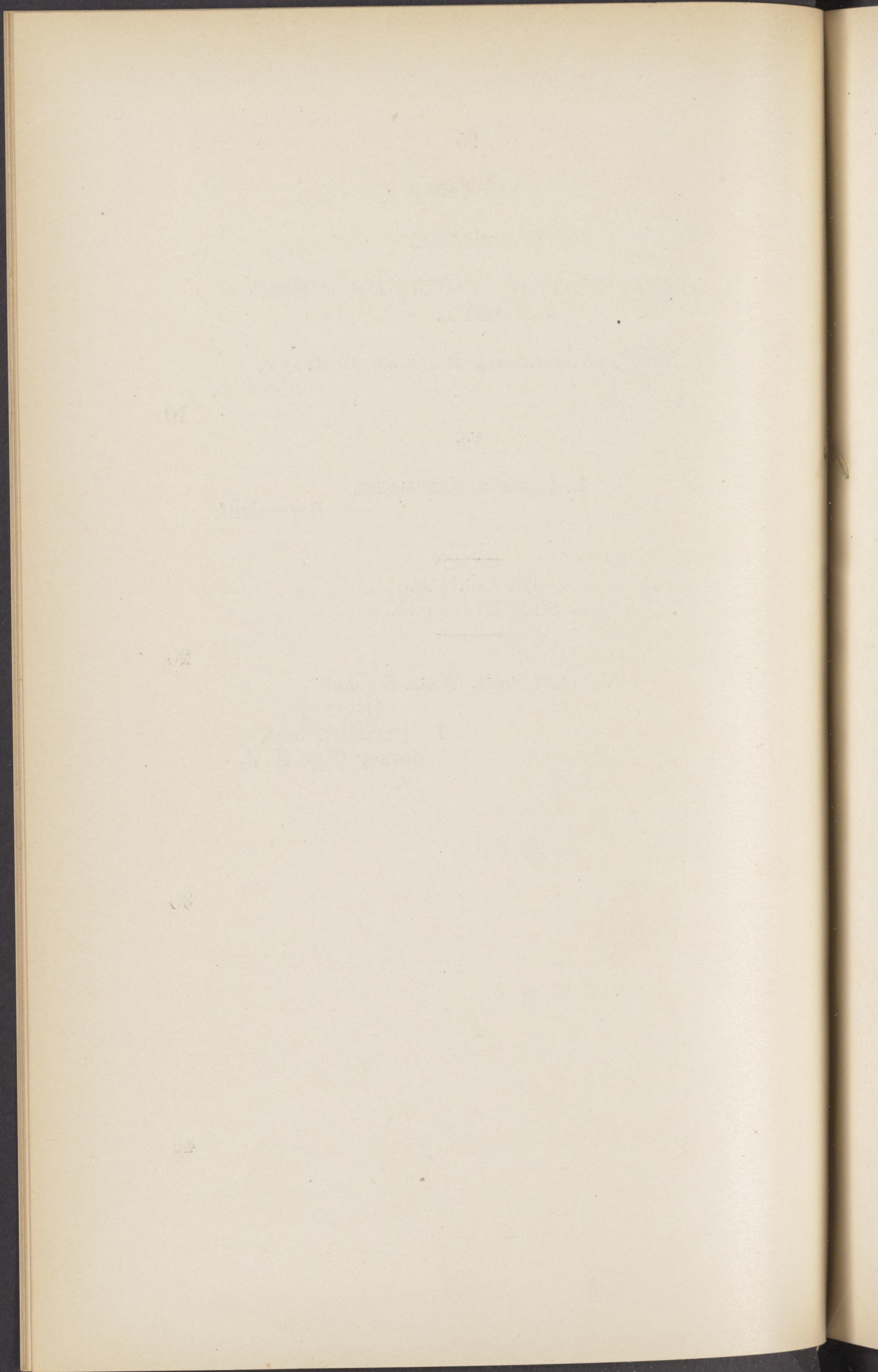
On Contract.
STIPULATION.

VREDENBURGH, WALL & CAREY,
Attorneys,
1 Exchange Place,
Jersey City, N. J.

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Notice.

(Served Apr. 28, 1916)

(Filed May 6, 1916)

NEW JERSEY SUPREME COURT

THE PENNSYLVANIA RAILROAD COM-
PANY,
Plaintiff-Appellant,

vs.

L. EDWARD HERRMANN,
Defendant-Appellee.

On Appeal from
Judgment of Su-
preme Court, af-
firming Judgment
of First District
Court of Jersey
City.

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NOTICE.

To L. EDWARD HERRMANN, Esq.,
Defendant-Appellee:

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SIR:

Please take notice, that the Plaintiff-Appellant, The Pennsylvania Railroad Company, hereby appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the whole of the judgment of affirmance entered in the New Jersey Supreme Court.

Yours respectfully,

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VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff-Appellant.

Dated April 27, 1916.

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Grounds of Appeal.

(Served Apr. 28, 1916)

(Filed May 6, 1916)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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THE PENNSYLVANIA RAILROAD COM-
PANY,
Plaintiff-Appellant,

vs.

L. EDWARD HERRMANN,
Defendant-Appellee.

On Appeal from
Judgment of Su-
preme Court af-
firming Judgment
of First District
Court of Jersey
City.

GROUND OF
APPEAL.

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The following are the grounds upon which the plaintiff appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the judgment of affirmance entered in this cause in the New Jersey Supreme Court:

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1. Because the judgment of the First District Court of Jersey City, in favor of defendant was affirmed by the New Jersey Supreme Court, whereas it should have been set aside and reversed, and judgment should have been entered for plaintiff.

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2. Because the New Jersey Supreme Court should have found that the Act of 1914, page 358, amending Section 40 of the Railroad Act of 1903, is unconstitutional, because it violates,—

(a) The 14th Amendment of the Constitution of the United States, in that it deprives the plaintiff-appellant of its property without due process of law.

Grounds of Appeal

(b) Article I, Paragraph 16 of the Constitution of New Jersey, in that it takes the private property of the plaintiff-appellant for public use without just compensation.

3. Because the New Jersey Supreme Court found that the defendant had the right to ride upon trains of the plaintiff by virtue of a certificate issued in conformity with Chapter 194 of the Laws of 1914, whereas they should have found that the attempt of the Legislature in Section 40, as amended in 1914, to authorize the defendant to pass on plaintiff's trains without paying for transportation, was an attempt to take the property of the stockholders of plaintiff without due process of law. 10

4. Because the New Jersey Supreme Court refused to apply the principles laid down by that Court in Delaware, Lackawanna & Western Railroad Co. v. Public Utilities Board, 85 N. J. L. 28, to the defendant. 20

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff-Appellant.

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Opinion.

(Filed Feb. 28, 1916)

NEW JERSEY SUPREME COURT,

Nov. TERM, 1915.

10 THE PENNSYLVANIA RAILROAD COM-
PANY,
Plaintiff-Appellant,

vs.

L. EDWARD HERRMANN,
Defendant-Appellee.

Submitted Dec. 4, 1915—Decided February 1916

20 The Secretary to the Governor of this State, held to be one of the state officials that the legislature can constitutionally require to be carried free upon the railroads of this State, according to the test laid down in *D. L. & W. R. R. v. Public Utilities Commission*, 85 N. J. L. 28.

Appeal from District Court.

Before Justices PARKER, MINTURN and KALISCH.

For the appellant, VREDENBURGH, WALL & CAREY.

For the appellee, HERBERT BOGGS.

30 The opinion of the court was delivered by PARKER, J.

This was a suit by the Railroad Company against Mr. Herrmann to recover the amount of a number of fares for passage over the plaintiff's road which defendant refused to pay. The bill of particulars runs from February 3, 1914 to October 20, 1914, and amounts to \$141.38. The defendant insisted upon his right to ride without payment of fare by virtue of a certificate signed by the Secre-

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tary of State pursuant to the provisions of Chapter 194 of the Laws of 1914 (P. L. p. 358), certifying that L. Edward Herrmann, Secretary to the Governor, whose term of office expires January 8, 1917, is entitled to pass and repass without payment of fare over any and all railroads in the State of New Jersey, within the borders of said State.”

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In each of the many cases specified the conductor or ticket collector (according to the memorandum of the court below) stated that the pass or certificate was not valid and did not entitle the defendant to ride, and demanded fare at the regular tariff, which was refused, whereupon the conductor handed the defendant a slip notifying him that the plaintiff was advised by its legal department that the defendant was not entitled to ride free on its trains, and that he was therefore requested to pay the proper fare. The fare was never paid, and defendant continued to ride to his destination without further demand for fare, or objection from the agent of the plaintiff. (We quote the language of the court below).

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This suit being brought as *in assumpsit* upon an implied promise to pay the fares, the retort was made and is now made that the plaintiff should not recover because the conductor did not offer to the defendant the alternative of paying or leaving the train.

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It is further objected that inasmuch as defendant is a State official, and the state of the case shows that at the various times in question he was travelling upon State business (however, it does not show that the company was on any of such occasions notified of that fact), therefore the claim should be made against the State and not against the defendant individually. We see no force in either of these objections and find it unnecessary

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to consider them in detail, because the case should be disposed of on the broader ground set up by the defendant, that by virtue of the statute in question and of the production of the certificate in pursuance thereof, he was entitled to ride free, upon the defendant's right, within the State of New Jersey during his term of office.

10 The answer made to this by the Railroad Company is that the statute of 1914 is unconstitutional as in violation of the Fourteenth Amendment of the National Constitution, and Article I, paragraph 16 of the State Constitution, relating to the taking of private property without compensation.

20 The plaintiff company operates under an old charter from the State, which stipulates that certain State officials not including the defendant were to be carried free. The plaintiff's position, as we understand it, is that so far as it carried free the State officials mentioned in the charter, under the circumstances therein laid down, which are not material here, the plaintiff would be performing the contract duty; but as relates to other persons mentioned in later statutes the legislature was without constitutional power to impose any such obligation upon the Railroad Company, and the imposition thereof would amount to a taking of its property without compensation. This in view
30 of a recent decision of this court, is too broad a claim. The statute is valid in so far as relates to the defendant as an exercise of the reserved right of the legislature to regulate corporations, or as an exercise of the police power. The matter was fully discussed in the decision to which we have just adverted, which is *D. L. & W. Railroad Company v. Public Utilities Board*, 85 N. J. L. 28. In that case it was held that so far as Chapter 129 of the Laws of 1911, a precisely similar statute,
40 required railroads to carry free the members of the

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State Water Supply Commission, it was unconstitutional and unenforceable. The reasons for so declaring it, as stated by Mr. Justice Garrison, are illuminative of the present controversy. He pointed out the harm that was done by the issue of complimentary passes by railroad companies because of the impression produced in the public mind, that public officials were placed under an obligation, or a suspicion of obligation, to corporations whose affairs in their relation to the public were constantly calling for official action; and that in New Jersey the question was dealt with by legislation so that "the gratuity, instead of being prohibited in whole or in part, was entirely eliminated by making the free transportation of certain governmental officers obligatory upon the railroads, a duty into the performance of which no element of gratuity could possibly enter." 85 N. J. L., 34, 35. 10 20

It was further held that this legislation presented the proper element of the exercise of the reserved right of the legislature to amend charters of corporations, and also of police power; that the legislature was clearly within its rights in dealing with this problem as one of public concern and in the course of legislation by which its chosen policy in this regard was evinced and effectuated. Page 35, 36. The test adopted by the court in deciding that case was whether the members of the State Water Supply Commission belonged to that class of public officials whose favor might be advantageous or whose disfavor detrimental to the interests of railroad corporations in their dealings with the State. The example given in the opinion is that of members of the legislature by whom the laws affecting the corporations and their interests are made. This of course is perfectly plain. The same may be said of the Governor, whose execu- 30 40

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tive approval is necessary for all bills, whose constitutional duty it is to advise with the legislature as to matters of legislative policy, and who in practice is in close touch with the members of the body most if not all of the time; so that quite apart from any charter question, it is clear from the reasoning of Justice Garrison's opinion that a statute requiring members of the legislature and the governor to be carried free during their terms of office must be upheld as a constitutional exercise of the reserved right and of the police power. The same, in our opinion, should be said of the secretary to the governor, whose duties, as prescribed by the statute (C. S. 3792, pl. 40), are to "keep a correct record of all the executive proceedings and decisions and do all other acts appertaining to his office which shall be required of him by the Governor." It is a matter of common knowledge that the secretary of the governor is necessarily in the very closest possible touch with the executive, constantly in attendance upon him, necessarily enjoying his fullest confidence, presumably cognizant of everything that passes between the governor and the legislature or its members, and from the very nature of his employment and his close association with the executive power, conceivably in a position to exercise more or less influence, indirectly at least, upon the course of legislation or official action. That the good will of such an official might well be deemed advantageous to the railroads and his ill will something to be deprecated is a proposition that we think needs no argument; and it therefore follows that he is within the class of State officials that the legislature in the exercise of its reserved power, and as a matter of public policy, was constitutionally entitled to require should be carried free.

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The district court gave judgment for the defend-

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ant, based upon the language of the statute, without undertaking to deal with the constitutional question involved. This question having been resolved by us in favor of the defendant, the judgment of the district court is affirmed.

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