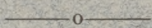


1878 *Clark*

N. J. Court of Errors and Appeals.

JUNE TERM, 1878.



EDWIN C. FULLER,

COLLECTOR OF TAXES IN THE TOWNSHIP
OF MONTCLAIR, IN THE COUNTY OF
ESSEX,

Plaintiff in Error,

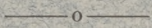
vs.

THE STATE,

(JOSEPH H. BALDWIN, ZENAS S. CRANE,
NATHANIEL R. DODD, AND ABRAHAM
P. DE VOURSNEY, *Prosecutors.*)

Defendants in Error.

*On Writ of
Error to
Supreme
Court.*

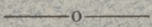


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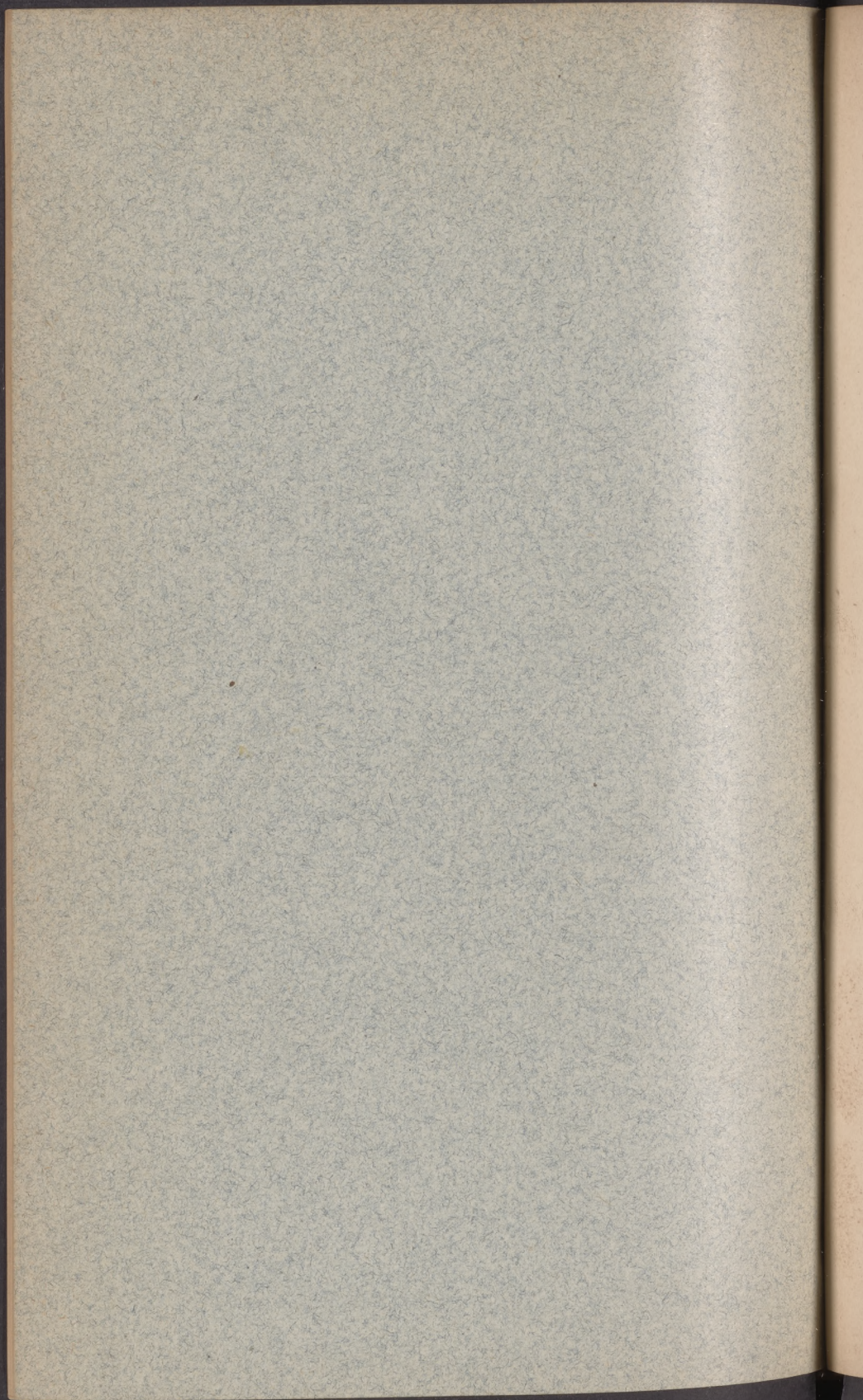
Attorney for Defendants in Error.



NEWARK, N. J.:

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1878.



N. J. Court of Errors and Appeals.

MARCH TERM, 1878.

EDWIN C. FULLER,
COLLECTOR OF TAXES, IN THE
TOWNSHIP OF MONTCLAIR, IN
THE COUNTY OF ESSEX,
Plaintiff in Error,

vs.

THE STATE,
(JOSEPH H. BALDWIN,
ZENAS S. CRANE,
NATHANIEL R. DODD, AND
ABRAHAM P. DEVOURSNEY,
Prosecutors,)
Defendants in Error.

On Writ of Error

to the

Supreme Court.

STATEMENT OF THE CASE.

In pursuance of the power granted in and by a certain act of the Legislature, approved April 9, 1875, (P. L., 579,) the committee of the township of Montclair created and established five certain lamp-districts, respectively embracing certain parts of certain public roads, within the bounds of such township; and caused the same to be lighted with gas.

The committee acted in the matter, upon the several petitions, in writing, of the owners of more than half (the same being measured by lineal feet of frontage,) of the lands in such respective districts. 10

The original expenditure for posts and lanterns has been defrayed.

The tax now in controversy was assessed for the expense of "lighting," in such districts, for the year ending October

15, 1876. And such tax was assessed in manner following, to wit: one half of said expense upon the said lands, in proportion to their lineal frontage, and the other half upon all the taxable property, within the limits of said respective districts.

From the assessments against the lands and property of the defendants in error, an appeal was taken to the Supreme Court, by writ of *certiorari*. And, now, the plaintiff in error, (being the Collector of said township,) brings up, for
10 review, the judgment rendered in the Court below. (See 10 Vroom, 576.)

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

The views of the majority of the judges before whom the case was argued below, seem to be clearly stated in the syllabus, prefixed to the opinion delivered by Mr. Justice VAN SYCKEL. It reads thus :—

“ While the burthen of a particular tax may be placed exclusively upon any political district to whose benefit such tax is to enure, the legislature has no power thus to impose it upon any territory narrower in bounds than the political district of which it is a part, without having regard to the special benefits which may accrue to those upon whom it is made to fall.” 10

Two questions are here presented :

I. May not the legislature create a special taxing district, of less extent than the political division to which it belongs, and impose a special tax thereupon ; causing the same to be levied on the lands or other property situated therein, without limitation as to the amount of special (or peculiar) benefits conferred upon such property ?

II. May not a gas-tax, such as that which is now before the Court, be imposed upon the lands and other taxable property, in a special taxing district of narrower bounds than the municipality of which it is a part, in the manner prescribed by the act of April 9, 1875, in relation to the lighting of the streets in the township of Montclair ? 20

I.

The first question is naturally resolved into two parts :—

1. May not the legislature create a special taxing district, of less extent than the political division to which it belongs, and impose a special tax thereupon ; and 30

2. May not the legislature cause the said special tax to be levied on the lands or other property situated in said district,

without limitation as to the amount of special (or peculiar) benefits conferred upon such property ?

1. With regard to the first branch of the inquiry, it appears to be only necessary to refer to the very decided expression of this Court, in the *Agens* case.

The learned CHIEF JUSTICE there said :

“There is nothing in the constitution of this State, that requires that all the property in the State, or in any particular sub-division of the State, must be embraced in the
10 operation of every law levying a tax.” (8 *Vroom*, 420.)

Such view is in harmony with the opinions of Mr. Justice DEPUE, in *The State vs. Town Com. of Readington*, (7 *Vroom*, 70;) and of Mr. Justice KNAPP, in *The State vs. Collector of Ocean*, (10 *Vroom*, 78;) and of Mr. Justice VAN SYCKEL, in the present case, (10 *Vroom*, 583,) as well as in *The State vs. Chamberlin*, (8 *Vroom*, 390.)

But, 2 ; May not the legislature cause a special tax to be levied, in a special district, of narrower bounds than the political division of which it is a part, without limitation
20 as to the amount of special (or peculiar) benefits conferred upon the property which is assessed ?

As a rule, and with reference to what are called “local improvements,”—such as the laying out, grading, paving and macadamizing of streets,—this Court have said that it cannot be done. And the profession, as well as the public in general, have approved of the decision, and of the reasoning upon which it is based.

Nevertheless, the rule has its exceptions. Our courts have admitted that it does not apply to road, school or drainage districts.

(a.) *Roads.*

The general law upon the subject of roads, provides (*Rev. Stat.*, 738, § 52,) that the highways of a township are to be divided into districts; and that the inhabitants are to be assigned to such districts "in equitable proportions," without regard to their places of residence; and that the overseers shall call upon such inhabitants, to work on such highways, as often as may be necessary to keep the same "in good order."

They may be required to work in districts not only far removed from their own residences and lands, but other than the districts to which they were assigned. 10

When the road-tax has been exhausted, they may be called out, again and again, as frequently as the overseers shall think proper, for the purpose of maintaining the roads, and keeping them in good condition for travel.

The labor, so rendered, is a tax; and it is rendered, without any inquiry into the benefits conferred upon the lands of such tax-payers.

Paxson vs. Sweet, 1 Green, 196. (See *post*.) 20

(b.) *School Districts.*

School districts, under the general law, afford another exception to the rule.

They are established by the county superintendent, in such manner as to him may seem fit. (*Rev. Stat.*, 770, § 24.) Money is raised therein, by taxation, for special purposes,—such as the building of school houses, and defraying the expenses of the schools,—without any adjudication of special benefits.

It is admitted by the Supreme Court, (10 Vroom, 586,) 30 that this is "an exceptional case"; and it is suggested that this may be because school districts are incorporated.

But, they were not always incorporated under the old school law, (P. L., 1851, p. 269, § 9;) which left the matter entirely in the discretion of the trustees. And it is doubtful, whether the incorporation of the *board* of trustees, under the new law, (*Rev. Stat.*, 773, § 38,) is an incorporation of the *district* which they represent.

It has also been suggested, that, in a school district, the people tax themselves. And so do the people in a lamp-district; the district being formed upon the petition, in writing, of the land owners. The amount of the tax to be raised in such district, is (or may be) as near a certainty, as the amount to be raised in the school district, for school purposes. In each case, the apportionment of the tax is made by the township officials.

We cannot help remarking, in this connection, upon the
 10 difference between the methods of taxation in the two districts. In the school district meeting, the votes of two men (being a majority of "the legal voters *present*,") may impose a debt upon the district which will embarrass it for years. There is no property qualification required. And the few (perhaps, being also non tax-payers,) may thus tax the many.

(c.) *Drainage Districts.*

These districts, created for the reclaiming of marsh and meadow lands, and in which a special tax is levied without
 20 regard to benefits, is, certainly, an exception to the general rule. Such districts have been referred by our courts to the "police power," and under that head, we shall hereafter speak of them at greater length.

(d.) It is a question, worthy of serious consideration, whether the Lamp-District be not another exception to the rule? May not the obligation to furnish and light lamps, in the highway, be analogous to the duty to maintain the highway in good order, for the benefit of the travelling public? Or, to provide schools, for the education of the people
 30 of the State?

II.

May not a gas-tax (such as that which is now before the Court,) be imposed upon the lands and other taxable prop-

erty, in a special taxing district, of narrower bounds than the municipality of which it is a part, in the manner prescribed by the act of April 9, 1875, in relation to the lighting of the streets in the township of Montclair?

The plaintiff in error contends that it may be done, under and by virtue of the POLICE POWER, inherent in the State, and delegated by the legislature to its agents,—the duly appointed authorities of any municipality.

1. What is the nature of the Police Power?

Blackstone, iv., 162. “The due regulation and domestic order of the kingdom, whereby individuals of the state, like members of a well regulated and well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious and inoffensive, in their respective stations.” 10

Jeremy Bentham, ix., 157. “Police is, in general, a system of precaution, either for the prevention of crimes or casualties.”

Potter's Dwaris on Statutes, 444. “Besides the methods of taking private property of the citizen by right of eminent domain, and by the taxing power, there exists another power by which private property may be taken, used or destroyed, for the benefit of others, and this is called the police power; sometimes called the law of overruling necessity. . . . In these cases, the rights of private property must be made subservient to the public welfare. The maxim of law is, that a private mischief is to be endured, rather than a public inconvenience.” 20

Ib., 458. “The limit to the exercise of the police power can be only this: the regulation must have reference to the comfort, the safety, or the welfare of society; it must not be in conflict with the provisions of the constitution.” 30

Cooley on Const. Lim., 572. "A power in the States, which, like that of taxation, pervades every department of business, and reaches to every interest and every subject of profit or employment."

Cooley on Taxation, 396. "That authority, which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges, by the observance of rules of order, fairness
10 and good neighborhood, by all around him.

"The distinction between a demand of money under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. *The one is made for regulation, and the other for revenue.* . . . Only those cases, where regulation is the primary purpose, can be specially referred to the police power."

Dillon on Munic. Corp., §§ 93, 329, 609.

20 *Weil vs. Ricord*, 9 C. E. Green, 173. RUNYON, C.: Police powers, "being among the powers which are of the most importance to the inhabitants; those by which THE PUBLIC PEACE, HEALTH, COMFORT AND CONVENIENCE, AND THE GENERAL WELFARE ARE SECURED OR PROMOTED; are not only respected but maintained by the Courts, who, as a matter of public policy, will not interfere with or disturb municipal bodies in the legitimate exercise of those powers."

The State, (Benson, pros.) vs. *Hoboken*, 4 Vroom, 282. DEPUE, J.: "The distinction between the power of taxation, and the usual police powers, which are granted for the
30 maintenance of peace and good order in the city, and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue."

7 Vroom, 76.

The License Cases, 5 How., 583. (1847.) Judge Taney said, that the source of the police power is "the power of

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

Commonwealth vs. Alger, 7 Cush., 85. (1851.) SHAW, C. J. : "The power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for *the good and welfare of the Commonwealth, and of the subjects of the same*. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." 10

Thorpe vs. Rut. & Bur. R. R. Co., 27 Vt., 150. (1855.) By this "general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to *secure the general comfort, health and prosperity of the State* ; of the perfect right in the legislature to do which, no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." . . . It "extends to THE PROTECTION OF THE LIVES, LIMBS, HEALTH, COMFORT, AND QUIET OF ALL PERSONS, AND THE PROTECTION OF ALL PROPERTY, within the State." 20

Gal. & Chi. U. R. R. Co. vs. Appleby, 28 Ills., 289. (1862.) "The right to adopt such police regulations, for *the safety of the people*, is a fundamental principle, lying at the very foundation of government itself, and may be exercised by the legislature upon individuals and corporations."

2. The courts, in the several States, have given frequent illustrations of the exercise of police powers, by the legislature and municipal corporations. 30

(a.) *Police Powers, in general; but having special reference to Streets and Highways.*

Commonwealth vs. Alger; (ubi, supra.) SHAW, C. J.: "Such are the laws to prohibit the use of warehouses for the storage of *gunpowder*, near habitations or highways;—to restrain the height to which *wooden buildings* may be erected, in populous neighborhoods, and require them *to be covered with slate*, or other incombustible material."

10 *Commonwealth vs. Stodder*, 2 Cush., 569. (1848.) "Regulations as to *the use of omnibuses and stage coaches*, while passing over the public streets of the city, are within the legitimate powers of the mayor and aldermen. The public safety and convenience of travellers may require regulations of this character. . . . Acting upon this principle, various ordinances have been adopted by the city government, regulating *the rate of speed of travellers* in the public streets, the *hour of the day* in which the public streets may be used for certain purposes, *and excluding vehicles* of all kinds from entering upon the sidewalks on public streets."

20 We are also referred to the police power, for authority to license *public vehicles*;—to establish *fire limits* in towns and cities, and prevent the erection of *wooden buildings* therein;—to enforce the erection of *division-fences*, between the lands of adjoining proprietors;—to compel railway companies to build *fences, cattle-guards and gates*, along the sides of their roads, or at crossings;—and to prevent *cattle*, and *other animals*, from running at large in the public highways.

Sedwick on Stat. & Const. Law, 435–440.

30 *Waterville vs. County Commissioners*, 59 Me., 87. (1871.) "Nor is this principle [of local assessment] new in the legislation of this State. It is recognized in all these cases of village corporations, instituted for the purpose of securing a more perfect construction of *streets and sidewalks*, in the more populous parts of the towns; for maintaining *fire apparatus, night watch* and *police force*; construction of *reservoirs* and

aqueducts; and various matters to improve the social condition of the population, and made more necessary and easily attainable by the density of the population."

(b.) *Sewers.*

Several of the States have attributed, to the police power, all legislation for the building of *Sewers*.

Cooley on Taxation, 399. "There seems to be no legal impediment to a requirement, under the police power, that lot owners, in cities and villages, shall be at the expense of constructing that portion of the public *sewer*, in front of their respective premises." 10

Boston vs. Shaw, 1 Met., 137. (1840.) PUTNAM, J.: "There is as much reason to subject the owners of the land abutting, to contribute to this expenditure, as there is to oblige them to pave the footways, in front of their grounds, or to keep the same in repair, when the city shall pave the streets adjoining. It should be a charge upon the land."

(c.) *Drains.*

In New Jersey, there can be no doubt that the construction and repairing of *Drains* may be properly classed under the police power. And we refer not only to surface-water drains, but, also, to the more extensive system of reclaiming swamp and meadow lands. 20

The State, (N. J. R. R. & Tr. Co., pros.,) vs. *Newark*, 3 Dutch., 188. GREEN, C. J.: "There are in the legislation of every State a variety of statutes, whose primary design is the improvement of private property, and in which the public interest is merely incidental. . . . Of this nature are many statutes, public and private, in relation to the reclaiming of drowned lands, and the draining and fencing of swamps and meadows. 30 The immediate design of these acts is the improvement of private property, each individual interested being required to contribute to the expense, in proportion

to his interest in the property, and to the benefit supposed to have been conferred upon him.

“The public are interested in this class of improvements, only as they tend to improve the salubrity of particular districts, or to increase the general wealth of the community.

“These assessments have but little analogy to public taxes, either in the purpose for which they are assessed, or in the mode of enforcing them ; so a city ordinance, requiring every lot owner to *drain the surface water* from his lot, to avoid the creation of a nuisance affecting the public health, and, in case of failure, directing it to be done at the public expense, and the amount to be a lien on the respective lots, though the design be purely a public benefit, savors more of a police regulation than a matter of taxation.”

The Tide Water Co. vs. Coster, 3 C. E. Green, 531. BEASLEY, C. J. : “The regulations established by the legislative power, whereby the owners of *meadow lands* are compelled to submit to an equal burthen of the expense incurred in their improvement, are rules of police, of the same character as provisions concerning party walls and partition fences.”

Akin to the drainage of meadow lands, as a police regulation, is the digging of *ditches*, by the overseer of the highway, upon the lands of the adjoining owner ; in order to draw off water from such highway. (*Rev. Stat.*, 736, § 45.)

(d.) *Sidewalks.*

The most prominent illustration of the burthens that may be cast by the police law upon the land-owner, is the *Sidewalk* ; which the law compels him to build and maintain, in front of his premises.

It is in performance of an obligation or duty, on his part, to the public ; for the safety and convenience of travellers.

Cooley on Taxation, 398.

Inhabitants of Palmyra vs. Morton, 25 Mo., 596. (1857.)
“The right of a municipal corporation to require the owner to pave the *sidewalk* in front of his property, may be derived

from its duty to protect the public health and to prevent nuisances, and is a mere police regulation. It is the exercise of the same power that prohibits persons from *throwing filth into the streets*, or from *obstructing the sidewalks*; that *regulates awnings*; that *forbids the building of wooden houses*, within certain districts; that *prescribes the quantity of powder* which may be kept in stores; and that requires the pavements in front of each house *to be kept clear of ice and snow.*"

The State vs. Charleston, 12 Richard., 733, (1860.) In the Court of Appeals; DUNKIN, C.: "From a very early 10 period, *sewers and pavements* [sidewalks,] have constituted exceptional subjects in relation to assessments. Statutes of Drains and Sewers were known before the time of Henry VIII., when the general statutes upon the subject were enacted, and the mode of assessment prescribed. In like manner, the act of 1764 provided for assessments for *drains or sewers*, and *sidewalks*.

"Various reasons have been assigned for these exceptions. Among others it has been plausibly urged, that, as a sanitary regulation, and under the power to abate nuisances, 20 the corporation [of the city of Charleston] might require every citizen *to drain his own lot*, or, in case of neglect, exact a penalty; and so, by the old act of 1698, every inhabitant of Charleston was required to mend and raise the sidewalk, in front of his house, in the manner and to the dimensions therein prescribed, on penalty of forfeiting, for each house, a penalty to be collected under the warrant of a justice of the peace. In order the better to carry into effect these objects, and to do what each individual might be required 30 to do for himself, the act of 1764 authorized the commissioners of streets to construct drains, and level and pave the footways, &c., and to assess the proprietors of lands and houses fronting on the street," &c.

Lowell vs. Hadley, 8 Met., 180. (1844.)

Mayor, &c., vs. Maberry, 6 Humph., 368. (1845.)

Bonsall vs. Lebanon, 19 Ohio, 418. (1850.)

Paxson vs. Sweet, 1 Green, 196. The corporate author-

ities of Trenton, by ordinance, required every lot owner, upon a certain part of Greene street, to set *curbstones* and make a brick *sidewalk*, in front of his lot; with a provision that, in default thereof, the work should be done by the city, at his expense.

FORD, J.: "The citizen receives [compensation] in part, by its adding to his private property an increase of its intrinsic value, either for sale or enjoyment; by the health and comfort of his household; by his enjoyment of the like frontages every where else, in which he freely participates without contributing to their expense; he receives it in his franchise, as a member of the corporation, in regulated markets, a vigilant police, and the innumerable pleasures, conveniences, benefits and security of an orderly city. . .

"It seems analogous to the law of the State also, for the making and reparation of the highways. All persons may be warned to work, at their private expense too, not only in a particular district, but in a particular spot, and that where the road-master may direct; and must continue to work there from day to day, until the work is done to his satisfaction, and in the manner he directs. If one of these systems is personally oppressive and odious, the other must be so too; for they each exact personal labor of the citizen, at his own expense."

The State, (Agents, pros.,) vs. *Newark*, 8 Vroom, 423. BEASLEY, C. J.: "A *sidewalk* has always, in the laws and usages of this state, been regarded as an appendage to, and a part of, the premises to which it is attached; and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate, to direct it to be put in order, at the sole expense of the owner of the property to which it is subservient and indispensable."

(e.) *Removal of Snow and Ice from Sidewalks.*

Closely connected with the tax for laying a sidewalk, at the expense of the abutting owner, and, in like manner to

be attributed to the police power, are all municipal ordinances for *the removal of snow and ice from sidewalks.*

In the matter of *Goddard*, 16 Pick., 510. (1835.) A complaint had been made against Goddard, for not removing snow from the sidewalk, in front of his land. The court held, (speaking by Chief Justice SHAW,) that the by-law of the city, was a rule of police, "*for the health, comfort and safety of the community;*" and, furthermore, that the land owner "has some peculiar interest in [the sidewalk,] and benefit from it, distinct from that which he enjoys in common with the rest of the community." 10

Woodbridge vs. Detroit, 8 Mich., 309. (1860.) Referring to the *Goddard* case, the court say: "This was expressly, and I think very properly, held to be a police regulation, and sustained on that ground; and the reasoning of the very able judge who gave the opinion of the court shows, that the decision was based substantially upon the principle of regulating the use of private property, or property partaking of the character of both public and private, *in a manner deemed necessary to the public safety and convenience;* 20 which is, I think, the most distinctive feature of a police regulation."

(f.) *The lighting of Streets.*

The plaintiff in error respectfully submits, that the act of the Legislature, under which the gas-tax now in controversy was assessed, was and is in the nature of a police regulation; and that, therefore, the assessments complained of were properly limited to the respective lamp-districts in which they were made, without further inquiry as to the peculiar benefits conferred upon the property which was assessed. 30

The gas-posts and lamps may be considered a *part of the sidewalk*; as much so as the curb and gutter stones are a part thereof. (*Paxson vs. Sweet, ubi supra.*) And the sidewalk is "a part of the premises to which it is attached." (*The State vs. Newark, ubi supra.*)

The lighting of the sidewalk does not confer any benefit upon the public at large; or upon the property outside of the gas-limits; except that incidental advantage which every municipality derives from every local work, within its bounds.

The lighting is in no sense a public work, or public "improvement." It is, primarily, for the benefit of the foot-passengers of the neighborhood. It would be wrong, therefore, to lay the expense, or any portion of it, on the general
10 public.

The plaintiff in error contends, that the burthen should be laid entirely upon the property within the district. Like a sidewalk tax, or a drainage tax, or a charge for the removal of snow and ice from the footways, *the lighting of the sidewalk is a duty which the land proprietor owes to the neighborhood in which he lives.*

It is for "the prevention of crimes or casualties" therein.

It is necessary for "the comfort, the safety, or the welfare" of the people of the vicinage.

20 It is "to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges, by the observance of rules of order, fairness and good neighborhood."

It is for "the maintenance of peace and good order," in the district.

It is for "the good and welfare of the commonwealth, and of the subjects of the same."

30 It not only "secures the general comfort, health and prosperity of the State;" but "extends to the protection of the lives, limbs, health, comfort and quiet of all persons," and "to the protection of all property," within the limits of the district.

It is required for "the public safety and convenience of travellers."

By it "the public peace, health, comfort and convenience, and the general welfare, are secured or promoted."

Norwich Gas Light Co. vs. Norwich City Gas Co., 25 Conn., 37. (1856.) "It is no part of the duty of government to

provide the community with lights in their dwellings, any more than it is to provide them with the dwellings themselves, or any of the necessities or luxuries which may be deemed important to the comfort or convenience of the community.

"And if it be assumed, that there would be no impropriety in the lighting of the streets, under the control and direction of the sovereign power, this would be merely as a regulation of police, or an incident to the duty to provide safe and convenient ways." 10

State vs. Milwaukee Gas Light Co., 29 Miss., 459. (1872.)
 "This method of lighting the buildings and streets of large cities with gas, is certainly productive of the good order, general safety, and welfare of the citizens."

In the matter of *Goddard*, 16 Pick., 510. (1835.) SHAW, C. J.: "Supposing a by-law should require, what is often done in practice, that, upon an alarm of fire in the night, all householders, on streets leading to and near the fire, should exhibit a light. This would seem to be reasonable. "Or, that all the owners or occupiers of dwelling houses, 20 having a well or pump, should keep them in repair at their own expense, to be used in case of fire. It would operate partially; but it seems to us not unequal, in the sense in which we are using that term."

Ib., 511. "It is like a land tax, or house tax. It does not bear upon owners of personal property, and therefore does not bear upon all citizens alike; but is not on that account unequal or partial, in the sense contemplated by the Declaration of Rights, requiring all taxes and burdens to be equal and impartial." 30

(f. 1.) Cities and towns are under no obligation to light their highways, or streets.

Addison on Torts, 4th Edit., 1311.

Shearman and Redfield on Negligence, § 392.

Randall vs. Eastern R. R. Co., 106 Mass., 276.

Hence, it would be a manifest injustice to place the expense of street-lighting upon the municipalities at large.

(f. 2.) The history of street-lighting shows, conclusively, that, like night-watching, *it has always been considered a police regulation.*

We read, that, in London, in 1175, "when night was come, no man durst adventure to walk in the streets." At that time, there were no street lights. During the reign of Edward I., a statute was enacted, which forbade any man going abroad "after ourfew tolled at St. Martin's-le-Grand, unless . . . with lanthorne in hand."

- 10 It is recorded in *Stowe's Survey of London*, (p. 561,) under the date of 1416, that then Sir Henry Barton, the mayor, "ordained Lanthornes with Lights, to bee hanged out on the Winter evenings, betwixt Hallowtide and Candlemasse." And *Knight's London*, (i., 102,) says that this continued to be a "custom of London," up to the time of Queen Anne.

- 20 Stowe also quotes from the "charge" of the mayor to the aldermen of the city, as to their duties in their respective wards, that "Lanthornes with light by Nightertaile, in old manner accustomed, be hanged forth." He also gives the form of the oath which was administered by each alderman to the inquest, in his wardmote; and which was, in part: "Yee shall sweare, that yee shall truly enquire . . . if there be any man that hangeth not out a Lanthorne, with a candle therein burning, after the vsage, according to the commandment thereupon given."

- 30 About three centuries after the time of Barton, the common council passed an ordinance "for securing the houses against robbers and thieves, for the prevention of murder, and the conveniency of passengers." This ordinance provided, that "every housekeeper whose house fronts any street or lane, and is of the rent of ten pounds, and every person having the charge of a public building, are each required and obliged, in every dark night, from the 29th of September until the 25th day of March, to hang out one or more lanthorn or lanthorns, with sufficient cotton-wick candles lighted therein, and to continue the same burning in every such dark night, from the hour of six until the hour of eleven of the same night." (*Knight's London*, i., 105.)

It was the duty of the "ancient and most quiet watch-

man" of that period, to see that this law was enforced. A rare print of a Dogberry, in the time of James I., has inscribed over it the legend: "Lanthorne and a whole candell light; hange out your lights heare."

But little attention seems to have been paid to the law, however, and many writers describe, in glowing terms, the dangers of walking in the streets of London, at night, even so late as the reign of Charles II. Macauley says, that, in 1685, "there began a great change in the police of London. An ingenious projector, named Edward Heming, obtained 10 letters patent conveying to him, for a term of years, the exclusive right of lighting up London. He undertook, for a moderate consideration, to place a light before every tenth door, on moonless nights, from Michaelmas to Lady Day, and from six to twelve of the clock." (*Hist. of England*, i., chap. 3.)

2 H. 8. c. 2; c. 8; § 15.
The "Westminster Paving and Lighting Act" was passed in 1762. The use of gas for street-lighting was introduced, in London, in 1807; but it did not become common, until after 1820.

20

In New York, in December, 1697, the common council "Resolved, that the mode of lighting the city be, that, during the dark time of the moon until the 25th of March next, every seventh householder cause a lanthorn and candle to be hung out on a pole, every night. The expense to be divided equally between the seven. The aldermen are charged to see this done." (*Valentine's Man. of the Corp. of N. Y.*, 1869, p. 858.)

No attempt was made to light the streets of New York, by public authority, until 1762; when the first posts and 30 lamps were erected. They were few in number, for many years, but gradually increased with the growth of the city.

In Philadelphia, in 1751, at the suggestion of Franklin, an act was passed by the legislature for "the better regulating the nightly watch, within the city of Philadelphia, and for enlightening the streets, lanes and alleys of the said city"; and providing for a special assessment of the expense

of both works, upon all who had been "assessed at eight pounds, or upwards."

The first law in New Jersey, for lighting streets, seems to have been passed in 1784, (p. 147, § 9.) This empowered the municipal authorities of Perth Amboy to enact by-laws, or ordinances, "relative to a City Watch, the Burial of the Dead, publick Lights and Lamps," &c.; with penalties, not exceeding twelve pounds, for any violation thereof.

10 In the same year, a similar law was passed for Burlington; having almost identically the same language.

In 1833, (P. L., 55, § 21,) a law was passed for the benefit of Newark; authorizing either of the wards to vote, and to tax themselves, for "the support of a night watch; lighting the town at night, by lamps or otherwise;" &c.

20 In 1836, (P. L., 185, § 18,) the first charter of Newark provided for the establishment of "a watch or lamp-district," with restricted boundaries; and that "so much of the taxes nevertheless as shall be raised for lighting the streets of said city, supporting a night watch therein, . . . be assessed and collected upon and from all persons residing, and lands located, within the lamp or watch-district of said city, to be by said common council hereafter from time to time established."

(*f.* 3.) We call the attention of the Court to the fact, that, in nearly all the legislation which has been had, either at home or in England, upon the subject of street-lighting, it has been treated as a police regulation,—in connection with the establishment of a day or night-police.

30 The last sub-division of this argument shows, that, in Philadelphia, as well as in Perth Amboy, Burlington and Newark, the "nightly watch," and "lighting the town at night," were not only provided for in and by the same laws, but were always coupled together—as being of similar character and purpose.

So, in modern England, the authority for the lighting of streets is uniformly to be found in what are called "Police Acts," or "Lighting and Watching Acts." The declared object of all such statutes, is local regulation. And the expense is always met by local assessment, without reference to benefits.

(f. 4.) Several of the English acts, however, discriminate in the rate of such taxation, upon different species of property.

For example, the "Lighting and Watching Act" of 10 3 and 4 Will. IV. (c. 90, § 33,) directs that houses and other buildings are to be rated, for this special tax, at a rate three times higher than land. This act applies not only to cities, towns, hamlets, &c., but, also, to "parts within the same."

Regina vs. East London Waterworks Co., 9 Eng. L. & E., 271. (1851.) The law in question provided for an original assessment, upon all the real estate of the hamlet which was to be lighted; and, afterwards, for a yearly assessment upon the owners or occupants of "any messuages, tenements, &c., . . . situate and being in such of the streets, squares, lanes, 20 or other public passages and places, only, within said hamlet, as shall from time to time be lighted by virtue of this act."

Regina vs. Midland Railway Co., 30 Eng. L. & E., 400. (1855.) The act for lighting the town of Chesterfield imposed the tax upon buildings, but exempted unimproved lands. Lord CAMPBELL, C. J., said: "The legislature intended to describe two distinct species of property, and to confer an exemption on those which derived no benefit from the lighting." 30

(f. 5.) In this country, it is believed that all—or nearly all—of the legislation upon the subject, has been of a similar character, as regards the limitation of the tax to the territory which is lighted.

We refer to the following charters, in our own State, to wit:—Bayonne, (P. L., 1869, p. 389, § 42;) Bergen, (P. L., 1868, p. 333, § 44;) Bridgeton, (P. L., 1858, p. 259, § 4;) Camden, (P. L., 1850, p. 221, § 23;) Elizabeth, (P. L., 1855, p. 233, § 24;) Hoboken, (P. L., 1855, p. 474, § 51;) Jersey City, (P. L., 1851, p. 414, § 51;) Newark, (P. L., 1836, p. 185, § 18; 1857, p. 150, § 69;) Orange, (P. L., 1869, p. 209, § 53;) Paterson, (P. L., 1861, p. 346, § 53;) and Rahway, (P. L., 1858, p. 138, § 28.)

- 10 (*f. 6.*) Analogous to lamp-districts are the “fire-limits,” which are so frequent in cities, and where the burthen of supporting a fire department is laid, exclusively, upon the thickly-settled neighborhoods.

The principle involved, is the same as that for which we are now contending.

(*f. 7.*) It is no valid argument against referring the gas tax to the police power, as its source, that the suggestion is a novelty,—“an advanced step.”

- 20 The better doctrine seems to be laid down in *The Mayor, &c., of Baltimore vs. Board of Police*, (15 Md., 389;) where the court held, that the police power “is emphatically a state power, one of the attributes of sovereignty; and, in the nature of things, *it is a power which the legislature should have the means of expanding, to meet all the varied and changing wants of the community.*”

Barwell vs. Brooks, 3 Doug., 371. Lord MANSFIELD: “As the usages of society alter, the law must adapt itself to the various situations of mankind.”

- 30 *Milbau vs. Sharp*, 15 Barb., 210. (1853.) “There are certain uses to which, in modern times, [the streets in a city] have generally been applied. These uses are not merely conducive to, but they have become almost necessary for, *the comfort, health and prosperity of the public.* They have been sanctioned by custom, and approved by experience. . . . These ‘urban servitudes’ [sewers, water

and gas-pipes,] as they have been called, are the necessary incidents of a street in a large city."

Gillette vs. Hartford, 31 Conn., 356. (1863.) BUTLER, J. :
 "The maintenance of a city watch, and of a fire and other departments, the grading, paving and *lighting of the streets*, and the exercise of the various other powers and privileges granted by the charter, necessarily require a heavy taxation ; and the benefits which they confer enure mainly to those who own property situated in the older and densely-populated parts of the city, occupied for residences or business purposes ; and not immediately, or to any material extent, to those who live on the confines of the city, and are owners of the kind of property exempted by the act " from full city taxation, for ordinary municipal purposes. 10

(f. 8.) The Supreme Court, in their opinion, have spoken (pp. 586 and 587,) of the " Long Branch Commission " District, and of the city of Plainfield and the village (town) of Flemington, as being " clearly distinguishable from the [case] under consideration."

This seems to be put upon the ground, that Long Branch, Plainfield and Flemington, although respectively embraced within the bounds of three larger divisions of the State, are municipalities, and, as such, "*political districts*." 20

1 We concede that Plainfield and Flemington are " political districts," and that the lamp-districts are not. We do not pretend, that the latter are any thing more than " taxing-districts."

2. But, it seems to have been overlooked by the Supreme Court, that Plainfield—like Montclair,—claims the right to establish lamp-districts, of narrower bounds than the municipality ; and to levy special taxes therein, for the expense of lighting the same. (*Charter of Plainfield* ; P. L., 1867, p. 866, § 16.) 30

Plainfield has, therefore, three distinct systems of taxation, in such districts ; viz : township, city and lamp-district.

3. We contend, that Long Branch is not a "*political* district." It appears to us, that the term: "*police* district" would be more appropriate.

A certain territory has been placed by the Legislature, *for police purposes only*, under the charge of a "police and sanitary board."

10 The powers of the commissioners are given for the promotion of health and good order. The preamble of the act under which they are appointed, (P. L., 1867, p. 976,) says that its object is "the establishment of local regulations, for preserving the peace," &c.

There is no incorporation of the district as a separate municipality. The only political power exercised by the inhabitants, as members of the district, is in selecting three of the six members of the commission; the remaining three being appointed by a Justice of the Supreme Court. All taxes, for the use of the commission, are to be levied and raised by the township officials, and in the same manner as township taxes.

20 Surely, this cannot be what is ordinarily understood by the term: "*political* district."

4. It is to be observed, moreover, that, in Long Branch, as well as in Plainfield, there is no inquiry as to benefits, in the imposition of taxes for the lighting of streets.

III.

We now desire to call the attention of the Court, to the eminent fairness of the methods prescribed by the law which is in controversy, for creating the lamp-districts, and for levying the special taxes therein.

30 I. *The people themselves originate the district.* Without a petition, the township committee can do nothing.

This petition is to be signed by the owners of *more than half* of the lands on the street, or part of a street, which is

to be lighted. In the Bloomfield Avenue District, (*Case*, p. 3,) more than 6,900 feet of "frontage" were represented on the petition.

And so it is, that the people not only create the district, but, also, *tax themselves*.

II. There is *nothing inequitable in the "mixed levy,"* whereby one-half of the expense is put upon the land, in proportion to its frontage, and the other half upon all the taxable property, within the district.

1. As both realty and personalty are protected, both 10
should participate in the burthen.

The English statutes to which we have alluded, show similar methods of distribution. Under one of them, land is to be rated, for this tax, two-thirds less than buildings. Under another act, vacant or unimproved land is altogether exempted.

In Illinois, it was held to be competent for the legislature, in prescribing rules for general taxation, to divide lands into three classes, at three separate and fixed valuations. *Rhin-
hart vs. Schuyler*, 2 Gilm., 473. (1845.) 20

And, in Florida, there has been similar legislation; which was sustained in like manner. *Levy vs. Smith*, 4 Fla., 154. (1851.)

We refer, also, to the case of *Serrill vs. Philadelphia*, 38 Pa. St., 358, (1861.) The legislature ordered, that all lands within the limits of Philadelphia, which the assessors might designate as "rural," should be assessed at only two-thirds of the regular rate for city taxation; because, as the court said, these lands derived no benefit from the lighting, paving and cleaning of the streets. A subsequent act made 30
a further discrimination in favor of marsh and meadow lands; and they were held liable for only one-half of the usual rate.

The original act creating a fire department, in the city of Newark, (P. L., 1819, p. 56,) exempted, from tax, all buildings of the value of less than two hundred dollars.

2. There can be no objection to the "mixed levy," on the ground of *double taxation*.

Westchester Gas Co. vs. County of Chester, 30 Pa. St., 233. "Double taxation is not uncommon. The power of the legislature to tax twice, is as ample as to tax once."

10 *Cooley on Taxation*, 118. "The legislature may constitute two districts; the one consisting of the whole city, to be assessed equally; and the other consisting of the more compact portions of the city, which, because of receiving a larger share of the benefits of city government, in the protection afforded by the police and fire departments, and the like, is required to pay a greater proportionate share of the expense of such government."

20 *The People vs. Mayor of Brooklyn*, 4 N. Y., 426. (1851.) "The power of taxation, and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision."

The State, (Fish, pros.) vs. *Branin*, 3 Zab., 484. Double taxation may be unequal, oppressive and unjust, but it is not prohibited by any constitutional provision, and is in the discretion of the legislature.

3. Nor can there be any valid objection raised, as to the assessment of the land, in these lamp-districts, in proportion to its "*lineal frontage*."

30 (a.) This method of assessment is not necessarily inequitable, even in the case of "street improvements."

Burroughs on Taxation, 469.

Allen vs. Drew, 44 Vt., 188. (1872.) REDFIELD, J.: "We

think the apportionment [for a water tax,] in the ratio of frontage, is not in violation of the constitution."

Hamett vs. Philadelphia, 65 Pa. St., 150. (1870.) "Perhaps no fairer rule can be adopted."

Washington Avenue, 69 Pa. St., 361. (1871.)

The State, (Hand, pros.) vs. *Elizabeth*, 2 Vroom, 551. By the Court of Errors: "The assessment appears to have been made by the lineal foot; but there is no evidence that such was not the mode most equitable and just."

The State, (Pudney, pros.) vs. *Passaic*, 8 Vroom, 68. 10
"There is no rule that condemns such method of assessment, without proof of its injustice, either apparent on the papers, or shown satisfactorily by independent testimony."

The State, (Hunt, pros.) vs. *Rahway*, 10 Vroom, 648.

(b.) Assessment by "frontage" is *usual*, in the imposition of a gas-tax, and is not *unequal*.

Nelson vs. La Porte, 33 Ind., 258. (1870.) A lamp-district was established by the common council of the city of La Porte; extending one hundred and twenty-one feet, on each side of the street which was to be lighted. 20

The court held, that, under the law, the expense of lamp-posts, including pipes and fixtures, could be met only "by an assessment on property holders bordering on such street, *per running foot*;" but that the subsequent cost of lighting might be assessed on "the owners of *lots fronting on said street*, in any manner the common council may determine, not inconsistent with the constitution and laws of this State."

Jonas vs. Cincinnati, 18 Ohio, 318. (1849.) The charter of the city empowered the common council, to cause any street to be lighted, and "to levy and collect a tax *on the front foot* of the property so binding on the street." A supplement, upon the same subject, provided that the common council "shall have power to levy and collect a special tax *from the real estate bounding on the section that may be lighted*, in such manner as they shall provide by ordinance." 30

The complainant filed a bill, to restrain the collection of a special tax, levied in pursuance of these statutes; raising the point, that "the lighting of a city is of general and public utility, and its expense must be defrayed by a tax generally assessed; and that special taxes for that purpose violate the fourth section of the Bill of Rights."

The council had improperly added, to the expense of lighting, a charge for the collection of the tax; and, on this ground, the assessment was set aside. But, the court said:
 10 "In this instance *they were only'authorized to collect taxes for lighting the city.* They must act strictly within the provisions of their charter; they can add nothing to the tax by implication."

It will be seen, on examination of the case, that the court did not question the right of the city, to create a special district, or to assess the cost upon the principle of frontage.

Creighton vs. Scott, 14 Ohio St., 438. (1863.) The assessment complained of was for street-grading, and was made according to frontage, under a statute in relation to the constructing, repairing and *lighting* of streets. It was sustained.
 20

(c.) It may be argued, that the levying of a gas tax upon certain selected property, by the rule of "lineal frontage" violates the constitutional provision that "property shall be assessed for taxes under general laws, and *by uniform rules, according to its true value.*" (Art. IV.; sect. vii; par. 12.)

To which we would reply:

(c. 1.) This point was not decided in *The State* (Cossitt, pros.,) vs. *Reimenschneider*, 10 Vroom, 625. The question was expressly reserved by the court; the tax complained of being set aside, because it was not, *as is required by the*
 30 *town charter*, "assessed in equal proportions on all lots."

(c. 2.) In other States, where there are similar provisions in the constitutional law, it has been repeatedly held by the courts, that the restrictions apply only to *ordinary taxation*,

for the *ordinary expenses* of the government, and do not extend to *special assessments* for municipal improvements.

Emery vs. San Francisco Gas Co., 28 Cal., 345. (1865.)
The subject of controversy was an assessment for the grading and macadamizing of a street; and it was claimed to be in violation of the constitutional law, that "taxation shall be equal and uniform, throughout the State"; and that "all property shall be taxed in proportion to its value." But the court decided, that the words "taxation" and "taxed" refer only to *general taxes*, for defraying the *ord-* 10
inary expenses of the State and local governments; and that, although special assessments come under the taxing power, they are not required to be upon the *ad valorem* principle.

Hagar vs. Supervis. of Yolo Co., 47 Cal., 234. (1874.)

Woodbridge vs. Detroit, 8 Mich., 298. (1860.) "The distinction between *general taxes* and special burdens, or *assess-*
ments, imposed for local purposes, has always been well understood in this State, and was generally recognized in all those States, whose institutions and judicial decisions had most influence here, at the time of the adoption of the 20
constitution; and such local assessments were not then, and never have been, understood here as referred to by the general provisions of statutes in reference to taxes."

Roundtree vs. Galveston, 42 Tex., 625. (1875.) "We cannot hesitate to say, however, that it has been so frequently decided that there can be no question, that it is now clearly settled by the great weight of authority, that the constitutional provisions having reference to taxes for *general revenue*, are not applicable to assessments like this for local improve- 30
ments."

Vasser vs. George, 47 Miss., 721. (1855.) "The limitation [that "taxes" shall be "equal," "uniform," and "according to value,"] only applies and governs taxes levied for the *usual, ordinary and general purposes* of the State, county or town, and does not include special assessments for local public objects, for the purpose of ameliorating property and

enhancing its value, and, also, contributing to the general convenience, health and welfare of the community."

(c. 3.) The only "uniformity" which can be required, is *uniformity within the district*.

Bright vs. McCullough, 27 Ind., 230. (1866.)

The State vs. Town. Com. of Readington, 7 Vroom, 70.
DEPUE, J.: "When the taxing district has been defined, and the classes of persons or kinds of property specially set apart for taxation have been designated, the tax must be
10 apportioned among those who are to bear the burthen, upon the rule of uniformity."

(c. 4.) It is furthermore to be observed, that our constitutional provision does not, in words, apply to *all* "property."

And it has been held, elsewhere, that even the words: "*all* property" will not include property which is to be subjected to special assessment.

Emery vs. San Francisco Gas Co.; *ubi supra*.

Hill vs. Higdon, 5 Ohio St., 243. (1855.) Local assess-
20 ments, of any kind, are not within a constitutional provision as to the taxation of "*all* property," by uniform rules, according to its value.

4. If a gas-tax can be traced to the police power, as its source, then it is a "tax" only in name, and is not subject to the rules which control ordinary taxation. It is for regulation; not for revenue.

IV.

The third "Reason" offered by the defendants in error is, that "the assessment was made *without notice* of any kind to the parties interested."

30 Of this there is no proof before the Court.

Nor was any notice required, other than that which is given in cases of ordinary taxation. The law says, that the gas-tax is to be "assessed and collected in the same manner as other township taxes are or may be."

If any injustice were done to a property owner, he had the opportunity of going before the Commissioners of Appeal in cases of taxation.

V.

The fourth "Reason" is, that the petitions were insufficient, in both form and substance;—that they did not, in terms, ask for "*the creation of districts*";—and that they improperly *limited the action* of the township committee. 10

We contend that these petitions were and are sufficient.

They ask that certain streets, or parts of certain streets, which are designated, shall be lighted "with gas made from coal, according to the provisions of an act approved April 9, 1875."

1. The law does not require any greater degree of accuracy, in the petition, with reference to the boundaries of a district. 20

The words: "as now lighted," define the limits of the territory which is proposed to be set apart as a district.

To ask that such territory shall be "lighted, according to the provisions of an act approved April 9, 1875," is equivalent to asking that the territory shall be formed into a "district," in the manner pointed out by the act.

Nelson vs. La Porte, ubi supra. The words: "for lighting such street, according to the general plan of improvement in said city," were construed to embrace street-fixtures, pipes, lamp-posts and lanterns. 30

2. In asking that the streets shall be lighted "with gas made from coal," there was no improper limitation of the power of the committee.

The property-owners had the right to determine the matter. They fixed the limits of the districts, and they could decide upon the use of either gas or oil.

VI.

The fifth "Reason" vaguely suggests irregularities, on the part of the township committee, in the creation of the lamp-districts.

The only specific charge is, that when the districts were formed, on March 18, 1876, "the power of the committee 10 was exhausted", and that, therefore, the committee had no right, on August 8, 1876, to form new districts.

But, the law expressly gave them the power, "from time to time, in the discretion of said committee, to *alter* and *consolidate* any one or more of said districts."

The change which is complained of, was a CONSOLIDATION of several existing districts, and it resulted in a positive advantage to the tax-payers; distributing, more equally, the burthen of the assessment.

CONCLUSION.

20 The result of this litigation will be important, to every town and city in the State which has become sufficiently populous to desire the use of gas in some—but not all—of its streets.

The lamp-districts, in Montclair, include only a little more than two-thirds of the public roads, in such township.

The unlighted territory is exclusively agricultural, and will not consent to be taxed, for a work which is partial and local in its operation, and from which it can derive no advantage.

And it could not be taxed, if it would; there being no authority in the law therefor. And, under the amended constitution, there can be no further special legislation upon the subject.

Nor is it readily to be seen, how any statute (whether general or special,) can be drawn, levying the tax upon the principle of assessment in proportion to benefits, which will be just to the property owners, and easy of execution.

Under such a law, who is to determine the area and proportion of benefits: the assessor, or the township committee, or a special board of commissioners? Must there be a cumbrous and expensive proceeding, such as is necessary in the making of "local improvements"? Is the tax to be laid on personal estate, or on realty; on buildings, or on lands? Shall the man having a gas-light in front of his door, pay a larger sum than his neighbor, fifty feet distant, who owns a more valuable property? Is there to be a sliding-scale; by which the ratio of assessment to benefits shall be always equal to the distance from the lamp-post? Is the mechanic, with a small house and a "twenty-five foot lot," to be assessed higher than the adjoining owner who has an unimproved frontage of a thousand feet? Or, shall farm-land, with a narrow opening upon the street, be rated higher than a long line of building lots, which are withheld from market in anticipation of "fancy prices"?

A yearly adjudication of benefits, as the basis of taxation, would be a new thing in the legislation of this State.

Any *permanent* improvement is supposed to confer a permanent benefit, which the land-owner will receive in the enhanced value of his property.

But, this cannot be said of an *annual* tax, to meet an *annual* expenditure for a *merely temporary purpose*.

The benefit, in such case, lasts no longer than the disbursement. When the gas was "turned off," in Montclair, because of this litigation, the "improvement" was at an end.

If the decision of the Court below shall be affirmed, the streets of Montclair must continue in darkness, until the constitution shall be again amended, or until some general law can be devised which will meet the exigencies of the case.

BLAKE & FREEMAN,

Attorneys of Plaintiff in Error.

ing the same, to our Court of Errors and Appeals in the last resort in all cases, to be held at Trenton, on the second Tuesday in March next, together with this writ; that the record and proceedings being inspected we may further cause to be done thereupon what of right and according to law ought to be done.

Witness the Honorable THEODORE RUNYON, our Chancellor, at Trenton, the eleventh day of February, A. D. eighteen hundred and seventy-eight.

10

HENRY C. KELSEY, *Clerk.*

BLAKE & FREEMAN, *Attorneys.*

The answer of the Justices of the Supreme Court of New Jersey within named.

The record and proceedings, whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain
20 schedule to this writ annexed, as within commanded.

M. BEASLEY, *Chief Justice.*

B. F. LEE, *Clerk.*

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,

Ex Rel.,

JOSEPH H. BALDWIN,
ZENAS S. CRANE,
NATHANIEL R. DODD,
ABRAHAM P. DEVOURSNEY,

Certiorari.

vs.

EDWIN C. FULLER,

Collector, &c.

I allow this writ on condition that argument be brought on at February Term, 1877.

DAVID A. DEPUE, *J. S. C.*

February 17, 1877.

* ~ *
L. S.
* ~ *

NEW JERSEY, ss: The State of New Jersey to
Edwin C. Fuller, Collector of Taxes in the
Township of Montclair, in the County of Essex,
Greeting:

We, being willing, for certain reasons, to be certified of a certain assessment, called a gas tax, in said township of Montclair, made, or pretended to have been made, under color of an Act entitled "An Act in relation to the lighting of streets in the township of Montclair, in the county of Essex," approved April ninth, eighteen hundred and seventy-five, upon the property of Joseph H. Baldwin, Zenas S. Crane, Nathaniel R. Dodd and Abraham P. DeVoursney, in said township. 10

We command you that the said assessment or gas tax, together with the petition or petitions, and all the proofs, proceedings, resolutions, acts, orders, ordinances, touching and concerning the said assessment, as they remain before you, by whatsoever name the said assessment or gas tax may be called therein, or however the assessment may have been made, to our Supreme Court at Trenton, on the fourth Tuesday of February instant, you certify and send, together with this writ, that therein may be done what of right and
 10 according to the laws and constitution of this State ought to be done.

Witness, MERCER BEASLEY, Esquire, Chief Justice of our said Supreme Court, at Trenton, this seventeenth day of February, in the year eighteen hundred and seventy-seven.

BENJAMIN F. LEE, *Clerk.*

JOSEPH L. MUNN, *Att'y.*

RETURN.

*To the Honorable the Chief Justice and Associate Justices of the
Supreme Court:*

The assessment and tax whereof mention is made within, together with the petitions and all the acts and proceedings touching and concerning the same, I do hereby certify and send in the schedule hereto annexed, as within I am commanded.

In witness whereof, I have hereto set my hand this twenty-second day of February, A.D. 1877.

10

E. C. FULLER, *Collector.*

SCHEDULE.

To the Hon. Town Committee of the Township of Montclair:

GENTLEMEN:—We, the undersigned, being owners of more than half (the same being measured by lineal feet) of the lands lying upon the certain public road known as Bloomfield avenue, being within the boundaries of the township of Montclair, do hereby petition your Honorable body to light the aforesaid street with gas made from coal, according to the provisions of an Act approved April 9, 1875.

20

Dated Montclair, N. J., Sept. 28, 1875.

N. O. Pillsbury, 499 feet,
John Levy, 135 feet,
Thomas Farrell, 276 feet,
D. V. Harrison, 549 feet,
Samuel C. Munn, 30 feet,
Van Gieson Bros. & Co., 30 feet,
John H. Hayden, 60 feet,
William B. Corby, 50 feet,
Peter A. Tronson, 98 feet,
Montclair M. E. Church, Joseph H.
Richards, Pres't Board of Trus-
tees, 143 feet,
G. J. Wheeler, 758 feet,

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| | |
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| | Peter Whelan, 25 feet, |
| | E. B. Jacobus, 75 feet, |
| | Jarvis G. Crane, 25 feet, |
| | Mathias Hermann, 60 feet, |
| | Conrad F. Wettyen, 151 feet, |
| | Katharin Scheifele, 60 feet, |
| | C. St. John Seymour, 69 feet, |
| | Anna B. Lloyd, 175 feet, |
| | James G. Moffet, 57 feet, |
| 10 | William Jacobus, 107 feet, |
| | P. H. Van Riper, 500 feet, |
| | J. W. Pinkham, 50 feet, |
| | Montclair Presbyterian Society, Wil- |
| | liam A. Torrey, President of the |
| | Board of Trustees, 467 feet, |
| | E. E. Wright, 225 feet, |
| | William B. Dodd, 191 feet, |
| | C. C. Corby, 60 feet, |
| | J. C. Doremus, 185 feet, |
| 20 | E. F. Dodd, 85 feet, |
| | Philip Doremus, 75 feet, |
| | T. A. Levy, 134 feet, |
| | Jacob Reynolds, 280 feet, |
| | S. R. Parkhurst, 700 feet, |
| | William P. Hughes, 60 feet, |
| | Jerome Sigler, 50 feet, |
| | Ellen Hanlon, 198 feet, |
| | John Rose, 104 feet, |
| | William Sigler, 65 feet, |
| 30 | Madison Bros., 25 feet, |
| | Berahard Dossenbach, 52 feet. |

Montclair, October 13, 1875.

This is to certify, that the enclosed petition for gas on Bloomfield avenue is signed by Freeholders owning more than one half the frontage on said avenue.

PIERRE P. HURLBUT,

Township Surveyor.

To the Hon. Town Committee of the Township of Montclair:

40 GENTLEMEN:—We, the undersigned, being owners of more than half (the same being measured by lineal feet) of the lands lying upon the certain public road or street, known as Elm street, situated and being within the boundaries of the township of Montclair, do hereby petition your Honorable body to light the aforesaid street, from Bloomfield ave-

nue to Orange Road, with gas, made from coal, according to the provisions of an act, approved April 9, 1875.

Dated, MONTCLAIR, N. J., October 8, 1875.

Thomas P. Simpson, William L. Ely, Jos. H. Richards, F. A. Richards, C. A. Marvin, Ella B. Marvin, Chas. R. Parsons, John S. Aughiltree, T. H. Bouden, Lucy A. Bouden, A. M. Clerihew, Emilie F. Clerihew, S. A. Tower, Eliza J. Tower, Delia M. Hays, A. M. Streets, George Unangst, Alice M. Parsons, B. F. Joslin, M.D.

MONTCLAIR, N. J., Nov. 24, 1875. 10

This is to certify that the within petition for gas, covers more than one-half the frontage, measured by lineal feet, within the district.

P. P. HURLBUT,
Township Surveyor.

A petition, relative to *Park street*, in the same form with the foregoing, and signed by nineteen land-owners, dated Oct. 8, 1875, and with the following certificate annexed :

MONTCLAIR, N. J., Oct. 13, 1875.

This is to certify that the within petition for gas on Park street, is signed by more than one-half the frontage. 20

PIERRE P. HURLBUT,
Township Surveyor.

(From the Book of Minutes of Township Committee, p. 55.)

At a meeting of the Township Committee, Saturday, March 18, 1876, among other things, the following preamble and resolution was offered and adopted :

"WHEREAS, Several petitions have been presented to this Township Committee, to establish new districts, as provided for under the law, approved April 9, 1875 ; therefore, 30

"Resolved, That all districts, heretofore known as Lamp Districts, be, and the same are hereby repealed and abolished.

"Resolved, That all that portion of Chestnut street, now lighted with gas, that is to say, all that part where lamps

are now lighted, and extending 150 feet beyond the extreme western lamp, and 150 feet each side of the centre of the street, be made, and it is hereby constituted, Lamp District Number 1.

“*Resolved*, That all that part of Park street now lighted with gas, and extending 150 feet beyond the most northerly lamp post, and extending 150 feet each side of the street, counting from the centre of the street, be known as Lamp District Number 2.

- 10 “*Resolved*, That all that part of Bloomfield avenue between Caldwell township line and Bloomfield township line, and extending 150 feet each side of the centre of the said avenue, be made and is hereby constituted Lamp District Number 3.

“*Resolved*, That all that part of Elm street between Bloomfield avenue and the Orange road, and extending 150 feet each side from the centre of the said Elm street, and 450 feet south on the Orange road, 400 feet west on Park avenue, be constituted Lamp District Number 4.

- 20 “*Resolved*, That all that part of Fullerton avenue now lighted with gas, and extending 150 feet beyond the most southerly lamp, and 150 feet each side from the centre of said street, be constituted as Lamp District Number 5.

“*Resolved*, That the Clerk be, and is hereby authorized, to furnish the Assessor and Collector with a copy of these resolutions.”

* * * * *

(From the Minutes of August 8, 1876, page 171.)

Among other things :

- 30 “The following preamble and resolution was offered by Mr. Parsons, Chairman of the Committee on Gas, and adopted :

“WHEREAS, Petitions have been heretofore presented to the Town Committee, requesting the lighting by gas of portions of the streets known as Bloomfield avenue, Washington street, Chestnut street, Park street, Fullerton avenue, Elm street, and Church street, in accordance with the requirements of an act entitled ‘An Act in relation to the

lighting of streets in the Township of Montclair, in the County of Essex," approved April 9, 1875 ; and

"WHEREAS, It is required that the Committee declare and define the Districts on which the cost thereof shall be assessed and collected ; therefore, be it

"*Resolved*, That the Lamp Districts heretofore created be, and the same are hereby altered and annulled, and for the purposes required by the said act, and for assessing and collecting the cost of such lighting, a Lamp District is hereby created, to be known as Lamp District Number 1, which shall comprise the territory of the Township south of a line drawn east and west through the centre of Watchung avenue, from the easterly to the westerly boundary of the Township. 10

"And the following preambles and resolutions was also offered by Mr. Parsons, which, upon a vote being taken, was adopted, namely :

"WHEREAS, petitions have been heretofore presented to the Township Committee, to lighten portions of the streets, known as Bloomfield avenue, Park street, Chestnut street, Elm street, Fullerton avenue, Washington street, and Church street, with gas, in accordance with the provisions of the act entitled ' An Act in relation to the lighting of streets in the township of Montclair, in the county of Essex,' approved April 9, 1875 ; and whereas, said streets, or portions thereof, have been so lighted with gas ; and 20

"WHEREAS, the cost thereof for the year has been ascertained to be, for the said several streets, the respective amounts, as set opposite the name of each street, as follows, to wit : 30

| | |
|-----------------------------|------------|
| Bloomfield avenue | \$1,675 80 |
| Park street | 712 00 |
| Elm street | 718 20 |
| Washington street | 34 20 |
| Chestnut street | 307 80 |
| Church street | 34 20 |
| Fullerton avenue | 317 80 |
| | <hr/> |
| | \$3,800 00 |

“AND WHEREAS, the one-half part of said cost, to wit, the sum of \$1,900, is assessable and collectable in the district known as Lamp District No. 1, as defined by resolution of this date, from the taxable property therein, and the residue, to wit, the sum of \$1,900, is assessable and collectable from the land or lands on either side of said street, between the points lighted, in proportion to the lineal feet so fronting on the same; and, whereas, it is the duty of the Township Committee to cause the said expense to be assessed and collected; therefore be it

10 *Resolved*, That the Assessor of the township is hereby directed to assess the said sum of (\$1,900,) nineteen hundred dollars, against the taxable property within the limits of said district, in the same manner as other township taxes are now assessed; and to assess against the land or lands lying on either side of the said streets between the points now named, that is to say, upon Bloomfield avenue, between the easterly line of the township and a point (150) one hundred and fifty feet north of the westerly line of Mountain avenue, the sum
20 of (\$837.90,) eight hundred and thirty-seven dollars and ninety cents, being one-half of the cost of lighting said street;

“Upon Park street, between a point (150) one hundred and fifty feet north of the northerly line of Chestnut street, the sum of (\$356.00,) three hundred and fifty-six dollars, being one-half part of the cost of lighting the same;

“Upon Chestnut street, between a point therein (150) one hundred and fifty feet east of the easterly line of Park street and a point (150) one hundred and fifty feet west of the westerly line of Central avenue, the sum of (\$153.90,) one
30 hundred and fifty-three dollars and ninety cents, being one-half of the cost of lighting the same;

“Upon Church street, between its point of intersection with Bloomfield avenue, and a point (150) one hundred and fifty feet west of the point at which the most westerly lamp is now lighted thereon by the town, the sum of (\$17.10,) seventeen dollars and ten cents, being one-half of the cost of lighting the same;

“Upon Elm street, between Bloomfield avenue and the most southerly lamp now lighted by the town on said street,
40 the sum of (\$359.10,) three hundred and fifty-nine dollars and

ten cents, being one-half part of the cost of lighting the same ;

“ Upon Fullerton avenue, between Bloomfield avenue and a point (150) one hundred and fifty feet south of Union street, the sum of (\$158.90,) one hundred and fifty-eight dollars and ninety cents, being one-half of the cost of lighting the same ;

“ Upon Washington street, between Elm street and a point (150) one hundred and fifty feet east of the easterly line of Elm street, the sum of (\$17.10,) seventeen dollars and ten cents, being one-half of the cost of lighting the same, the said several assessments against the lands on said several streets, to be made in proportion to the lineal feet thereon. 10

“ And be it further *resolved*, that the Township Collector is hereby directed to proceed and collect the said several sums so assessed, or as the same may be adjusted and corrected.”

The foregoing transcripts from the minutes of proceedings of the Township Committee of the township of Montclair, are full and correct, and embrace all the proceedings of said Committee as shown by their minutes, relating to the creating of lamp districts and assessments for lighting the streets, under the act of April 9, 1875. 20

The period of lighting, for which the assessment directed by the foregoing resolution of the Township Committee provided, is one year from October 15th, 1875, to October 15, 1876.

The amounts of tax and assessment for gas against Joseph H. Baldwin, Zenas S. Crane, Nathaniel R. Dodd and Abram P. DeVoursney, are shown in the following statement, which exhibits the frontage with which each of said persons is charged, the valuation of his property within the lamp district, the rate of assessment per foot of frontage, and the percentage of tax upon the said valuations, together with the sum total of tax and assessment, as the same stands upon the collector's duplicate. 30

| Owners. | Frontage in feet. | Property Val- | | | Total. |
|----------------------|----------------------|-------------------------------|------------------------------|-----------------|---------|
| | | uation, real and personal. | Assessment at .07 per ft. | Tax at .001. | |
| Joseph H. Baldwin, | 791. | \$4,800 | \$55.37 | \$4.80 | \$60.17 |
| Zenas S. Crane, | 876. | 9,000 | 61.30 | 9.00 | 70.32 |
| Nathaniel R. Dodd, | 721. | 10,300 | 50.47 | 10.30 | 60.77 |
| Abram P. DeVoursney, | 751.14 | 9,000 | 52.58 | 9.00 | 61.58 |

New Jersey Supreme Court.

| | | |
|--|---|-----------------------|
| THE STATE, (JOSEPH H. BALDWIN, <i>and als.</i> , <i>Prosecutors,</i>) | } | <i>In Certiorari.</i> |
| <i>vs.</i> | | |
| EDWIN C. FULLER, COLLECTOR, &C., OF MONTCLAIR. | | |

REASONS.

The Prosecutors present the following reasons for setting aside the proceedings, tax and assessment brought before this Court by the writ in the above entitled cause:

First. The act, under color of which these proceedings were had, (Statutes 1875, p. 579,) is unconstitutional.

It provides for raising by a mixed levy, a sum divided into two equal parts by the legislative will, of which one part is to be made of the taxable property within bounds narrower than the political district, the other part by an assessment upon certain selected property at an uniform rate, according to the lineal feet of frontage.

Second. The assessment is made without reference to benefits. The act requires no reference to benefits. And the actual distribution of the burden ignores benefits as a criterion.

Third. The assessment was made without notice of any kind to the parties interested.

Fourth. The petitions presented to the Township Committee were not of the form or substance required by the act.

They do not ask for the creation of Districts. And they limit improperly the action of the Committee.

Fifth. The petitions were first acted upon by the Township Committee, March 18, 1876, at which time the Districts were created and defined, and the power of the Committee exhausted. They were again acted upon August 8, 1876, at which time the former districts were annulled and a totally different plan adopted, and an entirely new districting took place; the assessment was made after August 8.

The year for which the assessment was made was from 10 October 15, 1875, to October 15, 1876.

JOSEPH L. MUNN,

Attorney for the Prosecutors.

AN ACT IN RELATION TO LIGHTING OF STREETS IN THE
TOWNSHIP OF MONTCLAIR, IN THE COUNTY OF ESSEX.

SECTION 1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That it shall and may be lawful for the township committee of the township of Montclair, in the county of Essex, upon the petition in writing of the owner or owners of more than half (the same 20 being measured by lineal feet) of lands lying upon any public road or roads, or any part or parts thereof, to create and establish a lamp district or districts for the lighting of said road or roads, or said part or parts thereof, with gas or oil, and take all necessary measures therefor, including the providing and erecting of posts and lanterns, and to make and enter into contract with any person or persons, company or companies, for all purposes whatsoever in relation thereto, and to cause the yearly expense thereof, with costs of posts and lanterns, to be assessed and collected, one-half part upon 30 and from all taxable property within the limits of said district or respective districts, and one-half part of said cost to be assessed and collected from the land or lands on each side of the road or roads, or part or parts thereof lighted, (in

proportion to lineal feet,) in the same manner as other township taxes are or may be assessed and collected; and also from time to time, in the discretion of said committee, to alter and consolidate any one or more of said districts.

SEC. 2. *And be it enacted*, That all acts or parts of acts inconsistent with this act shall be and the same are hereby repealed; and this act is hereby declared to be a public act, and shall take effect immediately.

Approved, April 9, 1875.

STATEMENT OF FACTS.

It is agreed, by and between the counsel, of the respective parties:

1. That the districts, established March 18, 1876, and in which the lands of the Prosecutors are situated, took the place of and were substituted for corresponding districts, that were established under the law of March 18, 1873.

2. That the original cost of establishing said districts (including the costs of posts and lanterns,) had been defrayed and collected, prior to October 15, 1875, and that the "yearly expense" of lighting the said districts, for the year succeeding that date, was the cost of supplying gas to the said lanterns, at a fixed price, previously determined.

BLAKE & FREEMAN,
Att'ys of Defendants.

JOS. L. MUNN,
Att'y of Prosecutors.

assessed and collected from the land or lands on each side of the road or roads, or part or parts thereof, lighted, (in proportion to lineal feet,) in the same manner as other township taxes are or may be assessed or collected.

Laws, 1875, p. 579.

Under authority of this act, the township committee established a lamp district, including the lands of the prosecutors, and assessed one-half the cost and expense of lighting the road upon the taxable property in said lamp district, and
 10 the other half upon the lands in said district fronting on said road, in proportion to the lineal feet of frontage.

The prosecutors, who are burdened with the assessment in both forms, have sued out this *certiorari* to test the legality of the imposition.

The objection to it is radical, denying the power of the legislature to authorize it in the form in which it is laid.

Under the theory of our State governments, all essential attributes of sovereignty, not expressly withheld or reserved, vest in the State. The general proposition therefor, that
 20 the taxing power resides in the government, as part of itself; that it is inherent and need not be expressly reserved, and that it may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the legislature may choose to carry it for lawful purposes of taxation, will not be controverted.

Assuming this to be true, it is contended that the power of taxing and the power of apportioning taxation are identical and inseparable, that without the latter the former cannot be beneficially exercised; that there is no constitutional
 30 restraint upon legislative action in either of these respects, and that, therefore, the power of assigning to each individual citizen his share of the public burden, is practically unlimited.

Slight reflection will show that this statement is too broad, and that any argument based upon it must be unsound. The difficulty lies, not in the taxation, but in the apportionment of it; in the attempt to establish in the State a power of selection co equal with and as unlimited as the right to levy contributions, to enable it to dispense its
 40 needful powers.

That the legislature may designate certain occupations, trades, or employments, as special subjects of taxation, or discriminate between different kinds of property, in the rate of taxation, or apportion the tax among classes of persons or property made liable to taxation, in such manner as may seem fit, provided it is apportioned upon the rule of uniformity, may be conceded. From the operation of such laws, no injustice necessarily flows. The class of tradesmen upon which they act, must add the burden to the selling price of their wares, and thus, ultimately, it is distributed 10
over the community with an approximation to equality.

Where real estate is selected to bear the heavier load, uniformity is still preserved—it acts on each and all in their turns, as they become owners of lands, and ceases to be exacted of them, when they no longer hold the estate in respect of which the duty is required.

But it seems equally clear that a tax for State purposes must fall upon the State at large; for county purposes, upon the county; and for the public uses of any lesser political district, upon such district. The county of Hudson 20
could not be required to defray the entire expense of the State government, nor could one township in that county be compelled to yield the whole revenue necessary for county purposes; nor could the legislature impose upon a single citizen the whole burden of taxation in the township in which he may reside; any such fiscal scheme would be pronounced by the common judgment of mankind so contrary to the principles of natural justice, that we would be driven to conclude that there was some radical error in the 30
premises upon which its justification was grounded.

Not that Courts may pronounce a law, which it is within the general sphere of legislation to pass, to be void merely because it is, in their judgment, contrary to the principles of equity. The rule is conceded to be otherwise, but there are some things so repugnant to our sense of justice, that we cannot admit that they are comprehended, in our system, in the powers of government. As an instance, we unhesitatingly declare that the legislature cannot make a man to be a judge in his own case.

Aside from this consideration, laws of the character speci- 40

fied would, to the extent that one man's property is appropriated by them, in excess of his just contribution, to relieve others of a public burden properly resting upon them, take private property for public use, without just compensation.

It would be confiscation, not taxation; as we approach the extreme limit of the power of apportionment, the violation of principle will be less striking, but it will still be so apparent that it cannot escape judicial observation. No one will question the right of the city of Trenton, under legislative authority, to grade, pave, and sewer its streets, and include the expense in the general tax levy, while an attempt to impose the cost of such work, in excess of any special benefits actually conferred upon a taxing district less than the political district of which it is a part, would be instantly arrested by an appeal to the appropriate judicial tribunal. The reason upon which this well settled doctrine, in this State, is rested is, that it would be a violation of our constitutional provision, "that private property shall not be taken for public use without just compensation." In other States, arbitrary exactions of this character have been sanctioned, on the ground that the principle upon which taxation is founded is, that the tax-payer is supposed to receive just compensation in the benefits conferred by the government under which he lives, and that the law-maker is the sole judge as to whether the benefits received are commensurate with the burdens imposed. Upon this theory, in *People vs. Lawrence*, 41 N. Y., 123, the cost of paying a railroad company for relinquishing their right to use steam in the city, with the cost of closing their tunnel and grading the street over it, was laid, without reference to actual benefits, upon specified property in the vicinity of the improvement.

To justify this conclusion, the Court declared that the right of determining what portion of the public burden, by way of taxation, shall be borne by any individual or class of individuals, is, in the legislature, absolute, and, however much abused, can be redressed only by legislative enactment. This is an assertion of power little, if any, less than despotism wields over the property of its subjects in like cases.

In the later case of *Gordon vs. Cornes*, 47 N. Y., 608, Judge RAPALLO after stating the rule in terms equally broad, is constrained to remark that "it would be going too far to deny that the provisions of the constitution, which declare that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, would afford protection to the citizens against impositions made, nominally, in the form of taxes, but which were, in fact, forced levies upon individuals, or confiscations of private property, as, 10
for instance, if the general expenses of the government of the State, or of one of its municipal divisions, should be levied upon the property of an individual or set of individuals, or perhaps, upon a particular district."

But why is it conceded that the general expenses of one of the municipal divisions of a State cannot be levied upon an individual, or upon a particular district? Obviously, because the purpose being a public, not a private one, it would be the taking of private property for public use without compensation. The exception put by the learned Judge, 20
is a striking one, but the same test applied to any enactment which produces a like effect, though in a less measure, must as surely condemn it.

In the cases reported in 34 *Barb.*, 69; 37 N. Y., 267, and 47 N. Y., 612, cited by Mr. Cooley, in support of the doctrine that the power of apportionment is absolute in the legislature, and the right to assign taxing districts unlimited, the question now presented was not essentially involved, and it was not necessary to take such extreme ground to justify the several judgments pronounced by the Court. In all 30
those cases by the express provisions of the legislative enactments, the burden was laid, not arbitrarily, but in proportion to the benefits received.

The views expressed in the opinion of the Court in these New York cases were adopted to some extent, in the *State*, (Sigler, *pros.*) vs. *Fuller*, 5 *Vroom*, 227, and led to a result which our Court of last resort subsequently declared not to be in harmony with the *Tidewater Case* (3 C. E. Green, 518;) *State* (Agens, *pros.*), vs. *Newark*, 8 *Vr.*, 415.

The suggestion in the Fuller case, that the benefits will 40

be presumed to equal the burdens of taxation was repudiated, and it was admitted that, if well founded, it would have led to a different result in the Tidewater case.

Under the firmly established doctrine of the *Agens* case, that an assessment for paving the roadbed of a street cannot be laid upon lands supposed to be peculiarly benefited, in excess of the benefit conferred, how could the cost of maintaining and repairing such pavement be imposed upon such lands, regardless of benefits; or, how can the cost of any other project for public uses be imposed upon a locality
 10 arbitrarily selected, without violating the principle upon which that case rests? If the cost of putting up lamps and lighting the street can be levied arbitrarily upon the owners of lands along the street, why will not the doctrine that the power of the legislature to create special taxing districts is unlimited, justify the laying of the burden upon any one or two owners of lands fronting on a given street, in case of all others? The Supreme Court, in the *State* (McCloskey, *pros.*) vs. *Chamberlain*, 8 Vr., 388, supposed
 20 that such power did not exist; for, as suggested in that case, if the legislative will, in this respect, is untrammelled by the simple device of creating a taxing district out of any area, however small, private property within it might, without any regard to resulting advantage, be confiscated, under the form of ordinary taxation, and the protection which it has heretofore been believed that our organic laws secured to individual property, and which has so frequently been asserted and enforced by our Courts, would be swept away.

The theory of taxation is that it is levied for public purposes; that it is an attribute essential to the existence of
 30 government, without which it would be powerless to discharge its functions, and for that reason it is held to be inherent. It is the public use for it which marks it as a tax. Where no public end is subserved, the power cannot be called into action. The levying of money from the public to erect a house for A, in which the public had no concern, would not be an act of taxation; it would be confiscation.

Special peculiar benefits may result incidentally to the individual citizen, but to impress the imposition with the
 40 character of taxation, it must be primarily for public uses.

If the work concerns the public, its cost in excess of peculiar local benefits, must fall upon the public according to some established rule of uniformity.

If the project, authorized by the act now under consideration, is purely for the benefit of the persons whose lands front on the street, the taxing power cannot be called into requisition to enforce its execution ; it would be a matter as exclusively within the control of private enterprise as the remodeling of houses on the street, or the planting of fruit trees in the gardens.

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Legislative interference to promote the scheme, can be legalized only upon the assumption that it is a public matter, affecting the welfare of the political district within which the legislative enactment is to operate.

To the extent that a locality is peculiarly benefited, the legislature may, at will, declare it to be a special taxing district, for the purpose of bearing the burden, and provide a way in which such special benefits shall be computed and levied ; but to impose upon A, because he chances to reside upon a certain street where the work is done, or the expense incurred, so much of the cost as enures to the public benefit, in which he has no greater interest than any other citizen, would violate established principles as clearly as if the expenditure had been incurred in a part of the township remote from him. The existence of such power can be maintained only by asserting that the law-maker is the final arbiter who is to determine whether the individual citizen derives such benefit from any given measure as will justify the burden cast upon him ; a doctrine which has hitherto found no countenance in our courts.

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I think the true rule, deducible from sound reason, is that legitimate taxation is limited to the imposing of burdens, like those in question, so far as they are for the public benefit, upon the persons or property within the political district possessing powers of local government, so that the exactions are distributed over the entire territory, upon the rule of uniformity. If the constitutional guarantee is not so interpreted as to enforce this rule, the legislature may, under the guise of taxation, appropriate private property to any extent to public use, without compensation. That this

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was the view entertained by the CHIEF JUSTICE in *Agens vs. Newark*, may be fairly inferred from his lucid opinion in that case, and it was so understood by this Court in the *State vs. Chamberlain* before cited.

In the *Agens* case, the Court say, "That there is nothing in the constitution of this State that requires that all property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax.

10 "That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities are vindicated.

"But while it is thus clear that the burthen of a particular tax may be placed exclusively on any political district, to whose benefit such tax is to enure, it seems to be equally clear that when such burthen is sought to be imposed upon particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line
20 which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is unlimited; for it would seem much more in accordance with correct theory, to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable."

The Court further declares that these local assessments are justifiable, on the ground that the locality is especially
30 benefited by the outlay of the money to be raised, and that unless this is the case, no reason can be assigned why the tax is not general. The rule adopted in this case did not depend upon any peculiarity, in the nature of the undertaking which gave rise to the assessment: it must have been a public improvement to justify legislative coercion in any form. It was declared to be a limitation upon the power of taxation, and as such it must be of universal application. The legal principle must be the same, whether the public benefit flows from the grading and paving of the road bed,
40 or from maintaining and keeping it in repair, or from erect-

ing posts and lamps and supplying gas to illuminate the highway. The obnoxious feature of the assessment in the Agens case was, that the tax for a public benefit was arbitrarily laid upon a specified locality, narrower than the political district of which it was a part. The tax now certified into this Court has manifestly the same vice, and the like limitation upon the power of selecting the subjects upon which it is to fall must be enforced.

Taxation is tolerated as the contribution of each one's proportion to the support of his government, only to serve 10 public ends, and must, from its very nature, be imposed upon the public.

This is fundamental in the idea of a tax; any attempt to appropriate the property of a designated locality, to discharge the duty which an entire community owes to its local government, must be regarded as a proceeding in which an essential attribute of taxation is absent, and as a palpable perversion of the true principle upon which the taxing power is based.

No one would assert that it was a legal exercise of the 20 taxing power, to enact that the residents on a block of a certain street, in a city, should be required to pay the annual salaries of all city officers, because that would imply a right to cast upon a single citizen the entire expenses of the State.

The confusion arises in those cases where special benefits, to a large extent, are supposed to be incidently imparted by a public enterprise to adjacent lands. But after eliminating from the whole expenditure the sum which represents the value of such special benefits, in what respect does the balance, which represents the benefit, which the general 30 public actually derives from the undertaking, differ in character from the salaries paid to public officers?

Upon what principle can it be imposed upon a selected few?

It seems apparent that it can be legalized only by conceding that the power of the legislature to select subjects of taxation is wholly illimitable. So firmly was this view impressed upon the mind of the Chief Justice, that, in the Agens case, he placed the right to assess upon the land owner, the cost of paving his sidewalks, upon different 40

ground from that on which it was sanctioned by the Supreme Court in the Fuller case, and pronounced the judgment of the Supreme Court to be erroneous in so far as it legalized the assessment upon the relators, for any part of the cost of paving on the opposite side of the street. There is nothing in this opinion of the Court of Errors relating to sidewalks, that will justify the advanced step that is now proposed to be taken.

10 It is suggested that this tax may be regarded as a legitimate exercise of the public police, but this does not remove the radical objection to it.

The vice inherent in the character of the proceeding is, that in effect it takes private property for public use without compensation, and it cannot be purged of this infirmity by shifting the ground upon which it is exacted. It is difficult to define the precise extent of police powers. In theory, their primary object is regulation, the raising of revenue being merely incidental. In some adjudications, so wide a range has been given to this power, that under it assessments for sewers have been wholly imposed upon adjacent lands, without regard to accruing benefits. In this State, these powers have been hitherto held within much narrower limits; and if it could be successfully invoked to support sewer assessments, and impositions like the one in controversy, it would practically overthrow a rule which is now the accepted law of the State. The authority granted by our school law to school districts to raise money by taxation to build school houses and maintain free schools, is apparently in conflict with the conclusion I have reached, but that must be regarded as an exceptional case. 20 The power of the legislature over the subject is certainly not absolute, for it will be conceded that the assessment of one school district for the benefit of another would be a palpable trespass upon the rights of private property. 30

There are, however, features in this matter of school taxation which distinguish it from any other case that now occurs to me. It is a district incorporated for an object affecting only those residing within it. They have absolute control of the question whether money shall be raised, and the

facilities it affords for acquiring an education are limited to those upon whom the burden is cast.

Another marked distinction is, that the school tax is not laid upon lineal feet of land arbitrarily selected, or on those, exclusively, residing along a particular street. When an attempt shall be made to impose a school tax in that mode, I think there will be no difficulty in concluding that it contravenes the organic law.

With regard to road districts, any scheme by which the cost of the improvement or paving of road-beds is assessed upon the lands adjacent thereto, without any regard to accruing benefits, must be viewed as a subterfuge to escape the doctrine of the *Agens* case. 10

That class of cases represented by the *State* (*Hoey, pros.*) vs. *The Collector of Ocean Township, ante p. 75*, is clearly distinguishable in principle from the one under discussion.

The act under which the Long Branch assessment was levied, (*Laws, 1867, p. 976*), erects a local government within certain specified boundaries, for designated objects; and for the purpose of enabling the constituted authorities to exercise the particular functions with which they are invested, the power of taxation, according to a rule of uniformity, is granted. 20

Justice KNAPP, in his opinion, clearly had in view this distinction, in stating "that the objects of government for which the tax is laid, are committed to the control of the corporation by the legislature."

The local government, in such cases, is of a dual character, certain powers being peculiar to the lesser district, while as to the residue, it is subject to the authority of the larger municipality. 30

The city of Plainfield and the village of Flemington are examples in point. As to those subjects over which powers of local government are ceded by the legislature, the territory embraced in the act becomes a political district, subject to taxation according to the constitutional limitations which apply in other like cases.

The recognized methods of taxation are adequate for all

the purposes of government, and, under them, its burdens may be distributed upon just principles.

In my opinion, the assessment certified here by the prosecutors is without authority, and should be set aside with costs.

Justice SCUDDER concurred.

Justice DEPUE dissented.

A true copy :

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BENJ. F. LEE,

Clerk.

New Jersey Supreme Court.

NOVEMBER TERM, 1877.

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| <p>THE STATE, JOSEPH H. BALDWIN, <i>et al.</i>, <i>vs.</i> EDWIN C. FULLER, <i>Collector, &c.</i></p> | } | <i>On Certiorari.</i> 10 |
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The Court having heard the arguments of counsel, and inspected the assessment removed by the writ in the cause, and duly considered the reason filed, and being of opinion that said assessment is without authority,

It is ordered that said assessment be set aside, made void, and for nothing holden, with costs to be taxed. 20

Entered November 27, 1877

On motion of

JOSEPH L. MUNN,
Attorney.

I, BENJ. F. LEE, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Rule for Judgment in above stated cause, as the same remains of record in my office. 30

In testimony whereof, I have hereto set my hand and the seal of said Court, at Trenton, this fifth day [SEAL] of March, A.D. eighteen hundred and seventy-eight.

BENJ. F. LEE,
Clerk.

N. J. Court of Errors and Appeals.

OF THE TERM OF MARCH, 1878.

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| 10 | EDWIN C. FULLER, COLLECTOR OF TAXES, IN THE TOWNSHIP OF MONTCLAIR, IN THE COUNTY OF ESSEX, <i>Plaintiff in Error,</i> | } | <i>On Error</i> |
| | <i>vs.</i> | | <i>to</i> |
| | THE STATE, (JOSEPH H. BALDWIN, ZENAS S. CRANE, NATHANIEL R. DODD, AND ABRAHAM P. DEVOURSNEY, Prosecutors,) | } | <i>Supreme Court</i> |
| | <i>Defendants in Error.</i> | | |

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ASSIGNMENT OF ERRORS.

Afterwards, to wit: on the second Tuesday of March, in the same term, before the Court of Errors and Appeals in the last resort in all causes, comes the said Edwin C. Fuller, Collector, and plaintiff in error as aforesaid, by BLAKE & FREEMAN, his attorneys, and says, that in the record and proceedings aforesaid, and, also, in giving the judgment aforesaid, there is manifest error in this, to wit: that the said Supreme Court, in and by their said judgment, did determine that the said tax and assessment against the said Joseph H. Baldwin, Zenas S. Crane, Nathaniel R. Dodd, and Abraham P. DeVoursney, the said prosecutors and defendants in error, were defective and illegal.

And there is also error in this, that the said Supreme Court set aside the said tax and assessment, with cost, whereas, in truth and in fact, the said Court should have sustained and confirmed the said tax and assessment, in all things, with costs.

And there is also error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given fo

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the said defendants in error, against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error.

And the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether holden for naught, and that the said plaintiff in error may be restored to all things which he hath lost by occasion of the said judgment, &c. 10

BLAKE & FREEMAN,
Attorneys and of Counsel for Plaintiff in Error.

N. J. Court of Errors and Appeals.

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| 10 | <p style="text-align: center;">EDWIN C FULLER, COLLECTOR OF TAXES, OF THE TOWN- SHIP OF MONTCLAIR, IN THE COUNTY OF ESSEX, <i>Plaintiff in Error,</i></p> | } | <p><i>On Error</i></p> <p style="margin-top: 20px;"><i>to</i></p> <p style="margin-top: 20px;"><i>Supreme Court</i></p> |
| | <p><i>vs.</i></p> | | |
| | <p style="text-align: center;">THE STATE, (JOSEPH H. BALDWIN, ZENAS S. CRANE, NATHANIEL R. DODD, AND ABRAHAM P. DEVOURS- NEY, Prosecutors,) <i>Defendants in Error.</i></p> | | |

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JOINDER IN ERROR.

And thereupon, afterwards, to wit: on the second Tuesday of March, A.D. eighteen hundred and seventy-eight, the said defendants in error, by Joseph L. Munn, their attorney, come into Court and say, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed.

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JOSEPH L. MUNN,
Attorney and of Counsel for Defendants in Error.