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NOTICE AND GROUNDS OF APPEAL.

Filed September 4, 1929.

New Jersey Supreme Court

THE STATE OF NEW JERSEY, *Plaintiff,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Messrs. Hobart & Minard, Attorneys for Defendant:

TAKE NOTICE that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the judgment and from so much of the rule for judgment entered in the above-entitled cause as denied the plaintiff's motion to strike out paragraph 11 of the First Defense of the Answer, the Second Defense, the Fourth Defense, and the Thirty-sixth and Thirty-seventh Defenses, and denied the motion to enter final judgment in favor of the plaintiff and so much of said rule as ordered that the Summons be quashed and the Complaint dismissed, and that final judgment be entered in favor of the defendant and against the plaintiff.

And take notice that the following are the grounds of appeal:

1. The New Jersey Supreme Court denied the plaintiff's motion to strike out paragraph 11 of the First Defense of the Answer.

2. The Court denied the plaintiff's motion to strike out the Second Defense of the Answer.

3. The Court denied the plaintiff's motion to strike out the Fourth Defense of the Answer.

4. The Court denied the plaintiff's motion to strike out the Thirty-sixth and Thirty-seventh Defenses of the Answer.

5. The Court denied the plaintiff's motion to enter final judgment in favor of the plaintiff and against the defendant.

6. The Court ordered that the Summons be quashed and the Complaint dismissed and that final judgment be entered in favor of the defendant and against the plaintiff.

7. Paragraph 11 of the First Defense and the Second Defense do not disclose any defense to the plaintiff's cause of action. It does not appear that the Court orders or the consent therein mentioned, relieved the plaintiff of its duty to comply with the Board's order or stayed the accrual of the penalty.

8. The Fourth Defense of the Answer discloses no defense to plaintiff's cause of action. No facts are set forth in the complaint or in said Fourth Defense whereby it appears that the Township of Hillsborough or the State Highway Commission was under a duty to adopt the resolutions or take the action suggested in said Defense. The failure of the Township and the Highway Commission to adopt such resolutions and take such action did not excuse the defendant from complying with the order of the Board.

9. This action was properly brought by the Board of Public Utility Commissioners in the name of the State of New Jersey.

10. Counsel of the Board as attorney of record properly issued the Summons and signed the Complaint.

JOHN O. BIGELOW,
Attorney for Plaintiff.

Service of the foregoing Notice is acknowledged September 3, 1929.

HOBART & MINARD,
Attorneys for Defendant.

Summons.

SUMMONS.

Filed January 17, 1929.

The State of New Jersey to the Lehigh Valley Railroad Company.

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of the Board of Public Utility Commissioners of New Jersey, who sue in the name and for the use of the State of New Jersey in an action at law in the Supreme Court and TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 11th day of January, Nineteen Hundred and Twenty-nine.

FRED L. BLOODGOOD,
Clerk.

JOHN O. BIGELOW,
Attorney.

COMPLAINT.

Filed January 17, 1929.

The Board of Public Utility Commissioners (hereinafter called the Board), who bring this suit in the name and for the use of the State of New Jersey, say that:

1. On November 24, 1926, and from thence continuously to the present time, the Lehigh Valley Railroad Company (hereinafter called the Company) the defendant to this action, operated and still operates within this State a steam railroad for public use under privileges granted by the State of New Jersey. Said railroad and a certain public highway now or lately known as State Highway Route No. 16, at all times aforesaid crossed and still cross each other at the same level in the Township of Hillsborough, in the County of Somerset. Said railroad and a certain other public highway known as Camp Lane at all times aforesaid, crossed and still cross each other at the same level in said township a few hundred feet east of the first mentioned crossing.

2. The Board, on said November 24, 1926, on its own motion, made an order instituting a proceeding under Chapter 57 of the Laws of 1913 relative to said crossings. A copy of said order is annexed hereto.

3. Due notice of said order and proceedings was given to the Company and pursuant to said order and notice hearings were had before the Board and the Board on April 26, 1927, made, issued and filed its decision and order relative to said crossings whereby it ordered the Company to alter said crossings according to the plan annexed to said order and to vacate the Camp

Lane crossing and to substitute for it and for the Route No. 16 crossing, a crossing not at the grade of the said highways, and the said Board did thereby further order that the Company begin the actual work required in the performance and execution of said order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of said order and complete all of the work required thereunder to be done within one year thereafter or the first day of June, 1928. A copy of said order is annexed hereto.

4. A certified copy of said last-mentioned order was duly served on the Company within ten days after April 26, 1927.

5. On June 1, 1927, the Company filed its bill of complaint against the Board and others, in the District Court of the United States for the District of New Jersey, praying among other things that the Board might be enjoined from commencing any suit or proceedings to enforce said order of April 26, 1927, against the Company by reason of anything done or omitted to be done by the Company.

6. And thereupon, on June 1, 1927, the Honorable William N. Runyon, a United States District Judge holding said District Court, made an order in said cause restraining the Board from instituting any action of debt in the name of the State of New Jersey or otherwise, to recover any penalties for the violation of said order of April 26, 1927, or from instituting any proceedings by mandamus or injunction to compel specific performance of said order.

7. On August 10, 1927, the Honorable J. Warren Davis, Circuit Judge, and Joseph L. Bodine

and William N. Runyon, District Judges, holding the United States District Court for the District of New Jersey, vacated said restraining order and denied the defendant's motion for interlocutory injunction to restrain the enforcement of said order of the Board in accordance with the prayer of the Bill of Complaint. The defendant duly appealed from said order to the United States Supreme Court and the Board consented that said appeal should operate as a supersedeas of said order of the Court and should suspend the enforcement of said order of the Board until the issuance of the mandate of the Supreme Court on said appeal, or until the final decree of the District Court in said suit, whichever might sooner happen. The final decree of said District Court was entered January 18, 1928, and said mandate of the Supreme Court was issued December 20, 1928.

8. Said cause came on for final hearing before the said Judges constituting said Court, on bill, answer and proofs and the Court having considered the same did, by its final decree dated January 18, 1928, dismiss the bill of complaint.

9. The Company not being content with the decree aforesaid, did appeal from the same to the Supreme Court of the United States, and the said District Court on January 18, 1928, ordered that said appeal should operate as a supersedeas of said final decree and should suspend until the final decree therein, the enforcement of the order of the Board of April 26, 1927.

10. The said appeal came on for argument and was argued before the said Supreme Court at the October Term, 1928, and the Court having considered the same, did affirm the decree of the

District Court as does more fully appear from the mandate which issued out of the Supreme Court of the United States December 20, 1928, and now remains of record in the United States District Court for the District of New Jersey.

11. The Company has failed and refused to comply with the order of the Board dated April 26, 1927, and still does fail and refuse to comply with the same and did not begin the actual work required in the performance and execution of said order on or before June 1, 1927, and has not yet begun the same and the Company did not perform and fully comply with the directions and requirements of said order and complete the work thereunder to be done within one year thereafter, or June 1, 1928; and has not yet performed or fully complied therewith, or completed the said work.

Whereby and by force of an Act of the Legislature of New Jersey entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, the Company is subject to a penalty of One Hundred Dollars per day for every day during which such default in compliance with said order has continued.

The Board demands judgment in favor of the State of New Jersey and against the Company in the sum of Fifty-seven Thousand Nine Hundred Dollars ($57,900.).

JOHN O. BIGELOW,
Counsel for Board of Public Utility Commissioners, and Attorney for Plaintiff.

ANNEXED TO COMPLAINT.

STATE OF NEW JERSEY

BOARD OF
PUBLIC UTILITY COMMISSIONERS.

In the Matter of Proceeding under Chapter 57, P. L. 1913, relating to the crossing of the Highway known as South Bridge Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsborough Township, Somerset County.	*Order.*

The Board of Public Utility Commissioners, by virtue of the powers conferred upon it by statute, hereby initiates a proceeding and calls a hearing to determine whether South Bridge street or State Highway, Route No. 16, in the Township of Hillsborough, County of Somerset, State of New Jersey, is a public highway and whether the said street crosses in the said Township of Hillsborough a railroad operated by the Lehigh Valley Railroad Company, and whether such crossing is dangerous to public safety or whether the public travel on such highway is impeded by such crossing and to determine what if any, order shall be issued by said Board for the alteration of said crossing by substituting therefor a crossing not at the grade of such public highway under or over said railroad or by reconstructing such railroad under or over such public highway, or by vacating, relocating, or

changing the lines, width, direction or location of such highway and the opening of a new highway in place of the one ordered vacated and to determine any and all other matters, the determination of which may be within the power of said Board and which may be involved in and incidental to the separation of the grades of said highway and of said railroad.

It appears that any order issued by the Board in this proceeding for the separation of the grades of said highway and of said railroad may affect a road known as Camp Lane in said Township of Hillsborough, which is or may be claimed to be a public highway.

The Board, hereby fixes Thursday, the 16th day of December, 1926, and the hour of eleven o'clock in the forenoon as the time and the rooms of said Board in the Industrial Office Building, 1060 Broad street, Newark, N. J., as the place of the hearing hereby called.

The Board hereby directs its Secretary within ten days from the date of entry hereof, to give notice to the Township of Hillsborough and the corporations, co-partnerships and individuals interested in the hearing hereby called, by sending to the said Township of Hillsborough, the State Highway Department of New Jersey, the Lehigh Valley Railroad Company, the Public Service Electric Company, the New York Telephone Company, the Western Union Telegraph Company, and the Hillsborough and Montgomery Telephone Company, certified copies of this order, and publishing in the Unionist Gazette, and Somerset Messenger, newspapers circulating in the Township of Hillsborough, at least one week prior to the date of the hearing hereby called, the notice provided for in Chapter 238, P. L. 1914.

Order Annexed to Complaint.

The Board hereby determines that such mailing and publication shall constitute reasonable notice of the proceeding hereby initiated and the hearing hereby called.

Dated November 24th, 1926.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By (Signed) Jos. F. Autenreith,
President.

(SEAL)

Attest:

(Signed) ALFRED N. BARBER,
Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of an Order adopted by the Board of Public Utility Commissioners at its meeting held Wednesday, November 24th, 1926, and recorded in the minutes of said meeting.

(Signed) ALFRED N. BARBER,
Secretary.

ANNEXED TO COMPLAINT.

STATE OF NEW JERSEY.

BOARD OF
PUBLIC UTILITY COMMISSIONERS.

In the Matter of the Proceeding under Chapter 57, P. L. 1913, relating to the crossing of the highway known as South Bridge Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsborough Township, Somerset County.	*Order.*

This matter having been heard by the Board and the Board on the date hereof, having filed its decision stating its findings of fact and conclusions thereon, which decision by reference thereto herein is hereby made part hereof, the Board ORDERS the Lehigh Valley Railroad Company to alter the crossings known as South Bridge street or State Highway Route No. 16 and Camp Lane according to the plan therefor annexed to and made part of this order, (which plan is shown on two sheets, known as "Scheme 'H. P.' Board of Public Utility Commissioners, Division of Bridges & Grade Crossings, Survey in the Vicinity of Royce Valley Station, L. V. R. R., Scale 1″=50′, November 20, 1926" and Profile marked "Scheme 'H. P.' Profile on Center Line of State Highway Route No. 16, Section 5A, traced from N. J. State Highway Map, sheet 11/31," which said plan, with the relocation of

Camp Lane as shown by red center line having been approved by said Board, and by reference thereto herein is made part hereof), by substituting therefor a crossing not at the grade of the said public highways; by changing the lines, width and direction thereof and by carrying so much as so changed under the said railroad, according to and as shown on said plan for said purpose, and by vacating the remaining part of said highway or highways within the lines of the right-of-way of said railroad company, and by the opening of new highways in the place of the ones hereby ordered vacated as aforesaid, which said new highways shall be of the width, length and direction and carried under the said railroad where so indicated, all according to and as shown on the said plan.

Any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, co-partnership or individual whose property or constructions it may be necessary to change or remove to carry said plan and this order into effect, shall remove and change the same according to said plan.

And It Is Further Ordered that the said the Lehigh Valley Railroad Company, the said Hillsboro Township, and the said Township Committee thereof, the County of Somerset, the New York Telephone Company, the Western Union Telegraph Company, the Hillsboro and Montgomery Telephone Company, the Public Service Electric and Gas Company, and all other parties to this proceeding, and each and every of them, proceed with due diligence to the execution of this order, and comply with all of the requirements thereof and the duties imposed upon them thereby, and by the said Act under which this order

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

And It Is Further Ordered that the said the Lehigh Valley Railroad Company begin the actual work required in the performance and execution of this order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of this order, and complete all of the work required thereunder to be done within one year thereafter, or the first day of June, 1928.

This order shall take effect May 10th, 1927.

Dated, April 26th 1927.

BOARD OF PUBLIC UTILITY
COMMISSIONERS,

(seal) By (Signed) Jos. F. Autenreith,
President.

Attest:

(Signed) Alfred N. Barber,
Secretary.

I Hereby Certify the foregoing to be a true copy of an order adopted by the Board of Public Utility Commissioners at its meeting held Tuesday, April 26th, 1927, and recorded in the minutes of said meeting.

(Signed) ALFRED N. BARBER,
Secretary.

Answer.

ANSWER.

Filed February 1, 1929.

The defendant, Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, having its principal office in New Jersey, at Jersey City, Hudson County, answering the complaint filed herein, says that:

FIRST DEFENSE.

1. It admits paragraph 1, except that it has no knowledge or information sufficient to form a belief as to whether the highway described as Camp Lane was or is a public highway.

2. It denies paragraph 2, except that it admits that said Board made an order on November 24, 1926, a copy of which is annexed to the complaint, and it prays reference to the original of said order for certainty as to the terms thereof.

3. It admits paragraph 3, except that it says that the plan annexed to and made part of said order is not included in the copy of the order annexed to the complaint, and it prays reference to the original of said order for certainty as to the terms and requirements thereof. A blue print copy of said plan is annexed hereto as Exhibit "A".

4. It admits paragraph 4.

5. It admits paragraph 5, except that it prays reference to the original bill of complaint for certainty as to the contents thereof.

6. It admits paragraph 6; a true copy of said order is annexed hereto as Exhibit "B".

7. It admits paragraph 7; a true copy of said order of August 10, 1927, is annexed hereto as Exhibit "C".

Answer.

8. It admits paragraph 8; except that it prays reference to the original of said decree for certainty as to the terms thereof.

9. It admits paragraph 9; a true copy of said order is hereto annexed as Exhibit "D".

10. It admits paragraph 10; a true copy of said mandate is hereto annexed as Exhibit "E".

11. It denies paragraph 11, except that it admits that it did not begin the actual work required in the performance and execution of said order on or before June 1, 1927, and has not yet begun the same; and complete the same within one year thereafter, or July 1, 1928, and it says that, between August 10, 1927, and January 18, 1928, said order, and the enforcement thereof, and the defendant's duty of compliance therewith, were suspended by consent of the Board.

SECOND DEFENSE.

1. Said order and the enforcement thereof and the defendant's duty of compliance therewith were restrained, enjoined and suspended as follows: From June 1, 1927 to August 10, 1927, by order of the District Court of the United States for the District of New Jersey, entered June 1, 1927 (Exhibit B hereto annexed); from August 10, 1927 to January 18, 1928 by the consent of the Board of Public Utility Commissioners that the appeal from the order of the District Court (Exhibit C hereto annexed) should operate as a supersedeas of said order of the Court and should suspend the enforcement of said order of the Board until the issuance of the mandate of the Supreme Court on said appeal or until the final decree of the District Court in

said suit, whichever might sooner happen; from January 18, 1928 to December 20, 1928, by supersedeas issued by the United States District Court for the District of New Jersey on January 18, 1928 (Exhibit D hereto annexed); on December 20, 1928, the mandate of the United States Supreme Court was issued (Exhibit E hereto annexed).

2. Since the issuance of said mandate, said Board has never given any notice, held any hearings or determined, or made any order fixing, new dates for the commencement or completion of said work.

3. Said order, at all times since December 20, 1928, was and still is ineffective, inoperative and unenforceable by reason of the expiration of the time therein specified for the commencement and the completion of the actual work of altering said crossing, and at all times since December 20, 1928, it was and still is, impossible for the defendant to comply with said order in its present form.

THIRD DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and a resident and citizen of said Commonwealth, duly authorized to operate a railroad in the State of New Jersey and having its registered office in said State at No. 1 Exchange Place, Jersey City; it has been for many years past, and is now engaged in the operation of a railroad, in and through the States of Pennsylvania, New York and New Jer-

sey, as a common carrier for the transportation of passengers and freight by rail from and to points in the State of New Jersey and other states, subject to the provisions of the Act of Congress known as the "Interstate Commerce Act" as amended by an Act of Congress known as the "Transportation Act, 1920".

3. Said railroad, at the place in question, consists of right of way 100 feet wide with four main line operating tracks, and certain side tracks, signals, switches, freight and passenger station and facilities and other appurtenances, owned by Lehigh Valley Railroad Company of New Jersey, a corporation of New Jersey, which are used and operated by defendant under and by virtue of a certain indenture of lease, dated June 17, 1914, between said Lehigh Valley Railroad Company of New Jersey and defendant; approved by the Board of Public Utility Commissioners by certificate dated June 22, 1914, a true copy of which lease and said certificate of approval are annexed hereto as Exhibit "F".

4. Said order requires the taking of private land for the purpose of increasing the width of State Highway Route No. 16 from the existing width of 33 feet to a width of 66 feet, and the construction of said state highway thereon, for a distance of approximately 400 feet across the railroad right-of-way and on either side thereof, and additional lands for highway slopes; which will thereafter be permanently devoted to public use as a part of the said Highway Route No. 16; the depression of the widened highway approximately 16½ feet and raising the railroad tracks approximately 6 inches; the construction of an undercrossing at an angle of 29

Answer.

degrees and 30 minutes across the said railroad, with a vertical clearance of 14 feet, 66 feet wide between the face of the abutments, with two roadways each 20 feet wide separated by a center pier five feet wide, with highway approaches with grades of 3 per cent. on the north, and 3.16 per cent. on the south, side of the railroad, and two sidewalk spaces each ten feet six inches wide and each having a clear width, exclusive of curb columns, of 8 feet 6 inches; the construction of a steel through plate girder skew bridge with a concrete floor, 134 feet long, measured along the railroad, and 105 feet wide measured along the highway; with girders projecting six inches above the top of the rails; the destruction of existing and the construction of new approaches to the passenger and freight depot and milk loading platform at the freight and passenger station of defendant known as "Royce Valley"; the spreading of tracks to admit the introduction of bridge girders; the improvement of Camp Lane to be used as a detour during construction, and other changes in tracks, switches, crossovers, signals, coal pockets, station facilities, and appurtenances at and in the vicinity of said crossing; the destruction of the passenger platforms at said station by the erection of bridge girders above the level of the rails of the tracks; the closing of the grade crossing on a road known as Camp Lane, located about 1,400 feet east of State Highway Route No. 16, and taking of private property and the construction thereon of a permanent Township road 1,940 feet long and 33 feet wide along the southerly side of the railroad to connect Camp Lane with State Highway Route No. 16.

Answer.

5. The cost of the plan ordered by the Board (as estimated by the Chief Engineer of the Board) is $324,400., exclusive of the cost of acquiring 64,070 square feet of private property, and exclusive of consequential damages to other private property affected but not taken thereby.

6. All of said railroad property, facilities and constructions, and 41,960 square feet of land required by said order to be taken and changed for public highway purposes, are owned by Lehigh Valley Railroad Company of New Jersey, which was not made a party to the proceedings and is not subject to said order, and said order requires defendant to make said changes in, or remove, said property facilities and construction of said Lehigh Valley Railroad Company of New Jersey.

7. Said Lehigh Valley Railroad Company of New Jersey was by law a necessary party to the proceedings in which said order was made, but was given no notice of the hearing in said proceedings or opportunity to be heard.

FOURTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 and 4 of the third defense.

3. It was the duty of the Township of Hillsboro to pass an ordinance and take such legal proceedings as were necessary to lawfully lay out and open, and to acquire and make available all of the land necessary for said connecting Township road and it was the duty of the New Jersey State Highway Commission to adopt

such resolutions and institute such legal proceedings as were necessary and to acquire and make available all of the land necessary, for widening said State Highway from 33 feet to 66 feet, and for slopes, before the defendant could commence any of the work required of it to be performed under said order and plan.

4. Neither said Township of Hillsboro nor said State Highway Commission has ever passed any ordinance or resolution or taken any legal proceedings or other proceeding or action to lawfully lay out and open said Township road, or taken any legal or other proceedings or any action or steps to acquire said land, or any part thereof, or made it, or any part thereof, available for use for the commencement of said work.

5. The defendant, ever since the date of said order, has been incapable of commencing the actual work of complying with said order.

FIFTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive of the first defense.

2. The highway in question, including the place where said crossing on State Highway Route No. 16 is located, was laid out, two rods wide, by the Surveyors of Highways duly appointed by the Court of Common Pleas of Somerset County at the April Term, 1811. The return of said Surveyors of Highways, dated May 25, 1811, containing a description of said highway, with a map thereof annexed, was duly filed in the office of the County Clerk of Somerset County on September 7, 1811, and recorded in Road Book B, p. 31, etc. Said highway there-

upon became, and was thereafter maintained as, a county highway under the control and jurisdiction of the Board of Chosen Freeholders of Somerset County.

3. The State Highway system was created and established by an act of the Legislature entitled "An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof" approved April 13, 1917, (which said act, and its several amendments and supplements, was revised by an act of the same title, (Revision of 1927) approved March 30, 1927).

4. The State Highway Commission was created and established by an act of the Legislature entitled "An Act to establish a State Highway Department and to define its powers and duties, etc.," approved March 13, 1917, and its various supplements and amendments.

5. Pursuant to authority of State Highway Department Act, siad State Highway Commission, on April 13, 1920, passed a resolution taking over the highway in question, including the crossing in question, and it thereupon became, and has ever since remained a state highway, and part of said State Highway System.

6. By an amendment to said act creating the State Highway System, approved April 6, 1921, said highway, including the crossing in question, was constituted Route No. 16 of said State Highway System. By said Revision of said Act, approved March 30, 1927, said highway, including the crossing in question, was incorporated in and became part of Route No. 31 of said State Highway System.

Answer.

7. Said acts conferred upon said State Highway Commission, full and exclusive control and direction of all projects and work on said highway, including the elimination of said crossing, and all power to do and perform whatever may be necessary or desirable to effectuate the objects described in said acts, including the elimination of said grade crossing.

8. From and after the passage of said resolution, it became under said Acts, and still is, the sole prerogative and duty of said State Highway Commission to take charge of and prosecute all work, including the elimination of said crossing, and all improvements, and maintenance thereof, in accordance with plans and specifications to be prepared by it, and at the sole expense of the State.

9. The Board of Public Utility Commissioners had and has no jurisdiction or authority to institute or conduct the proceedings in which said order was made or to make said order.

SIXTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 6, inclusive, of the fifth defense.

3. Said Acts repealed, in so far as the same related to the crossing in question, an act entitled "A supplement to an act entitled 'An Act concerning public utilities; to create a Board of Public Utilities Commissioners and to prescribe its duties and powers' approved April twenty-first, One thousand nine hundred and eleven," approved March 12, 1913.

Answer.

SEVENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

3. Pursuant to the authority conferred by said acts, said New Jersey State Highway Commission by resolution passed January 10, 1923, directed its engineering department to open negotiations with the defendant looking toward the elimination of the grade crossing in question. On July 11, 1923, the State Highway Engineer presented to said State Highway Commission a report thereon and informed it that the estimate cost of the entire structure would be $87,000.00 toward which the defendant was willing to contribute $40,000. Said State Highway Commission thereupon directed said State Highway Engineer to make a thorough investigation of the matter of the elimination of said crossing and present a report for consideration at a subsequent meeting of said Highway Commission. On March 11, 1924, said State Highway Engineer presented for consideration of said Commission alternate plans for the elimination of said crossing and recommended the adoption of a plan known as Plan "C" at a total estimated cost of $109,024.00, involving a structure with a center pier in the highway leaving 18′ of roadway on each side of the pier; the defendant to share in the cost of this improvement to the extent of $40,000.00. Thereupon said State Highway Commission, by a vote of a majority of all its members adopted the following motion:

"On motion of Mr. Kidde, seconded by Mr. Jelin, the State Highway Commission

approved Plan 'C' for the elimination of Lehigh Valley Railroad crossing at South Somerville (which is the crossing in question) and directed that this elimination be proceeded with and that $40,000.00 be accepted from Lehigh Valley Railroad Company as its proportionate share of the cost."

A blue print copy of Plan "C" is annexed hereto as Exhibit "G".

4. Said plan provided: for the acquisition of land therefor, and the relocation and reconstruction of State Highway Route No. 16 from a point thereon about 900 feet north, to a point thereon about 1200 south, of the railroad, and crossing under the railroad at a point about 400 feet east of the existing crossing of said highway; the construction of an undercrossing, at an angle of 54 degrees, forty feet wide between the face of the abutments, with a vertical clearance of 14 feet and approaches with grades of 3.39 per cent on the north, and 1.1 per cent. on the south, side of the railroad; the construction of a 2-span concrete slab bridge 70 feet long measured along the center of the railroad and 75 feet long measured along the center of the highway, with no girders projecting above the rails of the railroad, with two roadways each 18 feet wide, separated by a center pier 4 feet wide.

5. The cost of Plan "C", as estimated by the State Highway Commission is $109,024., including the cost of land necessary for the relocation of State Highway Route No. 16 and for consequential damages, to other lands affected but not taken therefor, and for the abandonment of the old location of said Route No. 16.

6. In conjunction with Plan "C", it was proposed by defendant to petition the Township

Answer.

Committee of the Township of Hillsboro, the municipality having jurisdiction thereover (which had consented to do so) to close the grade crossing of a road known as Camp Lane, located about 1400 feet east of the present grade crossing on State Highway No. 16 and construct a new permanent Township Road about 900 feet long and 40 feet wide along the southerly side of the railroad to connect Camp Lane with the relocated State Highway Route No. 16.

7. The cost of closing Camp Lane Crossing and the construction of said connecting road, as estimated by the defendant's engineers, is $7,660.23 including the cost of land to be taken therefor, and for consequential damages to other lands affected but not taken therefor.

8. At the request of the State Highway Commission the defendant prepared a contract in writing covering the work of eliminating said crossing in accordance with Plan "C". All the terms and conditions of said contract were duly approved by the State Highway Commission and by defendant. A copy of said contract, in the form in which it was so approved is annexed hereto as Exhibit "H". (The plan described in said contract is the same plan annexed hereto as Exhibit "G").

9. Said contract provides, among other things, that the defendant would prepare the necessary general and detail plans for the bridge, and its abutment and centre pier, to carry its tracks across the depressed highway; that the State would approve the same by and through its highway engineer; that the defendant would make the necessary excavations for the substructure of abutments and piers of the bridge over the pro-

posed undercrossing in accordance with said plans and provide supports and false work for the support of the tracks during construction; that the defendant would construct the bridge, substructure and super structure; that the State would acquire the necessary right of way for the relocated highway, do all grading and paving of the new highway, provide the necessary drainage, provide all safety devices and other means of protection, including fences, construct steps and ramp from the depressed highway to the defendant's Royce Valley Station, grade the driveways to said station and pave them with waterbound macadam, vacate or cause to be vacated the abandoned portion of highway Route No. 16, convey or cause to be conveyed to the defendant by warranty deed a certain portion of the abandoned highway across the railroad right of way, pay and settle all claims for direct and consequential damages to property and do other things therein mentioned necessary to the abandonment of the existing grade crossing and to the relocation and construction of the new portion of State Highway Route No. 16; that the defendant would after completion, maintain the entire structure of the railroad bridge and the steps, ramp and driveways leading to its station; all other portions and work to be maintained by the State; that the defendant would contribute toward the cost of the entire project a sum not exceeding $40,000.00; all of the remainder of the cost to be paid by the State; that the State would remove all buildings and obstructions in the line of the new highway; that the defendant, at its own expense and in conjunction with the local authorities having jurisdiction over Camp Lane, may abandon and close Camp Lane Crossing and divert said road,

along the South side of the railroad to connect with the relocated State Highway Route No. 16.

10. Pursuant to said resolution and contract, defendant prepared detailed plans and specifications at an expense of $2,800.00, which said plans and specifications were officially approved by the State Highway Commission and signed on its behalf and by its authority by its State Highway Engineer and Bridge Engineer, and signed on behalf and by the authority of the defendant by its Chief Engineer and Bridge Engineer, and defendant began the actual work of eliminating said crossing in accordance with Plan "C" and expended in that behalf $2,194.13 before work thereon was discontinued at the request of the State Highway Commission.

11. Said order of the Board impairs the obligation of said contract, in violation of Article 1, Section X, paragraph 1, of the Constitution of the United States.

EIGHTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

3. It repeats paragraphs 3 to 10, inclusive, of the seventh defense.

4. Said order of the Board impairs the obligation of said contract in violation of Article IV, Section VII, of the Constitution of the State of New Jersey.

NINTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first count.

Answer.

2. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

3. It repeats paragraphs 3 to 10, inclusive, of the seventh defense.

4. At the hearing before the Board defendant introduced in evidence and offered testimony in support of the adoption by said Board of Plan "C", as approved and adopted by said State Highway Commission.

5. At said hearings defendant presented an estimate of the cost of the enlargement of Plan "C" so as to provide an undercrossing 66 feet wide between the face of the abutments with two 20-foot roadways, separated by a centre pier, and two side-walk spaces each having a clear width of 9 feet, for consideration of the board in case it should insist upon sidewalk spaces and wider roadways.

6. Said plan provided for a good and sufficient bridge or passageway under said railroad, of suitable width and character to conform to the locality in which the same is situated; a safe, adequate and proper undercrossing which would fulfill the duty of the defendant in all respects according to law, and which is entirely feasible and practicable, and sufficient to comply with all the requirements of public safety, necessity and convenience, and of the traffic on said highway.

7. Said plan provides a method of eliminating the grade crossings in question which, in every respect of width, grade, curvature, visibility, safety, convenience, design, type and character of roadway and undercrossing, and economy of construction, operation and maintenance, conforms with engineering and operating standards

and good practice of the defendant and other railroads and of State Highway Commissions, and public regulatory Boards or Commissions having jurisdiction over the elimination of grade crossings, throughout the United States.

8. The cost of said plan, as so enlarged, to provide two roadways of the same width as, and two sidewalk spaces each of a clear width 6 inches wider than, the Board's plan including the closing of Camp Lane crossing and the construction of said connecting road, and including the cost of lands necessary to be acquired therefor, and damages to other lands affected but not taken therefor, is $205,184.70, as compared with the cost of the Board's plan of $324,400, exclusive of the cost of lands necessary to be acquired therefor, and damages to other lands affected but not taken therefor; or a difference of $119,-215.30, plus the cost of 64,070 square feet of private land necessary to be taken for highway purposes under the Board's plan, and damages to other lands affected but not taken thereby.

9. The action of said Board in refusing to adopt Plan "C" either as presented or as enlarged, and in adopting the plan annexed to its said order, was arbitrary, capricious and unreasonable and constituted an unlawful exercise of the police power of the State, and deprives defendant of its property without due process of law, in volation of Article XIV, Section I, of the Constitution of the United States.

TENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

Answer.

3. Said order deprives defendant of its property without due process of law, in violation of Article XIV, Section I of the Constitution of the United States.

ELEVENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 9, inclusive, of the fifth defense.

3. Said order deprives defendant of its property without due process of law, in violation of Article XIV, Section I, of the Constitution of the United States.

TWELFTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 3 to 10, inclusive, of the seventh defense.

3. Said order deprives defendant of its property without due process of law, in violation of Article XIV, Section I, of the Constitution of the United States.

THIRTEENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. Said order takes the property of defendant for public use without just compensation, in violation of Article 1, paragraph 16, of the Constitution of the State of New Jersey.

Answer.

FOURTEENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 9, inclusive, of the fifth defense.

3. Said order takes the property of defendant for public use without just compensation, in violation of Article I, paragraph 16, of the Constitution of the State of New Jersey.

FIFTEENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 3 to 10, inclusive, of the seventh defense.

3. Said order takes the property of defendant for public use without just compensation, in violation of Article I, paragraph 16, of the Constitution of the State of New Jersey.

SIXTEENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 4 to 9, inclusive, of the ninth defense.

3. Said order takes the property of defendant for public use without just compensation, in violation of Article I, paragraph 16, of the Constitution of the State of New Jersey.

SEVENTEENTH DEFENSE.

1. It repeats paragraphs 1 to 11, inclusive, of the first defense.

Answer.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. Said order takes the property of the defendant for the benefit of Lehigh Valley Railroad Company of New Jersey, contrary to law.

EIGHTEENTH DEFENSE.

1. It repeats paragraphs 1 to 11, inclusive, of the first defense.

2. Said Act in so far as it purports to authorize a penalty of one hundred dollars per day for failure to comply with said order, imposes excessive penalties upon the defendant and deprives it of the equal protection of the laws, in violation of Article XIV of the Constitution of the United States.

NINETEENTH DEFENSE.

1. It repeats paragraphs 1 to 11, inclusive, of the first defense.

2. Said Act, in so far as it purports to authorize a penalty of one hundred dollars per day for failure to comply with said order, imposes excessive fines upon the defendant, in violation of Artice I, paragraph 15, of the Constitution of the State of New Jersey.

TWENTIETH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. Said order denies to defendant the equal protection of the laws, in violation of Article XIV of the Constitution of the United States.

Answer.

TWENTY-FIRST DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 9, inclusive, of the fifth defense.

3. Said order denies to defendant the equal protection of the laws, in violation of Article XIV of the Constitution of the United States.

TWENTY-SECOND DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 3 to 10, inclusive, of the seventh defense.

3. Said order denies to defendant the equal protection of the laws, in violation of Article XIV of the Constitution of the United States.

TWENTY-THIRD DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 4 to 9, inclusive, of the ninth defense.

3. Said order denies to defendant the equal protection of the laws, in violation of Article XIV of the Constitution of the United States.

TWENTY-FOURTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

Answer.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

6. Said order requires defendant to make unreasonable expenditures for structures and maintenance, in violation of Article I, Section VIII, paragraph 3, of the Constitution of the United States.

TWENTY-FIFTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

6. Said order requires defendant to make unreasonable expenditures for structures and maintenance, in violation of Article VI, Section II, of the Constitution of the United States.

TWENTY-SIXTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

Answer.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

6. Said order requires defendant to make unreasonable expenditures for structures and maintenance, in violation of Section 15a of said Act to Regulate Commerce.

TWENTY-SEVENTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

6. By Section 15a of said Act to Regulate Commerce, as amended by Section 422, Transportation Act, 1920, the Interstate Commerce Commission was directed to initiate, modify, establish and adjust such rates so that the carriers, including the defendant, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such

carriers, including defendant, held for and used in the service of transportation, and from time to time, to determine and make public what percentage of such aggregate property value constitutes a fair return thereon. Said act directed said Commission, for the two years beginning March 1, 1920, to take, as such fair return a sum equal to 5½ per cent of such aggregate value, and conferred discretion to add thereto a sum not exceeding one-half of one per cent for improvements, betterments, or equipment chargeable to capital account.

7. Said Commission thereupon instituted a proceeding, held hearings and made an order dividing the country into rate groups (one, known as the Eastern Group, includes defendant's railroad) and fixing the prescribing rates intended, under the conditions prescribed in said Act, to earn an aggregate annual net railway operating income of 6 per cent. Said rates continued in force until May 16, 1922, when said Commission after further hearings, made an order changing said rate of return to 5¾ per cent, and fixing and prescribing rates intended to balance the cost of honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment against reasonable rates, in such a manner as to leave to the defendant a margin of net railway operating income equal to 5¾ per cent on the aggregate value of its property, held for and used in the service of transportation.

Answer.

8. Said rates have yielded to defendant net railway operating income as follows:

Year	Rate of Increase
1923	2.62 per cent
1924	4.42 " "
1925	4.83 " "
1926	5.15 " "
1927	3.60 " "
1928 (11 mos. actual and Dec. estimated)	4.46 " "

9. Although defendant's business has been conducted under honest, efficient and economical management, it has been unable to earn, under said rates, the amount of said fair return fixed and determined by said Commission.

10. The plan ordered by the Board is unreasonable and excessive in cost of execution; it requires performance by defendant in excess of the reasonable requirements of the situation, and in excess of the agreement made by defendant with the State Highway Commission; it requires a wasteful arbitrary, unreasonable and extravagant expenditure which without increase in rates, will tend to further reduce defendant's net railway operating income and deprive it of the fair return prescribed by law.

11. Said order creates, constitutes and imposes an unreasonable, arbitrary requirement or burden upon, interference with, impediment of or discrimination against, the interstate commerce of defendant, and otherwise impairs the usefulness of its facilities therefor, in violation of Article I, Section VIII, paragraph 3, of the Constitution of the United States.

Answer.

TWENTY-EIGHTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

6. It repeats paragraphs 6 to 10, inclusive, of the twenty-seventh defense.

7. Said order creates, constitutes and imposes an unreasonable, arbitrary requirement or burden upon, interference with, impediment of, or discrimination against, the interstate commerce of defendant, and otherwise impairs the usefulness of its facilities therefor, in violation of Article VI, Section II, of the Constitution of the United States.

TWENTY-NINTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. It repeats paragraphs 3 to 9, inclusive, of the seventh defense.

5. It repeats paragraphs 4 to 8, inclusive, of the ninth defense.

Answer.

6. It repeats paragraphs 6 to 10, inclusive, of the twenty-seventh defense.

7. Said order creates, constitutes and imposes an unreasonable, arbitrary requirement or burden upon, interference with, impediment of, or discrimination against, the interstate commerce of defendant, and otherwise impairs the usefulness of its facilities therefor, in violation of Section 13 of said Act to Regulate Commerce, as amended.

THIRTIETH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraph 4 of the third defense.

3. Said order, in so far as it purports to require the defendant to close Camp Lane Crossing and construct said connecting highway along the south side of the railroad between Camp Lane and Highway Route No. 16, was made without any proceedings having been instituted therefor and without any hearing having been held thereon and without any evidence to support reasonably said order.

4. Said order in so far as it purports to require the defendant to close Camp Lane and to construct said connecting highway along the southerly side of the railroad from Camp Lane to Highway Route No. 16 was purely arbitrary, capricious and unreasonable and constitutes an unlawful exercise of the police power of the State.

5. Said order deprived the defendant of its property without due process of law in violation of Article XIV of the Constitution of the United States.

Answer.

THIRTY-FIRST DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraph 4 of the third defense.

3. It repeats paragraphs 3 and 4 of the thirtieth defense.

4. Said order was without the jurisdiction of the Board.

5. It repeats paragraph 5 of the thirty-sixth defense.

THIRTY-SECOND DEFENSE.

It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraph 4 of the third defense.

3. Said order in so far as it purports to direct the defendant to alter the grade crossing on said Highway Route No. 16, was made without any evidence to support reasonably the same.

4. It repeats paragraphs 4 and 5 of the thirtieth defense.

THIRTY-THIRD DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraph 4 of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. Said order in so far as it requires the defendant to provide sidewalk spaces on each side of said State Highway Route No. 16 was made

Answer.

without any evidence to support reasonably the same.

5. It repeats paragraphs 4 and 5 of the thirtieth defense.

THIRTY-FOURTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraph 4 of the third defense.

3. It repeats paragraphs 2 to 8, inclusive, of the fifth defense.

4. Said order, in so far as it purports to require the defendant to increase the width of State Highway Route No. 16 at the place of said crossing thereon, from 33 feet to 66 feet, was made without any evidence to support reasonably the same.

5. It repeats paragraphs 4 and 5 of the thirtieth defense.

THIRTY-FIFTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 4, inclusive, of the third defense.

3. Said railroad at the place of said crossings was constructed and is operated under and by virtue of the provisions of a special act of the Legislature creating the Easton & Amboy Railroad Company, (predecessor in interest of the defendant and of said Lehigh Valley Railroad Company of New Jersey); said special act being known as Chapter 450 of the Laws of 1873, (p.

1017), and pursuant to the provisions of a special act of the Legislature creating the Bound Brook and Easton Railroad Company, known as Chapter 110 Laws of 1872 (p. 314).

4. Said railroad was constructed before April 2nd, 1873.

5. Said order enlarges the duty imposed upon the defendant by said special acts, respectively, and was therefore contrary to law and void.

THIRTY-SIXTH DEFENSE.

1. The defendant will object that this suit is improperly brought in that the summons is issued in the name of the Board of Public Utility Commissions and is signed and endorsed with the name of its counsel, contrary to the statute in such case made and provided.

THIRTY-SEVENTH DEFENSE.

1. The defendant will object that this suit is improperly brought in that it is brought by the Board of Public Utility Commissioners in the name and for the use of the state, and by the counsel of said Board, contrary to the statute in such case made and provided.

THIRTY-EIGHTH DEFENSE.

1. The defendant will object that this suit is improperly brought in that the plaintiff failed to endorse upon the process to compel the appearance of the defendant the name of the party who prosecutes this suit and the title of the statute upon which the action is founded, contrary to the statute in such case made and provided.

HOBART & MINARD,
Attorneys for Defendant.

EXHIBIT "B"

ANNEXED TO ANSWER.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Lehigh Valley Railroad Company, a corporation, *Plaintiff,* *vs.* Board of Public Utility Commissioners, Joseph F. Autenrieth, Frederick W. Gnichtel, Charles Browne, as members of and constituting the commission designated and known as the Board of Public Utility Commissioners; Edward L. Katzenbach, Attorney General, and Francis L. Bergen, Prosecutor of the Pleas of Somerset County, all of the State of New Jersey, *Defendants.*	*In Equity.* *On Bill of Complaint.*

It appears from the verified bill of complaint and the affidavits annexed thereto, verified May 31, 1927, duly filed on this 1st day of June, 1927, that the plaintiff is threatened with immediate and irreparable loss or damage if the defendants, or their successors in office, employees, agents or servants, or any of them, are allowed to compel the plaintiff to comply with the order

of the Board of Public Utility Commissioners made and issued April 26, 1927, as therein required, or to impose upon the plaintiff, for failure to comply therewith, the penalties, fines, suits and prosecutions in said bill of complaint and affidavit set forth, and that there is not sufficient time for the usual notice to be given because the plaintiff needs immediate relief; and is therefore entitled to a temporary restraining order restraining the defendants as hereinafter set forth, on motion of Hobart & Minard, solicitors for plaintiff, it is on this first day of June, 1927,

ORDERED that the defendants appear before this court at its court room, in the Post Office Building, in the City of Trenton, New Jersey, on the 10th day of June, 1927, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, then and there to show cause why the preliminary injunction prayed for should not issue.

And it appearing that there is danger of immediate and irreparable loss or damage to the plaintiff before the hearing of said application for the preliminary writ of injunction, unless the said defendants, pending such hearing are restrained as hereinafter set forth; now, therefore, it is

ORDERED that the said defendants, the Board of Public Utility Commissioners, Joseph F. Autenrieth, Frederick W. Gnichtel and Charles Browne, as members of and constituting the Commission designated and known as the Board of Public Utility Commissioners; Edward L. Katzenbach, as Attorney General of the State of New Jersey, and Francis L. Bergen, Prosecutor of the Pleas of Somerset County, all of the State of New Jersey, and each of them and their successors, agents, servants and attorneys, and all persons acting by or under their authority, sugges-

tion or direction, be and they are hereby specifically restrained and enjoined from instituting any action of debt in the name of the State of New Jersey or otherwise, to recover any penalties for the violation of said order or from instituting any proceedings by mandamus or injunction to compel specific performance of said order, or from instituting any proceedings for the prosecution of the defendant, its officers, agents, or employees, for failure or omission to do any act or thing required to be done by or under said order, or from compelling or coercing the plaintiff, its officers, agents or employees to begin the actual work of the elimination of said crossing in conformity with the requirements of said order, until the further order of this court; it is further

ORDERED that a copy of this order, together with a copy of the bill of complaint and affidavits attached thereto (certified by the solicitors of plaintiff), be served upon the defendants, and each of them on or before the third day of June, 1927; and it is further

ORDERED that at the time and place of the hearing of the application for preliminary injunction, the plaintiff have leave to present additional affidavits which shall be served upon the defendants at least one day prior to the date of hearing; and it is further

ORDERED that the defendants, or any of them, have leave to read answering affidavits on the return day of this rule, provided same are served upon the solicitors of the plaintiff at least twenty-four hours prior to the time of said return.

WM. N. RUNYON,
United States District Judge.

Answer—Exhibit C.

EXHIBIT "C"

ANNEXED TO ANSWER

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Lehigh Valley Railroad Company *vs.* Board of Public Utility Commissioners, *et als.*	*E. 2697.*

This cause having come on before a Statutory Court as provided by statute on an order to show cause and restraining order duly issued, and counsel for the respective parties having been heard and the Court having considered the matter and filed its memorandum, it is on this Tenth day of August, 1927,

ORDERED that said order to show cause and restraining order be vacated and the motion for Interlocutory Injunction denied.

And the complainant having filed a Petition for Rehearing and the defendants having filed an answer thereto, and the matter having been considered by the court, it is ordered that said Petition for Rehearing be and it hereby is denied.

WM. N. RUNYON,
Judge.

Answer—Exhibit D.

EXHIBIT "D"

ANNEXED TO ANSWER.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Lehigh Valley Railroad Company, a corporation, *Plaintiff,* *vs.* Board of Public Utility Commissioners, Joseph F. Autenrieth, Frederick W. Gnichtel, Charles Browne, as members of and constituting the commission designated and known as the Board of Public Utility Commissioners; Edward L. Katzenbach, Attorney General and Francis L. Bergen, Prosecutor of the Pleas of Somerset County, all of the State of New Jersey, *Defendants.*	*In Equity.* *Order Allowing Appeal From Final Decree and Supersedeas.*

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to Lehigh Valley Railroad Company, petitioner herein, and plaintiff in this suit, from the final decree entered January 18, 1928, in the above entitled cause and that said appeal should be returnable to the Supreme Court of the United States, and that, upon the execution of a bond in the penalty of Five Hundred Dollars ($500.00)

said appeal shall operate as a supersedeas of said final decree and shall suspend, until the final decree herein, the enforcement of a certain order of the Board of Public Utility Commissioners of the State of New Jersey, made April 26, 1927, directing the plaintiff to alter the crossing known as South Bridge street, or State Highway Route No. 16, by substituting therefore a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at the Camp Lane and construct a connecting highway therefrom to said State Highway Route No. 16 in the Township of Hillsborough, County of Somerset, State of New Jersey, and that a transcript of the record, including all the exhibits offered in evidence, by either party, be filed in the Supreme Court of the United States, according to law, as prayed for.

J. WARREN DAVIS,
United States Circuit Judge.

J. L. BODINE,
WM. N. RUNYON,
United States District Judges.

Signed and entered January 18, 1928.

EXHIBIT "E."

ANNEXED TO ANSWER.

UNITED STATES OF AMERICA, *ss*

The President of the United States of America,
To the Honorable the Judges of the
District Court of the United States for
(SEAL) the District of New Jersey.
GREETING:

WHEREAS, lately in the District Court of the United States for the District of before you, or some of you, in a cause between Lehigh Valley Railroad Company, plaintiff, and Board of Public Utility Commissioners, Joseph F. Autenreith, Frederick W. Gnichtel, Charles Brown, as Members, etc. *et al.*, defendants, wherein the decree of the said District Court, entered in said cause on the 18th day of January, A. D. 1928, is in the following words, viz:

"This cause came on to be heard at this term before a Statutory Court as provided by statute and was argued by counsel and thereupon, upon consideration thereof, it is on this 18th day of January, 1928,

Ordered that the motion to strike out the affirmative defense set up in Part II of the answer be and the same is hereby denied, and it is further

Ordered, adjudged and decreed that the bill of complaint be and the same is hereby dismissed.

J. Warren Davis, J. L. Bodine, Wm. N. Runyon,

Judges."

as by the inspection of the transcript of the record of the said District Court, which was

brought into the SUPREME COURT OF THE UNITED STATES by virtue of an appeal agreeably to the act of Congree, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand Nine hundred and twenty-eight, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby affirmed with costs; and that the said defendants, Board of Public Utility Commissioners; Joseph F. Autenreith, Frederick W. Gnichtel, *et al.*, etc., *et al.*, recover against the said plaintiff for their costs herein expended and have execution therefor.

November 19, 1928.

You, therefore, are hereby commanded that such execution and proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the twentieth day of December, in the year of our Lord one thousand nine hundred and twenty eight.

(Signed)

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of
the United States.

(SEAL) A true copy.

Test: CHARLES ELMORE CROPLEY
Clerk of the Supreme Court
of the United States.

EXHIBIT "F."

ANNEXED TO ANSWER.

THIS INDENTURE, made in duplicate this Seventeenth day of June, A. D., nineteen hundred and fourteen, between the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey (hereinafter called the lessor), of the first part, and the LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania (hereinafter called the lessee), of the second part, WITNESSETH:

THAT the Lessor, for and in consideration of the covenants of the Lessee to be by it kept and performed as hereinafter contained, doth hereby let and demise to the Lessee, its successors and assigns, for the term of ninety-nine years from July 1st, 1914, all of its railroad in the State of New Jersey, extending from Phillipsburg to Perth Amboy and to Jersey City, with all

branches, laterals, sidings and appurtenances whatsoever, together with the right to maintain and operate the same, and to receive all lawful tolls and revenue therefrom arising.

And the said parties hereto do hereby covenant and agree, each for itself, its successors and assigns, with the other, its successors and assigns, as follows, to wit:

FIRST: The Lessee shall assume and hereby agrees to pay during the continuance of this lease the entire cost of maintaining and operating the said railroad and apputenances, together with interest on any bonds or other obligations of the lessor now outstanding or that may, subsequent to the date hereof, be lawfully issued or entered into.

SECOND: The Lessee shall and will at its own proper cost and charge well and (within ninety days after they shall respectively become payable) faithfully bear, pay and discharge all taxes, charges and assessments of every kind and nature whatsoever, ordinary and extraordinary, which, during the term hereby demised, shall be lawfully assessed or imposed upon the said premises or any part thereof, or upon the business there carried on, or the receipts derived therefrom.

THIRD: It is covenanted and agreed by the parties hereto that the said Lessee may make such additions and betterments to the demised premises as it may deem advantageous, and that the Lessor shall and will when and as requested by the Lessee reimburse the Lessee for the cost of such additions and betterments, but in case of such reimbursements the Lessor shall be chargeable with lawful interest semi-annually upon the amount received. Such reimbursement may, at

the option of the Lessor, be made by means of its debentures or other obligations, provided the same shall be authorized and approved in accordance with the laws of the State of New Jersey by the Board of Public Utility Commissioners of the State of New Jersey. Such debentures or other obligations shall, if required by the Lessee, be secured by mortgage on the property and franchises of the Lessor, provided said Board of Public Utility Commissioners shall, in accordance with the laws of the State of New Jersey, authorize and approve the giving of any mortgage so required.

FOURTH: The Lessor shall and will during the term hereby demised maintain its corporate existence, and at all times and from time to time during the said term when requested by the Lessee, its successors or assigns shall and will put in force and exercise every corporate power and do each an every corporate act which the Lessor might now or may at any time hereafter lawfully put in force and exercise, to enable the Lessee to use and operate, manage and maintain the demised premises, and to make any extension, addition or betterment thereto that the Lessee may desire, the Lessee hereby agreeing to idemnify and save harmless the Lessor against any loss, damage or liability for such exercise of corporate powers or performance of corporate acts, when exercised or done at the request of and for the benefit of the Lessee.

In Witness Whereof, said parties have caused their common seals to be hereto affixed, and

these presents to be duly executed the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY
OF NEW JERSEY,

By:
E. B. THOMAS,
President.

Attest:

D. G. BAIRD,
Secretary.

LEHIGH VALLEY RAILROAD COMPANY,

By:
E. B. THOMAS,
President.

Attest:

D. G. BAIRD,
Secretary.

Approved as to form

E. H. BOLES,
Gen'l Solicitor.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.*

BE IT REMEMBERED, That on this 17th day of June, A. D. 1914, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in Pennsylvania, personally appeared D. G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, party to the

foregoing indenture; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate Seal of the said Company; that the same was so affixed thereto, and the said indenture signed and delivered by E. B. Thomas, who was, at the date and execution thereof, the President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

D. G. BAIRD.

Subscribed and sworn to before me, the day and year last above written.

J. W. ROBBINS,
A Foreign Commissioner of Deeds for New Jersey in Pennsylvania.

(SEAL)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.*

On the 17th day of June, A. D. 1914, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in Pennsylvania, and residing in Philadelphia, Pennsylvania, personally came D. G. Baird, Secretary of the within-named corporation LEHIGH VALLEY RAILROAD COMPANY, who, being duly sworn according to law, deposes and says, that he was personally present at the execution of the above-written Indenture and saw the common or corporate seal of the said Company duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of the said corporation, and that the

foregoing Indenture was duly signed, sealed and delivered, by and as and for the act and deed of the said corporation, for the uses and purposes therein mentioned, and by order and authority of the said corporation, and that the names of E. G. Thomas, President of said corporation, and of this deponent, subscribed to said Indenture in attestation of the due execution and delivery thereof, are in the proper and respective handwritings of said E. B. Thomas and of this deponent.

D. G. BAIRD.

Sworn and subscribed before me
the day and year last above
written.

WITNESS my hand and seal.

J. W. ROBBINS,
A Foreign Commissioner of Deeds for
New Jersey in Pennsylvania.
(SEAL)

Answer—Exhibit F.

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

In the matter of the application of the Lehigh Valley Railroad Company of New Jersey for approval of lease of its railroad to the Lehigh Valley Railroad Company, a corporation of the Commonwealth of Pennsylvania.	*Certificate.*

Application having been made to the Board of Public Utility Commissioners by the Lehigh Valley Railroad Company of New Jersey by petition in writing for approval of the lease of its railroad to the Lehigh Valley Railroad Company, a corporation of the Commonwealth of Pennsylvania, referred to in the report of the Board of Public Utility Commissioners dated June 2nd, 1914, and the Lehigh Valley Railroad Company of New Jersey having complied with the condition set forth in said report, requiring the filing of revised lease in complete form with proof of approval thereof by the stockholders as required by statute,

The Board of Public Utility Commissioners, no reason to the contrary appearing,

Answer—Exhibit F.

HEREBY APPROVES the execution of said lease.

Dated June 22d, 1914.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

BY

(Signed) RALPH W. E. DONGES,
President.

(SEAL)

Attest:

(Signed) ALFRED N. BARBER,
Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of Certificate adopted by the Board of Public Utility Commissioners at its meeting held on Friday, June 22nd, 1914, and recorded in the Minutes of said meeting.

ALFRED N. BARBER,
Secretary.

(SEAL)

EXHIBIT "H."

ANNEXED TO ANSWER.

BuT Sept. 19, 1924 16488.7

THIS AGREEMENT made in duplicate, this day of One thousand nine hundred and twenty-four (1924) by and between the STATE OF NEW JERSEY, acting by and through its State Highway Commission (hereinafter called the State) of the first part, and LEHIGH VALLEY RAILROAD COMPANY, a corporation of Pennsylvania, for itself and as lessee of Lehigh Valley Railroad Company of New Jersey, (hereinafter called the Railroad Company) of the second part,

WITNESSETH, THAT,

WHEREAS, a public highway known as State Highway Route No. 16, now crosses the tracks and right of way of the Railroad Company at grade at a point near Royce Valley Station, New Jersey, which crossing is indicated by the letter "A" on the map or plan hereto attached and made a part hereof, entitled:

"L. V. R. R. N. J. & L. DIV.
PROPOSED GRADE CROSSING
ELIMINATION AT SOUTH SOMERVILLE
SCHEME "C" CHANGED LOCATION
OF HIGHWAY
SCALE 1" = 50' HOR.
10' VERT. AUG. 15, 1924.
OFFICE OF CHIEF ENGINEER
NEW YORK CITY
W. H. R. 192."

AND WHEREAS, the State is about to reconstruct and improve said highway and in that connection desires to eliminate the aforesaid

grade crossing at point "A," by diverting said highway through a curve to the east of its present location and constructing the same under and across the right of way and tracks of the Railroad Company at point "B" as shown on said map.

And Whereas, the parties hereto have agreed upon the details of construction and the division of the work and expense incident thereto.

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree to and with each other as follows:

First: The Railroad Company grants to the State the right to construct, maintain and use a highway forty (40) feet in width, across and under the tracks and right of way of the Railroad Company at the new location designated as "B" on the aforesaid map, and agrees to dedicate to the State, for such public highway purposes, a strip of land forty (40) feet in width, between the Railroad Company's northerly right of way line at said new point of crossing, "B," and the intersection of the new highway with the existing highway at the point marked "C" on said map.

Second: The Railroad Company shall prepare the necessary general and detail plans for the bridge, and its abutments and center pier, to carry its tracks over and across the new depressed highway at said point "B," and the State agrees to approve the same, by through its highway engineer, when submitted by the Railroad Company.

Third: The Railroad Company, subject to clause seventh, will do the excavating under its tracks and within its right of way lines, (and also the excavating outside of said right of way

lines to the extent necessary to accommodate the substructure of the bridge abutments and center pier therefor), necessary to provide an underpass for said highway beneath said tracks with a clearance of at least fourteen feet beneath the lowest portion of said bridge and the finished surface of the new highway, all in accordance with the aforesaid plans. All temporary supports for tracks, and false work necessary to protect said tracks, during the excavation of the underpass and the construction of the new railroad bridge thereover, shall be constructed and maintained by the Railroad Company in a manner satisfactory to it.

Fourth: The bridge to carry the Railroad Company's tracks over and across said depressed highway shall be a re-enforced concrete, four-track, ballasted bridge with the necessary sub-structure and super-structure, all in accordance with the detail plans to be approved by the State, as aforesaid. Said bridge shall be constructed by and at the expense of the Railroad Company, subject to the provisions of Clause "Seventh."

Fifth: The State agrees

(a) to acquire the necessary right of way for said new highway south of the new point of crossing;

(b) to do all necessary grading and paving of the new highway under the said railroad bridge and elsewhere;

(c) to provide all necessary drainage facilities therefor;

(d) to provide all safety devices and other means of protection, including fences now or hereafter required;

(e) to construct the steps and ramp, shown on plans leading from said depressed

highway to the Railroad Company's Royce Valley station;

(f) to grade the driveways shown on said plans, from said highway to said station and surface the same with water bound macadam;

(g) to vacate or cause to be vacated, by proper legal proceedings, all that portion of the existing highway between points "X" and "D," on the aforesaid map;

(h) to convey or cause to be conveyed to the Railroad Company, by warranty deed with full covenants, that portion of said vacated old highway shown between said point "X" and the southerly right of way line of the Railroad Company at the old Crossing "A";

(i) to pay and settle any and all claims for direct and consequential damages to any property by reason of any of the work herein mentioned, and

(j) generally to do and perform all and whatever additional act or acts, services and work including any legal proceedings, and furnish all necessary materials incident to and necessary for the final completion, in all details, of the work of eliminating the existing grade crossing at point "A" and the construction of the new highway under the railroad tracks and right of way at said point "B," as herein contemplated and as shown by the plans hereto attached and referred to herein.

Sixth: Upon the completion, as herein provided, of all of the work referred to above, the

Railroad Company agrees at its own cost, to maintain the entire structure of the bridge carrying its tracks across the new highway and also to maintain the aforesaid steps, ramp and driveways leading to its Royce Valley Station. All other parts and portions of the work herein provided for, including but not limited to the highway, grading, paving, drainage, protection devices and fences, shall be maintained by the State as now or hereafter necessary.

Seventh: It is understood and agreed that the total estimated cost of constructing the entire work hereinabove referred to is $109,025.00. The Railroad Company agrees to contribute in work and materials as herein provided, the total maximum sum of $40,000 toward the construction cost of said entire elimination work. In no event shall the Railroad Company assume to bear any cost or expense or, at its expense, perform any labor or furnish any materials, whatever incident to the construction of the aforesaid work, in excess of the said sum of $40,000, and if the cost of furnishing the materials and performing the construction work which the Railroad Company has agreed, as aforesaid, to furnish and perform shall exceed the said sum of $40,000, then and in that event the State agrees to reimburse and pay to the Railroad Company, monthly, upon receipt of bills therefor all and any such additional expenditures so incurred by the Railroad Company in the performance of its part of the work.

Eighth: All buildings and other obstructions in the line of the new highway, including the building located on the easterly portion thereof, shall be removed by the State.

Ninth: The work to be done by the respective parties shall be commenced within days after

the date of this agreement and prosecuted vigorously to completion, and each party agrees to perform and complete its portion of the work at such time and in such manner as will not endanger or otherwise interfere with the working, business or operations of the other party, and each party hereby indemnifies the other from and against all loss, damage and injury (including injury resulting in death) in any way incident to or growing out of the manner in which each party performs or fails to perform its duties under this agreement.

Tenth: It is understood and agreed that a certain road, known locally as Camp Lane Road crosses the tracks and right of way of the Railroad Company at grade at a point a short distance east of the new underpass herein provided for, and that the Railroad Company, in conjunction with the local authorities having jurisdiction over said Camp Lane Road, may abandon the said grade crossing and divert and reconstruct said Camp Lane Road so as to connect the same into and with the new state highway at some point south of the new underpass (B) herein described, in accordance with plans and specifications satisfactory to and approved by the parties hereto, as well as by the local authorities having jurisdiction over said Camp Lane crossing. The State shall not be required to assume and bear any part of the cost of vacating said Camp Lane grade crossing or constructing said connection thereof with the new state highway.

Any waiver at any time of the Railroad Company's rights as to anything herein contained shall not be deemed a waiver as to any breach of covenant or other matter subsequently occurring.

Answer—Exhibit H.

In Witness Whereof the State, under authority of a resolution duly adopted by the State Highway Commission on the day of 1924, has caused this agreement to be signed by its chairman and attested by its Secretary, and the Railroad Company has caused the same to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

STATE OF NEW JERSEY

BY:

Chairman, State Highway Commission.

Attest:

Secretary.

LEHIGH VALLEY RAILROAD COMPANY

BY:

President.

Attest:

Secretary.

Supplemental Answer.

SUPPLEMENTAL ANSWER.

The defendant by leave of the court first had and obtained, hereby supplements its answer filed herein, by adding thereto, at the end thereof, the following:

THIRTY-NINTH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 1 to 3, inclusive, of the second defense.

3. On January 10, 1929, the Board caused to be served upon the defendant a notice of an application to be made before this court on Tuesday, January 15, 1929, for a peremptory, or in the alternative, for an alternative writ of mandamus to compel the defendant forthwith or within such time as the court may fix, to begin actual work for the alteration of the grade crossings in question and complete the work to be done within one year thereafter, in compliance with said order. A copy of said notice and of the two affidavits annexed thereto, is hereto annexed as Exhibits "I", "J" and "K", respectively.

4. On January 16, 1929, defendant filed its answering affidavits and exhibits, a copy of which is annexed hereto as Exhibits "L", "M", "N" and "O", respectively.

5. Said application was argued before and submitted to this court, as case No. 232 of this court on the list of causes at the January Term, 1929. On January 31, 1929, said court filed its decision denying said application, and on February 4, 1929, said court entered its judgment accordingly. A copy of said decision and judgment

is annexed hereto as Exhibits "P" and "Q", respectively.

6. Said application, decision and judgment necessarily involved the following issues:

Argued and Submitted on behalf of the Board:

1. That it was not necessary for the Board to fix new dates for beginning and completing the work.

II. That the order omits no necessary party.

III. That by virtue of the decree of the District Court of the United States, the validity of the Board's order is *res judicata* as to the defendant. A copy of the brief submitted by the Board on the argument of said application before this court is annexed hereto as Exhibit "R."

Argued and Submitted on behalf of the Defendant:

I. The Relator (the Board) has no authority to make an application for mandamus in its own name and through its own counsel.

IV. The order omits a necessary party.

V. The defendant lacks power to perform.

VI. The order in its present form is impossible of performance because of expiration of time. A copy of the brief submitted by defendant on the argument of said application before this court, is annexed hereto as Exhibit "S".

7. Said application was a suit in a court of competent jurisdiction, in the same court, between the same parties or their privies, and involved the same subject matter, controversy and issues, as set forth in the second defense of defendant's answer filed in this action.

Supplemental Answer.

8. Said issues as set forth in said second defense, were thereby adjudged and determined against the plaintiff and in favor of the defendant, and said judgment constitutes a final judgment on the merits and is a complete and effectual bar to plaintiff's cause of action.

FORTIETH DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first defense.

2. It repeats paragraphs 2 to 7, inclusive, of the third defense.

3. It repeats paragraphs 3 to 6, inclusive, of the thirty-ninth defense.

4. Said application was a suit in a court of competent jurisdiction, in the same court, between the same parties or their privies, and involved the same subject matter, controversy and issues, as set forth in the third defense of defendant's answer filed in this action.

5. Said issues as set forth in said third defense, were thereby adjudged and determined against the plaintiff and in favor of the defendant, and said judgment constitutes a final judgment on the merits and is a complete and effectual bar to plaintiff's cause of action.

FORTY-FIRST DEFENSE.

1. It repeats paragraphs 1 to 4, inclusive, of the first count.

2. It repeats paragraphs 2 to 4, inclusive, of the third defense.

3. It repeats paragraphs 3 to 5, inclusive, of the fourth defense.

Supplemental Answer.

4. It repeats paragraphs 3 to 6, inclusive, of the thirty-ninth defense.

5. Said application was a suit in a court of competent jurisdiction, in the same court, between the same parties or their privies, and involved the same subject matter, controversy and issues, as set forth in the fourth defense of the defendant's answer filed in this action.

6. Said issues as set forth in said fourth defense, were thereby adjudged and determined against the plaintiff and in favor of the defendant, and said judgment constitutes a final judgment on the merits and is a complete and effectual bar to plaintiff's cause of action.

FORTY-SECOND DEFENSE.

1. It repeats paragraph 1 of the thirty-sixth defense.

2. It repeats paragraphs 3 to 6, inclusive, of the thirty-ninth defense.

3. Said application was a suit in a court of competent jurisdiction, in the same court, between the same parties or their privies, and involved the same subject matter, controversy and issues, as set forth in the thirty-sixth defense of defendant's answer filed in this action.

4. Said issues as set forth in said thirty-sixth defense, were thereby adjudged and determined against the plaintiff and in favor of the defendant, and said judgment constitutes a final judgment on the merits and is a complete and effectual bar to plaintiff's cause of action.

Supplemental Answer.

FORTY-THIRD DEFENSE.

1. It repeats paragraph 1 of the thirty-seventh defense.

2. It repeats paragraphs 3 to 6, inclusive, of the thirty-ninth defense.

3. Said application was a suit in a court of competent jurisdiction, in the same court, between the same parties or their privies, and involved the same subject matter, controversy and issues, as set forth in the thirty-seventh defense of defendant's answer filed in this action.

4. Said issues as set forth in said thirty-seventh defense, were thereby adjudged and determined against the plaintiff and in favor of the defendant, and said judgment constitutes a final judgment on the merits and is a complete and effectual bar to plaintiff's cause of action.

HOBART & MINARD,
Attorneys for Defendant.

February 12, 1929.

Supplemental Answer—Exhibit I.

EXHIBIT "I."

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Application for Mandamus.* *Notice.*

To The Lehigh Valley Railroad Company:

TAKE NOTICE that on behalf of the Board of Public Utility Commissioners of New Jersey, I shall make application to the New Jersey Supreme Court on Tuesday, January 15, 1929, at 10:30 o'clock in the forenoon or as soon thereafter as counsel may be heard for a peremptory writ of mandamus commanding that you forthwith or within such time as the Court may fix, begin the actual work required in the performance and execution of a certain order of the said board dated April 26, 1927, entitled "In the matter of proceeding under Chapter 57, P. L. 1913, relating to the crossing of the highway known as South Bridge street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County," and commanding further that you perform and fully comply with the directions and requirements of said order and complete all of the work required thereunder to be done within one year thereafter.

And Take Further Notice that I shall apply in the alternative for an alternative writ of mandamus.

On this application, I shall read the affidavits of Alfred N. Barber and Charles A. Mead hereto annexed.

Dated: January 10, 1929.

Respectfully yours,

JOHN O. BIGELOW,
Attorney for Board of Public Utility Commissioners of New Jersey.

EXHIBIT "J."

Annexed to Supplemental Answer.

NEW JERSEY SUPREME COURT.

Board of Public Utility Commissioners, *Relator,* *vs.* Lehigh Valley Railroad Company, *Defendant.*	*On Application for Mandamus.* *Affidavit.*

State of New Jersey, County of Mercer. } *ss.*

Alfred N. Barber, of full age, being duly sworn according to law, on his oath says: I am the Secretary of the Board of Public Utility Commissioners of New Jersey.

Valley Railroad Company (hereinafter called the Company), operated and still operates within this State a steam railroad for public use under privileges granted by the State of New Jersey. Said railroad and a certain public highway now or lately known as State Highway Route No. 16, at all times aforesaid crossed and still cross each other at the same level in the Township of Hillsborough, in the County of Somerset. Said railroad and a certain other public highway known as Camp Lane at all times aforesaid, crossed and still cross each other at the same level in said township a few hundred feet east of the first mentioned crossing.

2. The board, on said November 24, 1926, on its own motion, made an order instituting a proceeding under Chapter 57 of the Laws of 1913 relative to said crossing. A copy of said order is annexed hereto.

3. Due notice of said order and proceeding was given to the company and pursuant to said order and notice hearings were had before the board and the board on April 26, 1927, made, issued and filed its decision and order relative to said crossings whereby it ordered the company to alter said crossings according to the plan annexed to said order and to vacate the Camp Lane crossing and to subsitute for it and for the Route No. 16 crossing, a crossing not at the grade of the said highways, and the said board did thereby further order that the company begin the actual work required in the performance and execution of said order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of said order and complete all of the work required thereunder to be done within

one year thereafter or the first day of June, 1928. A copy of said order is annexd hereto.

4. A certified copy of said last mentioned order was duly served on the company within ten days after April 26, 1927.

5. On May 14, 1927, the company made application to the Honorable Charles W. Parker, a Justice of the Supreme Court, for a writ of certiorari to review the order of the board of April 26, 1927. Justice Parker having considered the application, denied it for the reasons set forth in his opinion filed about May 17, 1927, and reported in 137 Atl. Rep. 442.

6. On May 23, 1927, the company before Part II of the Supreme Court renewed its application for a writ of certiorari to review the said order of the board and the Court having considered the same, denied the application as appears from its order dated May 31, 1927 and entered June 6, 1927.

7. On June 1, 1927, the company filed its bill of complaint against the board and others, in the District Court of the United States for the District of New Jersey, praying among other things that the board might be enjoined from commencing any suit or proceedings to enforce said order of April 26, 1927, against the company by reason of anything done or omitted to be done by the company.

8. And thereupon, on June 1, 1927, the Honorable William N. Runyon, a United States District Judge holding said District Court, made an order in said cause restraining the board from instituting any action of debt in the name of the State of New Jersey or otherwise, to recover any

penalties for the violation of said order of April 26, 1927, or from instituting any proceedings by mandamus or injunction to compel specific performance of said order.

9. On August 10, 1927, the Honorable J. Warren Davis, Circuit Judge, and Joseph L. Bodine and William N. Runyon, District Judges, holding the United States District Court for the District of New Jersey, did vacate said restraining order.

10. Said cause came on for final hearing before the said judges constituting said court, on bill, answer and proofs and the Court having considered the same did, by its final decree dated January 18, 1928, dismiss the bill of complaint.

11. The company not being content with the decree aforesaid did appeal from the same to the Supreme Court of the United States, and the said District Court on January 18, 1928, ordered that said appeal should operate as a supersedeas of said final decree and should suspend until the final decree therein, the enforcement of the order of the board of April 26, 1927.

12. The said appeal came on for argument and was argued before the said Supreme Court at the October Term, 1928, and the Court having considered the same, did affirm the decree of the District Court as does more fully appear from the mandate which issued out of the Supreme Court of the United States December 20, 1928, and now remains of record in the United States District Court for the District of New Jersey.

ALFRED N. BARBER.

Supplemental Answer—Exhibit K.

Sworn and subscribed before
me this ninth day of January,
1929.

MARY C. SHANNON,
Notary Public of New Jersey.

EXHIBIT "K."

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Application for Mandamus.* *Affidavit.*

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

CHARLES A. MEAD, of full age, being duly sworn according to law, on his oath says: I am Chief Engineer of the Division of Bridges and Grade Crossings of the Board of Public Utility Commissioners of New Jersey and I am familiar with the grade crossings at Royce Valley in the Township of Hillsborough, Somerset County, and with the order of the board dated April 26, 1927, for the elimination of the same. The Lehigh Valley Railroad Company has failed and still fails to comply with said order and has not yet

begun the actual work required in the performance and execution of said order.

CHARLES A. MEAD.

Sworn and subscribed before me this tenth day of January, 1929.

HELEN D. WOODRUFF,
Notary Public of New Jersey.

EXHIBIT "L"

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Application for Mandamus.* *Answering Affidavits and Exhibits.*

STATE OF NEW JERSEY, COUNTY OF ESSEX, } *ss.*

RALPH D. VAN DUZER, of full age, being duly sworn, on his oath deposes and says:

1. I am the general land and tax agent of the defendant company and have been connected with the land and tax department of said company for the past twenty-one years.

2. The function of said department is to handle all land and tax matters of said company and to keep a record of the ownership of and title to all lands and real estate owned, leased or used by said company.

3. I am familiar with the land and real estate owned, leased or used by said company in the Township of Hillsborough, Somerset County, New Jersey, and in particular those involved or affected by the order of the Board of Public Utility Commissioners made April 26, 1927, for the alteration of the crossing of the railroad of said company on State Highway Route No. 16 and Camp Lane, in said township.

4. All of the land used by the defendant, in said township and in the vicinity of said crossings, for railroad right of way, stations, sidetracks, aproaches and appurtenances is owned by Lehigh Valley Railroad Company of New Jersey, a corporation of New Jersey and not by the defendant, and is leased by Lehigh Valley Railroad Company of New Jersey to said defendant.

5. Said order of said Board requires the taking for, and devotion to, public highway purposes the following parcels of land owned by Lehigh Valley Railroad Company of New Jersey:

Route No. 16 Crossing.....25,460 square feet
Camp Lane connecting road..16,500 square feet

Total .....41,960 square feet

RALPH D. VAN DUZER.

Sworn and subscribed before
me this 12th day of January,
1929.

JOHN J. GAFFEY,
Notary Public of New Jersey.

EXHIBIT "M"

ANNEXED TO SUPPLEMENTAL ANSWER.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

WILLIAM R. JOHNSTONE, being duly sworn, on his oath deposes and says:

1. I am the engineer of grade crossings of the defendant, Lehigh Valley Railroad Company, and attended all the hearings before the Board of Public Utility Commissioners in which its order of April 26, 1927, was made.

2. I am familiar with the negotiations between the State Highway Commission and the defendant for the elimination of the crossing involved in this proceeding from some time during the latter part of the year 1923, until the proceedings in question before the Board of Public Utility Commisisoners for the elimination of this crossing was instituted in November, 1926, and thereafter until the making of the order of said Board on March 26, 1927, I had charge for the defendant of the engineering aspects of the case before the Board and am familiar with said proceedings before said Board.

3. The railroad right of way and all land and the tracks, stations, switches, approaches and other railroad facilities thereon used by the defendant in the vicinity of the grade crossing on State Highway Route No. 16 and at Camp Lane, involved in the Board's order, are owned by Lehigh Valley Railroad Company of New Jersey and leased by it to defendant for the operation of its railroad.

4. The proceeding for the elimination of said crossings was instituted by an order of the Board of Public Utility Commissioners dated Novem-

ber 24, 1926, in which the Board directed its secretary to give notice to certain persons, corporations or bodies therein mentioned and said order of April 26, 1928, is directed to certain persons, corporations or bodies therein expressly mentioned. Lehigh Valley Railroad Company of New Jersey is not mentioned in either of said orders, nor was it ever present or represented at any of the hearings before said Board. At the first hearing before the Board in that proceedings held on December 16, 1926, at which I was present, the secretary of the Board testified as follows, concerning the order instituting the proceedings:

> "Certified copies of the order were mailed to the Chairman of the Township Committee of the Township of Hillsboro, the State Highway Engineer, to the Clerk of the Board of Freeholders of Somerset County, and to the companies which might be affected as follows: Lehigh Valley Railroad Company, Public Service Electric and Gas Company, New York Telephone Company, Western Union Telegraph Company, Hillsboro and Montgomery Telephone Co." (Stenographer's minutes, hearing December 16, 1926, page 2.)

5. In addition to having been present at all of the hearings before said Board, I have examined the record of said proceedings and it appears from said records as well as from my observations at the hearings that Lehigh Valley Railroad Company of New Jersey was never given any notice of the issuance of either of said orders of November 24, 1926, or April 26, 1927, and was not mentioned in either of said orders and was not present or represented at any of the hearings before the Board.

6. As engineer of grade crossings of the defendant company I have charge of the work of preparing plans, detailed drawings, working plans, specifications, contracts, and advertisements for bids and the letting of contracts for the work of eliminating grade crossings. Owing to the suspension of the enforcement of the Board's order of April 26, 1927, ordered by the courts during the litigation of said order and finally by an order of January 18, 1928, a copy of which is annexed hereto as Exhibit "A" no work has been done on any of these items of preliminary preparation which must be undertaken and carried out before any actual work can be done on the ground for the elimination of a grade crossing.

7. The defendant is a corporation of the State of Pennsylvania. Before any work can be done upon the ground it will be necessary to acquire, by purchase or condemnation, lands owned by the Lehigh Valley Railroad Company of New Jersey for widening Highway Route No. 16 to the extent of thirty feet outside of the present lines of said highway across the right of way of the railroad and upon lands on either side thereof owned by said Lehigh Valley Railroad Company of New Jersey or by private individuals. It would also be necessary before said work can be begun on the ground to acquire, by purchase or condemnation, a strip of land 33 feet wide and 1,940 feet long owned in part by said Lehigh Valley Railroad Company of New Jersey and in part by private individuals, for the purpose of building a connecting road along the southerly side of the railroad from Camp Lane to Highway Route No. 16. The construction of this road would be one of the first things necessary to be done in order to pro-

vide a detour for highway travel on Route No. 16, while the work of eliminating the grade crossing on that route is being carried on.

8. No person or corporation was directed by said order of April 26, 1927, to acquire said land and no provision is made in said order for the acquisition thereof.

9. The parcels of land necessary to be acquired before any work on the ground can be commenced are as follows:

Owner	Area
Lehigh Valley Railroad Company of New Jersey	41,960 square feet
William Smith	4,620 square feet
Oscar J. Brown	11,715 square feet
Hubert M. Wright	5,775 square feet

10. On January 12, 1929, the defendant filed a petition for rehearing with the Board of Public Utility Commissioners, a copy of which is annexed hereto as Exhibit "B." No action has yet been taken by the Board upon said petition for rehearing.

11. The order of the Board dated April 26, 1927, ordering the elimination of grade crossings on Highway Route No. 16 and on Camp Lane provided as follows:

> "And it is Further Ordered, that the said The Lehigh Valley Railroad Company begin the actual work required in the performance and execution of this order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of this order, and complete all of the work required thereunder to be done within one year thereafter, or the first day of June, 1928."

Supplemental Answer—Exhibit M.

The supersedeas granted in the order of the United States District Court, dated January 18, 1928 (Exhibit "A," annexed hereto), suspended the enforcement of said order until the mandate of the Supreme Court of the United States issued December 20, 1928, at which time the effective date of said order, as well as the dates therein prescribed for the beginning and completion of the work, had expired and the Board has made no subsequent or further order fixing and establishing a new effective date or new dates for the beginning and completion of the work, respectively, and said order of said Board, with respect to the effective date or the time for beginning or completing the work, is now impossible of performance and there is in force and effect no order of said Board fixing the time when the work should be begun or completed and, before such order can be made it will be necessary to hold a hearing and take testimony to determine when said work could be begun and completed, in order to ascertain and determine the time necessary for the preparation of detailed plans, working plans, specifications, advertising for bids, preparing and letting contracts, and organizing and assembling forces, equipment, tools and machinery for the commencement of the work, and the ordering, fabrication, manufacture, transportation and assembling of materials necessary to carry on the work and acquisition of necessary land.

WILLIAM R. JOHNSTONE.

Sworn and subscribed before
me this 12th day of January,
1929.

JOHN J. GAFFEY,
A Notary Public of New Jersey.

EXHIBIT "N"

ANNEXED TO SUPPLEMENTAL ANSWER.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

LEHIGH VALLEY RAILROAD COMPANY, a corporation, *Plaintiff,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS, *et als.,* *Defendants.*	*In Equity.* *Order Allowing Appeal from Final Decree and Supersedeas.*

Considering the foregoing petition this day presented, it is ordered that a appeal be allowed to Lehigh Valley Railroad Company, petitioner herein, and plaintiff in this suit, from the final decree entered January 18, 1928, in the above-entitled cause and that said appeal should be returnable to the Supreme Court of the United States, and that, upon the execution of a bond in the penalty of Five Hundred Dollars ($500.00) said appeal shall operate as a supersedeas of said final decree and shall suspend, until the final decree herein, the enforcement of a certain order of the Board of Public Utility Commissioners of the State of New Jersey, made April 26, 1927, directing the plaintiff to alter the crossing known as South Bridge Street, or State Highway Route No. 16, by substituting therefore a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at the Camp Lane and construct a connecting highway there-

from to said State Highway Route No. 16 in the Township of Hillsborough, County of Somerset, State of New Jersey, and that a transcript of the record, including all the exhibits offered in evidence, by either party, be filed in the Supreme Court of the United States, according to law, as prayed for.

J. WARREN DAVIS,
United States Circuit Judge.

J. L. BODINE,
WM. N. RUNYON,
United States District Judges.

Signed and entered January 18, 1928.

Service of within order acknowledged this 18th day of January, 1928.

JOHN O. BIGELOW,
Solicitor for Defendants.

EXHIBIT "O"

ANNEXED TO SUPPLEMENTAL ANSWER.

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

In the matter of proceeding under Chapter 57, P. L. 1913, relating to the Crossing of the Highway known as South Broad Street, or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County.	*Petition for Rehearing.*

Filed January 14, 1929.

The petitioner, LEHIGH VALLEY RAILROAD COMPANY, respectfully shows:

1. It is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and is a resident and citizen thereof; it is a common carrier subject to the Act to Regulate Commerce and is engaged in the transportation of interstate and foreign commerce, in, between and through the States of New York and New Jersey and the Commonwealth of Pennsylvania, and other states of the United States and foreign countries.

2 It is the corporation of that name mentioned in an order of this Board, dated November 24, 1926, initiating this proceedings, under authority of the Fielder Act (Chapter 57, Laws

1913) for the alteration of a grade crossing in the Township of Hillsboro, Somerset County, where the railroad right-of-way and tracks leased to and operated by petitioner are crossed at grade by State Highway Route No. 16. On April 26, 1927, this Board made its order, effective May 10, 1927, directing petitioner to begin, on or before the first day of June, 1927, the actual work of altering said crossing (and a crossing known as Camp Lane) and to perform and fully comply with the directions and requirements of said order and complete all the work required thereunder within one year thereafter, or the first day of June, 1928, according to a plan annexed to and made a part of said order; said plan required the widening of the existing highway from its legal width of 33 feet to a width of 66 feet across the railroad right-of-way and for some distance on each side thereof; the raising of the railroad tracks and the depression of said widened roadway and the construction of a bridge to carry the railroad over said depressed roadway at an angle of 29° 30′, at said crossing of Route No. 16; the alteration of certain freight and passenger facilities and approaches; the closing of Camp Lane crossing; and the construction of a connecting road 1940 feet long between Camp Lane and Route No. 16, along the southside of the railroad.

3. Said railroad right-of-way and tracks, a freight station and passenger station (known as "Royce Valley"), and freight and passenger facilities and approaches, are owned by Lehigh Valley Railroad Company of New Jersey, a consolidated railroad corporation organized and existing under and by virtue of certain special and general laws of the State of New Jersey, and leased by it to the petitioner.

4. All of the land necessary to be acquired for widening Route No. 16 across the railroad right-of-way, and for some distance on either side thereof, and part of the land necessary to be acquired for the construction of the Camp Lane connecting road, are owned by said Lehigh Valley Railroad Company of New Jersey, and is railroad property of Lehigh Valley Railroad Company of New Jersey, held for and used in the service of transportation under the provisions of the laws of the United States and of New Jersey and is, therefore, already devoted to public use; that said land cannot be acquired or taken for any use inconsistent therewith, and in no event can it be taken except through the exercise of the right of eminent domain and upon payment, or tender, to said Lehigh Valley Railroad Company of New Jersey of just compensation therefor.

5. The Petitioner is not a corporation of New Jersey and has never been endowed by the legislature thereof with the right of eminent domain and has no power and authority to acquire or hold any part of said lands. Said order contains no provision directing any party to the proceeding, possessing the necessary power and authority to do so, to acquire said land and make it available for the purpose of carrying out said order.

6. Said Lehigh Valley Railroad Company of New Jersey is a public utility as defined in the Public Utility Act and was and is a necessary party to this proceeding and was required by law to be named in and served with said order of November 24, 1926, and served with notice of the hearings thereunder, and to be named in and served with said order of April 26, 1927;

It appears from the record of this proceeding that said Lehigh Valley Railroad Company of New Jersey was not named in, or served with either of said orders of November 24, 1926, or of April 26, 1927, and that no notice of said proceedings was ever given to it, and that it never appeared and was never made a party to this proceeding.

7. On April 12, 1920, the State Highway Commission, pursuant to authority conferred upon it by law, adopted a resolution to take over, as State Highway Route No. 16, the portion of the highway in question, (theretofore a county road), where said crossing is located, and on August 3, 1920, said commission caused a notice thereof to be served upon the Board of Chosen Freeholders of Somerset County as required by law. Upon the passage of said resolution on April 12, 1920, said highway, including the crossing in question, became part of the State Highway System established by an act entitled—"An Act to establish a State Highway System &c." approved March 13, 1917, and amendments and supplements thereof, and its further improvement, maintenance and repair, including the elimination of said crossing, is required by said statute to be done at the expense of the State.

8. Under and by virtue of the provisions of an act entitled—"An Act to establish a State Highway Department and to define its powers and duties; &c." approved March 13, 1927, and its amendments and supplements, the State Highway Commission was given exclusive control and direction of all projects and work on State Highways, including, expressly, the elimination of grade crossings on all such highways and

said commission has exclusive power and authority to fix and determine the width, location, direction, alignment, curvature and grade of all such highways; all of which control, direction, power and authority is directed by said statutes to be determined by said State Highway Commission by the vote of a majority thereof.

9. At the time of the institution of, and throughout this proceedings said State Highway Commission had exclusive jurisdiction over the grade crossing in question, and full and complete responsibility and duty to effectuate its elimination in accordance with plans and specifications prepared by, and at the sole expense of the State under the jurisdiction of, the State Highway Department.

10. Insofar as the Fielder Act may have theretofore applied to said crossing, or this Board may have theretofore possessed jurisdiction thereunder, to order the alteration of said crossing, said act was repealed and said jurisdiction was superseded by the State Highway Department Act and the State Highway System Act. Wherefore at the time of the institution of this proceeding this Board was, and ever since has been and now is, without jurisdiction or authority over the crossing in question, or over the alteration or elimination thereof.

11. On January 10, 1923, pursuant to authority conferred upon it by law, the State Highway Commission by unanimous vote adopted a motion directing the engineering department of said commission—"To open up negotiations with the railway company (your petitioner) looking toward the elimination of the grade crossing" in question, on State Highway Route No. 16. On

July 31, 1923, the following motion was adopted by unanimous vote of all present.

"The State Highway Engineer presented a report in connection with proposed elimination of grade crossing on Route #16 at South Somerville at the tracks of the Lehigh Valley Railroad Company. He informed the commission that the estimated costs of the entire structure would be $87,000.00, toward which the Lehigh Valley R. R. Co. is willing to contribute $40,000.00. On motion by Mr. Stewart, seconded by Mr. Jelin, the State Highway Engineer was directed to make a thorough investigation of the matter of the elimination of grade crossing on Route #16 at South Somerville and to present a report for consideration when all the commissioners are present."

On March 11, 1924, said commission by unanimous vote adopted the following motion.

"State Highway Engineer Sloan presented for the consideration of the Commission alternate shemes for grade crossing elimination in South Somerville, in which he recommended the adoption of Plan 'C' at a total estimated cost of $109,024.00, involving a structure with a center pier in the Highway, leaving 18′ of the roadway on each side of the pier, the railroad company to share in the cost of this improvement to the extent of $40,000.00. On motion of Mr. Kidde, seconded by Mr. Jelin, the state highway commission approved Plan 'C' for the elimination of Lehigh Valley railroad crossing at South Somerville and directed that this elimination be proceeded with and $40,000.00 be accepted from the Lehigh Valley Railroad

Company, as its proportionate share of the cost."

Pursuant to said action of the State Highway Commission and at the request thereof, petitioner prepared detailed plans and specifications which were duly approved by the State Highway Commission and signed by the duly authorized representatives thereof and by the chief engineer and the bridge engineer of the petitioner and the physical work of carrying out said plans and specifications was actually begun by petitioner and the petitioner actually expended the sum of $5,000.00 in the performance of said work, and said work was carried on until suspended at the request of the State Highway Commission. Petitioner was then and ever since has been and still is ready and willing to carry out said plans and specifications for the elimination of said crossing in accordance with the official action adopted by said State Highway Commission. Said action of the State Highway Department above quoted from the minutes of said commission, has never been modified, rescinded or altered. The record of this action of the State Highway Commission and the questions here presented were not before the Board when it made said order.

12. The effect of the order of the Board was to cast upon the petitioner all or substantially all of the cost (estimated by the Board's chief engineer, at $324,400.00, exclusive of the cost of necessary lands and damages) of carrying out the plan adopted and ordered by the Board, whereas under the statutes above mentioned, the total cost of the elimination of said crossing is required to be paid by the State. Said order

also impaired the obligation of the contract made between the State Highway Commission, duly authorized thereunto by law, and your petitioner, and deprived your petitioner of the benefit of the terms and conditions thereof.

13. Plan "C", offered by petitioner at the hearings before the Board was the plan designed and adopted by the State Highway Commission for the elimination of said crossings. It provides for the relocation of a portion of said highway so as to provide an undercrossing at an angle of 54° at an estimated cost of $145,024.47. During the hearings petitioner's Grade Crossing Engineer testified that the alteration of said Plan "C" to provide the same number and width of drive-ways and sidewalk spaces as (but 42 feet shorter than those of) the plan ordered by the Board, would cost $197,524.47 (including cost of land and property damages) as compared with a cost of $324,400. (exclusive of the cost of land and damages) for the plan ordered by the Board. The evidence shows, without dispute, that Plan "C" is an entirely feasible and practicable plan of accepted standard design, and could be carried out without increasing the danger or impediment to traffic on, or diminishing the usefulness of, the highway, and was, in every essential respect, as good a plan as that ordered by the Board.

14. On the line of railroad operated by petitioner in the States of New York, New Jersey and Pennsylvania, are 1222 grade-crossings (exclusive of side tracks) the elimination of which by the most economical practical means, is estimated to cost $107,791,847. They are classified, by the Public Service or Public Utilities Board of said Courts, according to danger:

	Number	Cost of elimination.
Class "A" crossings	150	$22,495,418.
Class "B" "	306	27,112,645.
Class "C" "	766	58,183,784.
	1222	$107,791,784.

15. Pursuant to the requirements of Section 15a of the Act to Regulate Commerce, the Interstate Commerce Commission fixed the aggregate value of the railroad property of the carriers, including petitioner, held for and used in the service of transportation, and, by its order of March 1, 1922 (68 ICC 676) fixed 5¾ per cent as a fair return thereon for the carriers. Pursuant, also to said act, said Commission fixed and established rates for the transportation of passengers and freight, intended to yield to the carriers in the Eastern Group, including petitioner, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, the amount of said fair return. Said rates, however, are and always have been inadequate for that purpose, as is shown by the following schedule of the net railway operating revenues actually received by petitioner:

Calendar year ending Dec. 31.	Property Investment	Rate of Return %.
1923	$250,989,203.	2.62
1924	257,505,658.	4.42
1925	258,468,372.	4.83
1926	268,955,467.	5.15
1927	272,937,948.	3.60
1928 11 months actual and December estimated)	272,937,948.*	4.46

*1927 figure used because complete 1928 figures for this item are not yet available.

16. Under these circumstances the Board's order requires petitioner to make unreasonable expenditures for construction and maintenance, and imposes upon the interstate commerce of petitioner an unreasonable and arbitrary requirement, rule and regulation and imposes an unreasonable burden upon, interference with, impediment of, or discrimination against the same, and impairs the usefulness of petitioner's facilities therefor.

17. Said order was dated April 26, 1927, and provides:— "This order shall take effect May 10, 1927." Section 32 of the Public Utilities Act provides that all orders of this character—

> "shall become effective upon the date specified therein, which shall be at least twenty days after the date of said order."

Said order was invalid in that it was made effective fourteen days after the date thereof, instead of "at least twenty days" thereafter as required by law.

18. Said order provided as follows:—

> "AND IT IS FURTHER ORDERED that the said the Lehigh Valley Railroad Company begin the actual work required in the performance and execution of this order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of this order, and complete all of the work required thereunder to be done within one year thereafter, or on the first day of June, 1928."

19. On January 18, 1928, United States District Court, for the District of New Jersey, allowed an appeal to the Supreme Court of the

United States, including, in the order therefor, the following:

> "That upon the execution of a bond in the penalty of Five hundred dollars ($500.-00) said appeal shall operate as a supersedeas of said final decree and shall suspend, until the final decree herein, the enforcement of said order."

A bond as prescribed in said order was filed January 18, 1928, and remained in force until after the date of the mandate of the Supreme Court of the United States issued December 20, 1928. On December 20, 1928, said Supreme Court of the United States issued its mandate affirming the decrees of said United States District Court of the United States for the District of New Jersey.

20. The litigation involving said order suspended its effective date and enforcement until said December 20, 1928. There is now no legal effective date of said order or for the beginning and completion of work thereunder, and said order, with respect to its effective date or for beginning and completing the work thereunder, is therefore impossible of performance and will continue so to be unless and until these deficiencies are supplied by the further order of the Board. It is, therefore, necessary under the statutes, as well as under the practice of the Board, to hold further hearing for the purpose of determining and fixing a new effective date of said order and for determining and fixing new dates for the beginning and completion of the work, respectively.

Supplemental Answer—Exhibit O.

21. The following is a summary of the expenditures of the petitioner for grade crossing elimination projects from 1924 to 1928, inclusive:—

	State of New York		Pennsylvania		New Jersey		Total	
Year	No. Projects	Amount	No. Projects	Amount	No. Projects	Amount	Projects	Amount.
1924	2	19,000.	1	100,000.	1	225,000	4	344,000.
1925	1	15,000.	—	—	2	232,000	3	247,000.
1926	2	1,000.	—	—	—	—	2	1,000.
1927	5	30,000.	—	—	—	—	5	30,000.
1928	3	59,000.	1	83,000.	1	280,000	5	422,000.
Total	13	124,000.	2	183,000.	4	737,000.	19	1,044,000.

22. In addition to the expenditures shown in the foregoing schedule, the following expenditures will be necessary to be made in 1929 to complete projects ordered prior to January 1, 1929, which are either partly completed or to be undertaken:—

New York	$ 977,000.
Pennsylvania	91,000.
New Jersey	405,000.
Total	$1,473,000.

The figures in this and the preceeding paragraph do not include anything for the cost of eliminating the crossing in question.

Petitioner therefore prays that a rehearing be granted, before all the members of the Board, sitting *in banc,* at which petitioner may submit proofs in support of each and all of the foregoing allegations, and that petitioner be allowed oral argument before said Board, with the op-

portunity of filing a brief if need be, in support of this petition.

LEHIGH VALLEY RAILROAD COMPANY.

By HOBART & MINARD,
Its Attorneys.

Dated, January 8, 1929.

Service of within Answering Affidavits and Exhibits acknowledged this 14th day of January, 1929.

J. O. BIGELOW,
Attorney for Relator.

EXHIBIT "P"

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

Nos. 232 January Term 1929.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY R. R. Co., *Defendant.*	*Application for Mandamus.*

Argued January 17th, 1929; Decided January 30th, 1929.

Before Justices Minturn, Black and Campbell.

For the Relator John O. Bigelow, Esq.

For the Defendant Messrs. Hobart and Minard.

PER CURIAM.

An application in this case is made for a peremptory, or in the alternative, for an alternative writ of mandamus to compel the defendant to begin actual work, within such time as the court may fix, required for making the crossing of the highway, known as South Bridge Street or State Highway Route No. 16 in Hillsboro Township, Somerset County, N. J., in compliance with an order made by the relator dated April 26th, 1927, and to complete the work to be done within one year thereafter. The application is based upon two affidavits; one by Alfred M. Barber, Secretary of the Board of Public Utility Commissioners of N. J., one by Charles A. Mead, Engineer; copies of two orders of the Board of Public Utility Commissioners, dater respectively, November 24th, 1926 and April 26th, 1927. Two answering affidavits, one by Ralph D. Van Duzer and one by William R. Johnstone, EX. B a petition for a re-hearing before the Board of Public Utility Commissioners filed January 14th, 1929.

We cannot find any case in our reports, that would justify us in ordering a writ of mandamus in this case at this time. The power to issue the writ of Mandamus is a discretionary one. Jones Co. v. Guttenberg, 66 N. J. L. 58; ib 659; English v. City of Asbury Park, 115 Atl. 614; Sutten v. Champion, 101 N. J. L. 569; 2 N. J. Mis. 1135.

The right to a writ of Mandamus must be clear, it will be denied where it creates disorder and confusion.

English v. City of Asbury Park, 115 Atl. 64; Hugg v. Ivins, 59 N. J. L. 139.

The public duty sought to be enforced must be clear and specific.

Uszkay v. Dill, 92 N. J. L. 327.

The application is, therefore denied at this time, but without prejudice to renew the same at a future time.

Filed, Jan. 31, 1929.

EXHIBIT "Q"

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

No. 232, January Term, 1929.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Motion for Mandamus.* *Order.*

This cause having been argued and submitted at the January Term, 1929, by John O. Bigelow, Esquire, Attorney for the Relator, and Hobart & Minard, Esquires, Attorneys for the Defendant, on application for a peremptory, or in the alternative, for an alternative writ of mandamus to compel the defendant to begin actual work for the alteration of a grade crossing and complete the work to be done within one year thereafter, in compliance with an order of the relator, made April 26, 1927, in a proceeding entitled—"In the matter of proceeding under Chapter 57, P. L.

1913, relating to the crossing of the highway known as South Bridge Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County.", and the court having considered the same; it is thereupon ORDERED and ADJUDGED that the application be denied, without prejudice.

Entered February 4th, 1929.

On motion of

HOBART & MINARD
Attorneys for Defendant.

A true copy

FRED L. BLOODGOOD,
Clerk.

EXHIBIT "R"

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Application for Mandamus.*

MEMORANDUM FOR THE BOARD.

This is an application by the Board for either a peremptory or alternative writ of mandamus to be directed to the Company commanding obedi-

ence to a grade crossing order made by the Board April 26, 1927.

The Board's order has been tested and upheld in prolonged litigation culminating in the decree of the Supreme Court of the United States. The Board believes that the time has now come for execution.

Immediately after the Board's order was issued, the Company applied to Mr. Justice Parker for a writ of certiorari. The matter was fully argued before him and he denied the application for the reasons set forth in his opinion.

Lehigh Valley Railroad Co. v. *Board,* 137 Atl. 442, 5 N. J. Misc. 559.

The Company renewed its application before Justices Trenchard, Kalisch and Katzenbach, holding Part II of this Court, and again the matter was argued at length and the application denied without opinion.

Lehigh Valley Railroad Co. v. *Board,* 137 Atl. 923, 5 N. J. Misc. 587.

The Company then filed a bill of complaint in the District of the United States for the District of New Jersey, asking for interlocutory and final injunctions restraining the enforcement of the Board's order. The application for interlocutory injunction was argued before Circuit Judge Davis and District Judges Bodine and Runyon, and was denied for the reasons stated in an unreported opinion by Judge Bodine. A motion for a reargument was also denied.

On final hearing before the same judges, the bill of complaint was dismissed.

From the order denying an interlocutory injunction and from the final decree, the Company appealed to the Supreme Court of the United States. The two appeals were argued together

last October with the result that the Court below was affirmed. The opinion was written by Chief Justice Taft.

Lehigh Valley Railroad v. *Board,* 49 S. C. 69.

After all this litigation the Railroad Company still remained unwilling to carry out the order of the Board and so on January 10, 1929, the Board served on the Company notice of this application. Thereafter, on January 12, the Company filed with the Board a petition for a rehearing of the whole matter. The Company can hardly expect the Board again to go into the merits of this matter. It may fairly be surmised that the Company hopes that the Board will make some order—any order will do—which may be made the subject of new applications for certiorari, new equity suits and in general, litigation which will delay this improvement for a year or two longer.

The Company has filed answering affidavits in this Court which restate most of the objections which have already been considered in the litigation above stated and in addition, two objections not heretofore raised, namely, first, that the time for carrying out the Board's order has expired, and second, that there is a defect of parties. These objections will be briefly considered.

I.

The order of the Board commanded the Com pany to start the work by June 1, 1927, and to complete it within one year thereafter or by June 1, 1928. The Company seems to contend that since it is now impossible for it to comply with the order insofar as these dates are con-

cerned, no mandamus should issue. The contrary is the general rule.

38 *C. J.* 555. "Ordinarily, it is no objection to the issuance of the writ that the time for the performance of the duty is passed, since it is only in case of default in performance at this time that the writ can issue."

The Company suggests that the Board should fix a new time for starting the work. If the Board should do this, the Company would doubtless allow that time to pass without action and then when the application for a mandamus was renewed, would again contend that the time had passed for beginning the work.

This Court has power to mould the writ to suit the circumstances and should, by its order, fix a reasonable day within which the work should be begun—say, March 15, 1929.

13 *Enc. of Pl. & Pr.* 782. "The writ will be so moulded and fashioned as to fit the exigencies of each particular case."

II.

The answering affidavits set forth that the owner of the railroad is the Lehigh Valley Railroad Company of New Jersey, and that such corporation ought to have been but was not a party to the proceedings before the Board, and that the defendant is the lessee and is a corporation of Pennsylvania without authority to condemn land in this State, and hense that it cannot carry out the Board's order.

Similar objections were raised in *Erie Railroad Co.* v. *Board,* (Paterson Grade Crossing case), 89 N. J. L. 57, 98 Atl. 13; 90 N J. L. 672. Atl. ; 254 U. S. 394, 41 S. C. 169. There the order of

the Board was directed against the Erie Railroad which operated as a lessee. Objection was made on this account but this Court held that under the Fielder Grade Crossing Act the operating company and not the owner was properly ordered to eliminate the grade crossing. With reference to the claim that the execution of the order might require the exercise of the power of eminent domain, this Court noticed that the City of Paterson had ample power for such purpose and that the Board's order directed the City to proceed with due diligence to the execution of the order.

The State Highway Commission and the Township of Hillsborough in which the crossing is located, were parties to the proceeding before the Board in the present case and were both ordered to proceed with due diligence to the execution of the order—the order being in the same terms as in the Paterson case. The latter order may be found in full in 3 *N. J. P. U. R.* 297. Both the Commission and the Township have power to condemn lands for roads and both will doubtless co-operate with the Railroad Company by the use of that power at its request and at its expense.

Furthermore, it does not clearly appear that the power of eminent domain is required in this case. The answering affidavit of William R. Johnston sets forth that there are only three property owners concerned in addition to the Lehigh Valley Railroad Company of New Jersey. There is no suggestion that the Railroad Company cannot make a reasonable bargain with them.

The lease from the Lehigh Valley Railroad Company of New Jersey was made in 1914 and

was approved by the Board, 3 *N J. P. U. R.* 64. As appears from that decision, it runs for a term of ninety-nine years and gives to the defendant corporation power to make such betterments as it may deem advantageous. No reason appears why the New Jersey company should have been made a party before the Board. Under the statute, the Board could make no order against it. If that company desired to be heard for any reason, it should itself have applied to the Board for that purpose or should itself seek relief by certiorari or otherwise. The present defendant should not be heard to make this objection.

If this is an objection which the defendant could properly make, it should have made it before the Board or on its applications for certiorari or in its equity suit. The objection comes too late.

By virtue of the decree of the District Court of the United States, the validity of the Board's order is res judicata as to the present defendant.

A writ of peremptory mandamus should issue.

Respectfully submitted,

J. O. BIGELOW,
Of Counsel with the Board.

EXHIBIT "S"

ANNEXED TO SUPPLEMENTAL ANSWER.

NEW JERSEY SUPREME COURT.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *Relator,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*On Motion for Mandamus.*

BRIEF FOR DEFENDANT.

This matter comes before the Court on a motion by the Board of Public Utility Commissioners for a peremptory writ of mandamus to compel the defendant "forthwith or within such time as the Court may fix" to begin the actual work required in the performance of an order of that Board for the alteration of a grade crossing, and to complete all the work "within one year thereafter," or, in the alternative, for an alternative writ of mandamus (p. 1, Appendix "A").

For the convenience of the Court, we have printed the relator's motion papers as Appendix "A" to this brief. Printed copy of defendant's answering affidavits and exhibits were submitted to the Court on the argument, and are referred to herein as "AA."

Summary of the Order in Question.

The order in question was dated April 26, 1927, and became effective May 10, 1927, and

provided that the work of altering the crossing should begin on or before June 1, 1927, and be completed within one year or June 1, 1928. It directed the defendant to alter a grade crossing on State Highway Route No. 16, in the Township of Hillsboro, Somerset County, N. J., and to close Camp Lane crossing; this is a crossing on a township road located about 1,400 feet east of the State Highway crossing.

The order also directed the defendant, Hillsboro Township and the Township Committee thereof, County of Somerset, New York Telephone Company, Western Union Telegraph Company, Hillsboro and Montgomery Telephone Company, Public Service Electric and Gas Company, and other parties to the proceedings (including the State Highway Department) and each and every of them to proceed with due diligence to the execution of the order and comply with all the requirements thereof and the duties imposed upon them thereby, and by the act under which the order was made and the laws of this State, and that they and each and every of them exercise in good faith all the powers conferred upon them and every of them by the laws of the State.

The plan adopted by the Board required the depression of Highway Route No. 16 and the construction of an under-crossing, half of the width of which would be within the limits of the existing highway and half upon additonal lands adjacent thereto to be acquired for that purpose. It also required the construction of a bridge 134 feet in length measured along the railroad right-of-way and 105 feet wide measured along the highway, to carry a four-track railroad.

The plan requires the acquisition of land for a connecting road 1,940 feet long and 33 feet wide over private property along the southerly side of the railroad. It also requires the acquisition of a strip of land 33 feet wide alongside of the existing Highway Route No. 16 for the purpose of widening that highway across the right-of-way of the railroad and for some distance on each side thereof, and also such additional private property on each side of the railroad as may be necessary for highway slopes.

The land to be taken is all to be devoted to public highway purposes and is as follows:

Owner	Area
Lehigh Valley Railroad Co of N. J.	41,960 Sq. ft.
William Smith	4,620 " "
Oscar J. Brown	11,715 " "
Hubert M. Right	5,775 " "

(p. 6, AA and Ex.).

The cost of this project was estimated by the Chief Engineer of the Board at $324,400 exclusive of the cost of necessary lands to be taken and damages to other lands affected (p. 16, AA).

Prior to the issuance of the Board's order of November 24, 1926, instituting the proceedings in which this order was made (p. 7, Appendix "A") the defendant and the State Highway Commission, which has jurisdiction over said Route No. 16, reached an agreement for the elimination of this crossing according to a plan designed and approved by the State Highway Commission, and the defendant had agreed to contribute $40,000 toward the cost of the project; the State Highway Commission by official action accepted said offer and directed the crossing to be altered according to its plan, the State to pay the re-

mainder of the cost. The work of altering the crossing according to the State Highway Commission's plan and under this arrangement was begun by the defendant, and the defendant spent upward of $5,000 in the preparation of detailed plans and in actual work for the alteration of the crossing in accordance with said arrangement (pp. 14, 15, 16, 17, AA).

I.

The relator has no authority to make an application for mandamus in its own name and through its own counsel.

The present application is based upon the provisions of Section 33 of the act concerning Public Utilities (Chapter 195, Laws of 1911) as amended by Chapter 168, Laws of 1924, p. 379). This reads as follows:

> "In default of compliance with any order of the Board when the same shall become effective, except orders to resume service which has been discontinued the person or public utility affected thereby shall be subject to a penalty of one hundred dollars per day for every day during which such default continues; in default of compliance by a public utility as herein defined with any order of the board when the same shall become effective, directing such public utility to resume service which has been discontinued, the person or public utility affected thereby shall be subject to a penalty of two hundred and fifty dollars per day for every day during which such default continues, such penalties to be recovered in an action of debt in the name of the State, and observance of the orders of the board may be enforced by mandamus or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order

or orders so made, or of the duties imposed by law upon such public utility."

It is well settled that an administrative commission, such as the relator, possesses only such powers as are expressly conferred upon it.

Passaic, etc., Water Co. v. *Board,* 139 Atl. 324 (affirmed 141 Atl. 921);

New York, Susquehanna & Western R. R. v. *Board,* 90 N. J. L. 432 (affirmed 91 N. J L. 701);

Public Service Electric Co. v. *Board,* 87 N. J. L. 128 (88 N. J. L. 603);

Potter v. *Board,* 89 N. J. L. 157.

There is nothing in the Public Utility Act which authorizes the Board *in its own name* to bring an action of mandamus, or which authorizes the counsel of the Board to bring such an action, either in the name of the Board, or otherwise.

The Board is merely the agent of the State to the extent and only to the extent, expressly conferred upon it by statute.

The refusal to comply with an order of the Board is equivalent to a refusal to comply with a statute; and the Attorney General is the only officer authorized to complain of such refusal; and such complaint, whether made by mandamus, by bill in equity, or otherwise, must be made in the name of the state. It is the public that is interested, and not the members of the Board.

The alteration of the crossing in question is not a local project and has no local nature. It is not a project in which any particular person or group of persons can have any peculiar or personal interest, as distinguished from the interest of the public as a whole. It is distinctly

and exclusively a state project in which the state at large (or its *"alter ego,"* the State Highway Commission) is alone interested.

Curtis & Hill Co. v. *State Highway Commission,* 91 N. J. E. 421.

State Highway Com. v. *Elizabeth,* 140 Atl. 335; affirmed VI N. J. Adv. Rep. 1587.

In cases in which the state at large is concerned the Attorney-General is the proper relator to bring an action of mandamus.

13 *Encyc. of Pl. & Pr.* 626.

The statute makes it the duty of the Attorney General to attend generally to all matters in which the state is a party or in which its rights or interests are involved. (Sec. 1, 1 Comp. Stats. 152.) By the same statute the Attorney General is made the *sole* legal advisor, attorney or counsel for all state boards, commissions or other state officials, and it is declared to be his duty to represent them in all suits or actions of any kind that may be brought for or against them in any courts of the state.

True, the Public Utility Act in Sec. 5 authorizes the Board to appoint its own counsel, but there is nothing therein which authorizes the Board to act in the name of the state or its counsel to act as attorney of record in a matter in which the state is interested. While under the Public Utility Act the Board has the power to fix the duties of its employees, including its counsel, there is nothing therein which permits the Board to authorize its counsel to perform the duties which the statute places exclusively upon the Attorney General.

Section 33, above quoted, does not enlarge the power of the Board or of its counsel in this respect. It merely provides that "observance" of

the Board's orders may be enforced by mandamus, etc.,—without specifying whether the mandamus shall be brought in the name of the state or otherwise; and, hence, there is nothing to change the rule fixed by the statute relating to the duties of the Attorney General which requires him to "attend" to all matters "in which the state is a party or in which its rights or interests are involved," and to represent boards, commissions and officials in all suits or actions that may be brought for or against them.

To summarize; a mandamus involving a proceeding in which the public is interested must be brought in the name of the state and not in the name of one of the creatures of the state—unless the power to do so is expressly conferred. The power and the duty to bring such an action is expressly conferred by statute upon the Attorney General of the state and is not conferred upon the Board of Public Utility Commissioners, or its counsel.

Counsel for the Board may argue that a precedent for his present application may be found in the case of *Board of Railroad Commissioners* v. *Delaware, etc., R. R. Co.,* 79 N. J. L. 219, wherein this court entertained an alternative writ in a proceeding brought in the name of the Board. The point which is now suggested apparently was not called to the attention of the court in that case, as the opinion makes no reference to the question

The application in that case was made by the Attorney General; under the statute under which the order then in question was made (Laws of 1907, p. 448), it was expressly provided that it should be the duty of the Attorney General to institute proper proceedings to enforce the orders of the Board. But it is not necessary, in the

statute which provides for the constitution of the Board and which fixes its powers and duties, to expressly provide that it shall be the duty of the Attorney General to bring actions to enforce the Board's orders—as that is the duty already imposed upon the Attorney General by other statutes.

We accordingly submit that the present application (if it can properly be made at all at this time, in view of the objections hereinafter presented), must be made by the Attorney General in the name of the State of New Jersey—or, perhaps, in the name of the State Highway Commission, which has exclusive control over the highway in question.

II.

Neither a peremptory writ nor an alternative writ should issue on this motion.

The usual practice is to allow a rule to show cause why an alternative writ should not issue, if, in the discretion of the court, such a rule seems justified.

If an alternative writ is sought, a petition, duly verified, is filed setting up (a) a clear legal duty to perform; (b) a clear right to have performance; (c) a demand and refusal of performance; and (d) the facts in support of such allegations.

If the allegations of the petition justify it, an alternative writ based upon the allegations of the petition, is issued which constitutes the equivalent of a complaint in a personal action. The return constitutes the equivalent of an answer. The alternative writ and the return (and the reply if one is necessary) constitute the pleadings by which the issues of fact or law are

raised. *Schintzler* v. *Transportation Co.*, 76 N. J. L. 171.

The defendant is entitled to such an opportunity to present for determination its grounds of opposition to the issuance of a writ.

On the present motion, the relator is entitled, at most, to a rule to show cause why an alternative writ should not issue.

Blackstone's Com. Book III, pp. 111, 265.

III.

This motion should be denied for lack of necessary parties to the application.

All persons who are under a legal duty and possessed of legal power to perform the order of the Board are necessary parties to this motion, yet the notice is served upon, and the motion is directed to, this defendant alone (p. 1, App. A).

While the defendant is directed to alter the crossing according to a general plan approved by the Board, the order is not directed to this defendant alone, but provides:

> "AND IT IS FURTHER ORDERED that the said Lehigh Valley Railroad Company, the said Hillsboro Township, and the said Township Committee thereof, the County of Somerset, the New York Telephone Company, the Western Union Telegraph Company, the Hillsboro and Montgomery Telephone Company, the Public Service Electric and Gas Company, and all other parties to this proceeding, and each and every of them, proceed with due diligence to the execution of this order, and comply with all the requirements thereof and the duties imposed upon them thereby, and the said Act under which this order is made, and the laws of this state, and that to that end they and each of them exercise in good faith all of the

powers conferred upon them and each or any of them by the laws of this State" (p. 11, App. A).

That order, by its title, purports to have been made under the Fielder Act (Chapter 57, P. L. 1913, p. 91), section 4 of which, provides as follows:

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

Each and all of the parties mentioned and referred to in the above quoted portion of the order, including the State Highway Department, as one of the "parties to this proceeding," are owners of property or constructions in which changes are required by said order; are subject to the direction of the order and are therefore necessary parties to this motion.

There are certain portions of the work, called for in this order, to be performed by parties other than the defendant, which are preliminary to the work to be done by the defendant. For instance: Since the defendant is a corporation of Pennsylvania and lacks the power to take lands in New Jersey, the duty will fall upon the public authorities of acquiring the necessary land for the connecting road which the order and plan of the Board requires to be constructed 1,940 feet long and 33 feet wide along the southerly side of the railroad and the land which, under the order

and plan, must be acquired for an increase of 33 feet in the width of State Highway Route No. 16, across the railroad right-of-way and for some distance on each side thereof, and also such additional land as may be necessary for the slopes of the highway depression on each side of the railroad right-of-way (p. 5, 7 AA).

The connecting road is to provide the detour for traffic on the state highway pending the completion of the undercrossing. The land for this road must be acquired and the road itself completed before any work is done to alter the crossing on the state highway. The land necessary for widening the state highway is to be excavated and used for the purpose of constructing the undercrossing. It, also, must be acquired and made available before any actual work on the job can be commenced (p. 5, AA).

Since the connecting road is to become a permanent township road, it is the duty of the Township of Hillsboro to exercise its powers and acquire the land necessary therefor. It has no authority to acquire lands for a state highway. By the Board's order of November 24, 1926, the State Highway Department was made a party to the proceedings (p. 8, App. A) and is one of the "other parties to this proceeding" referred to in the order of April 26, 1927, (p. 11, App. A.). It is required to exercise its powers and acquire the necessary land for widening the state highway and for slopes. These parties are necessary to any writ of mandamus, since they, also, have obligations to perform under the order, of equal importance with, and precedent to, those of this defendant. If the defendant is commanded to comply with the order, and the other parties are not likewise commanded, the defendant will be required not only to assume a

burden in excess of that imposed by the order, or the statute under which it was made, but also to perform a task beyond its power without the co-ordinated action of the other parties.

IV.

The order omits a necessary party.

The defendant is a corporation of Pennsylvania and operates, as lessee, a railroad and appurtenances, owned by Lehigh Valley Railroad Company of New Jersey, a corporation of New Jersey, consisting of the railroad right-of-way, tracks, switches, stations and appurtenances (p. 11, AA).

Said order requires changes in, or the removal of the property or constructions of Lehigh Valley Railroad Company of New Jersey, a New Jersey corporation, which Section 4 of the Fielder Act, above quoted, requires said New Jersey company to make, at its own expense, in conformity with said order. Said section also provides that companies and persons owning such property or constructions—

> "* * * shall be deemed parties in interest and shall be given notice of hearing and an opportunity to be heard." (2 *Cum. Supp.* 2891.)

Section 5 of the Fielder Act requires the Board to fix the time and place for a hearing before it in all proceedings for the alteration of grade crossings—

> "and shall give such notice thereof as it shall deem reasonable to the municipality and corporations, co-partnerships or individuals interested therein * * *."

Lehigh Valley Railroad Company of New Jersey was a necessary party to the proceedings for the alteration of the crossing in question. The

Board sent it no notice of the proceedings. It was not made a party thereto. It was not represented at any of the hearings (p. 4, AA). It was not mentioned either in the order instituting the proceeding (p. 7, App. A) or in the order for the work (p. 10, App. A), and neither order was served upon it.

The omission of this essential party renders the order incomplete and unenforceable by writ of mandamus.

> "Mandamus will not as a general rule issue where the rights of third persons not parties would be injuriously affected. Where questions of grave importance concerning rights of persons who have had no opportunity to be heard are involved in mandamus proceedings, the court, in the exercise of its sound judicial discretion, may refuse the writ, although it is an appropriate remedy." 38 *C. J.* 558.

The interest of the New Jersey Corporation in the proceeding is shown by the terms of the lease to which counsel for the Board referred in his oral argument and in his brief. In his brief he says, with reference to this lease, that it was approved by the Board as appears by its decision reported in *3 N. J. P. U. Reports,* p. 64. He further says, as appears from that decision, "it runs for a term of 99 years and gives to the defendant corporation, power to make such betterments as it may deem advantageous."

The lease is not in the record before this court, but in view of counsel's reference thereto, we deem it appropriate to quote *in full* that part thereof which is referred to in counsel's brief. This is the third paragraph of the lease and reads as follows:

> "THIRD: "It is covenanted and agreed by the parties hereto that the said Lessee

> may make such additions and betterments to the demised premises as it may deem advantageous, and that the Lessor shall and will when and as requested by the Lessee reimburse the Lessee for the cost of such additions and betterments, but in case of such reimbursements the Lessor shall be chargeable with lawful interest semi-annually upon the amount received. Such reimbursements may, at the option of the Lessor, be made by means of its debentures or other obligations, provided the same shall be authorized and approved in accordance with the laws of the State of New Jersey by the Board of Public Utility Commissioners of the State of New Jersey. Such debentures or other obligations shall, if required by the Lessee, be secured by mortgage on the property and franchises of the Lessor, provided said Board of Public Utility Commissioners shall, in accordance with the laws of the State of New Jersey, authorize and approve the giving of the mortgage so required."

See, *3 N. J. P. U. R.*, at page 67, where this paragraph is quoted in full as a part of the opinion of the Board.

It will be observed that by this provision, the Pennsylvania corporation *may* make additions and betterments but the lessor, the New Jersey corporation, is required to reimburse the lessee on request for the cost thereof with lawful interest. It is therefore obvious that the New Jersey corporation has a substantial interest in the order of the Board since it must ultimately pay the entire cost of carrying out the order, with lawful interest, at the request of the lessee.

V.

The defendant lacks power to perform.

Before any work can be commenced it is necessary to acquire and actually occupy certain lands incorporated within the plan ordered by the Board (p. 5, AA). Three different private individuals own 22,110 square feet, and Lehigh Valley Railroad Company of New Jersey (not a party to the proceeding) owns 41,960 square feet, of that land, all of which is required by the order to be taken and devoted to public highway purposes (p. 6, AA).

The order makes no provision for acquiring the necessary land and directs no particular party to acquire it and make it available for use. The defendant is a corporation of the State of Pennsylvania and has no power of eminent domain in New Jersey.

Every property owner in the community knows this order was made, and exactly whose and how much land will have to be acquired to carry out the order. Let this compulsion to acquire be accompanied by the lack of the power of condemnation, and "the sky is the limit" of the prices that will be demanded.

Counsel for relator argued in his brief that "it does not clearly appear that the power of eminent domain is required in this case." It requires very little experience in the acquisition of land for public or semi-public purposes to teach one that the power of eminent domain *is necessary* even though the land is acquired by purchase. It is the roof of reasonable prices. It is indispensable to any rational bargain.

If, as counsel for the relator says in his brief, the State Highway Commission and the Town-

ship of Hillsboro were parties to the proceedings before the Board and were both ordered to proceed with due diligence to the execution of the order, they are necessary parties defendant in this motion for a writ and if a writ should be issued against them as co-defendants with this defendant there would be no lack of power to condemn or to conduct reasonable negotiations for purchase, which are impossible without the power of eminent domain in the background.

Counsel of the Board contends that there is no virtue in this point and that the same objections were raised in *Erie Railroad Co.* v. *Board,* (Paterson Grade Crossing Case) 89 N. J. L. 57. Our objection on this point is based upon the fact that in this case the Board failed to do what it did in the Paterson case; namely, make the domestic-lessor-owing companies, as well as the foreign-lessee-operating company, parties to the proceedings and direct its order against them. *(3 N. J. P. U. C. Rep. 297)* as required by Section 4 of the Fielder Act. They participated in the hearings throughout the proceeding in the Paterson case, appealed from the order and argued their appeal before this court and the Court of Errors and Appeals.

In the Paterson case, the contention of the lessee-operating company was that the order of the Board should have been directed to the lessor-owning companies so that the expense of altering the grades might be apportioned among all of the companies in accordance with their several interests *(Erie R. R. Co.* v. *P. U. Com.,* 89 N. J. L. 57, 71). The question we raise in this case of the failure of the Board to make the lessor-owning company a party to the proceedings, was not raised or decided in the Paterson

case because the lessor-owning companies in that case, were made parties to the proceeding and subject to the order in the same manner and to the same extent as we contend should have been done in the present case with respect to the Lehigh Valley Railroad Company of New Jersey.

In the Paterson case no question was raised of any lack of power of eminent domain on the part of the Erie Railroad Company, which was the foreign-lessee-operating company in that case, and that question was not decided because that company, although domiciled in the State of New York, had acquired the power of eminent domain and all other powers of New Jersey Corporations under acts of the Legislature.

All this court held in the Paterson case on this point was that under these circumstances the Erie Railroad Company was obligated to exercise that power of eminent domain for the purpose of complying with the order of the Board. *Erie* v. *P. U. Com.*, 89 N. J. L. 57, 80.

Counsel for relator is therefore in error in the statement that objections similar to those urged by us herein were raised or decided in the Paterson case.

In the Paterson case this court held that an order of the Board, couched precisely in the same language as the paragraph quoted above, imposed upon the City of Paterson the duty to exercise its charter powers to lay out, open, change, altar or vacate the streets involved in that case and to take such lands and real estate as may be necessary therefor. Citing *Clark* v. *City of Elizabeth*, 61 N. J. L. 565, (89 N. J. L. 57, 80).

In spite of the decision of the Supreme Court in the Paterson case with respect to the power of the operating railroad company to acquire land by eminent domain, there still remains the question, yet undecided, whether the railroad company can exercise its power of eminent domain, in order to comply with an order of the Board, for any purposes other than to acquire land which it shall thereafter own and use. We submit that even for the purpose of complying with an order of the Board a railroad company has no power to acquire by condemnation lands which are to be turned over and devoted exclusively to the purposes of a public highway. Such lands must be acquired by the public authorities in the exercise of *their* powers of eminent domain, regardless of who shall ultimately pay the cost of such acquisition. This must be so because the municipal authorities require title to, and ownership of, the lands taken for public highway purposes, which they could not have in land acquired by a railroad company, either by purchase or condemnation.

Counsel for the Board admits a doubt as to whether section 13 of the Railroad Law confers the power of eminent domain upon a foreign corporation. We think it clear that it applies only to New Jersey railroad corporations.

Section 13 of the railroad law authorizes the lessor (Lehigh Valley Railroad Company of New Jersey) to take by condemnation land and property for right-of-way of its main line and branches, not exceeding 100 feet in width unless more is required for slopes or cuts or embankments or retaining walls along its right-of-way. It also authorizes it to take by condemnation such other land and property adjoining the

right-of-way as—"in the judgment of the directors and exigencies of business may demand," for freight and passenger depots, "and all other legitimate purposes of the company." That section also authorizes it to take by condemnation "any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners." Three distinct and separate purposes are thus specified for which land may be taken by the lessor company by condemnation:

1. For railroad right-of-way 100 feet wide.

2. For freight and passenger depots or other legitimate purpose of the company which in the judgment of the directors, the exigencies of the *business* of the company may demand.

3. For compliance with an order of the Board.

All the land which the Board's order in this case requires is to be used for public highway purposes. None of it is to be used for railroad purposes. Consequently, neither purpose No. 1 nor purpose No. 2 would serve as an authority for the lessor company to take the land by condemnation even though the lessee company should request it to do so. The only authority the lessor company would have to take the land would be for the compliance with an order of the Board *made against it.* An order made against another corporation, like the order in question, has no binding effect upon the Lehigh Valley Railroad Company of New Jersey and would not confer upon it any authority to exercise the power of eminent domain.

In *Akers* v. *United New Jersey Railroad Company* (43 N. J. L. 110), Justice Dixon held that the grant of eminent domain "is never to be extended by unnecessary implication."

Counsel for the Board in his brief refers to the lease from the Lehigh Valley Railroad Company of New Jersey to the defendant—which was approved by the Board in a decision reported in 3 *N. J. P. U. R.*, p. 64.

It so happens that the approval of the Board was granted only after the same lease in a different form had previously been disapproved. The reasons for the disapproval are set forth in the decision of the Board reported in *Vol. 2, N. J. P. U. R.*, p. 147. The opinion discusses at length the power of New Jersey railroad corporations to lease their property and franchises to railroad companies of other states.

The opinion demonstrates that this defendant has no power of eminent domain in the State of New Jersey. We quote therefrom as follows:

> "It must also be considered as settled in this State that a railroad company cannot lease its property and franchises necessary in the fulfillment of its obligations to the State without legislative sanction. (1873, *Black* v. *Delaware and Raritan Canal Co.*, 24 *N. J. E.* 455, 465; 1875; *Stewart* v. *Lehigh Valley R. R. Co.*, 38 N. J. L. 505, 513; 1886, *Mills* v. *Central R. R. Co.*, 41 *N. J. E.* 1, 6; 1892, *Stockton* v. *Central R. R. Co.*, 50 *N. J. E.* 52, 56.)
>
> In determining whether authority to lease exists and, if so, the scope and extent of such authority, this Board must be governed by the rule that a corporation created by statute can have no power and has no rights, except such as are expressly given or necessarily implied. (Cases before cited and 1850, *Camden and Amboy R. R.* v. *Briggs*, 22 N. J. L. 623, 647; 1873, *Pennsylvania R. R. Co.* v. *National Railway Co.*, 23 N. J. E. 441, 452; 1882, *Elkins* v. *The Camden and Atlantic Railroad Co.*, 36 *N. J. E.* 5; 1908, *State* v. *Atlantic City and Shore R. R. Co.*, 77 *N. J.*

L. 465; 1908, *Colgate* v. *United States Leather Co.*, 75 N. J. E. 228.)" (p. 152.)

"The lease sumbitted for approval, however, apparently seeks to bring within its grant more than the mere road of the New Jersey corporation and the franchises of using and operating the road and collecting fares and freights. It purports to include '*all the rights, powers, franchises* (other than the franchise of being a corporation and the privileges of the lessor thereto belonging, or in any wise appertaining, which *are now* or *may hereafter,* during the term of this lease be lawfully exercised or enjoyed in and about the premises.' It possesses the franchise to construct connecting roads and branches (Secs. 7, 8, 9 General Railroad Act, P. L. 1903, p. 645). It is vested with the power of eminent domain (Secs 12, 13). It is also vested with the right to establish and operate ferries for the transportation of persons and property and to collect rates of fare and tolls (Sec. 19).

We find in the statute, in terms at all events, no authority for the transfer by lease of these franchises by a railroad corporation of this State to a railroad corporation of another State. (Section 64 of the General Railroad Act) as revised in 1903 (as amended 1906) confines the authority to lease to the '*road or any part thereof,*' it provides merely that the lessee may use and operate the leased road and may collect fares and freight. The omission of all reference to *franchises* in general in conferring the power to lease is significant in that in specific legislation conferring such power the authority has been in terms extended to road, property and *franchises.* An illustration of this may be found in the statute giving consent to the New York, Susquehanna and Western Railroad Company to lease to Erie Railroad Company (P. L. 1898, p. 236). In that act the authority to lease

was specifically extended to '*franchises,* railroad and property.' Other illustrations may be found. The most recent is found in the statute giving consent to the Pennsylvania Tunnel and Terminal Railroad Company to lease to the Pennsylvania Railroad Company (P. L. 1910, p. 531). This statute also explicitly extended the consent thereby given to a lease of the '*franchises,* railroad and property.' In this situation we are not satisfied that the question of the power to make the lease in the form in which it is submitted to use for approval, is free from reasonable doubt. Under the rule of construction which we have referred to we cannot resolve that doubt in favor of the possession of the power. If this doubt was resolved in favor of the power to make the lease, other considerations would, on our view of the authority and duty conferred and imposed upon us, impel us to withhold our approval'' (pp. 155, 156).

''We find no legislation in this State authorizing the use and enjoyment of the franchises of the New Jersey corporation by the Pennsylvania corporation. Such use and enjoyment of the franchises of the New Jersey corporation by the Pennsylvania corporation cannot be rested on the ownership of all of the shares of outstanding capital stock of the New Jersey corporation by the Pennsylvania corporation. The franchises are vested in the New Jersey corporation, an artificial personage created by and subject to the power and authority of this State'' (p. 164).

Since the defendant has no power to take this land and is not obligated by the order or the statute to acquire it, a writ of mandamus directed against it, alone, would command an impossible thing, and an unjust thing in excess of the legal obligations of the defendant.

An effective writ would have to be directed to the Township of Hillsboro, the State Highway Commission and the Lehigh Valley Railroad Company of New Jersey, as well as to the defendant. But the Lehigh Valley Railroad Company of New Jersey is not a party to the order, hence a writ cannot be directed to it.

VI.

The order in its present form is impossible of performance because of expiration of time.

The order of the Board is dated April 26, 1927 and took effect May 10, 1927. It provided as follows:

> "And It Is Further Ordered that the said Lehigh Valley Railroad Company begin the actual work required in the performance and execution of this order, on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of this order, and complete all of the work required thereunder to be done within one year thereafter, or the first day of June, 1928" (p. 12, Appendix A).

On June 1st, the United States District Court for the District of New Jersey, issued a preliminary restraint, against the enforcement of the order, which continued in force until August 10, 1927 (p. 5, Appendix A). By agreement of the parties the enforcement of the order was suspended pending the final hearing in the suit before the District Court.

On January 18, 1928 the District Court denied an application for permanent injunction and dismissed the bill, but allowed an appeal with a supersedeas, suspending the enforcement of the order, pending the appeal to the United States Supreme Court. The mandate of the latter court

was issued December 20, 1928 (p. 5, Appendix (A. Twenty days thereafter, relator, without making any demand upon the defendant, or receiving any refusal, for the commencement of the work, prepared its affidavits, and, on the day following, served notice of this motion, which asks this court to issue a peremptory writ of mandamus because the defendant has not within those twenty days, in the middle of the winter, begun the work of altering the crossing.

During the litigation the enforcement of said order was continuously suspended by court orders and agreement of parties, until December 20, 1928. When that suspension expired the time provisions of the order had elapsed and it is now impossible to comply with the order in its present form.

It was the duty of the Board (and its invariable practice heretofore) to hold a hearing, on notice, and take testimony to determine, as a question of fact, new dates for beginning and completing the work. *Paterson Grade Crossing Case, XI N. J. P. U C. Rep.* 77.)

Work of this nature cannot be instantly begun. The time for beginning the work depends upon numerous conditions, such as seasonable obstructions, designing the structure, computing quantities, preparation of detail plans, working plans, specifications, advertising for bids, preparation and letting of contracts, organizing and assembling working forces, equipment, tools and machinery for doing the work, ordering, fabrication, manufacture, transportation and assembling of material, some of which, such as steel work, must be made to order according to specifications.

All these matters must be considered and testimony thereon taken before it is possible

to determine when the work can be commenced. Testimony is also necessary to determine how much time should be allowed to complete the work after it has been commenced.

On the oral argument and in his memorandum brief, counsel for the Board says that the fact that the time for beginning and completing the work has expired is of no consequence in this proceeding. He quotes from 38 C. J. 555, as follows:

> "Ordinarily, it is no objection to the issuance of the writ that the time for the performance of the duty is passed, since it is only in case of default in performance at this time that the writ can issue."

We will quote the next sentence of the *same* paragraph, which is as follows (italics ours):

> "However, although the opposite view has been taken in some cases, generally it is held that where the time within which performance may be lawfully had is fixed by statute, *mandamus will not lie to compel the performance of such act after the expiration of the time so limited.*"

Since the order of the Board has the effect of a statute, this rule applies to an order as well as to a statute.

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 67 L. Ed. 659;

Prendergast v. *N. Y. Tel. Co.,* 262 U. S. 43, 67 L. Ed. 853;

Louisville & N. R. Co. v. *R. R. Com.,* 208 Fed. 35.

In *Goodman* v. *Freeholders,* (66 N J. L. 571) this court said:

> "The time has passed within which the publication should have been made, and therefore the application is denied, without costs."

It is not the province of this court to substitute its judgment for that of the Board as to when work should commence or be completed nor is it the province of a writ of mandamus to alter or correct the form of the order sought to be enforced. The writ of mandamus takes the order as it finds it and undertakes to enforce it if it is enforceable in that form. The essence of the order is the date for beginning and completing the work. It is not the function of a writ of mandamus to supply deficiencies of this important element. If a further hearing is necessary to be held by the Board to hear testimony and determine when the work can be commenced and completed, it is the *Board's* duty and not the Court's, to alter the order accordingly. This has been the invariable practice of the Board in the past. In the Paterson Grade Crossing Case, after the order of the Board had been reviewed in the courts and finally sustained, the Board, on its own motion, issued an order calling a new hearing at which it considered testimony not only upon the question of how much time would be required to prepare for the beginning and for the completion of the physical work, but also upon the question of when the financial condition of the company would permit it to begin the work and how rapidly the financial resources of the company would permit the work to progress (*XI N. J. P. U. C. Rep.* 77).

The order of the Board involved in the present motion is incapable of being performed in its present form and it cannot be enforced unless and until the beginning and completing dates therein fixed are changed. That is not a function of this court or of a writ of mandamus.

VII.

Mandamus is not an appropriate remedy in this case.

The performance of this order involves more than a ministerial act or a single effort, such as issuing a building permit, paying a judgment, issuing bonds theretofore authorized, or other acts such as are usually ordered by mandamus.

The plan ordered by the Board is very general. It determines only location, dimensions and the general nature of the undercrossing to be made. It simply says—make an undercrossing so many feet high and so many feet wide, with certain street grades at a given place. Working plans and specifications must be prepared and submitted to the Board for approval before work can be commenced. Then there is supervision to be given during the progress of the work. Many questions remain to be determined. In such cases numerous minor changes and alterations in plans are usually necessary as the work progresses. In the Paterson case above referred to, the plan was radically changed by order of the Board at most of the 15 crossings involved, during the progress of the work.

The elimination of a grade crossing is not a single, definite, specific and complete act or entirety that can be compelled by a single final unalterable judgment or decree. It is a continuing operation extending, in this case, over a period of a year or more. No writ of mandamus can be framed to cover the situation as a finality, like a command to run a given train on a given schedule, to stop a given train at a given station, to promulgate a tariff for a given set of rates, or such like acts of regulation of a public utility, as

the Board is empowered to order by certain sections of the Public Utilities Act.

The mandate of enforcement of an order of the nature in question should issue from a court that can retain jurisdiction during the progress of the work.

Section 26 of the railroad law establishes the duty of a railroad company, incorporated under the general railroad law, and similar or identical provisions in the special charters, establish a similar duty upon railroad companies incorporated by special act, to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right-of-way where any public or other road shall cross the same so that public travel on said road shall not be impeded by the crossing; said bridges or passages to be of such width and character as shall be suitable to the locality in which they are situated. (3 C. S. 4231.)

By the Fielder Act the legislature conferred upon the Board power to determine whether danger or impediment of travel required the altering of a grade crossing so as to provide an under-crossing or an over-crossing, and to determine the width and character suitable to the locality, and thus enforce the duty imposed by Section 26 of the railroad law and similar provisions in the charters.

Section 29 of the railroad law prescribes the method of enforcing compliance with the duties imposed by Section 26 and it is our contention that that method of enforcement applies likewise to orders of the Board.

After authorizing the municipality (if it cares to do so) to make the necessary crossing changes

at the expense of the railroad company, that section provides as follows:

> "Or in lieu of such construction or repair the township or municipality may proceed by a suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings, * * *." (3 Comp. Stat. 4233.)

Section 33 of the Public Utilities Act specifies methods of enforcement of orders of the Board, as follows:

> "* * * and observance of the orders of the Board may be enforced by mandamus or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility." (2 Cum. Supp. 2895.)

This provision applies to all of the orders which the Board might make. Mandamus would be appropriate for enforcing regulatory orders such as requiring a railroad company to re-open a railroad station it had closed, as in the case of *Board of Railroad Commissioners* v. *D. L. & W.*, (79 N. J. L. 219), or to perform any single complete act of a similar nature, but it is not an appropriate remedy to compel performance of an order for the elimination of a grade crossing of the character in this case. Here, the plan is so general as to constitute merely a picture and full discretion is left to the railroad company in the designing and building of the structure. Detailed plans and specifications have not yet been prepared or approved by the Board. Variations in the plans usually occur in the progress of the work as unforeseen physical difficulties or other desirable mutually beneficial opportunities present themselves.

Certain parties mentioned in the order are required to do certain parts of the work at the expense of the railroad company. Accountings by the parties will have to be rendered from time to time, and the very nature of the work, which will involve a year or more in completion, requires that the enforcement of the order should be in the hands of a court or tribunal having a continuous jurisdiction and power to approve or direct accountings, modifications or alterations or to determine the proper exercise of the discretion of the defendant if occasion should arise.

It is for this reason that Section 29 of the railroad law gave this jurisdiction to the Court of Chancery in the form of a bill for specific performance of a duty imposed by law. The order of the Board has the effect of a statute for the alteration of grade crossings, and that is the reason why the legislature provided in Section 33 of the Public Utility Act the same remedy for enforcing an order of the Board as it had already provided in Section 29 of the railroad law for enforcing the same duty.

> "It is very generally held that except insofar as changes have been introduced by specific statutory provisions, the writ of mandamus being an extraordinary writ will not issue where there is another plain, speedy and adequate remedy available in the ordinary course of law." 38 *C. J.* 558, Section 31.
>
> "Where a specific equitable remedy which will do complete justice between the parties is provided by statute for the wrong complained of, this remedy must be pursued and mandamus will not lie." 38 *C. J.* 563, Section 33.

The writ of mandamus should not issue in any case where there are doubtful questions *either of law or of fact.*

Asbury Park v. *Neptune Township,* VI N. J. Miscl. 1114; 143 A. 867.

Uszkay v. *Hill,* 92 N. J. L. 329.

Englewood Theatrical Enterprise v. *Tipping,* 130 Atl. 638;

Strauss Contr. Co. v. *Board,* 143 Atl. 753.

In the present case there are at least two doubtful questions of law, namely, whether the order can be enforced without revision by fixing the dates for the beginning and completion of the work; and whether the order can be enforced at all unless it is directed also to the Lehigh Valley Railroad Company of New Jersey.

The notice asks the court to fix the time for beginning of work and specifically asks the court to order completion "within *one year* thereafter." Both of these dates involve issues of fact which cannot be determined on this motion.

The present case is not an "appropriate" one for the enforcement of an order by mandamus, not only for the reason that it is not possible to obey the order as it is now written, and the order must first be changed before the court can command or the company can obey the specific act required by the order, but also because a mandamus requires a certain act to be performed in strict compliance with the direction of a statute or previous judgment and does not permit any alteration or modification of the precise act that is commanded. The "appropriate" action in the present case is by suit in equity to compel the specific performance of the order; in such a suit the court may retain control of the proceedings until the work is completed and

order such accountings, modifications or changes as the exigencies of the work may require.

Section 38 of the Public Utility Act, providing for review of an order by certiorari, does not authorize the Supreme Court on review of an order to amend or modify the order, but merely directs either that the order be set aside or that the court may direct a rehearing before the Board, and in the latter event, the Board may re-adopt the order or alter, amend, modify or extend it. (2 Cum. Supp. 2896.)

This section emphasizes the contention that if the Supreme Court, even on certiorari, cannot itself change the order, still less can it do so, or supply deficiencies therein, in a mandamus proceeding.

For these reasons mandamus is not the appropriate remedy in this case.

VIII.

Petition for Rehearing.

Section 31 of the Public Utilities Act provides:

> "The Board, at any time, may order a rehearing and extend, revoke or modify any order made by it."

Defendant has filed a petition for rehearing setting up a number of pertinent facts and propositions which are entitled to consideration of the Board. A copy of that petition is printed as Exhibit "B" in the answering affidavits and exhibits filed herein (pp. 10-22, AA).

It will be observed from that petition (p. 10, AA) that the defects in the effective date and the dates for beginning and completing the work, the defects as to parties to the proceeding before the Board, and other matters are set up as reasons for granting a rehearing.

In his oral argument and in his brief on this motion, counsel for the Board says that this petition was filed after the notice of this motion was served. An examination of the petition will show that, unlike Minerva, who "leaped from Jupiter's head, full grown and armed with spear and shield," it was the labor of time. It was prepared on December 13, 1928, after the decision of the Supreme Court was rendered but before its mandate was issued. It was only the necessity of obtaining figures after the close of the year that delayed its completion until one day, and its actual filing, until two days, after the notice was served.

No action to enforce the existing order should be taken pending the consideration by the Board of that petition.

Conclusion.

For the above reasons it is respectfully submitted that the motion should be denied.

HOBART & MINARD,
Attorneys for Defendant.

I hereby consent to the filing of the within Supplemental answer, subject to any motion to strike out the same, this 13th day of February, 1929. Such motion may be made at the same time that motion is made to strike original answer.

J. O. BIGELOW,
Pltffs' Atty.

Notice.

NOTICE.

Filed Feb. 15, 1929.

To Messrs. Hobart & Minard, defendant's attorneys:

TAKE NOTICE that before the Honorable Dayton Olyphant, Circuit Court Judge sitting as Supreme Court Commissioners, at the Court House in Trenton, on the fifteenth day of February next, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, I shall make application addressed to the answer in the above entitled cause, as follows:

1. To strike out on the ground that it is sham and frivolous, so much of paragraph 1 of the First Defense as alleges that the defendant "has no knowledge or information to form a belief as to whether the highway described as Camp Lane was or is a public highway", and that I shall rely upon the record in the United States District Court for the District of New Jersey and in the United States Supreme Court, in the suit lately pending therein and mentioned in the complaint and answer in this action or on a certified copy of said record, and that I shall urge that such record establishes as *res judicata* the fact that Camp Lane was and is a public highway.

2. To strike out the First Defense on the ground that it or so much thereof as is not sham, does not disclose any defense to the plaintiff's cause of action.

3. To strike out the Second Defense on the ground that it does not disclose any defense to the plaintiff's cause of action, and that the court orders and the consent therein mentioned did not

Notice.

relieve the plaintiff of its duty to comply with the Board's order or stay the accrual of the penalty.

4. To strike out on the ground that they are frivolous and sham, the Third Defense, the Fifth to the Seventeenth Defenses inclusive, and the Twentieth to the Thirty-fifth Defenses inclusive, and that I shall rely on the record in the United States District Court for the District of New Jersey and the United States Supreme Court, in the suit above mentioned or a certified copy thereof, and that I shall urge that the said defenses and the facts therein alleged are *res judicata.*

5. To strike out the Fourth Defense on the ground that it does not disclose any defense to the plaintiff's cause of action and on the ground that no facts are set forth in the complaint or in said Fourth Defense whereby it appears that the Township of Hillsborough or the State Highway Commission was under a duty to adopt the resolutions or take the action suggested in said defense and on the ground that the failure of the Township of Hillsborough and the State Highway Commission to adopt such resolutions and take such action, does not excuse the defendant from complying with the order of the Board mentioned in said defense.

6. To strike out the Eighteenth and Nineteenth Defenses on the ground that they do not disclose any defense to the plaintiff's cause of action and that the penalty provisions of the Public Utility Act mentioned in said defenses, are not unconstitutional.

7. To strike out the Thirty-sixth, Thirty-seventh and Thirty-eight Defenses on the ground that they do not disclose any defense to the plaintiff's cause of action.

Notice.

8. To strike out the answer on the ground that it is sham and frivolous, and to enter judgment final in favor of the State of New Jersey and against the Lehigh Valley Railroad Company in the sum of Fifty-seven Thousand Nine Hundred Dollars ($57,900) or so much thereof as the Court may ascertain, and that I shall rely upon the record or certified copy thereof above mentioned, and upon the affidavit hereto annexed.

Dated: Trenton, N. J., February 8, 1929.

J. O. BIGELOW,
Plaintiff's Attorney.

ANNEXED TO NOTICE.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

CHARLES A. MEAD, being duly sworn according to law, on his oath says:

I am Chief Bridge Engineer of the Board of Public Utility Commissioners of New Jersey and am cognizant of the facts in the above entitled cause and hereinafter set forth:

On November 24, 1926, and from thence continuously to the present time, the Lehigh Valley Railroad Company, the defendant to this action, operated and still operates within this State a steam railroad for public use under privileges granted by the State of New Jersey. Said railroad and a certain public highway now or lately known as State Highway Route No. 16, at all times aforesaid crossed and still cross each other at the same level in the Township of Hillsborough in the County of Somerset. Said railroad and a certain other road known as Camp Lane, at all times aforesaid crossed and still cross each other at the same level in said Township a few hundred feet east of the first mentioned crossing.

Affidavit Annexed to Notice.

The Board on November 24, 1926, made an order of which a copy is annexed to the complaint in this cause.

I am informed and believe that due notice of said order and the proceeding thereby instituted was given to the Railroad Company, pursuant to said order and notice, hearings were had before the Board and the Board on April 26, 1927, made issued and filed its decision and order relative to said crossings. A true copy of said order, excepting the plan referred to therein, is annexed to the complaint in this action and a true copy of the plan is annexed to the answer in this action. I am informed and believe that a certified copy of said last mentioned order was duly served on the Railroad Company within ten days after April 26, 1927.

Said order as appears therefrom directs that the Railroad Company begin the actual work required in the performance and execution thereof on or before the first day of June, 1927, and perform and fully comply with the directions and requirements thereof and complete all of the work required thereunder to be done within one year thereafter. The Railroad Company has failed and still does fail to comply with said order and did not begin the actual work required in the performance and execution of said order on or before the first day of June, 1927, and has not yet begun the same and the Company did not perform and fully comply with the directions and requirements thereof and complete all of the work required thereunder to be done within one year thereafter or on June 1, 1928, and has not performed or fully complied therewith or completed the said work. I am aware that the Public Utility Act prescribes a penalty of One Hundred Dollars ($100.) per day for every day dur-

ing which default in compliance with an order of the Board of the character above mentioned continues. I am not, however, a lawyer and I do not know to what extent, if at all, the litigation in the United States District Court for the District of New Jersey and in the United States Supreme Court, mentioned in the complaint and answer in the above entitled cause, relieves the Railroad Company of said penalty.

The amount claimed in this suit in favor of the State of New Jersey is Fifty-seven Thousand Nine Hundred Dollars ($57,900), which is at the rate of One Hundred Dollars ($100.) a day for 579 days, namely, from June 1, 1927 to December 30, 1928, inclusive.

In my belief, the cause of action in the above entitled cause is true and there is no defense to the action.

CHARLES A. MEAD.

Sworn and subscribed before
me this 9th day of February,
1929.

MAUD WAGNER,
Notary Public of New Jersey.

Exhibit A.

EXHIBIT A.

This exhibit was a copy of the entire record in the suit mentioned in the above notice, namely between Lehigh Valley Railroad Company, plaintiff, and Board of Public Utility Commissioners, and others, defendants, in the United States District Court for the District of New Jersey and in the United States Supreme Court. It appeared therefrom that the mandate of the United States Supreme Court, dated December 20, 1928, was filed in the District Court December 21, 1928.

This exhibit was presented to Judge Olyphant by the plaintiff upon the argument of the above stated motion.

The exhibit is not printed as it seems immaterial to any question on this appeal.

ANSWERING AFFIDAVIT.

Filed February 15, 1929.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } *ss.*

DUANE E. MINARD of full age being duly sworn on his oath deposes and says:

1. I am a member of the firm of HOBART & MINARD, attorneys for the defendant and I am actually participating in the conduct of this suit on behalf of the defendant.

2. The blue print plan annexed to the answer as Exhibit "A" is a true and correct copy of the plan which was annexed to and made a part of the order of the Board of Public Utility Commissioners, dated April 26, 1927, the original tracing of which is on file in the office of the secretary of said Board.

3. The order to show cause annexed to the answer as Exhibit "B" is a true copy of the original thereof, entered and filed June 1, 1927, in the United States District Court for the District of New Jersey. The original whereof is on file in the office of the clerk of said court.

4. The order annexed to the answer as Exhibit "C" is a true copy of an order entered and filed August 10, 1927, in the United States District Court for the District of New Jersey, the original whereof is on file in the office of the clerk of said court.

5. The order allowing appeal from final decree and supersedeas annexed to the answer as Exhibit "D" is a true copy of an order entered and filed January 18, 1928 in the United States District Court for the District of New Jersey,

the original whereof is on file in the office of the clerk of said court.

6. The mandate annexed to the answer as Exhibit "E" is a true copy of the original mandate issued December 20, 1928, out of the Supreme Court of the United States, the original whereof is on file in the office of the clerk of the United States District Court for the District of New Jersey.

7. The lease annexed to the answer as Exhibit "F" is a true copy of the original lease made June 17, 1914 between Lehigh Valley Railroad Company of New Jersey and the defendant, and approved by certificate issued June 22, 1914, by the Board of Public Utility Commissioners. A duplicate original of said lease is on file in the office of the secretary of the defendant, and the original certificate of approval is on file in the office of the secretary of the defendant.

8. The blue print annexed to the answer as Exhibit "G," is a true copy of Plan "C" as prepared and approved by the State Highway Commission by resolution adopted March 11, 1924, by said State Highway Commission and the original tracing thereof is on file in the office of the engineer of said State Highway Commission.

9. The contract annexed to the answer as Exhibit "H" is a true copy of the contract between the State of New Jersey, acting by and through its State Highway Commission, and the defendant, as prepared September 19, 1924, by the defendant, at the request of the State Highway Commission and approved by said State Highway Commission.

10. The notice annexed to the supplemental answer as Exhibit "I" is a true copy of a notice

served by the attorney of the Board of Public Utility Commissioners upon the attorneys for the defendant, January 10, 1929, of an application to this court for writ of mandamus, the original of which notice is on file in the office of the clerk of this court.

11. The affidavit annexed to the supplemental answer as Exhibit "J" is a true copy of the affidavit of Alfred N. Barber, annexed to and served with said notice; the original of which affidavit is on file in the office of the clerk of this court.

11. The affidavit of Charles A. Mead annexed to said supplemental answer as Exhibit "K" is a true copy of the original annexed to and served with said notice; the original of which affidavit is on file in the office of the clerk of this court.

12. The answering affidavit of Ralph D. Van Duzer annexed to the supplemental answer as Exhibit "L" is a true copy of the original filed in the office of the clerk in this court, on January 16, 1929.

13. The affidavit of William R. Johnstone annexed to the supplemental answer as Exhibit "M" is a true copy of the original thereof filed January 16, 1929, in the office of the clerk of this court.

14. The order allowing appeal from final decree and supersedeas annexed to the supplemental answer as Exhibit "N," signed and entered January 18, 1928 in the United States District Court for the District of New Jersey, is a true copy of the original thereof signed and entered on said date and now on file in the office of the clerk of said court.

15. The petition for rehearing annexed to the supplemental answer as Exhibit "O" is a true copy of the original thereof filed January 14,

1929, in the office of the secretary of the Board of Public Utility Commissioners.

16. The decision of this court annexed to the supplemental answer as Exhibit "P" is a true copy of the original as rendered by this court January 30, 1929, and filed January 31, 1929 in the office of the clerk of this court.

17. The judgment of this court annexed to the supplemental answer as Exhibit "Q" is a true copy of the original thereof entered February 4, 1929 in the office of the clerk of this court.

18. The memorandum brief for the Board annexed hereto as Exhibit "R" is a true copy of the original thereof used on the argument for said writ of mandamus, filed in the office of the clerk of this court, January 16, 1929, and a true copy of which was served upon the attorneys for the defendant on or about said date.

19. The brief for defendant annexed to the supplemental answer as Exhibit "S" is a true copy of the original thereof used on the argument of said motion for writ of mandamus on January 16, 1929 and filed on said date in the office of the clerk of this court.

20. Each of said exhibits will be referred to and used by the defendant on the argument of this motion.

DUANE E. MINARD.

Sworn and subscribed before me
this 13th day of February, 1929.

J. J. GAFFEY,
An Attorney at Law of N. J.

Service of within Answering Affidavit acknowledged this 13th day of February, 1929.

JOHN O. BIGELOW
Attorney for Plaintiff.

MEMORANDUM BY JUDGE OLYPHANT.

Filed Aug. 9, 1929.

This matter is before the Court on a motion to strike out the answer filed by the defendant herein.

It is a suit to recover the penalty provided for under Section 33 of an Act of the Legislature of New Jersey entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers" Laws of 1911, Chapter 195.

By an order of the Board of Public Utility Commissioners, dated April 26, 1927, the defendant was directed to eliminate two railroad grade crossings in Hillsboro Township, Somerset County. One crossing involved State Highway Route No. 16 and the other one known as Camp Lane Road.

The defendant Company then brought the matter before the Supreme Court on a writ of certiorari which Justice Parker denied and it was then taken before the Supreme Court *in banc* with the same result.

On June 1, 1927 defendant filed a bill of complaint in the District Court of the United States for the District of New Jersey alleging that the order of the Board was invalid for numerous reasons and praying for an injunction. It first came before that Court on a motion for interlocutory injunction which was denied. After final hearing a decree was entered by that Court on January 18, 1928 dismissing the bill of complaint.

From both the order denying the interlocutory injunction and from the final decree, appeals were taken by the defendant here to the United

States Supreme Court and after argument the District Court was affirmed.

The Board of Public Utility Commissioners then applied to the Supreme Court of this State for a peremptory writ of mandamus to compel the defendant to begin work pursuant to its order. This application, in an opinion filed January 31, 1929, was denied, the Court stating that the denial was "without prejudice to renew the same at a future time."

The plaintiff in the present action seeks to recover the sum of fifty-seven thousand nine hundred dollars ($57,900) as penalty for the non-compliance by the defendant with the order of the Board of Public Utility Commissioners. In support of the arguments of counsel there were presented to the Court the records of the proceedings had in the United States District Court for the District of New Jersey, the United States Supreme Court and the Supreme Court of New Jersey.

After examination of the pleadings, the records presented and the arguments of counsel, I have concluded and determined as follows:

Strike out so much of Paragraph 1 of the first defense as alleges that "defendant has no knowledge or information to form a belief as to whether the highway described as Camp Lane was or is a public highway" on the grounds that it is *res adjudicata* and sham.

Strike out the first defense except Paragraph 11 thereof on the ground that the same discloses no defense to the plaintiff's cause of action and is frivolous.

Strike out the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, twentieth,

twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth defenses on the ground that the matters and things alleged therein are *res adjudicata.*

In these defenses the validity of the order of the Board of Public Utility Commissioners is attacked. This has been fully litigated in a court of competent jurisdiction and has been established by judgment final rendered upon the merits. While this suit is at law and the former was in equity, a final determination in either court may be invoked as a bar or estoppel in the other. Hoboken etc. Co. *vs.* Hoboken, 76 N. J. L. 122. As all the facts and reasons now relied upon by the defendant might have been presented in the former suit, the defendant is now estopped as to all of them. In McEligot etc. Co. *vs.* Nutley, 92 N. J. L. 120, the Court said "the legal rule is well settled that a judgment in a former case between the same parties relating to the same subject matter settles all matters which came before the Court under the pleadings and also every other ground which might have been presented."

Strike out the eighteenth and nineteenth defenses provided it is stipulated that if the defendant is liable for the prescribed penalty that penalty should run only from December 21, 1928, the date of the issuance of the mandate of the United States Supreme Court.

Strike out the thirty-eighth defense on the ground that the same sets up no defense of plaintiff's cause of action and is frivolous.

Section 219 of the Practice Act, 3 C. S. 4120, refers only to actions by common informers.

Memorandum by Judge Olyphant.

Strike out the thirty-ninth, fortieth, forty-first, forty-second and forty-third defenses on the ground that the refusal of the Supreme Court to grant a writ of mandamus did not constitute a final judgment on the merits and is not a complete and effectual bar to the plaintiff's cause of action.

The motion to strike out Paragraph 11 of the first defense and the second defense should be denied.

I cannot conceive how the defendant could be held liable for the penalty pending the outcome of litigation to test the validity of the order on a violation of which the right to the penalty rests. Wadley etc. Co. *vs.* Georgia, 235 U. S. 651.

The motion to strike out the fourth defense is denied.

In an action such as this, to recover a penalty for the non-compliance with an order made by the Board of Public Utility Commissioners, the defendant should be permitted to show that it was impossible to comply with said order because of reasons beyond its control.

The motion to strike out the thirty-sixth and thirty-seventh defenses should be denied. The thirty-sixth defense is as follows: "The defendant will object that this suit is improperly brought in that the summons is issued in the name of the Board of Public Utility Commissioners and is signed and endorsed with the name of its counsel, contrary to the statute in such cases made and provided." The thirty-seventh defense is as follows: "The defendant will object that this suit is improperly brought in that it is brought by the Board of Public Utility Commissioners in the name and for the use of the

State, and by the counsel of said Board, contrary to the statute in such cases made and provided."

I am advised that this is the first attempt ever made to enforce the penality provision of the Public Utility Act. There are, therefore, no precedents for suits of this exact nature in this State.

Section 33 of the Public Utility Act, under which this suit is brought provides that "in default of compliance with any order of the Board when the same shall become effective—the person or public utility affected shall be subject to a penalty of one hundred dollars ($100.00) per day for every day during which such default continues —such penalty to be recovered in an action of debt in the name of the State."

It will be noted that the statute expressly states that the action must be brought in the name of the State. While this suit is styled in the name of the State, the complaint is by the Board of Public Utility Commissioners and endorsed by its attorney, not the Attorney-General of New Jersey.

While the Public Utility Act provides for the appointment of counsel to the Board, I know of no statute or decision which confers upon him the power to represent the State. The Attorney-General has no power over him and in the present instance cannot control the litigation. The penalty, if recovered, goes to the State Treasury and the State through its proper officer must sue therefore.

The act defining the duties of the Attorney-General and his assistants provides that he shall "attend generally to all matters in which the State is a party or in which its rights and interests are involved, and to act as advisor and

counsel for all State Boards, Commissions or other State Officials and to be—the sole legal advisor, attorney or counsel thereof and to represent it in all suits or actions of any kind that may be brought for or against them in any of the Courts of this State. P. L. 1904, page 150.

While the Public Utility Act allows for the appointment of counsel by the Board it gives to that counsel no special powers and does not delegate to him the duties of the Attorney-General nor take the duty to represent the State away from the Attorney-General.

The fiftieth section of the Act, while giving general supervision and regulation of, jurisdiction and control over all public utilities, cannot be said to give to the Board of Public Utility Commissioners power to sue on its own complaint for a penalty due to the State alone.

The Practice Act, Section 218 provides that the penalty may be recovered by the party aggrieved which in this case is the State, to whom the penalty, if recovered, goes.

As the forfeiture of the prescribed penalty goes to the State, nobody but the State has any interest in the enforcement of the penalty and a Board created by statute cannot sue to enforce that penalty, at least except by the action of the Attorney-General.

The only interest the Board of Public Utility Commissioners has is to compel the elimination of grade crossings, which, if it is on solid ground can be compelled by writ of mandamus and not through this proceeding.

Counsel for the Board has cited in support of its contention the case of Board of Public Utility Commissioners *vs.* Shelden, *et al.*, 95 N. J. Equity 408. That suit was on a bill for injunc-

tion and while the Court held in such a case the powers of the Attorney-General were bestowed on the Board, I am unable to reach the conclusion that that power can be bestowed in a suit to recover a penalty in a Court of Law. Protection of the public interest and vindication of the public right are not here involved. The Board of Public Utility Commissioners suing in the name and for the State of New Jersey is suing to recover a debt due to the State for non-compliance with an order of the Board.

The summons should not have been issued in the name of the Board of Public Utility Commissioners or signed by its counsel.

A. DAYTON OLYPHANT,
Circuit Court Judge,
Supreme Court Commissioner.

Stipulation.

STIPULATION.

Filed Aug. 27, 1929.

The plaintiff having moved to strike out the answer and supplemental answer and the several defenses therein contained, and the Honorable A. Dayton Oliphant, Circuit Court Judge as Supreme Court Commissioner, having filed his opinion on the motion whereby he concluded among other things that the Eighteenth and Nineteenth Defenses should be struck out, provided it is stipulated that if the defendant is liable for the prescribed penalty, that penalty should run only from December 21, 1928, the date of the filing in the United States District Court for the District of New Jersey of the mandate of the United States Supreme Court in a certain cause wherein Lehigh Valley Railroad Company was plaintiff and appellant, and Board of Public Utility Commissioners of New Jersey and others, were defendants and appellees,

It is hereby stipulated by the plaintiff that if the defendant is liable for the prescribed penalty, that penalty should run only from December 21, 1928.

Dated: August 12, 1929.

JOHN O. BIGELOW,
Attorney for Plaintiff.

RULE FOR JUDGMENT.

Filed Aug. 31, 1929.

This matter coming on to be heard on the plaintiff's motion to strike out certain defenses and parts thereof of the defendant's answer and supplemental answer, as set forth in the notice of said motion, on the several grounds therein stated, and to strike out the answer and supplemental answer, on the ground that the same are sham and frivolous and to enter final judgment in favor of the plaintiff and against the defendant for the amount claimed in the complaint, or so much thereof as the court may ascertain; and the pleadings and exhibits thereto attached and the affidavits of the parties having been read and the argument of counsel thereon having been duly considered; and the plaintiff by its attorney of record, having stipulated that if the defendant is liable for the prescribed penalty, said penalty should run only from December 21, 1928, (the defendant objecting to the filing of said stipulation on the ground that the attorney of record of the plaintiff has no authority to sign said stipulation or otherwise to represent or appear for the plaintiff in this action, or to take any further proceedings therein in behalf of the plaintiff);

And the parties hereto consenting in open court that said motion be heard and considered by me as Circuit Court Judge and Supreme Court Commissioner, with the same force and effect as if the same were heard by the Supreme Court of the State of New Jersey, or a justice thereof.

And the parties hereto further consenting that the validity of the Thirty-sixth Defense and of

the Thirty-seventh Defense be heard and considered by me, with the same force and effect as if the matters therein set forth had been raised by objection on motion, and/or by rule to show cause why the complaint should not be struck out and the summons quashed on the grounds mentioned in said defenses, and that the validity of said defenses be heard and considered by me as Circuit Court Judge and Supreme Court Commissioner, with the same force and effect as if the same were heard by the Supreme Court of the State of New Jersey or a Justice thereof;

ORDERED as follows:

1. As to the First Defense:

The motion to strike out so much of paragraph 1 of the First Defense as alleges that the defendant "has no knowledge or information to form a belief as to whether the highway prescribed as Camp Lane was or is a public highway," is granted.

The motion to strike out the First Defense, except paragraph 11 thereof, is granted;

The motion to strike out said paragraph 11, is denied.

2. As to the Second Defense:

The motion to strike out said defense, is denied.

3. As to the Third Defense:

The motion to strike out said defense, is granted.

4. As to the Fourth Defense:

The motion to strike out said defense, is denied.

5. As to the Fifth to Seventeenth Defenses:

The motion to strike out said defenses, is granted.

6. As to the Eighteenth and Nineteenth Defenses:

The motion to strike out said defenses, is granted, the plaintiff having filed a stipulation as aforesaid, (subject to defendant's objection as aforesaid), that of the defendant is liable for the prescribed penalty, the penalty should run only from December 21, 1928.

7. As to the Twentieth to the Thirty-fifth Defenses:

The motion to strike out said defenses, is granted.

8. As to the Thirty-sixth and Thirty-seventh Defenses:

The motion to strike out said defenses, is denied, the validity thereof having been considered by me pursuant to the aforesaid stipulation of counsel.

9. The motion to strike out the Thirty-eighth Defense of the original answer and the Thirty-ninth to Forty-third Defenses of the supplemental answer, is granted.

10. The motion to enter final judgment in favor of the plaintiff and against the defendant, is denied.

And it appearing that the decision as to the validity of the Thirty-sixth and Thirty-seventh Defenses determines the right of the plaintiff to bring the action as well as the right of the plaintiff's attorney of record to issue the sum-

mons herein and to sign the complaint as the attorney of record of the plaintiff;

Further ORDERED that the summons be quashed and the complaint dismissed and that final judgment be entered in favor of the defendant and against the plaintiff.

A. DAYTON OLYPHANT
Circuit Court Judge and
Supreme Court Commissioner.

Rule entered this 31st day of August, 1929.

On motion of

HOBART & MINARD
Attorneys of Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

State of New Jersey, *Plaintiff-Appellant,* *vs.* Lehigh Valley Railroad Company, *Defendant-Respondent.*	*On Appeal.*

BRIEF OF JOHN O. BIGELOW FOR THE APPELLANT.

This action was brought by the Board of Public Utility Commissioners in the name of the State to recover a penalty for failure to obey an order of the Board. The defendant Railroad Company filed an answer and supplement thereto setting up forty-three separate defenses. The plaintiff thereupon moved before Judge Oliphant to strike out each defense on the ground that it disclosed no defense or was sham or frivolous and further moved for judgment final. The Court struck out thirty-nine defenses but denied the motions to strike out the others, and further, considering that the motion opened the whole record, quashed the summons. dismissed the complaint and rendered judgment for the defendant.

The plaintiff appeals from the judgment of the Supreme Court and from the order denying plaintiff's motions.

STATEMENT.

The provision for a penalty is found in the Public Utility Act, P. L. 1911, page 374, Section 33, as amended by P. L. 1924, page 379, 2 Sup. C. S. 2895:

> "In default of compliance with any order of the Board when the same shall become effective * * * the person or public utility affected thereby shall be subject to a penalty of $100. per day for every day during which such default continues; * * * such penalties to be recovered in an action of debt in the name of the State, and observance of the orders of the Board may be enforced by mandamus or injunction in appropriate cases or by suit in equity to compel the specific performance of the order or orders so made or of the duties imposed by law upon such public utility."

The order of the Board which is the basis of the claim for the penalty, was made under authority of the Fielder Grade Crossing Act, P. L. 1913, page 91, 2 Sup. C. S. 2890:

> "Whenever a public highway and a railroad cross each other at the same level and it shall appear to the Board that such crossing is dangerous to public safety or that the public travel on such highway is impeded thereby, the Board of Public Utility Commissioners may order the company operating such railroad, within such time as said Board may fix, to alter such crossing according to plans to be approved by said Board by substituting therefor a crossing not at the grade of such public highway * * * ."

The facts set forth in the complaint (Case, p. 5) and admitted by the answer (Case, p. 15) are as follows:

The defendant is a public utility operating a railroad which crosses at the same level State

Highway Route No. 16 in the Township of Hillsboro, Somerset County. The railroad and another road known as Camp Lane, also cross at the same level a few hundred feet away in the same Township. The Board in 1926 made an order, of which a copy is annexed to the complaint (Case, p. 9), instituting a proceeding before it in respect to these crossings. Hearings were had in the matter before the Board and the Board on April 26, 1927, made its final order relative to these crossings. A copy of that order is also annexed to the complaint (Case, p. 12).

By this order of April 26, 1927, the defendant was directed to carry the State Highway under its tracks, to vacate the Camp Lane crossing and to build a short connecting road between Camp Lane and the State Highway so that travelers by either route would use the same underpass. This order required that the defendant begin the actual work on or before June 1, 1927, and complete the work within one year thereafter.

The defendant has not yet begun the work. The complaint demands judgment in favor of the State for $57,900. This is at the rate of $100 a day for 579 days, namely, from June 2, 1927 to December 31, 1928, inclusive. The latter date is the day when the papers in this case were first drawn and the amount was inadvertently not changed although the papers were redrafted and the summons not issued until January 11, 1929.

This order has already been the subject of much litigation. First came an application by the Company to Mr. Justice Parker, May 14, 1927, for a writ of certiorari to review the order of the Board. He denied the application for

the reasons set forth in an opinion reported in 137 Atl. 443, 5 N. J. Misc. 559. The application was renewed the same month before Part II of the Supreme Court. Again the application was denied. 137 Atl 923, 5 N. J. Misc. 587.

On June 1, 1927, the Company filed in the United States District Court a bill of complaint alleging that the order was invalid on sundry grounds and praying that enforcement of it be enjoined. Judge Runyon made an order to show cause embodying temporary restraint (Case, p. 44). This order came on for argument before Circuit Judge Davis and District Judges Bodine and Runyon, and an interlocutory injunction was denied and the temporary restraint vacated for the reasons stated in an unreported opinion of Judge Bodine. The Company appealed from that order to the United States Supreme Court and the Board consented that the appeal should operate as a supersedeas and should suspend the enforcement of the Board's order pending the appeal.

The suit in the District Court came on for final hearing with the result that the bill was dismissed. From the decree of dismissal, the Company also appealed, and the District Court ordered that the appeal should operate as a supersedeas and suspend the enforcement of the Board's order (Case, p. 48).

In due time the appeals were argued and the District Court was affirmed (Case, p. 50). The mandate was filed December 21, 1928. The opinion was read by Chief Justice Taft and is reported in 278 U. S. , 49 S. C. 69.

Upon the decision of these appeals, the Board took action to compel the actual elimination of the grade crossings. It not only instituted the

present suit but at the same time it applied to the Supreme Court for either an alternative or a peremptory writ of mandamus (Case, p. 72). This application was denied January 31, 1929, on the ground that the right to the writ was not clear (Case, p. 99). 144 Atl. 589, 7 N. J. Misc. 160.

Now to return to the defenses in the present suit which the Court refused to strike out and which raise the questions presented on this appeal:

Paragraph 11 of the First Defense and the Second Defense (Case, p. 16) plead the temporary restraint granted by Judge Runyon, the Board's consent that the first appeal to the United States Supreme Court should operate as a supersedeas, and the supersedeas allowed by the Court upon the second appeal. The pleader concludes that thereby the defendant's duty of compliance with the Board's order was suspended and further that thereby the Board's order became

> "and still is ineffective, inoperative and unenforcible by reason of the expiration of the time therein specified for the commencement and the completion of the actual work of altering said crossing."

The Fourth Defense (Case, p. 20) alleges that defendant is a corporation of Pennsylvania; that the Board's order required the taking of private land for widening the State Highway on each side of the crossing and also the land necessary for the connecting township road; that neither the Township of Hillsboro nor the Highway Commission has taken any steps to acquire this land and therefore, concludes this defense, the defendant has ever been incapable of beginning the actual work of complying with the Board's order.

The Thirty-sixth and Thirty-seventh Defenses (Case, p. 43) raise a legal objection, namely, that this suit is improperly brought by the Board and the summons and complaint improperly signed by its counsel. Judge Oliphant sustained this objection and therefore gave judgment for the defendant (Case, p. 160).

ARGUMENT.

I.

This action was properly brought by the Board of Public Utility Commissioners in the name of the State, and the summons and complaint were properly signed by the Board's counsel.

The summons commands the defendant,

> "to answer the annexed complaint of the Board of Public Utility Commissioners of New Jersey who sue in the name and for the use of the State of New Jersey."

The complaint begins,

> "The Board of Public Utility Commissioners who bring this suit in the name and for the use of the State of New Jersey, say that—."

The summons and complaint are both signed by the counsel of the Board.

Two questions are involved in this point. The first is whether the Board has the function of determining that suit should be instituted and has the authority to bring the suit. The second question, assuming that the Board has power so to sue, is whether it can employ in the litigation its own counsel or must employ the Attorney General.

Judge Oliphant held that only the Attorney General and not the Board could maintain the action (Case, pp. 155 to 158).

A.

The penalty clause of the statute has already been quoted. It will be noticed that the same sentence which authorizes an action for penalty also authorizes mandamus, injunction and specific performance. All of these, including the penalty, are remedies intended to secure observance of the Board's orders.

Obviously, the penalty provision is not a revenue measure but is an exercise of the State's police power, intended to secure obedience. It is on this ground that such penalty provisions have been upheld.

Wadley Southern etc. Co. v. *Georgia,* 235 U. S. 651; 35 S. C. 214.

The statute does not specify by whom any of these proceedings shall be instituted. But as they have a common purpose and are authorized in the same sentence, the inference arises that whatever officer or board can institute one class of remedy, can institute the others.

This same objection, that the Attorney General and not the Board, must represent the State, was forcibly urged by the present defendant when the Board applied for a mandamus in this litigation. The brief raising that point is Exhibit S annexed to the Supplemental Answer (Case, p. 111). Apparently the Supreme Court was not impressed by that part of the argument as the opinion (Case, p. 99) does not notice it.

Since the organization of the Board in 1911, numerous other proceedings in mandamus as well as suits in equity have been maintained to enforce the Board's orders. All of them have been instituted by the Board without the inter-

position of the Attorney General. None of the mandamus suits have been reported but a number of them are referred to in *Brown on New Jersey Public Utility Law* at page 52. Some of the equity cases have been reported. In one of them the Board's power was questioned.

Board v. *Sheldon,* 95 N. J. Eq. 408, 124 Atl. 65. Backes, *V.-C.*

> "The jurisdiction of equity to protect the rights of the State is one of common exercise, usually upon the relation of the Attorney General. But where, as here, the duty of protecting the public interest as against the unlawful operation of public utility jitneys is vested by the State in the Board, the authority to vindicate the public right is conferred by necessary implication, if not by express terms, and the functions of the Attorney General are bestowed."

Other pertinent provisions of the Public Utility Act are:

> 5. "The Board * * * shall appoint * * * counsel * * *."
>
> 15. "The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities and also over their property, property rights, equipment facilities and franchises, so far as may be necessary for the purpose of carrying out the provisions of this act."
>
> 37. "This act shall not have the effect to release or waive any right of action by the Board or by any person for any right, penalty or forfeiture which may have arisen or which may arise under any of the laws of this State, and any penalty or forfeiture enforcible under this act shall not be a bar to or affect a recovery for a right or affect or bar any indictment against any public utility as herein defined or person or persons operating such public utility, its officers, directors, agents or employees."

This action clearly implies that the Board may maintain an action for a penalty even though that penalty may be owing under some other statute.

Section 38 provides that no certiorari shall be granted by the Supreme Court except after notice to the Board, and so implies that the Board may defend suits in the interest of the State or of the public. Such, of course, has been the constant practice.

Section 40 gives preference in court to any proceeding "directly affecting an order of the Board or to which the Board is a party." This again implies that the Board may be a litigant.

The order of the Board involved in this case was not made under the Public Utility Act itself but under the supplement known as the Fielder Grade Crossing Act. That act provides,

> 6. "All the powers, supervision, regulation of, jurisdiction and control over public utilities granted in the act to which this is a supplement, are hereby vested in the Board of Public Utility Commissioners and courts of this State as may be necessary to carry the provisions of this act into effect."

The reasonable interpretation of the Public Utility Act and the Fielder Act puts upon the Board the duty of determining whether an action for a penalty should be instituted and gives to the Board the power to sue for the penalty in the name of the State.

B.

The present Board of Public Utility Commissioners was created by the Legislature to take the place of the Board of Railroad Commissioners

created by P. L. 1907, page 448, 3 C. S. 4283. That statute provided in Section 8,

> "It shall be the duty of said Board to see that the laws of this State, regulating said railroad companies, are observed and enforced and it may cause action to be brought against any railroad company violating any of the laws of this State for the specified penalty through the Attorney General who shall, in all things, be the advisor and legal counsel of said Board.
>
> * * *
>
> "Said Board shall report the failure to comply with said orders and all such violations with the facts in their possession to the Attorney General and it shall then be his duty, within thirty days, to institute proper proceedings to enforce the order or orders of said commission to recover suitable penalties or damages or to institute proceedings in equity, mandamus, injunction, receivership proceedings or other civil remedies.
>
> * * *
>
> 9. "To enforce the orders of said commission, said commission may proceed by a suit in equity to compel the specific performance of the order or orders so made or of the duties imposed by law upon such company."

Section 10 of this act is identical with Section 37 of the present statute quoted above.

The Legislature in 1909, P. L. 1909, p. 254, repealed Section 9, and struck out the sentence in Section 8 quoted above, beginning "Said Board shall report the failure" etc., and inserted the following:

> "In default of compliance with said order when the same shall have become operative, said railroad company shall be subject to a penalty not exceeding $100 per day for violation thereof to be recovered in an action of debt at the suit of the Board."

By P. L. 1910, p. 56, the name of the Board of Railroad Commissioners was changed to "Board of Public Utility Commissioners."

The present statute should not be construed to narrow the authority of the Board and to take from them the authority expressly given to sue for the penalty by the amendment of 1909.

It will be observed that even under the statute of 1907 the Attorney General does not act in his own right or on his own initiative but merely as counsel for the railroad commissioners, and upon their direction. Accordingly, in *Board of Railroad Commissioners* v. *D. L. & W. R. R.*, 79 N. J. L. 219, 76 Atl. 236, the Board, in its own name, obtained a writ of mandamus and the Attorney General appeared only as counsel for the Board. The present statute by expressly providing that the Board should appoint its own counsel and by other provisions mentioned above, indicates an intention to vest more fully in the Board the power to institute litigation for enforcing its own orders and to control such litigation without the necessity of resorting to the Attorney General.

C.

This interpretation is strengthened by a consideration of the general policy of the Legislature with reference to penalties.

In the early days of the State, statutes imposing penalties invariably provided that action should be brought by a common informer or by a local officer such as the Overseer of the Poor. It seems to have been thought that wrongs of importance affecting the public at large should be remedied by indictment and not by action

for a penalty. The earliest statute which I have found imposing a penalty not recoverable by an informer or local officer is P. L. 1853, page 445, relating to annual reports to the Legislature by railroad and canal companies. It provides upon failure to make such report that the company shall,

> "forfeit and pay to the State for every such omission the sum of $10,000. to be sued for and recovered against them in an action of debt with costs of suit. That all fines recovered from any incorporated companies in this State under the provisions of this act shall be added to the school fund of this State for the benefit of public schools."

This provision is now Section 78 of An Act Concerning Railroads, P. L. 1903, p. 645; 3 C. S. 4253. It may be noted that no officer is named who should enforce this statute.

The Fire Insurance Act of 1867, P. L. 1867, p. 776, Section 9, provided a penalty of $100 for every violation of the act to be sued for in the name of the State by the Prosecutor of the Pleas for the county where the offense shall have been committed.

The first mention of the Attorney General in connection with a penalty, that I have found, is in a supplement to the Act of 1867, namely P. L. 1874, p. 49. This required an annual report by insurance companies to the Secretary of State and provided a penalty of $500 "to be sued for and recovered in the name and for the benefit of the State by the Attorney General on notice from the Secretary of State."

The Savings Bank Act of 1876, P. L. 1876, p. 341, Section 40, required managers of savings banks to file an annual report with the Secretary of State; imposed a penalty of $100 a day for

failure to make the report and provided that the Secretary of State "may maintain an action against such managers jointly in his name to recover such penalty, and when collected, the same shall be paid into the treasury of this State."

These statutes sufficiently illustrate the early legislative policy.

During the last quarter century the Legislature has created a great number of boards and departments to regulate certain businesses and professions and to enforce the law in respect thereto. Penalties are usually provided to be recovered by an action. The legislative policy is almost uniform to this effect: Such penalties are recovered in an action prosecuted by the board or officer who is charged with the enforcement of that particular branch of the law. The following statutes illustrate this policy.

State Board of Agriculture, 1 C. S. 37, Sec. 111.

Commissioner of Banking and Insurance, 1 C. S. 162, Sec. 10; *id.* 170, Sec. 13; *id.* 341, Sec. 26; *id.* 346, Sec. 35; 2 C. S. 2879, Sec. 127.

State Board of Registration and Examination in Dentistry, 1 Sup. C. S. 936, Sec. 33.

State Board of Health, 2 C. S. 2661, Sec. 8k; 1 Sup. C. S. 152, Sec. 14; *id.* 1442, Sec. 159a (3); 2 Sup. C. S. 3818, Sec. 68.

Commissioner of Labor, 3 C. S. 3033, Sec. 58; 1 Sup. C. S. 1693, Sec. 58a (15).

State Live Stock Commission, 1 C. S. 98, Sec. 202.

State Board of Medical Examiners, 1 Sup. C. S. 1872, Sec. 37; *id.* 1882, Sec. 38a; *id.* 1885, Sec. 54.

State Board of Optometrists, 1 Sup. C. S. 1904, Sec. 109.

State Board of Pharmacy, 3 C. S. 3946, Sec. 7.

State Board of Tenement House Supervision, 2 Sup. C. S. 3622, Sec. 193.

State Board of Undertakers & Embalmers, 2 Sup. C. S. 3776, Sec. 15.

State Board of Veterinary Medical Examiners, 4 C. S. 5709, Sec. 8.

State Commissioners of Water Supply, 3 C. S. 3942, Sec. 10.

In all these acts, the burden of suing for the penalty is placed upon the department concerned and the Attorney General is not even mentioned.

These are some apparent exceptions to this policy which should be noted.

State Board of Assessors, 4 C. S. 5273, Sec. 20; *id.* 5280, Sec. 4.

State Agricultural Experiment Station; 1 Sup. C. S. 53, Sec. 10; *id.* 54, Sec. 7.

State Athletic Commissioner, 1 Sup. C. S. 201, Sec. 14.

State Board of Commerce & Navigation, 1 Sup. C. S. 611, Sec. 9.

State Board of Conservation and Development, 1 Sup. C. S. 622, Sec. 9.

In the acts referred to above, the heads of the departments concerned are the moving parties in the collection of the penalties and the Attorney General appears merely as their counsel.

In 1907 the Legislature passed a series of acts relating to life insurance companies. One of them, P. L. 1907, p. 133, Sec. 9, provides, for misrepresentation of the terms of policies, a penalty "to be recovered by the Attorney General for the use of the State." This is a real exception and the only one which I have found to the usual legislative policy. The Commissioner of Banking and Insurance is under no duty in regard to this penalty. The whole burden is placed upon the Attorney General.

D.

Light may be thrown upon the question at issue by a consideration of the functions of the Attorney General. On the one hand, he performs the ordinary duties of a lawyer as counsel for sundry State officers and bodies. He renders to them legal opinions when requested and conducts litigation when so directed. For instance, when the State Highway Commission so desires, he institutes a condemnation proceeding and when they effect a settlement, he discontinues the case. This branch of his duties does not concern the question whether the Board may bring this action. On the other hand, the Attorney General is a high executive officer exercising a wide discretion. Thus, he determines whether public policy demands the institution of a quo warranto in respect to a franchise. He takes such proceedings in relation to charities as he sees fit.

The enforcement of penalties except in relation to the revenue laws was not, at common law, one of his peculiar functions.

> 3 *Blackstone* 261. "An information filed in the exchecquer by the king's attorney general * * * is commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others which regard mere matters of police and public convenience being usually left to be enforced by common informers."

In this State, as appears from the review of legislation set forth above, the enforcement of penal statutes has never been a customary part of the duties of the Attorney General.

The use in Section 33 of the Public Utility Act of the term "action of debt" is perhaps signifi-

cant. An *action* is not the typical mode of procedure by the Attorney General when he enforces in court the rights of the State. The ancient mode of procedure and the one still usually followed is by information whether in law or in equity. "Action of debt" is a phrase more apt to describe a suit instituted by the Board.

E.

Express words are not necessary to vest in the Board the power to sue for the penalty. Express words are not necessary even in the case of a common informer. It is sufficient if the intention to confer such a right ought to be implied from what the Legislature has said upon any sound principle of construction.

Bradlaugh v. *Clark,* 8 App. Cas. 354, 358.

The particular words and general purpose of the Public Utility Act and the Fielder Act, as well as the usual legislative policy in the matter of penalties, give to the Board the right and duty to maintain this action in the name of the State.

F.

Assuming that the Board was the proper body to bring this action, it is clear that they properly employed for this purpose their usual counsel and not the Attorney General. Section 5 of the Public Utility Act expressly directs the Board to appoint a counsel. The statute does not define his duties but the uniform precedents of a great amount of litigation throughout the last eighteen years make it evident that he should appear as their attorney of record in suits of all kinds. The Board has never been represented by the Attorney General.

Nor is this an infringement on the office of the Attorney General. While he is a constitutional officer, his powers and duties are not defined by the constitution, and the Legislature has always exercised the power of changing his functions. The first act in which a general definition of his duties was attempted is P. L. 1854, p. 131. It provided that he should give opinions at the request of the Legislature, the executive and officers of the State government, decide cases submitted by the State Superintendent of Schools, attend at the trial of certain criminal cases, pass on mortgages in which the State school fund was invested "and attend generally to all matters in which the State is a party or in which its rights and interests are involved."

This definition remained unchanged until 1904. Apparently it was not thought that the Attorney General *ex officio* and without the specific direction of the Legislature, was counsel for the various State boards from time to time created. In 1886, he was expressly made counsel of the State Board of Assessors. P. L. 1886, p. 401, Sec. 5; 4 C. S. 5283. The act naming him counsel to the State Board of Railroad Commissioners has already been noted. The act of 1904, P. L. 1904, p. 150, directed, in addition to the duties specified in the Act of 1853, the Attorney General

> "To act as advisor or counsel for all State boards, commissions or other State officials and to be in connection with such assistants as may be employed in his department, the sole legal advisor, attorney or counsel thereof, and to represent them in all suits or actions of any kind that may be brought for or against them in any courts of this State."

The Public Utility Act of 1911 by directing the Board to appoint their own counsel, repeals

the Act of 1904, so far as the latter act would make the Attorney General counsel for the Board of Public Utility Commissioners.

The summons and complaint were properly signed by counsel for the Board.

The Court below erred in quashing the summons, dismissing the complainant and rendering judgment for the defendant.

II.

The Fourth Defense is insufficient in law.

The Fourth Defense alleges that the defendant is a corporation of Pennsylvania; that the order of the Board requires the taking of private land to increase the width of the State highway and to construct the connecting road to Camp Lane, and that neither the Township of Hillsboro nor the Highway Commission had taken steps to acquire and make available this land (Case, p. 20).

On this motion to strike out, the answer is construed most strongly against the defendant and any ambiguity or omission therein operates against the defendant.

State v. *Jersey City,* 94 N. J. L. 431, 111 Atl. 544.

Conclusions of law in the answer are not admitted to be true by the motion to strike out. The sufficiency of the answer is tested by the allegations of fact therein.

Koewing v. *West Orange,* 89 N. J. L. 539, 99 Atl. 203.

Such is the statement in the defense that it was the duty of the Township and the Highway

Commission to acquire land necessary to fulfill the Board's order.

The learned judge sitting for the Supreme Court sustained this defense on the ground that,

> "the defendant should be permitted to show that it was impossible to comply with said order because of reasons beyond its control" (Case, p. 155).

If this defense is sound, the order was invalid when the action in the United States District Court was brought, since the defense alleges no new fact. The defense should therefore be concluded by the judgment in that suit.

A.

Counsel for defendant, in the Supreme Court, upheld this defense on the theory that the defendant, a Pennsylvania corporation, operating a railroad in this State, has no power to acquire land by condemnation in order to carry out the order of the Board.

Under the Fielder Act, the order of the Board is directed to the operating company rather than the company which owns the railroad. This provision was sustained in the Paterson Grade Crossing case.

> *Erie Railroad Co.* v. *Board,* 89 N. J. L. 57, 98 Atl. 13.

The year after the adoption of the Fielder Act, the Legislature amended the Railroad Act of 1903, P. L. 1914, p. 490, Sec. 13; 2 Sup. C. S. 2908, to read as follows:

> "Any railroad company may either at the time of its organization or construction or thereafter as occasion may require, take by condemnation * * * and any land and property required for the purpose of complying with any order made by the Board of Public Utility Commissioners * * *."

It may be questioned, of course, whether the power given by this amendment applies to foreign corporations like the defendant or only to New Jersey companies. Some of the provisions of the Act of 1903 apply only to corporations organized under that act; other provisions, to any New Jersey corporation; and still other provisions, to all corporations operating or leasing railroads. Of the last class, for instance, is Section 26 requiring every railroad company owning, leasing or controlling any right-of-way for a railroad within this State to construct sufficient bridges, etc., over highways. Whether any particular power is applicable to a foreign corporation must be determined, in case of ambiguity, by the purpose of the Legislature in granting the power. Since the object of the Legislature in the Amendment of 1914 was clearly to enable operating railroad companies to comply with grade crossing orders of the Board under the Fielder Act, the amendment should be construed to be broad enough to accomplish that purpose.

This amendment was considered in the Paterson case and was held to confer upon the Erie Railroad Company power to take by condemnation land necessary to carry out the order of the Board. The Erie Railroad Company is a corporation of New York although I am informed by counsel for the defendant that it possesses in this State some peculiar rights not usually enjoyed by foreign corporations.

The act of 1914 should be construed to grant to the defendant the power to acquire by condemnation the land required to fulfill the order of the Board. If this is the correct construction, then clearly the Fourth Defense is insufficient.

B.

I will assume for the purpose of argument that the defendant has no power of eminent domain. It has, however, power to acquire land by bargain, taking title either in itself or in a subsidiary formed for that purpose, in order to carry out the Board's order. The answer does not disclose any facts which show that it is impossible for it to acquire the land in this manner.

The number of land owners involved is not stated. I am willing to admit, however, that the Lehigh Valley Railroad Company of New Jersey, a subsidiary of the defendant, owns the greater part of the land in question and that the rest of it is owned severally by three persons not connected with the defendant. The answer does not allege that these persons are unwilling to sell or that the defendant is unable to buy the land or has made the slightest effort to do so.

C.

Further assuming, for the purpose of argument, that the defendant cannot acquire the land by condemnation or bargain, the Fourth Defense is still insufficient. It alleges that it is the duty of the Township and the Highway Commission to acquire the land and I will concede that under certain circumstances such a duty may arise.

The Fielder Act, Section 2, places "the entire expense of such alterations, changes, re-location or opening, including damages to adjacent property," upon the railroad unless a street railroad uses the crossing. The answer does not allege that the defendant has tendered to the Township or the Highway Commission the fund necessary to cover the expense of acquiring the land or

has otherwise assured them that it would indemnify them against such expense. It does not even allege that the defendant has requested them to acquire the land. If, in these circumstances, the Highway Commission and the Township should condemn, they would, of course, be liable to the land owners for the value of the land taken. It might be urged that they might have a claim over against the railroad company arising by operation of law. But since it would appear that they were mere volunteers, not acting at the request of the company, and since the company would not have had an opportunity to be heard in the condemnation proceeding and could well claim that it might have acquired the land at a lower price, it is unlikely that the Commission or the Township could recover from the company.

If the railroad company can sit still and disregard a grade crossing order of the Board until the municipality acquires the land, it can shift to the municipality a large part of the expense which the Legislature has placed upon the railroad.

The Fourth Defense discloses no defense to the action. The Court erred in denying the motion to strike it out.

III.

Paragraph Eleven of the First Defense and the Second Defense are insufficient in law.

This part of the answer (Case, p. 16) alleges that by the orders of the United States District Court and by the consent of the Board until December 20, 1928 (the date of the mandate of the United States Supreme Court), not merely was the enforcement of the Board's order sus-

pended but the accrual of the penalty; that the Board's order required work to begin June 1, 1927, and hence, defendant contends, ever since December 20, 1928, the order has been ineffective, inoperative and unenforcible.

The first order of the District Court on which the Company relies was the order to show cause made June 1, 1927, by Judge Runyon (Case, p. 44). It restrained the Board, the Attorney General and the Prosecutor of the Pleas of Somerset County, until the further order of the Court, from instituting any action of debt in the name of the State to recover any penalty for the violation of the Board's order or from instituting any other proceeding to enforce that order.

On August 10, 1927, that order was vacated (Case, p. 47) and the Company appealed to the United States Supreme Court and thereupon the Board consented that the appeal should operate as a supersedeas of the order from which the appeal was taken and should suspend the enforcement of the order of the Board until the final decree of the District Court.

The final decree of the District Court was entered January 18, 1928, and again the Company appealed. This time the District Court ordered that the appeal should operate as a supersedeas of the final decree and suspend the enforcement of the Board until the mandate of the Supreme Court (Case, p. 48).

A.

It will be observed that at no time was the Company enjoined from carrying out the order of the Board. It was free at any time to comply with the Board's order; nor did any of these orders of the Court relieve the Company of the

duty of carrying out the order. At all times the order was a valid exercise of the police power of the State. It was merely the enforcement of the order, the bringing of suit on behalf of the State, which was stayed.

I have found no cases dealing with the effect on a penalty of a temporary injunction which was afterward vacated but the same principle is involved which applies to injunctions staying the prosecution of actions at law generally.

> 33 *C. J.* 246. "If an injunction is procured by the debtor restraining the collection of a debt due by him and the injunction is afterward discharged, interest will be allowed on the debt even during the time when the injunction was in force."

Likewise, a temporary injunction may be granted against prosecuting an action for rent or ejectment or trespass. When the restraint is vacated, the plaintiff at law recovers rent for the period that the injunction was in force, or mesne damages or damages for the trespass.

The validity of the order of the Board has been fully established. It commanded the defendant to begin work by June 1, 1927. The defendant failed to do so. Therefore on June 2, the defendant became and was indebted to the State in the sum of $100 as a penalty. Clearly, the United States District Court or any court had no power to remit this indebtedness. Only the Legislature or possibly the Governor under the pardoning power, could remit it. And yet the defendant claims that the District Court by its ex parte order of June 1, remitted this penalty. I submit that the fallacy of this claim is obvious.

B.

This argument so far as it deals with the liability of the defendant for the penalty prior to the filing of the mandate of the Supreme Court, may seem to be merely academic inasmuch as the plaintiff has stipulated that the defendant is not liable for any penalty accrued before that date (Case, p. 159).

This stipulation was filed pursuant to the direction of Judge Oliphant in order to have the Eighteenth Defense struck out (Case, p. 154, l. 30). That defense urges that the penalty provision of the Public Utility Act is in conflict with the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the United States has held in a number of cases that the imposition of penalties as a means of enforcing an administrative order is in contervention of due process and a denial of equal protection of law, where no adequate opportunity is afforded for safely testing the validity of the order.

Wadley etc. Co. v. *Georgia,* 235 U. S. 651, 35 S. C. 214;

St. Louis etc. Co. v. *Williams,* 251 U. S. 63, 40 S. C. 71.

In view of these decisions and similar cases, I was constrained to admit that the penalty provision would violate the due process clause, if it should be construed to impose the penalty while bona fide litigation was pending to ascertain the validity of the order. The statute should be construed in such a way as to bring it in harmony with the Constitution of the United States.

Rutgers v. *New Brunswick,* 42 N. J. L. 51;

Atlantic etc. Co. v. *Water Co.,* 44 N. J. Eq. 427, 15 Atl. 581.

Or the same result may be reached by enforcing the statute so far as it does not conflict with the constitution and by holding it void to the extent only it does so conflict.

Morgan v. *Monmouth etc. Co.*, 26 N. J. L. 99;

Blessing v. *McLinden*, 81 N. J. L. 379, 79 Atl. 347.

The learned judge below held accordingly, with reference to the Eighteenth Defense that the penalty would not begin to accrue until December 21, 1928, that is, until after the mandate of the Supreme Court.

It was not the restraining order or the stay on appeal which operated to prevent the accrual of the penalty but the Fourteenth Amendment and the pendency of bona fide litigation. The effect would have been the same if the litigation had been on certiorari in the New Jersey Supreme Court. This distinction is, I believe, somewhat important because without it the remedy in equity seems more adequate than that in law and utilities may feel constrained more frequently to test the validity of the Board's orders by a suit in equity rather than by certiorari.

C.

The defendant's counsel further argue that since the order of the Board directed the Company to begin work by June 1 and the District Court on that date made an ex parte order restraining the officers of the State from enforcing the order, therefore the order became forever "ineffective, inoperative and unenforcible." Again it seems obvious that neither the United States District Court nor any other court has power to render inoperative a valid order of the

State of New Jersey. The sanction of the order is the statute and not the decree of the United States Supreme Court. That decree merely proclaimed what was already a fact, namely, that the order was valid. Likewise, the duty of the defendant springs from the statute and from the order of the Board and not from the decree of any court.

Judge Oliphant appears to have agreed with this contention of the Board and to have considered this Defense only a partial defense, covering the period up to the filing of the mandate of the United States Supreme Court. He said of this Defense:

> "I cannot conceive how the defendant could be held liable for the penalty pending the outcome of litigation to test the validity of the order on a violation of which the right to the penalty rests" (Case, p. 155, l. 15).

The Second Defense and paragraph 11 of the First Defense are only a partial defense, at best, and despite them, the State should have judgment for the penalty accruing after December 21, 1928.

It may seem to the Court that the question here involved is trivial; that the Board may make a new order setting new dates, but ingenious counsel for the company would then doubtless apply for a new ex parte restraining order and the whole litigation would be repeated and finally we would be here again with the indentical question. Furthermore, the Legislature has changed the law relative to grade crossings on State Highways, P. L. 1929, p. 138. If the Board should make a new order, very difficult questions would arise as to the effect of that statute on this particular crossing.

Conclusion.

All the Defenses in the answer should have been struck out and judgment final should have been entered for the plaintiff at the rate of $100 a day beginning December 21, 1928.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

J. O. BIGELOW,
Of Counsel.

A3-147

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Plaintiff-Appellant,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant-Respondent.*	*On Appeal.* *On Motion to Dismiss Appeal.*

MEMORANDUM FOR APPELLANT.

The first reason stated in the notice as a ground for dismissing the appeal is "The judgment entered in the Supreme Court is not a final judgment on the merits of the case and is therefore not appealable."

A judgment to be appealable need not be based on the merits of the case. It is sufficient if it is a final determination of the present action.

Sweeney v. *Miner*, (E. & A.) 88 N. J. L. 361, 95 Atl. 1014, holds that an order quashing service of summons is appealable.

Jaudel v. *Schultzke*, (E. & A.) 95 N. J. L. 171, 112 Atl. 328, holds that order quashing attachment is appealable.

Eames v. *Stiles*, (E. & A.) 31 N. J. L. 490, discusses scope of writ of error.

The second and third reasons for the motion deal with the authority of the Board of Public Utility Commissioners to maintain this action. This question is considered at length in the principal brief for the appellant.

Notice is also given of motion to strike out those grounds of appeal which relate to the re-

fusal of the Supreme Court to strike out certain defenses.

The action of the Court on a motion to strike out defenses is appealable under Supreme Court Rules 40 and 41.

An order sustaining or overruling a demurrer to a declaration is appealable.

Tomlinson v. *Armour*, (E. & A.) 75 N. J. L. 748, 70 Atl. 314.

This is true even though the demurrant is given leave to plead over, since the taking of the appeal waives the right to plead over and makes the judgment final.

Bretthauer v. *Jacobsen*, 79 N. J. L. 223, 75 Atl. 560.

The motion in the present case to strike the defenses was equivalent to a demurrer. It was based on the contention that these defenses disclosed no defense to the complaint.

Counsel for the Company suggests that this Court should strike out the grounds of appeal dealing with the refusal of the Court below to strike the defenses in controversy and should reverse (if at all) on the ground of error in quashing the summons and dismissing the complaint. Such a procedure would result immediately in a second judgment by the Supreme Court for defendant based on the failure of the plaintiff to reply to the defenses in question—namely, the second and fourth. Then would come a second appeal to this Court, questioning again the refusal of the Supreme Court to strike the defenses.

If the defenses are sound in law, the judgment of the Supreme Court should be affirmed. For by this appeal the plaintiff waives any right to plead over, and rests its case on the legal in-

sufficiency of the defenses. These defenses, therefore, are properly before this Court.

The motion to dismiss the appeal and to strike out certain grounds of appeal should be denied.

Respectfully submitted,

J. O. BIGELOW,
Of Counsel.

NEW JERSEY

Court of Errors and Appeals

STATE OF NEW JERSEY, Plaintiff-Appellant, vs. LEHIGH VALLEY RAILROAD COMPANY, Defendant-Respondent.	On Appeal from the Supreme Court.

BRIEF IN BEHALF OF DEFENDANT-RESPONDENT.

(1)

Statement of the Case.

This appeal comes before the court in two aspects:

(a) Defendant's motion to dismiss the appeal and to strike out certain of the grounds thereof.

(b) A purported appeal by the State of New Jersey as plaintiff from a judgment of the Supreme Court quashing the summons and entering final judgment in favor of the defendant.

The "Statement" as set forth in the brief of counsel for the Board, is substantially accurate as to the facts—although the defendant conceives that many of the facts therein set forth are immaterial to the matters to be considered by this Court on the present appeal.

(2)

Grounds of Appeal.

As the brief of counsel for the appellant does not set forth the grounds of appeal, we append a copy of same as follows:

1. The New Jersey Supreme Court denied the plaintiff's motion to strike out paragraph 11 of the first defense of the answer.

2. The court denied the plaintiff's motion to strike out the second defense of the answer.

3. The court denied the plaintiff's motion to strike out the fourth defense of the answer.

4. The court denied the plaintiff's motion to strike out the thirty-sixth and thirty-seventh defenses of the answer.

5. The court denied the plaintiff's motion to enter final judgment in favor of the plaintiff and against the defendant.

6. The court ordered that the summons be quashed and the complaint dismissed and that final judgment be entered in favor of the defendant and against the plaintiff.

7. Paragraph 11 of the first defense and the second defense do not disclose any defense to the plaintiff's cause of action. It does not appear that the court orders or the consent therein mentioned relieved the plaintiff of its duty to comply with the board's order or stayed the accrual of the penalty.

8. The fourth defense of the answer discloses no defense to plaintiff's cause of action. No facts are set forth in the complaint or in said fourth de-

fense whereby it appears that the Township of Hillsborough or the State Highway Commission was under a duty to adopt the resolutions or take the action suggested in said defense. The failure of the Township and the Highway Commission to adopt such resolutions and take such action did not excuse the defendant from complying with the order of the Board.

9. This action was properly brought by the Board of Public Utility Commissioners in the name of the State of New Jersey.

10. Counsel of the Board as attorney of record properly issued the summons and signed the complaint.

(3)

Brief of the Argument.

The motion to dismiss the appeal and to strike out certain of the grounds thereof is, to some extent, involved in the appeal on the merits and will, therefore, be discussed in the argument of the main case.

The grounds of the motion to dismiss are:

1. The judgment entered in the Supreme Court is not a final judgment on the merits of the case and is therefore not appealable. (Not urged.)

2. Neither the Board of Public Utility Commissioners, nor its counsel, has any legal interest in the case.

3. The counsel of the Board of Public Utility Commissioners has no authority to take this appeal.

The grounds of the motion to strike out numbers 1, 2, 3, 4, 7 and 8 of the grounds of appeal are that they are premature and form no part of the judgment from which this appeal purports to be taken.

(See original notice filed in this court on or about October 1, 1929.)

I.

The Board of Public Utility Commissioners had no authority to bring this suit in the name and for the use of the State by its own counsel, and its counsel had no authority to sign and issue the summons therein.

Defenses numbers 36 and 37 are:

> 36. This suit is improperly brought in that the summons is issued in the name of the Board of Public Utility Commissioners and is signed and endorsed with the name of its counsel.
>
> 37. This suit is improperly brought in that it is brought by the Board of Public Utility Commissioners in the name and for the use of the state (p. 43, lines 15-30).

Plaintiff's motion to strike out these defenses was denied (p. 162, lines 20-25).

In the opinion of Judge Oliphant, after quoting these defenses, he says:

> "I am advised that this is the first attempt ever made to enforce the penalty provision of the Public Utility Act. There are, therefore, no precedents for suits of this exact nature in this State.

Section 33 of the Public Utility Act, under which this suit is brought, provides that 'in default of compliance with any order of the Board when the same shall become effective—the person or public utility affected shall be subject to a penalty of one hundred dollars ($100.00) per day for every day during which such default continues—such penalty to be recovered in an action of debt in the name of the State.'

It will be noted that the statute expressly states that the action must be brought in the name of the State. While this suit is styled in the name of the State, the complaint is by the Board of Public Utility Commissioners and endorsed by its attorney, not the Attorney-General of New Jersey.

While the Public Utility Act provides for the appointment of counsel to the Board, I know of no statute or decision which confers upon him the power to represent the State. The Attorney-General has no power over him and in the present instance cannot control the litigation. The penalty, if recovered, goes to the State Treasury and the State through its proper officer must sue therefor.

The act defining the duties of the Attorney-General and his assistants provides that he shall 'attend generally to all matters in which the State is a party or in which its rights and interests are involved, and to act as advisor and counsel for all State Boards, Commissioners or other State Officials and to be—the sole legal advisor, attorney or counsel thereof and to represent it in all suits or actions of any kind that may be brought for or against them in any of the Courts of this State. P. L. 1904, page 150.

While the Public Utility Act allows for the appointment of counsel by the Board it gives to that counsel no special powers and does not delegate to him the duties of the Attorney-General nor take the duty to represent the State away from the Attorney-General.

The fiftieth section of the Act, while giving general supervision and regulation of, jurisdiction and control over all public utilities, cannot be said to give to the Board of Public Utility Commissioners power to sue on its own complaint for a penalty due to the State alone.

The Practice Act, Section 218, provides that the penalty may be recovered by the party aggrieved which in this case is the State, to whom the penalty, if recovered, goes.

As the forfeiture of the prescribed penalty goes to the State, nobody but the State has any interest in the enforcement of the penalty and a Board created by statute cannot sue to enforce that penalty, at least except by the action of the Attorney-General.

The only interest the Board of Public Utility Commissioners has is to compel the elimination of grade crossings, which, if it is on solid ground can be compelled by writ of mandamus and not through this proceeding.

Counsel for the Board has cited in support of its contention the case of Board of Public Utility Commissioners *vs.* Sheldon, *et al.*, 95 N. J. Equity 408. That suit was on a bill for injunction and while the Court held in such a case the powers of the Attorney-General were bestowed on the Board, I am unable to reach the conclusion that that power can be bestowed in a suit to recover a penalty in a Court of Law. Protection of the public interest and vindication of the public right are not here involved. The Board of Public Utility Commissioners suing in the name and for the State of New Jersey is suing to recover a debt due to the State for non-compliance with an order of the Board.

The summons should not have been issued in the name of the Board of Public Utility Commissioners or signed by its counsel" (p. 156, lines 3-17, inclusive).

The part of Judge Oliphant's order which affects defenses thirty-six and thirty-seven is the subject of grounds of appeal numbers 4, 9 and 10.

Defendant has moved to dismiss the appeal for the reason that neither the Board nor its counsel has any legal interest in the case and that the Board's counsel has no authority to take the appeal.

Defendant has also moved to strike out (*inter alia*) ground of appeal number 4—which refers specifically to said defenses numbers thirty-six and thirty-seven.

The motion to dismiss the appeal and the motion to strike out said ground are necessarily involved in the question whether defenses thirty-six and thirty-seven are valid, and whether error can be assigned on the denial of the plaintiff's motion to strike out said defenses; if the Board has no authority to bring the suit in the name of the State by its own counsel, and if the Board's counsel had no authority to sign and issue the summons therein, it follows that neither the Board nor its counsel has any interest in the case and it equally follows that the Board's counsel has no more authority to take the appeal than he had to start the suit.

On the other hand, if it should be decided that the Board had the right to bring the suit and its counsel to issue the summons, then the Board and its counsel had authority to take this appeal.

Hence, the motion to dismiss must be considered in connection with the argument of the grounds of appeal numbers 4, 5, 6, 9 and 10—all of which depend on whether Judge Oliphant was correct in his conclusion that the Board had no right to bring the suit.

The Board relies for its authority upon the provisions of Section 33 of the act concerning public utilities (Chap. 195, Laws of 1911, as amended by Chap. 168, Laws of 1924, p. 379). This reads as follows:

> "In default of compliance with any order of the board when the same shall become effective, except orders to resume service which has been discontinued the person or public utility affected thereby shall be subject to a penalty of one hundred dollars per day for every day during which such default continues; * * * such penalties to be recovered in an action of debt in the name of the State, and observance of the orders of the board may be enforced by mandamus or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility."

This section does not expressly authorize the Board or its counsel to bring an action for penalties. It provides that "observance" of the orders of the Board may be enforced by mandamus or injunction, or by suit for specific performance; these enforcement measures have nothing to do with penalty actions; a penalty is not a means of enforcing compliance with an order. It is "the punishment inflicted by a law for its violation" (Bouvier's Law Dict., p. 2551, 8th Ed.).

The present suit is not a *qui tam* action because no person shares in the penalty and the plaintiff did not declare *qui tam;* neither is it a suit by a common informer; if it is, then it is not brought in the manner required by Section 219 of the Practice Act of 1903, which requires process in such action to be endorsed with the name of the party who

prosecutes it and the title of the statute. There are no such endorsements upon the present summons and Judge Oliphant struck out defense number thirty-eight, which raised this question. The question whether his ruling was correct in this respect is not presented by this appeal.

By the provisions of Section 33 of the statute, above quoted, the penalty must be sued "in the name of the State." When and if the penalty is collected, it belongs to the State; the State, therefore, is the only party interested in the collection thereof.

"An Act to define the duties and fix the salary of the attorney-general" (1 C. S. 152) provides:

> "It shall be the duty of the attorney-general, * * * to attend generally to all matters in which the state is a party or in which its rights and interests are involved * * *."

This is merely declaratory of the common law. At common law all penalties accrued to the crown and it was the duty of the King's Attorney General to sue therefor. The attorney general is one of the common law officers adopted by our Constitution (Art. VII, Sec. II, par. 4). With the adoption of the office, the common law duties of that officer were likewise adopted. The first act of the legislature defining his duties was approved February 24, 1854 (Revision of N. J. 1709—1877, p. 56; Nixon's Digest, p. 45). While the definition of his duties has since been enlarged, to the extent above quoted, they have remained without change since the enactment of the first statute. Those matters to which he, exclusively, was required by the common law to give attention included the collection of penalties (3 Bl. Com. 262).

A grant by statute of certain powers would not operate to deprive an attorney general of those belonging to the office at common law, unless the statute either expressly or by reasonable intendment forbade the exercise of powers not thus expressly conferred.

In *Rex* v. *Wilkes* (Hilary Term, 10 Geo. 3 B. R.), 4 Burrows Rep. 2570, Mr. Justice Yates said:

> "The attorney general is the officer of the *King,* the Master of the Crown office, the officer of the *public.* Informations exhibited by the King's Attorney General are considered as the King's *own* prosecutions, and are called 'Declarations for the King.' "

In *Causey* v. *United States,* 240 U. S. 399; 60 L. Ed. 711, the court said (italics ours):

> "The bill, while purporting to be drawn in the name and for the benefit of the United States and bearing the signature of the assistant United States Attorney for the district, does not state or show that it is brought with the sanction of the Attorney General, and because of this it is objected, as it was in both courts below, that the bill should not be entertained, but dismissed. *In the absence of a controlling statute, and there is none, it is essential to such a suit that it be brought with the Attorney General's approval, and while the usual and better practice is to state or show in the bill that it is brought with his approval, this is not indispensable.* The case is argued here on behalf of the government by one of the Assistant Attorneys General, who files a certified copy of a letter from the Attorney General, authorizing the institution of a suit conformably to the request of the Secretary of Interior. This sufficiently meets the objection, * * *."

In *Babcock* v. *Hauselman,* 56 Mich. 27, the court said:

> "The attorney general is the proper representative of the people in proceedings in this Court when the state is a party and we cannot recognize any other attorney without his consent or approval to represent the people in suits before us."

In *People* v. *Pacheco,* 29 Cal. 210, the court said:

> "By statute the Attorney General shall attend each of the terms of the Supreme Court and there prosecute or defend * * * all causes to which the State may be a party. The attorney general is the only person to whom authority is given by law to appear for the people and he or such person as he may delegate authority to, must represent the people."

In *Hunt* v. *Chicago, etc., R. Co.,* 20 Ill. App. 282, it was said:

> "In England the office of the Attorney General has existed from a very early period. The attorney general was the law officer of the Crown and its only legal representative in the courts (Citing *Rex* v. *Wilkes, supra*). * * * The prerogatives which pertain to the crown in England are here vested in the people and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties by proper proceedings in the courts of justice, is just as imperative here as there. * * * There is nothing in our present constitution or statutes which necessitates in our opinion, a construction which would exclude the attorney general from the exercise of common law powers in addition to those conferred by statute.

> In those jurisdictions where the common law has been adopted where applicable, and so far as it has not been changed by statute, a duty required of the attorney general by the rules of the common law is as much a duty 'required of him by law' as though it were imposed by the express mandate of a statute."

In *People* v. *Miner,* 2 Lans. (N. Y.) 397, the court said:

> "Most, if not all, of the colonies appointed attorney-generals, and they were understood to be clothed with nearly all the powers of the attorney-generals of England, and as these powers have never been defined we must go back to the common law in order to ascertain them. The attorney general had the power, and it was his duty
>
> 1st. To prosecute all actions necessary for the protection and defense of the property and revenues of the Crown * * *."

In *State* v. *Southern Pac. R. R. Co.,* 24 Tex. 80, it was said:

> "The statute makes it 'the duty of the attorney-general to prosecute and defend all actions in the Supreme Court of the State, in which the state may be interested.'
>
> In England, the king could direct and control the bringing of suits, by his direct control over the officer who might be attorney-general."

In *State* v. *Ehrlick,* 23 L. R. A. (N. S.) 692, it was held:

> "It is not the bill of the Attorney General. The State of West Virginia is the plaintiff and there is a presumption that any attorney would institute such a suit without authority. It would be inconsistent with

> his duty and obligation as an officer of the Court. When the question is properly raised, the authority of the attorney must be shown, but we think the question was not properly raised."

An act giving a penalty cannot be extended beyond its words:

Allen v. *Stevens,* 29 N. J. L. 509.

Where a statute directs anything to be done, and does not appoint any special manner, it is to be done according to the common law.

Raritan Water Power Co. v. *Veghte,* 21 N. J. E. 463, 470.
Welsh v. *Blackwell,* 14 N. J. L. 344, 347.

Statutes in derogation of the common law are to be strictly construed.

Sinnickson v. *Johnson,* 17 N. J. L. 129, 144.
Borough of Florham Park v. *Dept. of Health,* 7 N. J. Misc. 549, 146 Atl. 354.

The summons in this suit directs the respondent to answer the "complaint of the Board of Public Utility Commissioners of New Jersey, who sue in the name and for the use of the State of New Jersey." It is then signed "John O. Bigelow, Attorney" (p. 4).

The complaint is entitled "The State of New Jersey, plaintiff, vs. Lehigh Valley Railroad Company, defendant" (p. 1) and recites, "The Board of Public Utility Commissioners (hereinafter called the Board), who bring this suit in the name and for the use of the State of New Jersey."

The *ad damnum* of the complaint reads:

> "The Board demands judgment in favor of the State of New Jersey and against the company in the sum &c."

Unless otherwise expressly provided by law, no one can bring an action in the name or for the benefit of another. While the form of this complaint resembles the declaration in a *qui tam* action at common law (2 Chitty Pl. 187), it cannot be a *qui tam* action because the entire penalty belongs to the State (3 Bl. Com. 161; 4 Bl. Com. 308; 1 Chitty Pl. 356-360). It does not profess to be an action by a common informer, although the inference might be drawn from page 15 of the Board's brief that the Board is acting as a common informer. If that is true, then the suit is brought in violation of Section 219 of the Practice Act (3 C. S. 4120). Indeed, such an action could not be brought save by authority of the statute (3 Bl. Com. 161), and no such authority is given by the statute. Aside from these two forms of actions, in appropriate cases, none but the sovereign could sue for a penalty under a public act and only his Attorney General could institute the suit.

The act defining the duties of the Attorney General (1 C. S. 152) requires him "to attend generally to all matters in which the State is a party or in which its rights or interest are involved."

While Section 33 of the Public Utilities Act does not specify who shall receive the penalties when recovered at common law, they belong to the State and the State alone is interested in the penalty and in the suit to recover it. Certainly the statute justifies no other inference.

In *Brownell* v. *Old Colony R. R. Co.*, 41 N. E. 107, the Supreme Judicial Court of Massachusetts

reviewed a decision of a lower court in a case where ten citizens had instituted a suit to collect a penalty for the discontinuance of a ferry. The statute applicable to that case authorized ten or more citizens to file a petition in equity to enforce the obligation of the railroad company to operate the ferry. The statute imposed a penalty of $100 a day for each day's delay in operating the ferry, but it did not authorize the citizens to institute a penalty suit. The court held that the forfeiture of the prescribed penalty was to the commonwealth and that nobody but the commonwealth had any interest in the enforcement of the penalty. The court also held that the Attorney General could not bring a suit in his own name to represent the pecuniary interest of the commonwealth and that the only way to enforce a penalty which is to go to the commonwealth is by a proceeding in the name of the commonwealth, unless some other mode is enacted by statute or established by custom. It held that a heavy penalty inuring to the commonwealth could not be enforced in a suit instituted, managed and controlled and subject to be discontinued by persons who have no interest in the penalty; that the commonwealth only could enforce a penalty which inured to its benefit.

The discussion of this subject in 25 *C. J.*, p. 1188 *et seq.*, may be summarized as follows:

The person entitled to recover a statutory penalty is to be determined by the language and intent of the statute. Any person attempting to recover a penalty imposed by statute must bring himself clearly within the terms of the statute. In some cases it has been held that even the State cannot recover a penalty unless the statute provides that

the penalty shall be payable to it. It has also been held that

> "where the law does not authorize or empower anyone to bring an action to recover the penalty prescribed, it is defective and the penalty imposed cannot be recovered" (25 *C. J.*, Sec. 98, p. 1189, citing several N. Y. cases).

And that the State cannot sue except where authorized by law:

> "A public officer may not, in the absence of statutory authority, maintain an action in his own name for penalties accruing to the state" (25 *C. J.*, p. 1192).

The present statute is obviously incomplete in that it fails to provide for the distribution of the penalties when collected. We have examined something over twenty different statutes (other than criminal statutes) in which penalties for default are imposed. Without exception, they specify the circumstances under which a person or corporation shall be liable for the penalty, the name of the person or officer who may sue for the same, and to whom the penalty shall be paid, or between whom it shall be divided, when collected. Not one of them is vague or incomplete in any of these respects. There are numerous provisions of the Railroad Law carrying penalties, but all of them observe the qualifications above mentioned.

Under Section 78 of the Railroad Law, a penalty is imposed upon a railroad company for failure to file an annual report with the Comptroller of the State. The penalty applies only to a "wilfull failure," in which case

> "such company shall forfeit and pay to the State for every such omission the sum

> of $10,000. to be recovered in an action on contract, with costs of suit and to be added to the Public School Fund of the State" (3 C. S. 4253).

It will be observed from this statute how clearly the Legislature expresses itself with regard to all the necessary elements of a penalty suit when it undertakes to do so in a proper manner.

At pages 13 and 14 of the Board's brief various statutes are referred to as authorizing the departments to institute suits for the collection of penalties. That authority is, however, exercised only by express provision of the several acts, and *then*, as counsel for the Board admits, only the Attorney General may bring the action.

II.

The plaintiff's appeal from that part of the order which refuses to strike out the first defense (paragraph 11), the second defense, and the fourth defense, is premature and the defendant's motion to strike out grounds of appeal numbers 1, 2, 3, 7 and 8, should, therefore, be granted.

If, however, the defendant's motion to strike out said grounds of appeal is denied, then the judgment of the Supreme Court as to said defenses should be affirmed on the merits.

(a)

Grounds of Appeal Nos. 1, 2 and 7.

These grounds allege error because the court below denied the plaintiff's motion to strike out the first defense (in part) and the second defense.

The part of the first defense in question (paragraph 11 thereof) denies the corresponding paragraph of the complaint and then sets forth "except that it (the defendant) admits that it did not begin the actual work required in the performance and execution of said order on or before June 1, 1927, and has not yet begun the same; and complete the same within one year thereafter, or July 1, 1928, and it says that between August 10, 1927, and January 18, 1928, said order, and the enforcement thereof, and the defendant's duty of compliance therewith, were suspended by consent of the Board" (p. 16, lines 12-20).

The second defense sets up:

> "1. Said order and the enforcement thereof and the defendant's duty of compliance therewith were restrained, enjoined and suspended as follows: From June 1, 1927 to August 10, 1927, by order of the District Court of the United States for the District of New Jersey, entered June 1, 1927 (Exhibit B hereto annexed); from August 10, 1927 to January 18, 1928 by the consent of the Board of Public Utility Commissioners that the appeal from the order of the District Court (Exhibit C hereto annexed) should operate as a supersedeas of said order of the Court and should suspend the enforcement of said order of the Board until the issuance of the mandate of the Supreme Court on said appeal or until the final decree of the District Court in said suit, whichever might sooner happen; from January 18, 1928 to December 20, 1928, by supersedeas issued by the United States District Court for the District of New Jersey on January 18, 1928 (Exhibit D hereto annexed); on December 20, 1928, the mandate of the United States Supreme Court was issued (Exhibit E hereto annexed).

> 2. Since the issuance of said mandate, said Board has never given any notice, held any hearings or determined, or made any order fixing, new dates for the commencement or completion of said work.
>
> 3. Said order, at all times since December 20, 1928, was and still is ineffective, inoperative and unenforceable by reason of the expiration of the time therein specified for the commencement and the completion of the actual work of altering said crossing, and at all times since December 20, 1928, it was and still is, impossible for the defendant to comply with said order in its present form" (p. 16, lines 22-40; p. 17, lines 1-25).

In refusing to strike out these defenses, Judge Oliphant said:

> "I cannot conceive how the defendant could be held liable for the penalty pending the outcome of litigation to test the validity of the order on a violation of which the right to the penalty rests. Wadley etc. Co. v. Georgia, 235 U. S. 651" (p. 155, lines 15-20).

Ground No. 7 alleges that the above defenses "do not disclose any defense to the action. It does not appear that the court orders or the consent therein mentioned relieved the plaintiff of its duty to comply with the Board's order or stayed the accrual of the penalty" (p. 2, line 25).

We will deal first with the motion to strike out these grounds of appeal; the motion is to strike them out as premature and as forming no part of the judgment from which the present appeal purports to be taken.

We submit that the question raised by these defenses and the action of the court below in sustaining same is immaterial on the present appeal;

if the judgment of the court below is sustained, that is the end of the present case and neither party would then have any further concern with the question raised by these grounds. On the other hand, if the judgment is reversed, it can be only on the ground that the present suit is properly brought by the Board through its own counsel, and in that event this court would enter a remittitur sending the case back for trial as to any points not already decided by the court below; and, after a final judgment on such trial, if such judgment should go against the plaintiff, then these grounds may be raised *after* such final judgment on the merits (Sup. Ct. Rule 40). From either point of view, the point sought to be raised by these grounds of appeal is premature and of no present concern.

If, however, the defendant's motion to strike out these grounds of appeal is denied, we then come to a consideration of the merits of the point.

The Board practically concedes that this point, as originally made in behalf of the defendant, was well taken, as the plaintiff has stipulated that the defendant is not liable for any penalty that may have accrued *prior* to December 21, 1928 (p. 159).

This stipulation is signed by the counsel for the Board as "attorney for plaintiff" (p. 159, line 32), and was filed subject to the defendant's objection (as set forth in the Rule for Judgment) "that the attorney of record of the plaintiff has no authority to sign said stipulation or otherwise to represent or appear for the plaintiff in this action, or to take any further proceedings therein in behalf of the plaintiff" (p. 160, lines 25-30).

Assuming that counsel for the Board had authority to sign such a stipulation, there is left for

consideration on this phase of the case the question whether the defendant can be held liable for penalties that accrued *after* December 21, 1928, notwithstanding the fact that the date originally fixed for the beginning of the work had long since expired, pending the litigation, and that *the Board did not thereafter fix any further date for the beginning of the work.*

We therefore have a situation where the order is impossible of performance in its present form; nevertheless, counsel for the Board insists that, in the face of such impossibility, the defendant has become liable to pay a penalty because of non-observance of the order.

It seems unnecessary to argue seriously against such a proposition; to state it is to refute it.

It has been the uniform practice of the Board to make a supplemental order when the time fixed by the original order has expired, pending litigation. See for example the Board's order of March 11, 1924, in the *Paterson Grade Crossing* case, reported in 11 P. U. Rep., p. 344.

Counsel for the Board argues that if the Board makes a new order fixing new dates "ingenious counsel for the company" would repeat the whole litigation (p. 27 of Brief).

Counsel for the Board seems to be apprehensive that the Board cannot make an order in this case which would survive judicial inquiry; but, in any event, the defendant could not be deprived by the Board of whatever legal rights it might have to review the Board's action; indeed, counsel for the Board, in his brief, admits that the attempt made by the original complaint in this case to collect penalties from the defendant, pending litigation, was a violation of the Due Process Clause of the Federal Constitution (p. 25 of Brief).

Counsel for the company attempted to present to the Board its claim that the order could not be enforced until the Board fixed new dates to begin and complete the work and filed with the Board a petition for a rehearing in which this point was raised, as follows:

> "The litigation involving said order suspended its effective date and enforcement until said December 20, 1928. There is now no legal effective date of said order or for the beginning and completion of work thereunder, and said order, with respect to its effective date or for beginning and completing the work thereunder, is therefore impossible of performance and will continue so to be unless and until these deficiencies are supplied by the further order of the Board. It is, therefore, necessary under the statutes, as well as under the practice of the Board, to hold further hearing for the purpose of determining and fixing a new effective date of said order and for determining and fixing new dates for the beginning and completion of the work, respectively" (p. 97, lines 20-40).

This petition is dated January 8, 1929, and was filed with the Board on January 14, 1929 (p. 99, line 10; p. 87, line 25)—which happens to be the very day on which the summons and complaint in the present action were served upon the defendant (the summons being dated January 11, 1929, and filed January 17, 1929).

In this petition it will be observed that the attention of the Board was directed to the proper procedure and a further hearing was requested by the company for the purpose of fixing new dates to begin and complete the work. Notwithstanding the filing of this petition, the Board has continued with the present action to enforce the

penalty, *and thus far the Board has taken no action whatever with regard to this petition, except to mark it filed.*

Within a few days after the mandate of the United States Supreme Court was filed, counsel for the company filed the above petition with the Board, requesting that the Board prescribe the dates for the beginning and the completion of the work. At any time during the interval since the filing of that petition the Board, within a period of twenty days, could have changed the beginning and completion date of the order and put it into effect. The Board seems more intent in collecting its pound of flesh in the form of penalties, than in accomplishing the elimination of the crossing.

Counsel for the Board calls attention in his brief to the change in the law relating to grade crossings on state highways by Chapter 88, Laws of 1929. This provides for a different division of the cost of eliminating crossings and deprives the Board of any jurisdiction of such crossings except in case of a dispute between the Highway Commission and the Railroad. This statute became effective April 15, 1929. The question of the enforcement of this order, either by the imposition of penalties or otherwise, has therefore become moot.

A reversal by this Court would be futile since the complaint would then be immediately open to attack by motion to strike out on the ground that the order had lost its force, and the Board its jurisdiction, by virtue of the statute of 1929.

Moreover, the legislation in question was in accord with the suggestion of the Board itself in its annual reports to the Governor in 1927 and 1928. If the Legislature has changed the policy of the State with regard to the distribution of the cost of

eliminating grade crossings on state highways, what possible objection could the Board have if the defendant became entitled to the benefit of that change with respect to this crossing? The only duty of the Board under the Fielder Act was to make an order for the elimination of grade crossings in appropriate cases; who shall pay the cost of the work is the concern of the Legislature and not of the Board.

(b)

Grounds 3 and 8.

These grounds allege error because the court below denied the plaintiff's motion to strike out the fourth defense.

This defense repeats certain paragraphs of the first defense and of the third defense and then alleges:

> "It was the duty of the Township of Hillsboro to pass an ordinance and take such legal proceedings as were necessary to lawfully lay out and open, and to acquire and make available all of the land necessary for said connecting Township road and it was the duty of the New Jersey State Highway Commission to adopt such resolutions and institute such legal proceedings as were necessary and to acquire and make available all of the land necessary, for widening said State Highway from 33 feet to 66 feet, and for slopes, before the defendant could commence any of the work required of it to be performed under said order and plan.
>
> Neither said Township of Hillsboro nor said State Highway Commission has ever passed any ordinance or resolution or taken

> any legal proceedings or other proceeding or action to lawfully lay out and open said Township road, or taken any legal or other proceedings or any action or steps to acquire said land, or any part thereof, or made it, or any part thereof, available for use for the commencement of said work.
>
> The defendant, ever since the date of said order, has been incapable of commencing the actual work of complying with said order" (p. 20, line 34, to p. 21, line 23).

In denying the motion to strike out this defense, Judge Oliphant said:

> "In an action such as this, to recover a penalty for the non-compliance with an order made by the Board * * * the defendant should be permitted to show that it was impossible to comply with said order because of reasons beyond its control" (p. 155, lines 20-25).

In ground of appeal No. 8 the plaintiff argues that no facts are set forth in the complaint or in said fourth defense whereby it appears that the Township of Hillsborough or the State Highway Commission was under a duty to adopt the resolutions or take the action suggested in said defense, and that the failure of the Township and the Highway Commission to adopt such resolutions and take such action did not excuse the defendant from complying with the order of the Board.

Again we will deal first with the defendant's motion to strike out these grounds of appeal. As in the case of the grounds of appeal discussed under sub-head (a), *supra,* so here the defendant claims that these grounds are premature. The same argument applies as in the discussion of the other grounds included in the motion to strike out and it need not be repeated.

If, however, the motion to strike out these grounds is denied, we then come to a consideration of the merits.

By reference to the repeated paragraphs set up in the fourth defense and to the additional paragraphs thereof, as above quoted, it will be observed that this defense sets up that the defendant is a corporation of Pennsylvania and operates a railroad in interstate commerce subject to the Act to Regulate Commerce as amended; that the order of the Board requires the taking of private land to increase the width of Highway Route No. 16 from 33 to 66 feet for a distance of approximately 400 feet across and on either side of the railroad right-of-way and additional land for highway slopes, which will thereafter be permanently devoted to public use as a part of Highway Route No. 16; the depression of the widened highway and the raising of the railroad tracks; the construction of an under-crossing and of a bridge of the dimensions and character described in paragraph 4 of the third defense; the spreading of tracks, the improvement of Camp Lane for detour purposes and other changes in or impairment of railroad facilities, the closing of a grade crossing known as Camp Lane and the taking of private property for, and the construction thereon of, a permanent road as described in paragraph 4 of the third defense; that it was the duty of the Township of Hillsboro to pass ordinances and take necessary legal steps to lay out and open, and acquire and make available the land necessary for, the connecting road between Camp Lane and Highway Route No. 16, and that it was the duty of the State Highway Commission to adopt resolutions and institute proceedings necessary to acquire and make available the land necessary for widening Route No. 16 from 33 to 66 feet and for slopes

before the defendant could commence the work required to be performed by it under the order and plan.

The defense alleges that neither the Township nor the State Highway Commission has passed any ordinances or resolutions or taken any proceeding or action or acquired any land for these purposes, and for that reason the defendant was incapable of commencing the actual work of complying with the order, since the acquisition of the land was a necessary condition precedent to the use thereof for the purpose of carrying out the order.

Exhibit "M," paragraph 7 (annexed to supplemental answer), shows that before any work can be done upon the ground it is necessary to acquire the land for the purposes above mentioned (pp. 82, 83). This allegation is not disputed.

Paragraph 9 of said exhibit shows that this land, aggregating 64,070 square feet, belongs to four different owners (p. 83). None of it is owned by the defendant.

The order of the Board directed the Township, by name, and the State Highway Commission, as a party to the proceedings, to proceed with due diligence in the execution of the order and to comply with all its requirements and duties therein imposed and to exercise all of the powers conferred upon them and each of them by the laws of the State. They have ample statutory authority to do so.

Under the same language, contained in an order of the Board for the elimination of grade crossings in Paterson, this court held that it was the duty of the City of Paterson to exercise its charter powers to lay out, open, change, alter or vacate the streets involved in that order and to take such lands and real estate as was necessary therefor.

Erie R. R. Co. v. *Board,* 89 N. J. L. 57, 80.

In the matter of the petition of the Lehigh Valley Railroad Company of New Jersey for approval of the lease of its railroad to the defendant (2 P. U. Rep. 147), the Board of Public Utility Commissioners held that the defendant, being a corporation of Pennsylvania, had no right to use and enjoy the franchise of a New Jersey corporation and, therefore, refused to approve the lease in the form then submitted because it purported to lease to the defendant the rights, powers and franchises, as well as the property, of the lessor company. It was not until the lease was modified to omit "rights, powers and franchises" that the Board approved the same (3 P. U. Rep. 64).

This decision of the Board demonstrates that the defendant had no power of eminent domain or power to take real estate for its own purpose, much less for the purpose of public highways which would belong to the Township or the State.

Counsel for the Board argues that a foreign railroad company has the power of eminent domain in New Jersey by virtue of the Amendment of 1914 (p. 490) to the Railroad Act of 1903, and he says that this amendment was considered "in the Paterson case and was held to confer upon the Erie Railroad Company power to take by condemnation land necessary to carry out the order of the Board."

The Amendment of 1914 makes no change whatever in the original Act of 1903, in so far as relates to the power of condemnation, except that it authorizes condemnation for the purpose of condemning land required for the purpose of complying with an order of the Board. In the *Paterson* case no question was raised of the lack of power of eminent domain on the part of the railroad company, for the reason that that company, although

domiciled in the State of New York, had acquired the power of eminent domain under Acts of the Legislature of this State which were applicable to it, but are not to this defendant.

In *Akers* v. *United New Jersey Railroad Co.*, 47 N. J. L. 110, it was held that the grant of eminent domain is "never to be extended by unnecessary implication."

III.

Comments on brief of counsel for the Board.

Page 7:

Section 33 of the Utility Act does not, as stated, authorize actions for penalty, mandamus, injunction and specific performance all by the same authority. Counsel fails to distinguish between an action for a penalty which has already accrued (whether the order is ever enforced) from those provisions (totally independent of punishment for violation of the order) which are intended to carry the order into effect; it may be that the Board has authority to enforce its orders, but the collection of the penalty is no part of enforcement. Counsel argues that because the penalty provision is not a revenue measure it is a means of enforcement. There is no difference between the penalty provision in this act and those of other acts—even in criminal statutes the penalties when collected become revenue and penalties for the violation of ordinances are included as "anticipated revenue" in municipal budgets.

It is true that the statute does not specify by whom any of these proceedings shall be "instituted." The established rule of construction in

such cases is that the proceedings shall be instituted in accordance with the common law. This requires the proceedings to be instituted by the Attorney General.

Counsel says: "Apparently the Supreme Court was not impressed" by this same contention in the mandamus case. It is true that the court in its opinion did not mention this ground, but it did not mention any of the grounds upon which that case was argued. No specific grounds having been mentioned as a basis for refusing the writ, we are entitled to the inference that the writ was dismissed on any or all of the grounds urged before the court.

Page 8:

Board v. *Sheldon* (95 N. J. Eq. 408) was a suit in equity and not a suit under the common law. Judge Oliphant referred to this case in his opinion (p. 158), and said (italics ours):

> "I am unable to reach the conclusion that that power can be bestowed in a suit to recover a penalty in a court of law. * * * The Board * * * is suing to *recover a debt due the State* * * * *"*

Sections 15 and 37 of the statute have no bearing. The general supervisory power given in Section 15 does not apply to the elimination of grade crossings. Section 37 is merely a bar against waiver of right of action for a penalty.

Page 9:

Section 38 refers only to certiorari to review the orders of the Board.

Section 40 recognizes the Board might be a party to an action simply because the Board is a neces-

sary party to a suit by certiorari to review an order or by injunction to restrain its enforcement.

Section 6 of the Fielder Act cannot be construed to imply powers of the Board derogatory to the common law. It relates merely to the procedure before the Board or before the courts. It does not in itself give the Board any standing in the courts.

Page 10:

The statute of 1909 giving the Board of Railroad Commissioners the right to bring a suit to collect the penalties never applied to the Board of Utility Commissioners. The fact that this provision was omitted from the Public Utility Act of 1911, and that the Legislature inserted therein a different provision with respect to penalties, consistent with the common law rule, indicates an intention of the Legislature not to re-enact that provision of the former statute. The Legislature evidently intended to narrow the authority of the Board and to "render unto Caesar the things that are Caesar's," and to the Board the things that are the Board's.

Page 11 (C):

The conclusion as to the penalty provisions of the statute is misleading. Our State follows the common law practice under which *qui tam* actions may be brought to recover penalties in cases where they are shared by the person bringing the suit. That is not the case with this penalty. The other form of action was by a common informer who thereby secured all of the penalty. That is not the case with this penalty. Moreover, if this were a common informer, suit was not brought in accordance with Section 219 of the Practice Act.

Page 12:

It was not necessary in the Act of 1853 to specify who should enforce the penalties provided therein, because at common law only the Attorney General could do so. The Act of 1867 authorizes the Prosecutor of the Pleas to collect the penalty; his position is analogous to that of the Attorney General of the State and it is appropriate in the statute to specify who should sue for such penalties.

Pages 13 and 14:

As to all the boards and departments that are authorized by law to collect penalties, it is admitted that the Attorney General must bring the suits. The fact that in the Act of 1907 (mentioned at the bottom of p. 14), the Legislature specifies that suits for penalties shall be brought by the Attorney General does not imply a contrary procedure as to collection of penalties under other acts. This statute was merely declaratory of the common law.

Page 15:

In citing Blackstone, counsel confuses an action for penalty with an information for the forfeiture of lands and personal property. The distinction between an action for penalty which accrued to the king's exchecquer and an information to redress a private wrong in which the property of the crown was affected—usually in a criminal case—is discussed in 3 Bl. 261. He says, "but after the attorney general has informed upon the breach of a penal law, no other information can be received."

The subject is further discussed in 4 Blackstone 308, where a distinction is made between those suits

for penalties purely and properly the king's own suits, which are filed ex-officio by his attorney general, and those which may be filed at the relation of a private person or common informer.

Page 16:

Counsel says that an *action* is not the typical mode of procedure by the Attorney General when he enforces the rights of the State. An action for penalty is recognized by Chitty (1 Chitty Pl. 356) and the Legislature has the power to so denominate the remedy.

Page 16 (E):

It is erroneous to say that express words are not necessary to give the Board power to sue for a penalty because express words were not necessary to give a common informer the right to sue. But a common informer must be a citizen who has an interest in the collection of the penalty. The Board is not a natural person and is not entitled to any part of the penalty. It is a creature of the statute and its powers are limited by the express provisions of the statute.

Page 16 (F):

It is stated that the Board has never been represented by the Attorney General. The fact is that the Board has never before "throughout the last 18 years" brought a suit for a penalty.

Page 17:

It is stated that the Attorney General is a constitutional officer, that his powers and duties are not defined by the Constitution, and that the Legislature has always exercised the power of changing

his functions. This statement involves a misapprehension of the facts. When the Constitution adopted the officers or offices of the common law, their common law powers continued automatically until changed by the Legislature. This is true both of the courts and of the Attorney General. The Legislature did not begin to define his powers until 1854, and then it merely declared his common law duties. Those duties have never been changed, although other duties have been subsequently added, but those added duties related solely to departments or boards which did not exist under the common law, but were the creatures of the Legislature.

IV.

The appeal should be dismissed, or, if not dismissed, the judgment in favor of the defendant should be affirmed.

HOBART & MINARD,
Attorneys of Defendant-Respondent.

GEORGE S. HOBART,
of Counsel.