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*Information.*

**INFORMATION.**

Filed June 25, 1919.

**In Chancery of New Jersey**

*To the Honorable Edwin Robert Walker, Chancellor of  
the State of New Jersey:* 10

Informing shows to your Honor, your informant,  
Thomas F. McCran, Attorney-General of the State of  
New Jersey on behalf of the said State, that:

1. The State of New Jersey is the owner in fee simple  
of certain riparian lands which lie under and along the  
Passaic River at the part of said river where it flows  
between the City of Newark, Essex County, New Jersey,  
and the Town of Kearny, Hudson County, New Jersey. 20  
The said lands above-referred to as being owned by the  
State, were irrevocably appropriated for the support of  
Free Public Schools of this State by an Act entitled,  
"A Supplement to an Act entitled 'An Act to establish  
a system of Public Instruction (Revision) approved  
March 27th, 1874.' " Approved April 24th, 1894, Ses-  
sion Laws of 1894, Chapter 71, page 123.

The Passaic River lies wholly within the State of New  
Jersey, and that part of it where it flows between the  
said City of Newark and said Town of Kearny, is naviga- 30  
ble, and is tide water.

2. In the year 1870, an Act entitled, "An Act to in-  
corporate the Newark and Hudson Railroad Company"  
was passed, granting a charter to the said Newark and  
Hudson Railroad Company, which Act, among other  
things, empowered said Company to construct a railroad  
between the said City of Newark, in Essex County, and  
points in Hudson County, which Act was supplemented  
by an Act approved February 22nd, 1871. Said charter 40



*Information.*

of the Newark and Hudson Railroad Company appears in the Sessions Laws for the year 1870, Chapter 518 of Special Public and Private Laws, on page 1274, and contains among other provisions, the following:

10       “Section 6. That it shall be lawful for the  
said company to lay out and construct a railroad,  
not exceeding one hundred feet in width, from a  
point in the City of Newark, in the County of  
Essex, in this State, at or near Gouverneur street,  
in said city, to a point in the county of Hudson,  
where the said railroad may connect with the  
New Jersey Railroad and Transportation Com-  
pany, or with some other railroad in said county  
of Hudson, running to the waters of the Hudson  
River, and may connect the same with the New  
Jersey Railroad and Transportation Company,  
20       and other railroads in the counties of Essex and  
Hudson, upon such terms as may be agreed upon,  
and for that purpose the said company may erect  
and maintain bridges over the Passaic and Hack-  
ensack Rivers, the said bridges to be provided with  
draws at least seventy feet in width.”

3. Under its said charter, the said Newark and Hudson  
Railroad Company constructed a railroad and has erected  
and maintained a bridge over the Passaic River between  
30       the said City of Newark and the said Town of Kearny,  
which railroad and bridge has been used by the said  
Newark and Hudson Railroad Company and its lessees  
for many years last past.

4. The Newark and Hudson Railroad Company  
leases the said railroad, including the right of way and  
the bridge over the Passaic River between the City of  
Newark and Town of Kearny, to the Erie Railroad Com-  
pany, which is now operating said railroad, and is main-  
taining and using said bridge under the direction of the  
40       United States Railroad Administration.



*Information.*

5. The said Newark and Hudson Railroad Company, the Erie Railroad Company, or Walker D. Hines, United States Railroad Administrator, or one or all of them, now propose to build a new bridge shown by blueprint annexed and made part hereof over and across the Passaic River at a point northerly from the bridge as now maintained by or on behalf of the Newark and Hudson Railroad Company, for the purpose of carrying the tracks of the said Newark and Hudson Railroad Company over and across the Passaic River; and in the erection of said bridge it is proposed to occupy riparian lands which are the property of the State of New Jersey. 10

6. On September 13, 1916, an application was made by, or on behalf of the Newark and Hudson Railroad Company, or the Erie Railroad Company, or one of them, for a grant of the riparian lands of the State of New Jersey, which it is necessary to take or to destroy in value in the erection of the proposed bridge. Said application was duly considered by the Board of Commerce and Navigation of the State of New Jersey, to which said application was made, and it was resolved by the said Board of Commerce and Navigation to offer to said Newark and Hudson Railroad Company, or the said Erie Railroad Company, or one of them, a license to cross the Passaic River and a grant of riparian lands necessary for the erection of the proposed bridge, upon payment by either or both of said railroad companies, of the sum of nineteen thousand one hundred and twenty dollars (\$19,120) consideration, which action of the Board of Commerce and Navigation, was duly reported to the Erie Railroad Company. Thereafter, a communication was received by the said Board of Commerce and Navigation from the Erie Railroad Company, which said communication was signed by its Vice-President, and in which, said Erie Railroad Company accepted on behalf of the Newark and Hudson Railroad Company the offer of the 20 30 40



*Information.*

said Board of Commerce and Navigation to grant riparian lands and to issue a license to cross the Passaic River with a railroad bridge, upon payment of the consideration of nineteen thousand one hundred and twenty dollars (\$19,120).

7. Thereafter, the said application for a grant and  
 10 license was withdrawn, and the said Newark and Hudson Railroad Company, the Erie Railroad Company and the United States Railroad Administrator, or some or one of them, now propose, or proposes, to build said new bridge without first having obtained from the Board of Commerce and Navigation of the State of New Jersey, which board is invested with authority over riparian lands within this State, a grant or other authority to use and occupy such riparian lands in the State of New Jersey  
 20 as will be necessary in the erection of said bridge; but claim that they have the right to occupy and use the riparian lands of the State of New Jersey by virtue of the charter granted to the Newark and Hudson Railroad Company, as hereinbefore referred to, or by virtue of an Act entitled, "An Act concerning Railroads" (revision of 1903) approved April 13th, 1903.

8. Neither the Newark and Hudson Railroad Company, the Erie Railroad Company, nor the United States Railroad Administrator, is the owner of the riparian lands  
 30 under and along the Passaic River between the City of Newark and the Town of Kearny, aforesaid, and northerly from the railroad bridge across said river between said City of Newark and Town of Kearny now erected and maintained by the Newark and Hudson Railroad Company, or the Erie Railroad Company, or the United States Railroad Administrator, to be taken or destroyed in value by the erection of the railroad bridge proposed; nor has either the Newark and Hudson Railroad Company, the Erie Railroad Company, or the United States  
 40 Railroad Administrator any such interest in said lands



*Information.*

as to give to them, or any of them, the right to construct a bridge over and across the said Passaic River between the City of Newark and Town of Kearny aforesaid, northerly from the said bridge as now erected and maintained by the said Newark and Hudson Railroad Company, the Erie Railroad Company, or the United States Railroad Administrator.

10

9. Your informant says that the said Erie Railroad Company and Newark and Hudson Railroad Company and United States Railroad Administrator, or some or one of them, have or has begun the construction of said bridge by driving test piling and by doing other work upon the lands of the State of New Jersey for the purpose of the erection of said bridge upon the lands of the State of New Jersey, without authority and contrary to law.

10. In the construction of said new bridge as proposed, riparian lands lying under and along the Passaic River northerly from the right of way and railroad bridge as now occupied and maintained by the said Newark and Hudson Railroad Company, Erie Railroad Company and United States Administrator, which riparian lands belong to the State of New Jersey, will be occupied to the width of two hundred and two (202) feet on the Newark side of the said Passaic River, and to the width of fifty-eight (58) feet on the Kearny side of said river, and extending the entire width of the said Passaic River. Said occupation will consist in the erection upon said riparian lands of four concrete piers, two concrete abutments and two pile and timber fenders upon which, will be supported the super-structure, which occupation will take or destroy in value the said riparian lands now owned by the State of New Jersey.

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30

Your informant on behalf of the State of New Jersey, is without adequate remedy at law, and therefore prays:

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*Information.*

1. That, the premises considered your Honor grant that the State's writ of injunction issue out of and under the seal of this Honorable Court, to be directed to Walker D. Hines, United States Railroad Administrator, Erie Railroad Company and Newark and Hudson Railroad Company, their officers, agents, servants and employees, 10 restraining all and each of them from constructing, or erecting, or taking any steps toward constructing, or erecting, a bridge across the Passaic River between the Town of Kearny and the City of Newark, unless they, or one of them, shall have first obtained a license to construct such bridge and a grant from the State of New Jersey, of such riparian lands as shall be necessary to the construction of such bridge.

2. That the State's writ of subpoena issue out of and under the seal of this Honorable Court, to be directed to 20 the said Walker D. Hines, United States Railroad Administrator, Erie Railroad Company and Newark and Hudson Railroad Company, commanding them, and each of them, by a certain day and under a certain penalty therein to be expressed, to answer the matters contained in this information and to abide by and perform such Order and Decree as this Court may make in the premises.

And your informant, as in duty bound, will ever pray, etc.

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THOMAS F. McCran,  
*Attorney-General of New Jersey.*

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*Affidavit of Harrison P. Lindabury.*

**AFFIDAVIT.**

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

HARRISON P. LINDABURY, of full age, being duly sworn according to law, upon his oath deposes and says: That he is a practicing attorney licensed by the Supreme Court of the State of New Jersey, and assistant to the Attorney-General of the State of New Jersey, specially deputed to represent the Board of Commerce & Navigation of the State of New Jersey. 10

As such legal representative of the Board of Commerce & Navigation he has had charge, among other things, of the matter of the application of the Newark & Hudson Railroad Company for leave to erect a railroad bridge across the Passaic River between the City of Newark and the Town of Kearny, running from a point opposite Fourth avenue and Gouverneur street, in said City of Newark, and running from the easterly shore of said river diagonally in a northwesterly direction to a point on the shore near Fourth avenue, in said City of Newark as shown by annexed blueprint. 20

That in the construction of said bridge it will be necessary to construct, according to the proposed plans, 4 piers, 2 abutments and 2 pile and timber fenders; 1 abutment being erected at each end of said bridge and the piers and 2 pile and timber fenders being erected in the river, on which will be located the bridge and tracks. 30

The pier at the Kearny end of said bridge will be 40 feet by 13 feet 6 inches. The pier at the Newark end will be about 10 feet by 20 feet, with a wing wall or abutment 40 feet long on the northerly side. One of said piers located in the river will be 40 feet by 15 feet, one will be 55 feet by 20 feet, one will be 60 feet by 30 feet, and the fourth will be 60 feet by 22 feet. The pile and timber fenders will be about 125 feet long and of an ir- 40



*Affidavit of Harrison P. Lindabury.*

regular shape; one being placed at each side of the draw or opening provided for the passage of vessels.

An application for a grant of riparian lands to be used and occupied in the construction of said bridge, in addition to those riparian lands used and occupied by the bridge now erected across said river, was made to the  
10 Board of Commerce & Navigation by the Newark & Hudson Railroad Company under date of September 13, 1916, which said application was favorably considered by the Board of Commerce & Navigation, and the said applicant notified that a grant pursuant to the application made, would be given and the consideration for said grant was fixed at \$19,120. Under date of December 11, 1916, the Board of Commerce & Navigation was notified by the Erie Railroad Company, by its Vice-President, that it accepted the grant so made at the cost  
20 of \$19,120. Subsequently the said Newark & Hudson Railroad and the Erie Railroad Company, by their attorneys, notified the Board of Commerce & Navigation that they would withdraw their application for grant of riparian lands necessary to be used and occupied in the erection of the proposed bridge, stating that by virtue of the charter of the Newark & Hudson Railroad Company and the general railroad laws of this State, particularly Revision of 1903, approved April 13, 1903,  
30 the right to erect said proposed bridge was given and the right to occupy riparian lands of the State of New Jersey obtained without a grant of said lands by the Board of Commerce & Navigation, and proposed to proceed with the construction of said bridge without grant first obtained.

Deponent further says that the lands so proposed to be occupied are riparian lands owned in fee by the State of New Jersey, lying under the Passaic River, and the Passaic River at the point where the bridge is proposed  
40 to be erected is a navigable stream and tide water.



*Affidavit of Harry R. Tooker.*

Deponent further says that he was informed by the legal representative of said railroad companies that they proposed to begin work in the week of June 2nd, whereupon deponent caused an examination and inspection to be made, and a report was made to him that work had been begun as stated.

Deponent says that he has read the annexed information and is familiar with its contents, and that the matters and things therein stated are true, except as to such matters as are stated on information and belief, and as to those matters deponent believes them to be true. 10

HARRISON P. LINDABURY,

Subscribed and sworn to before me  
this 24th day of June, 1919.

JAMES L. R. LAFFERTY,  
*Attorney at Law of*  
*New Jersey.*

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**AFFIDAVIT.**

STATE OF NEW JERSEY, }  
HUDSON COUNTY. } ss.

Harry R. Tooker, of full age, being duly sworn according to law, on his oath deposes and says that he is employed by the Board of Commerce and Navigation of the State of New Jersey as a draughtsman; that he is familiar with the bridge work proposed to be done by the Erie Railroad or the Newark and Hudson Railroad Company, across the Passaic River between Newark and the Town of Kearny, having examined plans and specifications for said bridge as lodged with the Board of Commerce and Navigation in connection with such work and knows where said bridge is proposed to be built. 30

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*Affidavit of Harry R. Tooker.*

Deponent further says that on Saturday, the seventh day of June, 1919, he went to the site of the proposed bridge and made an examination of the conditions there and found preliminary work being done. He found there a pile driver bearing the name and address of Linde and Griffith Company, foot of Fourth avenue, Newark, New Jersey, "Pile Driver No. 5." There were six men working and were engaged in driving a pile in the river bottom approximately on the center line of the proposed bridge.

Deponent further says that he has been a mechanical draughtsman for seven years past and has a knowledge of bridge work, and the pile that he saw driven was such work as is usually done preparatory to the placing of foundations for bridge building.

Deponent further says that the pile that was being driven was located about sixty feet upstream from the center line of the old railroad bridge as it now exists across the river.

HARRY R. TOOKER,

Subscribed and sworn to before me  
this tenth day of June, 1919.

EDWARD J. MURPHY,  
*Notary Public, New Jersey.*

Service of a copy of the within information and affidavits acknowledged this 27th day of June, 1919.

COLLINS & CORBIN,  
*Solicitors for Director-General of Railroads.*

RALPH E. COOPER,  
*Solicitor for Erie Railroad Co. and  
Newark and Hudson Railroad Co.*



*Restraint and Order to Show Cause.***RESTRAINT AND ORDER TO SHOW CAUSE.**

Filed June 25, 1919.

The informant having filed his information by which it appears that the Newark and Hudson Railroad Company and the Erie Railroad Company, lessee of the Newark and Hudson Railroad Company and Walker D. Hines, United States Railroad Administrator, are about to erect, or cause to be erected, a railroad bridge across the Passaic River, to be located wholly or in part, upon riparian lands owned by the State of New Jersey, without having obtained a grant or other authority from the State of New Jersey, or its duly authorized agents, permitting the erection of said bridge, and praying that the erection of said bridge be enjoined, and the Court having read the information and affidavits attached thereto and considered the same,

It is thereupon on this twenty-fifth day of June, 1919, ORDERED, that the said Erie Railroad Company, the Newark and Hudson Railroad Company and Walker D. Hines, United States Railroad Administrator, show cause before this Court on the eighth day of July, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in Newark, why an injunction should not issue pursuant to the prayer of said information, or that such other relief be granted, as the equity of the case may require.

And it is further ordered, that the said Erie Railroad Company, Newark and Hudson Railroad Company, their officers, agents, servants and employees, and the said Walker D. Hines, United States Railroad Administrator, his agents and representatives, be and they are hereby restrained from erecting a railroad bridge across the Passaic River between the Town of Kearny and the City of Newark, or from doing any work upon riparian lands owned by the State of New Jersey in said river, prepara-



*Restraint and Order to Show Cause.*

tory to the erection of said bridge, until the further order of this Court.

It is further ordered, that a true, but uncertified copy of the information and this order be served upon the said defendants within three days from the date hereof.

E. R. WALKER,

C.

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Respectfully advised,

JOHN E. FOSTER,  
V.-C.

A true copy.

JESSE R. SALMON.  
Clerk.

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*Affidavit of J. C. Patterson.*

**AFFIDAVITS.**

Filed July 8, 1919.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK. } ss.

J. C. Patterson, of full age, being duly sworn according to law, on his oath says:

10

1. I am a civil engineer and was formerly Office Engineer of the Erie Railroad Company and Newark and Hudson Railroad Company and am now Principal Assistant Engineer of the Erie Railroad and Newark and Hudson Railroad for the Director-General of Railroads.

2. The Newark and Hudson Railroad extends from the westerly end of the Bergen tunnel in Hudson County to a point in the City of Newark, in Essex County, State of New Jersey, and is wholly in the Counties of Hudson and Essex. Said railroad crosses the Passaic River on a bridge. Said bridge was built many years ago and is old and obsolete and is unsuitable and unsafe for the present traffic over said railroad. A new bridge to carry said railroad over said river should be built as soon as possible.

20

3. "Branch B" of the Newark and Hudson Railroad, a map and survey of the route of which were filed in the office of the Secretary of State of the State of New Jersey on September 13, 1918, runs from a point in the Town of Kearny in the County of Hudson, to a point in the City of Newark in the County of Essex and connects the Newark and Hudson Railroad with the Paterson, Newark and New York Railroad in the County of Essex. The new bridge of the Newark and Hudson Railroad across the Passaic River mentioned in the information in this matter is to be built on said branch and when completed will take the place of the present bridge of said railroad across said river.

30

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*Affidavit of Duane E. Minard.*

4. The riparian lands which will be necessarily used for said new bridge, and the use of which will be interfered with by it, have a frontage of 128 feet along the bulkhead line in the City of Newark, and a frontage of 58 feet along the bulkhead line in the Town of Kearny outside of the present right of way of said railroad, and  
 10 said new bridge will have four concrete piers in said river.

5. Said new bridge has been approved by the Secretary of War of the United States and his permission to build the same has been obtained.

J. C. PATTERSON,

Subscribed and sworn to at New York City, New York, this 7th day of July, 1919, before me the sub-  
 20 scriber, a Foreign Commissioner of Deeds for New Jersey, in and for said County and State duly commissioned and sworn as witness my hand and official seal.

(L. S.) A. L. TRAVIS,  
*A Foreign Commissioner  
 of Deeds for New Jer-  
 sey in New York.*

30

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK. } ss.

Duane E. Minard, of full age, being duly sworn according to law, on his oath says:

1. I was formerly an Assistant General Solicitor of the Newark and Hudson Railroad Company and Erie Railroad Company and am now an Assistant General Solicitor of the Newark and Hudson Railroad and Erie Railroad  
 40



*Affidavit of Duane E. Minard.*

for the Director General of Railroads, who took control of said railroads under the Act of Congress of the United States and the proclamation of the President thereof.

2. Said Newark and Hudson Railroad Company was incorporated under an act of the legislature of the State of New Jersey entitled "An Act to incorporate the Newark and Hudson Railroad Company," approved March 17, 1870, which act was supplemented by an act approved February 22, 1871, and built a railroad extending from the westerly end of the Bergen tunnel in the County of Hudson to a point in the City of Newark in the County of Essex, State of New Jersey, which railroad is now operated by said Erie Railroad Company under a lease or agreement made by said Newark and Hudson Railroad Company. 10

3. Sometime prior to April 17, 1916, said Erie Railroad Company planned certain improvements along the shore of the Passaic River in the City of Newark and State of New Jersey, opposite the Town of Kearny, and said Newark and Hudson Railroad Company determined to build a new bridge over the Passaic River between the City of Newark and the Town of Kearny aforesaid. 20

4. On or about May 17, 1916, the Newark and Hudson Railroad Company filed the plans of said new bridge with the Board of Commerce and Navigation of the State of New Jersey, said plans having been approved by the Secretary of War of the United States, and his permission to build the bridge obtained as required by act of Congress, and applied to that board for its permission to build said new bridge. At the same time said Newark and Hudson Railroad Company applied to said board for a grant of the riparian lands needed for said proposed improvement, along the shore of the Passaic River in the City of Newark, said riparian lands having 30



*Affidavit of Duane E. Minard.*

a frontage of 300 feet along the bulkhead line, and sometime thereafter the Newark and Hudson Railroad Company applied to said board for a grant of the riparian lands needed for said new bridge along the shore of the Passaic River in the Town of Kearny.

5. Said board fixed a price of \$50 a lineal foot along  
10 the bulkhead line for said riparian lands in the City of Newark and \$20 a lineal foot along the bulkhead line for said riparian lands in the Town of Kearny, and in addition thereto fixed the sum of \$2,000 as the compensation to be paid by said Newark and Hudson Railroad Company to the State of New Jersey for the right to place the piers of said new bridge in the Passaic River, the total price and compensation to be paid for said riparian  
20 lands and the right to build said new bridge being \$19,120. Said board notified the Erie Railroad Company of said terms and said company by letter dated December 11, 1916, informed said board that a grant would be accepted on said terms.

6. Subsequent to the last-mentioned date the United States entered the war in Europe, and control of the Erie Railroad and Newark and Hudson Railroad was taken  
30 by the Director-General of Railroads under act of Congress and proclamation of the President of the United States. The making of said improvements was thereafter suspended, but it was determined that said new bridge should be built.

7. The matter of building said new bridge was then referred to local counsel for the Director General of Railroads in the State of New Jersey and they advised that said Newark and Hudson Railroad Company had power to build said new bridge, provided the route upon which it is to be built was located and a description of the survey thereof filed as required by law, under the charter of said company as well as under the General  
40 Railroad Act of 1903, and that there was some doubt



*Affidavit of Duane E. Minard.*

whether the State could exact compensation from said company for the right to build said new bridge and for the riparian lands necessary therefor.

8. Said Newark and Hudson Railroad Company filed in the office of the Secretary of State of New Jersey a map and description of the survey of the route of "Branch B" of the Newark and Hudson Railroad, upon which route said new bridge is to be built. The aforesaid applications to said board for its permission to build said new bridge and for grants of riparian lands were withdrawn, and said Newark and Hudson Railroad Company, on November 18, 1918, made a new application to said board for approval of the plans for said bridge, taking the position that it had power to build the same and use the riparian lands necessary therefor without compensation to the State. 10

9. Said board at its meeting held on February 24, 1919, refused its approval of said plans to build said new bridge until said Newark and Hudson Railroad Company acquired the rights to the land under water which will be taken or destroyed by said new bridge, and subsequently at its meeting held on March 17, 1919, again fixed a price of \$50 a lineal foot along the bulkhead line in the City of Newark and \$20 a lineal foot along the bulkhead line in the Town of Kearny, for the riparian lands taken or destroyed by said new bridge, and the sum of \$2,000 for the right to place the piers of said bridge on the State's land in the river, together with interest on all of said sums at 7% from the time said terms were first fixed, which was on or about October 23, 1916. 20 30

10. Section 6 of the act incorporating said Newark and Hudson Railroad is as stated in paragraph 2 of the Information. "Branch B" of the Newark and Hudson Railroad, upon which said new bridge is to be built, connects that railroad with the Paterson, Newark and New York Railroad in Essex County. The Newark and Hudson 40



*Affidavit of Duane E. Minard.*

10 Railroad Company and The Paterson, Newark and New York Railroad Company have agreed upon the terms of such connection. Said new bridge has been approved by the Secretary of War of the United States and his permission for the building thereof obtained as required by Act of Congress. Under the circumstances the right of the State of New Jersey to compensation for the riparian lands which will be taken or destroyed by said new bridge, and for the right to build said new bridge, is in doubt, and until such doubt is settled, the Director General of Railroads who is to build said new bridge and pay the cost thereof, in the first instance, and the Newark and Hudson Railroad Company would not be justified in paying the compensation demanded by said board.

20 11. Furthermore, the riparian land in the Town of Kearny which will be necessary for, or destroyed by, said new bridge, and for which compensation has been demanded by said board, or some part thereof, has been filled in by said town, and said town claims some right, title or interest therein. Neither the Director General of Railroads nor the Newark and Hudson Railroad Company can safely pay compensation to the State of New Jersey for said riparian land until the right of said town thereto has been determined.

DUANE E. MINARD.

30 Subscribed and sworn to at New York City, New York, this 3rd day of July, 1919, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in New York, in and for said County and State, duly commissioned and sworn, as witness my hand and official seal.

(SEAL) A. L. TRAVIS,

*A Foreign Commissioner of Deeds for New Jersey in New York.*



*Order Discharging Restraint, etc.*

**ORDER DISCHARGING RESTRAINT, ETC.**

Filed July 8, 1919.

The order to show cause made on June 25, 1919, in the above-entitled cause having been heard and argued in the presence of Mr. Harrison P. Lindabury, counsel for informant, and Messrs. Collins & Corbin, counsel for defendants (the defendant, Director-General of Railroads, having been sued as Walker D. Hines, United States Railroad Administrator), and it appearing that the defendant, Newark and Hudson Railroad Company, submitted the plans of the bridge mentioned in the information herein, to the Board of Commerce and Navigation of the State of New Jersey, and applied to said board for its approval thereof and for the permission of said board to carry out the work thereon; and it further appearing that said board has no objection to the plans of said bridge but refused to approve said plans and to permit the work on said bridge to be carried out solely because said company has not acquired a grant of the riparian lands which will be used, or the use of which will be interfered with, by said bridge; and it further appearing the said board has fixed a price of \$50 a lineal foot along the bulkhead line in the City of Newark and of \$20 a lineal foot along the bulkhead line in the Town of Kearny for said land, and a price of \$2,000 for the right to build the piers of said bridge in the Passaic River, together with interest on said several prices at 7% from October 26, 1916; and it further appearing that the riparian land which will be used, and the use of which will be interfered with, by said bridge has a frontage of 128 feet along the bulkhead line in the City of Newark, and a frontage of 58 feet along the bulkhead line in the Town of Kearny, outside of the present right of way of the Newark and Hudson Railroad; and it further appearing that the said bridge is to replace the present bridge of

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*Order Discharging Restraint, etc.*

the Newark and Hudson Railroad over the Passaic River, which is old and obsolete and unsuitable and unsafe for the traffic over said railroad, and should be built as soon as possible; and it further appearing that the Secretary of War of the United States has approved the plans of said bridge and his consent to the building thereof has  
 10 been obtained, as provided by Act of Congress:

Therefore, it is on this 8th day of July, 1919, on motion of Collins & Corbin, counsel for the defendants, ORDERED that said order to show cause made on June 25, 1919, in the above-entitled matter, and the restraint therein contained, be and they hereby are discharged, and that the defendants, Newark and Hudson Railroad Company and the Director-General of Railroads, or either of them, shall be permitted to build said bridge upon condition  
 20 that they, or either of them, shall within 15 days from the date hereof deposit with the Clerk of this Court, the sum of \$11,372.42, being the price fixed by said board for said riparian grant and for the right to build the piers of said bridge in the Passaic River, which sum so deposited shall abide the final determination in this cause.

E. R. WALKER,

Respectfully advised,

C.

JOHN E. FOSTER,

V.-C.

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*Amendment of Information.***AMENDMENT OF INFORMATION.**

Filed July , 1919.

The information is hereby amended by striking out of said information the words "Walker D. Hines, Administrator", or the words, "United States Railroad Administrator" wherever they appear in said information, and substituting therefor the words, "Director-General of Railroads." 10

That the information be further amended by striking out of paragraphs 1 and 2 of the prayer the words, "Walker D. Hines, United States Railroad Administrator" and substituting therefor the words, "Director-General of Railroads."

THOMAS F. McCRAN,  
Attorney-General of New Jersey,  
*Solicitor of Informant.* 20

We consent to the foregoing amendment.

COLLINS & CORBIN,  
*Solicitors for the Director-General of Railroads.*

RALPH E. COOPER,  
*Solicitor for The Erie Railroad Company and  
Newark and Hudson Railroad Company.*

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*Answer and Counter-Claim.***ANSWER AND COUNTER-CLAIM.**

Filed September 11, 1919.

The answer of the defendants, Erie Railroad Company, a corporation, and Newark and Hudson Railroad Company, a corporation.

10 These defendants jointly and severally answering the information, as amended, say that:

1. They admit the averments contained in the first paragraph of the information except that they have no knowledge or information sufficient to form a belief as to whether the State of New Jersey is the owner of said riparian lands along the Passaic River in said Town of Kearny, and deny that said riparian lands were irrevocably appropriated for the support of the free public schools of the State, as against said Newark and Hudson  
20 Railroad Company.

2. They admit the averments contained in the second paragraph of the information.

3 They admit the averments contained in the third paragraph of the information.

4. They deny that said Newark and Hudson Railroad Company leased its railroad to said Erie Railroad Company and say that said Newark and Hudson Railroad Company leased its railroad to the Erie Railway Company, a corporation, by lease or agreement dated January 30, 1872, and that said lease became vested in said  
30 Erie Railroad Company by several mesne conveyances. They deny that said Erie Railroad Company is now operating said railroad and maintaining and using said bridge and say that said railroad, including said bridge, is in the possession and control of, and is being maintained and operated by the Director-General of Railroads by virtue of a proclamation of the President of the United States, dated December 26, 1917, and under and pur-  
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*Answer and Counter-Claim.*

suant to an act of Congress entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, and an act of Congress entitled "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners, and for other purposes," approved March 21, 1918, and also by virtue of a proclamation of the President of the United States dated March 29, 1918, and other action taken by him in the exercise of the authority conferred by law. 10

5. They admit that the Director-General of Railroads intends to construct the new bridge mentioned in the fifth paragraph of the information and say that said bridge is upon the route of Branch B of the railroad of said Newark and Hudson Railroad Company, a survey and description of which were duly filed in the office of the Secretary of State of the State of New Jersey on September 13, 1918. They admit that said bridge will occupy certain riparian lands but have no knowledge or information sufficient to form a belief as to whether said riparian lands in said Town of Kearny are the property of the State of New Jersey. 20

6. They admit that on or about September 13, 1916, said Newark and Hudson Railroad Company applied to the Board of Commerce and Navigation of the State of New Jersey for a grant of certain riparian lands along the Passaic River in said City of Newark and say that subsequently thereto, and on or about June 7, 1917, said Newark and Hudson Railroad Company applied to said board for a grant of the riparian lands along said river in said Town of Kearny, which will be occupied and affected by said bridge. Said Newark and Hudson Railroad Company and said Erie Railroad Company intended to use said riparian lands in said City of Newark, together with other lands adjoining the same, not only for 30 40



*Answer and Counter-Claim.*

the purposes of said bridge, but for certain general improvements. Said application which was made on or about June 7, 1917, was on notice to one John Watts Kearny, a riparian owner, who it was assumed was first entitled to a grant of said riparian lands in said Town of Kearny. They admit that said board fixed a price of \$19,120 for a grant of all of said riparian lands for which applications were made as aforesaid, together with a license to build said bridge across said river, and that said board notified said Erie Railroad Company that said price had been so fixed. They admit that the Vice-President of said Erie Railroad Company informed said board that a grant of said riparian lands would be accepted for the price fixed.

7. They admit that said applications for riparian grants were withdrawn and say that they were withdrawn because the entry of the United States into the war in Europe and the consequent taking by the Director-General of Railroads of the possession and control of the railroads of said Newark and Hudson Railroad Company and of said Erie Railroad Company compelled said companies to abandon their proposed improvements in said City of Newark, and also because said applications had been made under mistakes of law and of fact, in that it was erroneously assumed that said Newark and Hudson Railroad Company could not construct said bridge without first obtaining a grant of the riparian lands which would be occupied or affected thereby, whereas said company has the power and right under the act incorporating it to take and occupy such riparian lands as are necessary for said bridge without obtaining a grant thereof, and to construct said bridge across said river without compensation to the State, and in that it was erroneously assumed that said John Watts Kearny, as a riparian owner, was first entitled to a grant of the riparian lands along said river in said Town of Kearny, whereas he was not



*Answer and Counter-Claim.*

so first entitled to a grant. They admit that the Director-General of Railroads intends to construct said bridge without said Newark and Hudson Railroad Company having first obtained from the Board of Commerce and Navigation of the State of New Jersey, a grant or other authority to use and occupy such riparian lands as are necessary therefor, and that said Newark and Hudson Railroad Company claims to have the right to occupy and use said riparian lands by virtue of the act incorporating it. 10

8. They admit that neither said Erie Railroad Company or the Director-General of Railroads is the owner of the riparian lands mentioned in the eighth paragraph of the information, but deny the other averments contained in said paragraph.

9. They deny that any work on said bridge has been begun by said Erie Railroad Company or said Newark and Hudson Railroad Company, but admit that said work has been begun by the Director-General of Railroads as averred in the ninth paragraph of the information, and deny that such work was begun without authority and contrary to law. 20

10. They deny that the riparian lands mentioned in the tenth paragraph of the information will be occupied by said bridge and say that the riparian lands which will be occupied or affected by said bridge in said City of Newark have a width of 128 feet along the bulkhead line and those in said Town of Kearny have a width of 58 feet along the bulkhead line outside of the present right of way of the Newark and Hudson Railroad. They admit that said bridge will have four concrete piers, two concrete abutments and two pile and timber fenders in said river, which will support the superstructure, and that said bridge will occupy and affect certain riparian lands. 30

11. Further answering these defendants say that the bridge described in the information is to be constructed 40



*Answer and Counter-Claim.*

upon the route of Branch B of the railroad of said Newark and Hudson Railroad Company as aforesaid, and will connect that railroad with the railroad of the Paterson, Newark and New York Railroad Company in said City of Newark. Said branch is less than a mile in length and both of said companies have consented to such connection. Said bridge, when completed, will take the place of the present bridge which carries the railroad of the Newark and Hudson Railroad Company over the Passaic River and connects said railroads.

12. The plans of said bridge have been approved by the Secretary of War of the United States and his permission to build said bridge has been obtained as required by the act of Congress.

13. By virtue of the act incorporating said Newark and Hudson Railroad Company and particularly the sixth section thereof, which is quoted in the second paragraph of the information, and of the permission of the Secretary of War of the United States for the building of said bridge given as aforesaid, said company and the Director-General of Railroads, who is in possession and control of its railroad, have lawful power to construct said bridge and occupy and use such riparian lands as are necessary therefor, without compensation to the State of New Jersey.

14. On or about November 18, 1918, said Newark and Hudson Railroad Company submitted the plans of said bridge to the Board of Commerce and Navigation of the State of New Jersey, which board succeeded to the powers and duties of the New Jersey Harbor Commission, pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act to create the New Jersey Harbor Commission and to define its powers and duties," approved April 8, 1914, for the approval of said board. Said board made no objection to said plans but refused to approve the same for the reason



*Answer and Counter-Claim.*

that said company had not obtained a grant of the riparian lands which will be occupied and affected by said bridge and a license to build said bridge. Said board fixed a price for said riparian lands of \$50 a lineal foot along the bulkhead line in said City of Newark, and \$20 a lineal foot along the bulkhead line in said Town of Kearny and the sum of \$2,000 for the right to build the piers and other structures of said bridge in the Passaic River, together with interest on the said several prices at 7% from October 23, 1916, and demanded that the prices fixed by it as aforesaid be paid before it would approve the plans of said bridge. 10

15. The refusal of said board to approve the plans of said bridge and its demand for compensation to the State of New Jersey for the riparian lands which will be occupied and affected by said bridge, and for the right to build the piers and structures of said bridge in the Passaic River, were erroneous and unlawful. 20

16. A large part of the riparian lands in the Town of Kearny which will be occupied and affected by said bridge, and for which compensation to the State of New Jersey was demanded by said board, has been filled in and is now in the possession of said Town of Kearny and said town claims title thereto. Neither said Newark and Hudson Railroad Company or the Director-General of Railroads can safely pay compensation to the State of New Jersey for that part of said riparian lands, if the State is entitled to compensation for any of the riparian lands which will be occupied or affected by said bridge, until the title thereto as between the State and the Town of Kearny has been determined. 30



*Answer and Counter-Claim.*

By way of counter-claim against the Town of Kearny, a third party, the defendant, Newark and Hudson Railroad Company says that:

10 1. Said Newark and Hudson Railroad Company was incorporated by an act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Newark and Hudson Railroad Company," approved March 17, 1870, and is the owner of a certain railroad extending from a point in the City of Newark in the County of Essex, and State of New Jersey, to the westerly end of the Bergen tunnel in the County of Hudson, both of said counties being in the State of New Jersey. The Erie Railroad Company is the lessee and the Director-General of Railroads is in possession and control of said railroad as above stated.

20 2. Branch B of said railroad extends from a point on said railroad in the Town of Kearny in said County of Hudson to a point in said City of Newark and connects said railroad with the railroad of the Paterson, Newark and New York Railroad Company in said city. Both of said companies have consented to such connection.

30 3. The Director-General of Railroads, who is in possession and control of said railroad as aforesaid, is about to construct a bridge across the Passaic River on said branch and said Newark and Hudson Railroad Company requires certain lands for that purpose.

4. A particular description of the lands so required for the use of said company in the construction of said bridge is as follows:

All that tract of land and premises situate, lying and being in the Town of Kearny, in the County of Hudson and State of New Jersey described as follows:

Beginning at a point in the present northerly right of way line of the Newark and Hudson Railroad Company, said point being distant forty-two (42) feet measured



*Answer and Counter-Claim.*

along said right of way line in a northwesterly direction from the intersection of said right of way line with the westerly line of Passaic avenue; thence (1) along said right of way line north fifty-three degrees ( $53^{\circ}$ ) forty-one minutes ( $41'$ ) west a distance of three hundred ten and seventy-five hundredths (310.75) feet more or less to a point in the bulkhead line of the Passaic River; thence 10  
(2) along said bulkhead line north eleven degrees ( $11^{\circ}$ ) forty-two minutes ( $42'$ ) east a distance of seventeen and fifty-eight hundredths (17.58) feet to a point; thence (3) south seventy-five degrees ( $75^{\circ}$ ) thirty-four minutes ( $34'$ ) east a distance of fifty-one and three hundredths (51.03) feet to a point; thence (4) south forty-six degrees ( $46^{\circ}$ ) nineteen minutes ( $19'$ ) east a distance of two hundred seventy-two and ninety-seven hundredths (272.97) feet more or less to the point of beginning; containing five thousand eight hundred eighty-six (5,886) square feet 20  
more or less.

5. Some part of said lands lies between the original high water line and the present bulkhead and pierhead line of the Passaic River and title to that part of said lands is claimed both by the State of New Jersey and by the Town of Kearny, said town being in possession thereof.

6. There is no record of any grant or conveyance of that part of said lands which lies between said high 30  
water line and said bulkhead and pierhead line by any body having power to make such a grant or conveyance, whereby said Town of Kearny has acquired title thereto, nor is there any record of any license whereby that part of said lands was filled in and reclaimed, and therefore said Newark and Hudson Railroad Company charges that said Town of Kearny has no right, title or interest in that part of said lands, but said Newark and Hudson Railroad Company cannot proceed to occupy and use that part of said lands under and by virtue of the act 40



*Answer and Counter-Claim.*

incorporating that company until it ascertains whether said Town of Kearny has any right, title or interest therein, other than appears of record.

10 7. Said bridge is necessary to safely and adequately carry the present traffic over the railroad of said Newark and Hudson Railroad Company and it is a matter of public importance that the bridge be constructed as soon as possible.

8. Said Newark and Hudson Railroad Company is ready and willing to pay to said Town of Kearny such compensation as this court shall fix for any part of said lands described in the fourth paragraph of this counter-claim, which said Newark and Hudson Railroad Company can be lawfully compelled to acquire from said town.

20 This defendant, therefore, prays:

1. That said Town of Kearny may answer this counter-claim and each statement therein made.

2. That this court may decree whether said Town of Kearny has any right, title or interest in or to the lands described in this counter-claim or in or to any part thereof.

30 3. That this court may decree whether said Town of Kearny is entitled to compensation from said Newark and Hudson Railroad Company for the whole or any part of said lands, and if this court shall decree that said Town of Kearny is entitled to such compensation, then that this court may decree the amount of such compensation to be so paid.

4. That a writ of subpoena may issue commanding said Town of Kearny to answer this counter-claim and to



*Answer of Director-General of Railroads.*

abide by such decree as this court may make in the premises.

RALPH E. COOPER,  
*Solicitor for Defendants, Erie Railroad Company  
 and Newark and Hudson Railroad Company.*

ROBERT J. BAIN, 10  
*Counsel for Defendants.*

**ANSWER.**

The answer of the defendant, the Director-General of Railroads.

This defendant answering the information as amended, says that:

He repeats as his own the statements contained in the foregoing answer of the defendants, Erie Railroad Company and Newark and Hudson Railroad Company. 20

COLLINS & CORBIN,  
*Solicitor for Defendant,  
 the Director-General of Railroads.*

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*Answer of Town of Kearny to Counter-Claim.*

**ANSWER OF TOWN OF KEARNY TO COUNTER-  
CLAIM OF NEWARK AND HUDSON RAILROAD  
COMPANY AND CROSS BILL.**

Filed December 3, 1919.

10     The answer of the defendant, Town of Kearny, a municipal corporation, located in the County of Hudson and State of New Jersey. The defendant answering the counter-claim of the defendant, Newark and Hudson Railroad Company, says that:

1. It denies the averments contained in the first paragraph of the counter-claim.

2. It denies the averments contained in paragraph two of the counter-claim.

20     3. It has no knowledge or information sufficient to form a belief as to paragraph three of the counter-claim and requires the Newark and Hudson Railroad Company to make proof thereof.

4. It has no knowledge or information as to the averments of paragraph four sufficient to form a belief and, therefore, requires the Newark and Hudson Railroad Company to make proof thereof.

30     5. It has no knowledge or information as to the averments contained in paragraph five of the counter-claim and, therefore, requires the Newark and Hudson Railroad Company to make proof thereof, but it does deny that there are any lands anywhere near the lands described in said counter-claim or any part of said lands that are claimed both by the State of New Jersey and the Town of Kearny so far as any claim by the Town of Kearny is involved.

40     6. As to the averment in paragraph 6 it has no knowledge or information sufficient to form a belief and, therefore, requires the Newark and Hudson Railroad Company to make proof thereof.



*Answer of Town of Kearny to Counter-Claim.*

7. As to the averment contained in paragraph 7 of the counter-claim it has no knowledge or information sufficient to form a belief and, therefore, requires the Newark and Hudson Railroad Company to make proof thereof.

8. As to the averment contained in paragraph 8 of the counter-claim it has no knowledge or information sufficient to form a belief and, therefore, requires the Newark and Hudson Railroad Company to make proof thereof, but it denies that any tender has ever been made to it of any compensation for any of the lands so described.

9. As a matter of law Town of Kearny denies the right of the Newark and Hudson Railroad Company to appropriate for public use any property of the Town of Kearny by way of this action in the Court of Chancery and will rely upon said position at the hearing of this cause instead of proceeding by way of motion to strike out in order that the progress of this matter may be facilitated, but the Town of Kearny answers this counter-claim on the express understanding that by so doing it shall not be considered as a waiver of the right to urge the lack of jurisdiction in this court to pass upon the right of the railroad to take land of the municipality for its use or to fix a proper compensation therefor, and the filing of this answer shall not be understood to be a submission to the jurisdiction of this court on that subject.

By way of counter-claim against the Newark and Hudson Railroad Company, Erie Railroad Company and the Director-General of Railroads, the defendant, Town of Kearny, a municipal corporation, says that:

1. The bridge described in paragraphs two, three and four of the counter-claim of Newark and Hudson Railroad Company against the Town of Kearny was constructed by the Paterson and Newark Railroad Company under



*Answer of Town of Kearny to Counter-Claim.*

Chapter 44 of the Laws of New Jersey for the year 1866.

10     2. The said Chapter 44 of the Laws of New Jersey for the year 1866 require and obligate the Paterson and Newark Railroad Company to maintain a suitable passageway for the accommodation of persons crossing the river on said bridge.

3. The said Chapter 44 of the Laws of New Jersey for 1866 require of Paterson and Newark Railroad Company as a condition for the erection of any bridge at the location described in the counter-claim of the Newark and Hudson Railroad Company to maintain a suitable foot passageway thereon for pedestrians.

20     4. Any bridge to be erected at the place described in the counter-claim of the Newark and Hudson Railroad Company must provide a suitable foot passageway thereon for the accommodation of persons crossing the river.

30     5. A foot passageway over the property and bridge of the railroad company as described in paragraphs one, two, three and four of the counter-claim of the Newark and Hudson Railroad Company has been used, openly, notoriously, uninterruptedly, undisputedly, adversely, under a claim of right and with the knowledge and acquiescence of the Paterson and Newark Railroad Company, Paterson and Hudson River Railroad Company, their successors, assigns and lessees for a period of fifty years.

40     6. Public Laws of 1917, Chapter 152, Article 28, Section 3, provides that one who desires to erect any wharf, dock or structure or other building in the nature of the structure shown by the plans described in the information filed in this cause by the Attorney-General, shall make application in writing to the proper officer or body within the limits of the municipality where said structure is to be erected, stating the nature and extent of such intended structure, and file plans and specifications showing



*Answer of Town of Kearny to Counter-Claim.*

the proposed erection and produce deeds or other evidences of title to the property to be so occupied or improved; whereupon the governing body shall give notice of the time and place of hearing such application to all parties interested, by advertising at least once a week for two successive weeks in two newspapers of general circulation in the municipality within which such application is made and by posting such notice upon the premises referred to in such application and, if the governing body upon said hearing shall approve the plans and specifications offered and such application, it shall give its assent and issue a license for the erection for which application shall have been made and cause the same to be recorded in the office of said officer or body of the said department in a book to be kept by it for that purpose, and such license shall not be unreasonably withheld. The Newark and Hudson Railroad Company has not filed the application required by this act and no license has been issued by the Town of Kearny to permit the erection described in the counter-claim of the said Newark and Hudson Railroad Company and in the information filed in this cause.

7. The Town of Kearny is the owner in fee simple of certain lands immediately adjoining the right of way of the said railroad in the Town of Kearny between Passaic avenue and the Passaic River in said town and lying immediately north of the said right of way. A part of this land the plans of the Erie Railroad Company as described in the information filed in this cause contemplate the use of. This said land has been dedicated by the Town of Kearny to public use, and is, therefore, not the subject of appropriation for a subsequent public use.

8. The Newark and Hudson Railroad Company, its successors and assigns or lessees has not secured from



*Answer of Town of Kearny to Counter-Claim.*

the Board of Commerce and Navigation of the State of New Jersey its approval of the plans of said bridge described in paragraphs one, two, three and four of its counter-claim filed in this cause.

9. As to the Erie Railroad Company, the Town of Kearny repeats all of the matters and things set forth  
10 in paragraphs one, two, three, four, five, six, seven and eight of this counter-claim.

10. As to the General Director of Railroads, the Town of Kearny repeats all the matters and things set forth in paragraphs one, two, three, four, five, six, seven and eight in this counter-claim.

This defendant, therefore, prays:

1. That said Newark and Hudson Railroad Company, Erie Railroad Company and the Director-General of Rail-  
20 roads may answer this counter-claim and each statement therein made.

2. That a writ of injunction may issue out of this court enjoining the Newark and Hudson Railroad Company, Erie Railroad Company and the Director-General of Railroads from constructing the said bridge as at present contemplated by the plans filed in this cause.

3. That this court may decree whether said Newark and Hudson Railroad Company, Erie Railroad Company,  
30 Director-General of Railroads all or any of them shall place a suitable foot passageway for pedestrians crossing the river by said bridge over the said bridge described in the plans filed with this court.

4. That the Town of Kearny may have such further and other relief in the premises as to this court shall seem proper.

5. That a writ of subpoena may issue commanding said Newark and Hudson Railroad Company, Erie Railroad Company and the Director-General of Railroads to  
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*Affidavit of Robert E. Torrance.*

answer this counter-claim and to abide by such decree as this court may make in the premises.

CLYDE D. SOUTER,  
*Solicitor for and of Counsel with Town of Kearny.*

We hereby consent to the filing of the within answer and Cross Bill as of time, 10

Dated Nov. 6, 1919.

RALPH E. COOPER,  
*Solicitor for Erie Railroad Company and  
Newark and Hudson Railroad Company.*

COLLINS & CORBIN,  
*Solicitors for Director General of Railroads.*

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### **AFFIDAVITS.**

Filed December 3, 1919.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.

Robert E. Torrance, of full age, being duly sworn according to law, on his oath deposes and says: That he is the Mayor of the Town of Kearny, in the County of Hudson and State of New Jersey; that up to the present time neither the Erie Railroad Company, Walter D. Hines, Director General of Railroads, nor the Newark and Hudson Railroad Company have secured permission from the Town of Kearny to construct any wharf or similar structure on the east bank of the Passaic River at the point where the bridge described in the information filed in this cause is to be erected and that no permission as required by Public Laws of 1917, Chapter 152, Section 28, paragraph 3. 30

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*Affidavit of Robert E. Torrance.*

Deponent further says that the defendants above mentioned or some of them or one of them have commenced the construction of said bridge by driving piles and he is informed and believes that application has been made by a contracting company for permission to receive a supply of water necessary for going forward with the work of constructing the bridge.

Deponent further says that a foot passageway over the bridge in question has been used by the public openly, notoriously, continuously and uninterruptedly during a period of over twenty years under a claim of right adversely as to the owners of the bridge and with their knowledge and acquiescence and the plans of the bridge described in the information filed in this cause do not contemplate a foot passageway over said bridge.

Deponent further says that the plans of said bridge as shown by the information filed in this cause contemplate the use of property of the Town of Kearny immediately adjoining the present right of way of the railroad on the east bank of the Passaic and north of said right of way and deponent says that no proceedings have been taken to condemn the said land or to secure the right to the use of said land in the manner provided by law.

Deponent further says that the land in question furthermore has already been devoted to public use by the Town of Kearny and therefore is not the subject of appropriation for a second public use.

Deponent further says that in addition to the public use to which the surface and riparian lands of the property in question has been appropriated the sub-surface has been appropriated for the location of a large outlet sewer for store water for the Town of Kearny and that the location of a bridge upon the surface and supported as it must necessarily be and as the plans of the said bridge demonstrate by foundation sunk in the earth would disturb and probably destroy the said sewer.



*Affidavit of William B. Ross.*

Deponent says he has read the cross bill of the Town of Kearny in the cause and to the best of his knowledge the facts therein stated are true.

ROBERT E. TORRANCE.

Subscribed and sworn to before me this  
2nd day of December, 1919.

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BURTON E. CANFIELD,  
(L. S.)                      *Notary Public.*

## IN CHANCERY OF NEW JERSEY.

STATE OF NEW JERSEY, } ss.  
COUNTY OF HUDSON. }

William B. Ross, of full age, being duly sworn according to law, upon his oath deposes and says: That he is the Clerk of the Town of Kearny, New Jersey; that up to the present time no application has been received from the Erie Railroad Company, Walter D. Hines, Director General of Railroads, or Newark and Hudson Railroad Company for permission to construct any wharf, bulkhead or other structure as shown in the plans of the bridge described in the information filed in this cause as required by Public Laws of 1917, Chapter 152, Section 28, paragraph 3; that there has been no sale of the property of the Town of Kearny to either of the Erie Railroad Company, Walter D. Hines, Director General of Railroads, or Newark and Hudson Railroad Company by the Town of Kearny of its property immediately adjoining on the north and on the easterly side of the Passaic River the present right of way of the railroad passing over the present bridge to replace which the new bridge is to be erected and according to the plans of said new bridge filed in this cause the said land of the Town of Kearny is to be used by the railroad company.

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*Affidavit of Hugh W. McQuoid.*

Deponent further says that the Town of Kearny has not been made a party defendant in any condemnation proceedings or any proceedings of any kind except in this cause looking to the taking of the said land necessary for said new bridge and belonging to the Town of Kearny.

10 Deponent further says that the public has used a foot passageway over the present bridge openly, notoriously, continuously and uninterruptedly for a period of over twenty years adversely to the interest of the owner of the bridge and under a claim of right and with the knowledge and acquiescence of the owners of the bridge, and deponent says that the plans of the proposed bridge to replace the present bridge do not show a foot passageway for the use of the public.

WILLIAM B. ROSS.

20 Subscribed and sworn to before me this  
2nd day of December, 1919.

BURTON E. CANFIELD,  
(L. S.)                      *Notary Public.*

## IN CHANCERY OF NEW JERSEY.

30 STATE OF NEW JERSEY, } ss.  
COUNTY OF HUDSON. }

Hugh W. McQuoid, of full age, being duly sworn according to law, on his oath deposes and says that he is the Water Purveyor of the Town of Kearny; that on Saturday, the twenty-ninth day of November, 1919, the Arthur McNullen Company made application to him for permission to have a water connection installed and advise him that they were about to commence the construction of a bridge over the Passaic River, being the said bridge described in the information filed in this cause.

40



*Affidavit of John E. Castles.*

Deponent further says that he has seen the driving of piles at the present bridge and the activity of the workmen which would appear to show an intention to go forward with the construction of the bridge.

HUGH W. McQUOID.

Subscribed and sworn to before me this  
2nd day of December, 1919.

10

BURTON E. CANFIELD,  
(L. S.)      *Notary Public.*

IN CHANCERY OF NEW JERSEY.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON.    } ss.

20

John E. Castles, of full age, being duly sworn according to law, upon his oath deposes and says: That he is the Municipal Superintendent in the Town of Kearny, New Jersey, and that in the prosecution of his duties he has frequently passed the site of the bridge described in the information filed in this cause and that within the last few days he has seen a pile driver and workmen operating same driving piles at the site of said bridge and a general activity of workmen thereabouts apparently engaged in the construction of the bridge described in the information filed in this cause.

30

JOHN D. CASTLES.

Subscribed and sworn to before me this  
2nd day of December, 1919.

BURTON E. CANFIELD,  
(L. S.)      *Notary Public.*

40



*Order of Restraint.***ORDER.**

Filed December 3, 1919.

10 This matter being opened to the Court by Clyde D. Souter, of counsel for the defendant, Town of Kearny, upon the answer and counterclaim heretofore filed by the said defendant, and upon affidavits in support of the allegations of said counterclaim and the said affidavits having been read and considered and filed by the Court, it is, on this third day of December, 1919, on motion of said Clyde D. Souter, solicitor for said defendant, Town of Kearny,

20 ORDERED, that Erie Railroad Company, Walter D. Hines, Director General of Railroads and Newark and Hudson Railroad Company, their agents, servants and employees be and they are hereby restrained from the further prosecution of any work in connection with the erection of the new bridge described in the information filed in this cause and in the said answer and counterclaim of the defendant, Town of Kearny, until the further order of this Court, and it is further

ORDERED, that either party may make application upon two days' notice for a modification of this order, and it is further

30 ORDERED, that copies of this order and of said affidavits and of said answer and counterclaim (which copies need not be certified) be served upon said defendants, Erie Railroad Company, Walter D. Hines, Director General of Railroads, and Newark and Hudson Railroad Company or other respective solicitors of record in this cause within one day from date hereof and that such service upon said solicitors shall be sufficient service upon the parties mentioned, and it is further

40 ORDERED, that the said defendants, Erie Railroad Company, Walter D. Hines, Director General of Railroads, and Newark and Hudson Railroad Company show cause



*Order Discharging Restraint.*

before this Court at the Chancery Chambers in Newark, on Tuesday, the 9th day of December, 1919, why this order should not be continued in force and effect.

E. R. WALKER,  
C.

Respectfully advised,

10

MALCOLM BUCHANAN,  
V.-C.

**ORDER DISCHARGING RESTRAINT.**

Filed December 9, 1919.

The order to show cause made in the above-entitled cause on December 3, 1919, having been heard in the presence of Clyde D. Souther, counsel for the Town of Kearny, and Duane E. Minard, counsel for the Director General of Railroads and Robert J. Bain, counsel for said Director General of Railroads and for the Erie Railroad Company and Newark and Hudson Railroad Company; and argument on said order having been heard and considered and the Court being of opinion that the restraint contained in said order should be discharged, except in so far as it applies to permanent structures on land claimed by the Town of Kearny, in said town, and to interference with the sewer now on said land,

It is, on this ninth day of December, 1919, on motion of Collins & Corbin, solicitors for and of counsel with defendant, the Director General of Railroads, ORDERED that the restraint contained in said order be, and it hereby is, discharged, except as to permanent structures on the land in the Town of Kearny claimed to be owned by said town, and as to any interference with the sewer now on said land, until the further order of this Court.



*Order Discharging Restraint.*

IT IS FURTHER ORDERED, that said Town of Kearny have leave to take depositions within two days from the date hereof before Nicholas W. Bindseil, one of the Special Masters in Chancery, as to the title of said Town of Kearny to the land claimed by said town.

10 And it is further ORDERED that said Town of Kearny and its officers, employees, servants and agents be, and they hereby are, enjoined and restrained from interfering with the work on the new bridge of the Newark & Hudson Railroad across the Passaic River between said Town of Kearny and the City of Newark in the State of New Jersey until the further order of this Court.

And it is further ordered that the question as to the right of the Town of Kearny to a passageway for pedestrians on said new bridge be and it hereby is reserved until the final hearing of this cause.

20

E. R. WALKER,

C.

Respectfully advised,

JOHN E. FOSTER,  
V.-C.

Service of a copy of this order acknowledged this 9th day of December, 1919.

30

CLYDE D. SOUTER,  
*Solicitor for Town of Kearny.*

40



*Supplemental Order Discharging Restraint.***SUPPLEMENTAL ORDER DISCHARGING  
RESTRAINT.**

Filed January 13, 1920.

The order to show cause made on December 3, 1919,  
 in the above-entitled cause, having been heard on De- 10  
 cember 9, 1919, in the presence of Clyde D. Souther, coun-  
 sel for the defendant, Town of Kearny, and Duane E.  
 Minard and Robert J. Bain, counsel for the defendants,  
 Erie Railroad Company, Newark and Hudson Railroad  
 Company, and the Director-General of Railroads; and  
 affidavits on the part of said defendants, Erie Railroad  
 Company, Newark and Hudson Railroad Company and the  
 Director-General of Railroads having been presented and  
 filed; and the argument of counsel having been heard;  
 and counsel for the defendant, Town of Kearny, having  
 asked leave to submit further proofs as to its title to the 20  
 land in said town claimed to be owned by it; and an order  
 having been made on December 9, 1919, giving the de-  
 fendant, Town of Kearny, leave to produce further proofs  
 as to its title to said land before Nicholas W. Bindseil,  
 one of the Special Masters in Chancery, within two days  
 from the date of said order, and discharging the restraint  
 contained in said order to show cause, except as to per-  
 manent structures on the land in the Town of Kearny  
 claimed to be owned by said town and as to any inter- 30  
 ference with the sewer now on said land, the question as  
 to continuance of the restraint as to permanent structures  
 on said land being reserved until the coming in of the  
 further proofs to be submitted by said town as to its  
 title to said land; and said further proofs having been  
 submitted and considered; and the affidavits upon which  
 said order to show cause was made and said further  
 proofs failing to show that the defendant, Town of  
 Kearny, has such right, title or interest in and to the land  
 in said town which will be taken and used for the pur- 40



*Supplemental Order Discharging Restraint.*

poses of the new bridge mentioned in the information and in the counterclaim of the defendant, Newark and Hudson Railroad Company, in the above entitled cause, as would prevent the erection of said new bridge thereon.

10 It is on this 13th day of January, 1920, ORDERED that the restraint contained in said order to show cause made on December 3, 1919, be and it hereby is discharged, except as to any interference with the sewer now on said land in the Town of Kearny.

20 And it having appeared from the affidavits presented and filed on the part of the defendant, Erie Railroad Company, Newark and Hudson Railroad Company and the Director-General of Railroads on the hearing of said order to show cause, that the defendant, Town of Kearny, had interfered with the building of the new bridge mentioned in the information and in the counterclaim of the defendant, Newark and Hudson Railroad Company, in the above-entitled cause; and it having further appeared that said town might continue to interfere with the building of said new bridge unless prevented by order of this Court; and the Court having thereupon included in said order of December 9, 1919, an order enjoining and restraining the defendant, Town of Kearny, and its officers, employees, servants and agents, from interfering with the work on said new bridge, until the  
30 further order of this Court:

It is on this 13th day of January, 1920, FURTHER ORDERED that said restraint against the defendant, Town of Kearny, and its officers, employees, servants and agents be and it hereby is continued until the final hearing of the above-entitled cause.

And it having appeared on the hearing of said order to show cause that the question as to the right of the defendant, Town of Kearny, to have a passageway for pedestrians on said new bridge should be reserved until  
40



*Answer to Counter-Claim of Town of Kearny.*

the final hearing of the above-entitled cause; and the Court having included in said order of December 9, 1919, an order to that effect:

It is on this 13th day of January, 1920, FURTHER ORDERED that the question as to the right of the defendant, Town of Kearny, to have such a passageway on said new bridge, together with the other issues raised by the pleadings in the above-entitled cause, be and they hereby are reserved until the final hearing of said cause. 10

E. R. WALKER,

C.

Respectfully advised,

JOHN E. FOSTER,  
V-C.

20

**ANSWER TO COUNTERCLAIM OF TOWN OF  
KEARNY, A THIRD PARTY.**

Filed January 13, 1920.

The answer of the defendants, Erie Railroad Company, a corporation, Newark and Hudson Railroad Company, a corporation, and the Director-General of Railroads, defendants in the above-entitled cause, to the counterclaim of the Town of Kearny, a municipal corporation, a third party and defendant on a counterclaim of said Newark and Hudson Railroad Company in said cause. 30

These defendants, Erie Railroad Company and Newark and Hudson Railroad Company, jointly and severally, answering said counterclaim say that:

1. They deny the averments contained in the first paragraph of said counterclaim.

2. They deny the averments contained in the second paragraph of said counterclaim. 40



*Answer to Counter-Claim of Town of Kearny.*

3. They deny the averments contained in the third paragraph of said counterclaim.

4. They deny the averments contained in the fourth paragraph of said counterclaim.

5. They deny the averments contained in the fifth paragraph of said counterclaim.

10 6. They deny the averments contained in the sixth paragraph of said counterclaim except they admit that the Newark and Hudson Railroad Company has not filed an application to the Town of Kearny for its permission to construct and erect the proposed new bridge described in the information and in the counterclaim of said Newark and Hudson Railroad Company in the above-entitled cause, and that no license for the construction and erection of said proposed new bridge has been issued by said Town of Kearny. Further answering they say that said  
20 proposed new bridge is not within the provisions of Section 3 of Article XXVIII of Chapter 152 of the Laws of 1917 and that said Town of Kearny has no jurisdiction or control in the premises under said act or otherwise. Further answering they say that said Newark and Hudson Railroad Company was incorporated under an act of the Legislature of the State of New Jersey, approved March 17, 1870, and that said company is authorized and empowered by said act to build said proposed new bridge,  
30 and that the authority and power so given by said act is not affected or impaired by anything contained in an act entitled "An Act concerning municipalities," approved March 27, 1917, being Chapter 152 of the Laws of 1917.

7. They deny the averments contained in the seventh paragraph of said counterclaim except they admit that the Newark and Hudson Railroad Company contemplates the use of certain lands immediately adjoining and north of the right of way of its railroad, between Passaic  
40 avenue and the Passaic River in the Town of Kearny, for the purposes of said proposed new bridge.



*Answer to Counter-Claim of Town of Kearny.*

8. They admit the averments contained in the eighth paragraph of said counterclaim but say that said Newark and Hudson Railroad Company submitted the plans of said proposed new bridge to said Board of Commerce and Navigation for the approval of said board and that said board made no objection to said plans but refused to approve the same for the reason that said company had not obtained a grant of the riparian lands which will be occupied and affected by said bridge and the permission of said board to build the piers and structures of said bridge in the Passaic river, for which grant and permission said board fixed certain compensation to be paid to the State. The Newark and Hudson Railroad Company and the Director-General of Railroads, or either of them, by an order of this Court made on the information in this cause, and dated July 8, 1919, were permitted to build said new bridge, notwithstanding the refusal of said board to approve the plans thereof, upon depositing the sum so fixed as compensation to be paid to the State for said grant and permission, with the clerk of this Court within fifteen days from the date of said order, to abide the final determination of the cause averred in the information, which sum was deposited with said clerk pursuant to said order on July 22, 1919.

9. The Erie Railroad Company repeats the statements contained in the foregoing answer.

10. The Director-General of Railroads answering said counterclaim, repeats as his own the statements contained in the foregoing answer.

RALPH E. COOPER,

*Solicitor for defendants, Erie Railroad Company  
and Newark and Hudson Railroad Company.*

COLLINS & CORBIN,

*Solicitor for defendant, Director-General of Railroads.*



*Replication.*

**REPLICATION.**

Filed December 9, 1919.

The informant, Thomas F. McCran, Attorney-General of the State of New Jersey, replying to the answer of  
10 the defendants, says that:

1. He has not sufficient knowledge or information to admit or deny the allegations contained in Paragraph 4 of the Answer, except that he admits that the lease therein referred to, is now vested in the Erie Railroad Company, and except that he admits that the railroad, including the bridge therein referred to, is now operated by the Director-General of Railroads, pursuant to the authority therein referred to.

2. He has not sufficient knowledge or information to  
20 admit or deny that the application for riparian rights as referred to in Paragraph 7 of the Answer was withdrawn for the reasons stated in said Paragraph 7.

3. He denies that the Newark and Hudson Railroad Company has the power and right under the Act incorporating it, to take and occupy such riparian lands as were necessary for its bridge, without obtaining a grant thereof, as alleged in Paragraph 7.

4. He has not sufficient knowledge or information to  
30 admit or deny the allegations set forth in Paragraph 11 of the Answer.

5. He admits the allegations contained in Paragraph 12 of the Answer.

6. He denies the allegations contained in Paragraph 13 of the Answer.

7. He admits the allegations contained in Paragraph 14 of the Answer.

8. He denies the allegations contained in Paragraph  
40 15 of the Answer.



*Replication.*

9. He denies the allegations contained in Paragraph 16 of the Answer, except that he admits that certain riparian lands in the Town of Kearny adjoining the present right of way of the Newark and Hudson Railroad Company have been filled in, and that said Town of Kearny claims title to such lands, but he says that the filling as aforesaid, was without authority from the State of New Jersey, and constituted a perprestore, and that title to said lands so filled in is not in the Town of Kearny, but that title to said lands in the Town of Kearny adjoining the right of way as aforesaid, is in the State of New Jersey. 10

THOMAS F. McCRAN,  
*Attorney-General of New Jersey.*

Formal note of issue by all parties.

Reference to Lewis, V.-C., and cause brought on for final hearing. 20



*Opening.*

IN CHANCERY OF NEW JERSEY.

|    |                                                                |                    |
|----|----------------------------------------------------------------|--------------------|
|    | <i>Between</i>                                                 |                    |
| 10 | THOMAS F. McCran, Attorney-General of the State of New Jersey, | <i>Informant.</i>  |
|    | <i>and</i>                                                     |                    |
|    | THE ERIE RAILROAD COMPANY,<br><i>et. als.,</i>                 | <i>Defendants.</i> |

*On Bill &c.,  
Testimony.*

20 Transcript of testimony taken in the above-entitled cause at the Chancery Chambers, Jersey City, New Jersey, on the twelfth day of May, nineteen hundred and twenty, before Hon. Vivian M. Lewis, Vice-Chancellor.

Appearances:

Harrison P. Lindabury, Esq., for the Attorney-General, informant.

Robert J. Bain, Esq., representing Collins & Corbin, Esq., solicitors for the Director-General of Railroads.

30 Ralph E. Cooper, Esq., solicitor for the Erie Railroad Company (with Duane E. Minard, Esq.).

Clyde D. Souter, Esq., attorney for the Town of Kearny.

*Mr. Bain.* I desire to reserve the right to amend the pleadings so as to substitute the necessary party in place of the Director-General of Railroads.

As a matter of fact, I understand that Mr. Walker D. Hines was appointed agent, but he has to resign very shortly, in a few days, and we are not sure just whom  
40 we ought to substitute.



*Opening.*

I desire to amend very slightly the seventh paragraph of the answer to the information of the Attorney-General. (Reading amendment.)

So far as the proofs are concerned, I am not sure just what the Attorney-General desires to put in evidence.

*Mr. Souter.* I appear for the town. On the 11th of December, 1919, in this case we took certain testimony before Mr. Bindseil, Special Master, showing the town's title to the property involved. Upon an examination of the record, I found that the town had never secured the riparian rights. We take the position that we are the first persons owning the uplands entitled to the riparian rights, and that until they have been offered to us they cannot be sold by the State to someone else, and, therefore, that the railroad, not requiring these, but merely finding them desirable, is not in a position to take these lands until they have first foreclosed our right to take the lands in question. 10 20

I think that the other matters that are set up in our counterclaim have been covered.

*Mr. Bain.* I assume the town admits that it has no right, title or interest in or to the riparian lands which are to be used for the purpose of the new bridge.

*Mr. Lindabury.* The Attorney-General, on behalf of the State, alleges that the lands to be occupied by this new bridge, outside of the old structure, are riparian lands owned by the State of New Jersey, so far as those lands lie between high water mark on the east and west side of the stream. Then, also, that there is no grant or lease to any other person for any of these lands, or any right by license to any other person for any of these lands, unless such right is in the railroad company under the charter in question. 30

I assume it is also admitted that the railroad proposes to build this bridge as shown by the map which we offer 40



*Victor Gelineau, direct—cross.*

here, the new structure being indicated in red, and the old structure in black lines across the river.

*Mr. Bain.* This the first time I have seen this plan. There is a plan of the bridge annexed to the information, which correctly shows it.

10 VICTOR GELINEAU, being duly sworn in behalf of the informant, testified as follows:

*Direct examination by Mr. Lindabury.*

Q You are the director of the Board of Commerce and Navigation? A Yes, sir.

Q I call your attention to a map of the proposed bridge, and also an old bridge, now there on the Passaic River, between Kearny and Newark, New Jersey, and ask you if you made that map, or whether it was made  
20 under your supervision? A It was made under my supervision.

Q Will you tell the Court what the lines in red represent? A The lines in red on this map represent the location of the proposed bridge, as indicated by the plan filed by the Erie Railroad Company in its application for permit, and as shown by markings used by surveyors in lining up such a structure on the ground.

Q Is that bridge so shown in red the same as shown  
30 in the blueprint attached to the information filed in this case? A Yes, sir.

Q But without all the detail which is shown on that blueprint? A Yes, sir; this is a ground plan.

Q Now, the lines in black, showing what appears to be a bridge, what do they represent? A They show the existing structure.

*Cross examination by Mr. Souter.*

Q Showing you the map which has just been offered  
40 in evidence, and drawing your attention to that part of



*Victor Gelineau, cross.*

the map showing property of the Town of Kearny on the east bank of the river fronting on Passaic avenue, I call your attention particularly to a curved red line running into the property of the Town of Kearny from the proposed new right of way, and ask you whether that indicates the amount of property that will be required to support the tracks in their new location? A Yes, sir; 10  
that is the foot of the fill—toe of the slope of the fill.

Q If the toe of the slope of the fill, as you term it, were continued to—(question withdrawn). If the entire slope of the northerly side of the proposed new right of way were shown on this map it would cut off a larger section of the property of the Town of Kearny that is at present shown on the map? A The northerly toe of the slope should continue on down from the position shown on this map approximately parallel to the tracks as shown on this map—that is, the proposed tracks. 20

*Mr. Souther.* If the railroads are satisfied to permit their own map to illustrate the portion of this section on "Exhibit 1" for the Attorney-General, then this map need not be correct.

*Mr. Bain.* We propose to put in evidence a plan showing the location of the original high water line of the Passaic River in the Town of Kearny at the point where the river is crossed by the new bridge; and that plan will also show how much of the riparian lands is to be occupied by the new bridge. I take it that that answers the question. 30

*The Court.* You cannot go beyond this map, this offer of the State, and of the map prepared by them for their case.

Who heard this originally?

*Mr. Bain.* Vice-Chancellor Foster.

*The Court.* It is strange it came to me. Does the Public Utility Commission have jurisdiction 40  
over all these matters?



*Victor Gelineau, cross.*

*Mr. Bain.* Not over a bridge over a navigable stream. The Board of Public Utility Commissioners has ordered us to build a new bridge.

*Cross examination by Mr. Bain.*

10 Q The map or plan that you produce does not show the right of way of Branch "B" of the Newark and Hudson Railroad upon which the new bridge is to be built? A No, sir.

Q Were those right of way lines shown upon the plan of the bridge, as presented to the Board of Commerce and Navigation for its approval? A I don't recall; I could look up the record, if it is desired.

20 Q Does the plan of the proposed new bridge, as submitted by the railroad company to the Board of Commerce and Navigation, indicate the extent to which the riparian lands on each side of the river will be used or affected by the new bridge—this map or plan or map that you produce does not show those facts? A The figures are not all here, but the facts can be just as readily ascertained from this map as from yours.

Q The map that you produce has upon it a line marked "High water line as shown on the New Jersey Riparian Commissioners' map, adopted January 27, 1877?" A Yes, sir.

30 Q Was that line taken from that map, and is it correctly shown upon the map you produce? A Yes, sir; using the map of 1877 as correct.

Q And the map that you have produced does not show the right of way lines of the old road of the Newark and Hudson Railroad Company, where that railroad crosses the Passaic River, except back of the bulkhead line of the river on the Kearny side? A Correct.

40 Q The purpose of the plan you produce is merely to show the location of the present bridge, and the location of the old bridge, and the original high-water line of the



*Victor Gelineau, re-direct.*

Passaic River on the Kearny side, and the Newark side?

A And the present bulkhead line.

Q And your map was not designed for any other purpose? A No, sir.

*The Court.* Let this map be marked.

Marked "Exhibit L. 1."

*The Court.* Do you desire this witness further? 10

*Mr. Lindabury.* Yes, sir.

*Re-direct examination by Mr. Lindabury.*

Q Will you tell the Court what you found the conditions to be with reference to the new structure? A I found some fill had been placed on the Kearny side, and some of the concrete for the abutment had been placed, and there was a structure there where they were preparing the cement mixture; there were a lot of small dump cars with an extra track laid on the north side of the present rails—the old rails, and there were a lot of markers set on the old flat iron for the convenience of the bridge builders in lining up, and several pile drivers were in readiness on the west side—that is, on the Newark side; some fill was being placed on the west side, and there was a derrick on posts in the water on the west side, right in a position to lay some of the work on the new bridge. I saw a lot of piling that could be used for the new bridge; I saw where some test piling had been driven—still in place. 20 30

Q On the map that has been marked "Exhibit L. 1," you have a line indicating the high-water mark, as shown on the map—New Jersey Riparian Commissioners—January 27, 1877; have you that original map here? A Yes, sir.

Q And on the original map are these bridges shown, either of them? A The old structure; yes, sir.



*Victor Gelineau, re-cross.*

Q And in preparing this map, have you kept the relation between the old bridge and the high-water line the same? A Yes, sir.

Q And worked into it the proposed structure as indicated on the application map filed by the Railroad Company in asking for permission to build this bridge? A  
10 Yes, sir.

Q And the permit asked for authorizing the building of this bridge, has been denied by the Board of Commerce and Navigation? A Yes, sir.

Q But not because of any fault found with the structure, but because the riparian lands have not been acquired by the railroad? A That is correct.

*Re-cross examination by Mr. Bain.*

Q Have you the application by the Newark and Hudson Railroad Company to the Board of Commerce and Navigation for its approval of the plan of the new bridge?  
20 A Yes, sir.

Q Kindly produce that. A Here it is.

Q Is the paper you produce the last application by the Newark and Hudson Railroad Company to the Board of Commerce and Navigation for its approval of the plans of the new bridge of the railroad over the Passaic River?  
A Yes, sir; this is the last application.

30 Marked "Exhibit B. 1" for identification.

Q After that application was filed, did the Railroad Company file with the Board a map or plan showing the extent to which riparian lands on each side of the Passaic River will be used or affected by the new bridge? A  
Yes, sir.

Q Have you that map or plan? A Yes, sir.

Marked "Exhibit B. 2 for identification."

Q Did the Board subsequently affix by resolution the  
40 compensation it demanded from the Railroad Company



*Victor Gelineau, re-cross.*

for the riparian lands to be used or affected by the new bridge on each side of the river, and also for the right to build the bridge across the river? A Yes, sir.

Q Have you that resolution? A Yes, sir; I want to qualify that, Mr. Bain—the rate per front foot is fixed by resolution, and the amount for the crossing—

Q That is, there was a separate rate fixed per front foot for the riparian lands which will be used on the Newark side, and a different rate fixed for the riparian lands to be used on the Kearny side, and still a third rate fixed for the right to build the bridge across the river? A That is right. 10

*By the Court.*

Q You mean by the Board of Commerce and Navigation? A Yes, sir.

*Further cross by Mr. Bain.* 20

Q Can you state from that resolution what those rates were? A Yes, sir; they were \$2,000 for the crossing.

Q That is, for the right to build the bridge across the river? A Yes, sir; the license to build the bridge between the pierhead and bulkhead lines on each side of that stream, that is \$2,000; then the Board demanded \$50.00 per front foot, measured on the bulkhead line, for the number of front feet destroyed or actually used, on the Newark side; and \$26.00 per front foot for the same on the Kearny side. The exact amount of ground, front feet, is a matter to be determined upon— 30

Q That is shown upon the plans filed by the company with the Board, isn't it? A Yes, sir; but the attorney for the railroad subsequently decided that some of that land was not desired—would not be used.

Q Was not this what happened—that originally the Newark and Hudson Railroad Company made application for a riparian grant of certain lands both on the Newark side and on the Kearny side of the Passaic River, and 40



*Victor Gelineau, re-cross.*

on that application a price was fixed for the riparian lands; that subsequently that application was withdrawn, and a new application filed by the Railroad Company with the Board merely for the approval of the plans of the new bridge, and on that new application a plan was presented by the Railroad Company, showing the extent to which the riparian lands will be occupied and used by the new bridge on both sides of the river? A That is correct.

Q And then the Board fixed these rates you have mentioned as the compensation for the riparian lands, and also for the right to cross the river? A Yes, sir.

Q And that rate was fixed for the amount of riparian lands to be taken and used by the new bridge, as shown upon the plan filed by the company with the Board of Commerce and Navigation; is not that the fact? A No, sir; the amount of front that we have agreed was destroyed by the bridge differs somewhat from the amount shown on the plan filed by the company, some of the lineal distance shown on this plan filed by the company with this application for permit to build the bridge has been eliminated in the claim of the State, upon the agreement between Mr. Bain and counsel of the Board.

Q Is not this the fact; that the only riparian lands which will be used or affected by the new bridge are those indicated on the plan filed by the company with the Board of Commerce and Navigation and intended to show such riparian lands? A I will say the plan filed by the Railroad Company, showing the amount destroyed, comprehends all lands so destroyed or taken.

*By the Court.*

Q Practically the bridge occupies as many feet as the map shows they would have occupied; is that so? A Yes, sir.



*Victor Gelineau, re-cross.*

Q You have filed with the Commission a map which shows all the lands you will require? A Some part of that land is within our present right of way.

*Further cross by Mr. Bain.*

Q Is not that what accounts for your last statement that some of the riparian land which will be affected or used for the purpose of a new bridge is within the present right of way of the Newark and Hudson Railroad? A Yes, sir. 10

Q But the plan filed by the company with the Board shows separately the extent to which the riparian land will be used or affected outside of the present right of way? A Yes, sir.

Q Will you kindly refer to the plan filed by the company with the Board and state the number of lineal feet along the bulkhead line of the riparian land which will be used or affected by the new bridge, both in the City of Newark and in the Town of Kearny, that is outside of the present right of way? A The map filed by the railroad company shows—I am speaking now of the Newark side—and the distances given are measured on the pier-head and bulkhead line—first, one section of 74 feet; an additional section just south thereof of 102 feet; an additional section just south of that, 26 feet; and the southerly section, 98 feet. 20

Q Is that all outside of the present right of way; just state how much land outside of the present right of way will be occupied by the new bridge as shown by that plan? A The amount actually occupied or destroyed amounts to 202 feet. 30

Q Are you not familiar with the order made in this suit for the payment of certain moneys into court by the railroad company? A Yes, sir.

Q Does not that order correctly state the number of lineal feet outside of the present right of way, which will be used or affected by the new bridge? A It does. 40



*Victor Gelineau, re-cross.*

*The Court.* Then there is no necessity for going into it now?

*Mr. Bain.* No.

RECESS TO 2 P. M.

AFTER RECESS.

10

VICTOR GELINEAU, resumes the witness stand.

*Re-cross examination (continued) by Mr. Bain.*

20 Q The order discharging the restraint obtained by the Attorney-General in this matter states that the riparian lands to be occupied by the new bridge have a frontage of 128 feet along the bulkhead line in the City of Newark; and a frontage of 58 feet along the bulkhead line in the Town of Kearny, outside of the present right of way of the Newark and Hudson Railroad. Indicate on the map where that number of lineal feet on each side of the river lies. A On the Newark side that 128 feet would extend from the line put on this map between the words, in the word "bulkhead" between the letters "B" and "n", to a point where a right angle line to the pierhead and bulkhead line would just graze the toe of the slope.

30 Q And what about the Kearny side? A On the Kearny side, the 58 feet would extend to a point where a right angle line to the bulkhead line would strike the northwest corner of the first pier, and the 58 feet extends from that intersection southwardly to the northeasterly line of the right of way of the Newark and Hudson Railroad.

Q Do the records of your board show any grant to the Town of Kearny of the riparian lands immediately north of the right of way line of the Newark and Hudson Railroad? A No, sir.

Q Or lease? A No, sir.

40 Q You spoke this morning of an application by the Newark and Hudson Railroad Company to your board for a grant of riparian lands? A Yes, sir.



*Victor Gelineau, re-cross.*

Q That application was made long before the present application for approval of the plans of the bridge? A Yes, sir.

Q And that application was withdrawn by the railroad company? A Yes, sir.

*Mr. Lindabury.* I think that establishes our *prima facie* case. There may be some further details. 10

*The Court.* If there is anything overlooked you can put it in.

*Mr. Bain.* Will your Honor permit me to put in the case for the defendant, both on the information and on the counter-claim of the defendants against the town, and on the counter-claim of the town against the defendants, at one time?

*The Court.* Yes, if there is no objection to it.

*Mr. Bain.* And if it is necessary for us to put in any further testimony in answer to the town, we will put it in later. 20

*The Court.* It will simplify the matter to do that—shorten it.

*Mr. Bain.* I offer in evidence an act of the Legislature of the State of New Jersey—"An Act to incorporate the Newark and Hudson Railroad," approved March 17, 1870, and a supplement thereto, approved February 22, 1871. The incorporating act is found in Pamphlet Laws, 1870, page 1274; and the supplement, in the Pamphlet Laws of 1871, on page 302. 30

I next offer in evidence a certified copy of the route of Branch "B" of the Newark and Hudson Railroad.

Marked "Exhibit B. 2."

I also offer in evidence the application by the Newark and Hudson Railroad Company to the 40



*Walter M. Dawley, direct.*

Board of Commerce and Navigation for its approval of the plans for the proposed new bridge of the Newark and Hudson Railroad Company, identified by Mr. Gelineau, and marked for identification.

10 I also offer in evidence the plan filed by the Newark and Hudson Railroad Company with the Board of Commerce and Navigation, showing the riparian lands to be used or affected by the new bridge; those plans having been produced by Mr. Gelineau and marked for identification.

WALTER M. DAWLEY, sworn in behalf of the Director-General of Railroads, testified as follows:

*Direct examination by Mr. Bain.*

Q What is your occupation? A Civil engineer for the Land and Tax Department of the Erie Railroad.

20 Q How long have you held that position? A Since July, 1907.

Q Prior to July, 1907, were you employed by the Erie Railroad Company? A From March, 1903.

Q In what capacity were you employed from March, 1903, until July, 1907? A Division engineer of the Mahoning Division of the Erie Railroad.

Q Are you familiar with the lines of the Erie Railroad in the State of New Jersey? A Yes, sir.

30 Q What lines composed the so-called Newark Branch of that railroad? A The Newark and Hudson Railroad and the Paterson, Newark and New York—formerly the Paterson and Newark Railroad.

Q From what point and to what point does the Newark and Hudson Railroad run? A That runs from the west end of the Bergen tunnel to a point near Gouverneur street in the City of Newark; it is about 104 feet west of Fourth avenue, Newark, New Jersey.



*Walter M. Dawley, direct.*

Q Where is the Paterson and Newark Railroad? A That runs from Paterson to Newark, New Jersey.

Q With what railroad does the Newark and Hudson Railroad connect on the westerly end of the Bergen tunnel at Jersey City? A With the main line of the Erie on tracks on property of the Long Dock Company.

Q Where is the terminus of the Paterson, Newark and New York Railroad in Newark? A Near Fourth avenue in the City of Newark. 10

Q Does the Newark and Hudson Railroad connect with the Paterson and Newark Railroad in the City of Newark? A Yes, sir.

Q Can you say whether the new bridge, or rather, the proposed new bridge, of the Newark and Hudson Railroad will connect that railroad with the Paterson and Newark Railroad in the City of Newark? A Yes, sir.

Q How do you know that the Paterson, Newark and New York Railroad terminated in Newark? A By the description of the route of the Paterson and Newark Railroad. 20

Q Have you personally examined the description of the route of that railroad? A I did examine a copy of it.

Q Have you examined the routes of the Paterson and Newark Railroad and the Newark and Hudson Railroad Company, as filed in the office of the Secretary of State at Trenton, New Jersey? A I have not examined them personally, but I have had them examined. 30

Q By one of your employees? A Yes, sir.

*The Court.* The Newark and Hudson Railroad is the one involved?

*Mr. Bain.* Yes, sir. I am prepared to put in evidence a certified copy of the record of a suit in the Supreme Court of this State. I offer in evidence a certified copy of the record in a suit by Joseph K. Meeker and Viner J. Hedden *v.* New- 40



*Walter M. Dawley, direct.*

ark and Hudson Railroad Company, in which summons was issued on October 16, 1872.

Marked "Exhibit B. 3."

Q Has the Newark and Hudson Railroad only one bridge over the Passaic River? A Yes, sir.

10 Q It never has had any more than one bridge? A No, sir.

*Mr. Bain.* I call attention to the fact that the suit, a certified copy of the record of which I have offered in evidence, was for the purpose of recovering against the Newark and Hudson Railroad Company on a contract by that company for the construction of the draw of the railroad bridge across the Passaic River.

20 Q Have you prepared a plan showing the riparian lands which will be occupied by the proposed new bridge of the Newark and Hudson Railroad in the Town of Kearny? A Yes, sir.

Q Kindly produce that. A (Witness does so.)

Q How are the riparian lands to be so occupied shown on the plan you produce? A Enclosed within the yellow line on the map, entitled—

30 Q Does that plan show the several courses of the riparian land to be used and occupied by the proposed new bridge? A It shows the boundary of the lands to be occupied.

Q And describes the boundaries of the lands to be occupied? A Yes, sir.

Q Does that plan also show the original high water line on the Kearny side of the Passaic River at a point where the river is to be crossed by the proposed new bridge of the Newark and Hudson Railroad? A Yes, sir.

40 Q From what was that original high water line taken? A From the right of way maps of the Newark and Hud-



*Walter M. Dawley, cross.*

son Railroad, prepared by the Chief Engineer, August Pruyn, in 1873.

Q Have you that old map with you? A I have a white print copy of it.

Q Will you kindly produce that? A Yes, sir.

*The Court.* There is no objection to the use of these copies, I suppose? 10

*Mr. Lindabury.* No. This is in reference to the high water line; we substantially agree.

*Mr. Bain.* I offer in evidence first, the plan produced by the witness, entitled "Town of Kearny, Hudson County, New Jersey, dated May 4, 1920."

Marked "Exhibit B. 3½."

And also the old map produced by the witness, showing the route of the Newark and Hudson Railroad Company across the Passaic River, and the original high water line of the Passaic River in the Town of Kearny at the point of the crossing of the river by that railroad. 20

Marked "Exhibit B. 4" being sheet 14.

*Cross examination by Mr. Lindabury.*

Q Have you checked your map that you have just referred to with the map in the possession of the Board of Commerce and Navigation which has been referred to as the map of 1877? A No, sir. 30

Q Do you know whether it has been checked? A I don't know.

*Mr. Lindabury.* It is my information, Mr. Bain, that these maps agree substantially?

*Mr. Bain.* I cannot say so definitely; I am inclined to think that they do.

Q You have referred to the original route of the Newark and Hudson Railroad Company as appearing on sheet 14? A Yes, sir. 40



*Allen N. Knowles, direct.*

Q Is that the route which was filed with the Secretary of State at the time this road was built originally? A Yes, sir.

Q That you referred to? A Yes, sir.

Q Does that show the route as located on the site of the present bridge—that is, the old bridge—as now located? A Yes, sir.

Q And it is so indicated in that route, as filed with the Secretary of State at that time? A Yes, sir.

ALLEN N. KNOWLES, being duly sworn, testified as follows:

*Direct examination by Mr. Bain.*

Q What is your position? A Assistant Engineer of Construction on the Erie Railroad.

Q Does that include bridges? A Yes, sir.

Q How long have you held that position? A Since 1905.

Q Prior to that time were you employed by the Erie Railroad? A No, sir; by the American Bridge Company.

Q As an engineer? A Yes, sir.

Q You are an engineer? A Yes, sir.

Q I show you a plan entitled "United States Railroad Administration, Erie Railroad, Division New York, Newark Branch, Newark and Hudson Railroad proposed restriction of draw-bridge 804 over Passaic River, Newark, New Jersey," and I ask you whether that is the plan for the proposed new bridge of the Newark and Hudson Railroad over the Passaic River, approved by the Secretary of War? A Yes, sir.

Q Have you the approval by the Secretary of War of the plans of that bridge? A Yes, sir.

Q Kindly produce that.

Mr. Lindabury. The State admits that it was approved by the Secretary of War.



*Allen N. Knowles, direct.*

*Mr. Souter.* And the town also admits it.

*Mr. Lindabury.* I offer in evidence the plan showing the proposed new bridge of the Newark and Hudson Railroad produced by the witness.

Marked "Exhibit B. 4½."

Q Does the plan of the proposed new bridge that you have produced show the extent to which the riparian lands on each side of the river will be occupied or affected by the new bridge, so far as this land lies outside of the present right of way of the Newark and Hudson Railroad? A Yes, sir; they do. 10

*Mr. Lindabury.* It is agreed that the amount involved is 128 feet of water front on the Newark side, and 58 feet on the Kearny side.

Q Are you familiar with the lines of the Erie Railroad in New Jersey? A Yes, sir. 20

*The Court.* Do you want corroboration of that?

Q Are you familiar with the present bridge of the Newark and Hudson Railroad across the Passaic River? A Yes, sir.

Q What can you say as to whether there is any planking on that bridge? A There is planking between the tracks—

Q Between the two tracks? A Yes, sir. 30

Q That is, outside of the draw, on either side of the draw? A Yes, sir.

Q Is there a truss or girder between the two tracks on the draw? A Yes, sir; a truss.

Q What is the distance, if you know, between the nearest side of each rail on the draw and the central truss or girder on the draw? A It is approximately four feet six inches.

Q Approximately 4 feet 6 inches? A Yes, sir. 40



*Allen N. Knowles, direct.*

Q To what extent does standard equipment overhang the rails on railroad tracks? A Approximately 21½ feet.

Q What distance does that leave between the overhang of rolling stock and the central truss or girder on the draw of the present Newark and Hudson bridge? A  
10 About two feet.

Q Are you familiar with the construction of railroad bridges? A Yes, sir.

Q Have you been familiar with them for a long period of time? A Yes, sir.

Q What do you say as to whether the planking of the present Newark and Hudson bridge is customary on such bridges? A Yes, sir; it is as much as is provided on bridges of this character.

Q For what purpose? A For the purpose of employees getting from one side to the other safely.  
20

Q Do you know whether or not there are signs on both sides of the bridge, stating that there is no passageway over the bridge for pedestrians generally? A Yes, sir; there are such signs.

Q Do you know for how long a period of time such signs have been there? A So far as I know personally, for at least ten years.

Q Do you know about the sewer of the Town of Kearny on the riparian lands immediately north of the proposed new bridge? A I know there is a sewer there.  
30

Q Will the proposed new bridge of the railroad interfere in any way with that sewer? A No, sir.

Q Has the sewer been taken care of by the construction of the abutment of the proposed new bridge? A Yes, sir; we have located the abutment in such a way that it does not interfere with the sewer in any way.

Q The proposed new bridge will not interfere with the use of the sewer? A No, sir.  
40



*Allen N. Knowles, cross.*

*Cross examination by Mr. Souter.*

Q On either end of the bridge there is a walk provided? A The bridge is planked over between the tracks on each end of the bridge.

Q Not on the bridge, but on the ground? A No, sir; no walk provided that I know of.

Q Would you say there is not a plank walk at least six feet wide on the Kearny side of that bridge? A You say on the bridge? 10

Q On the approach? A Yes, sir; there is planking there.

Q How wide is that? A All the space there is between the tracks.

Q How wide is that? A About eight feet.

Q What sort of construction is that? A There are timbers laid crossways to the girders—on them is planking. 20

Q How close are the planks? A Fairly close together—not more than one inch apart.

Q And they reach from one side to the other in that form of construction? A Yes, sir.

Q And it is about eight feet wide? A Yes, sir.

Q And at either extremity there is a large wooden girder, isn't there, running lengthwise with the bridge? A I don't know that there is.

Q Would you say that there was not? A I don't know of any wooden girders. 30

Q Is it a large wooden girder, or is there any other timber over it; is there a large wooden plank? A I don't know to what part you refer.

Q At this point we are discussing. A This planking you speak of rests on top of the steel girders.

Q And running in the same direction as the planks on either side is there some binder—large wooden girder? A Not that I know of.

Q Would you say there is not? A Yes, sir. 40



*Allen N. Knowles, cross.*

Q And on the draw itself do you recall how many planks are located from the center truss that you speak of to the nearest track on the south? A I have not counted them; I should say there are about four, perhaps.

Q Might there be five? A Yes, sir.

10 Q And how wide is each plank? A I have not measured them; I should say about eight or ten inches.

Q Are they one foot wide? A I don't know.

Q At the southerly side of that walk across the draw-bridge do you recall that there is there a large wooden girder running lengthwise with the bridge? A No, sir.

Q When were you last on this bridge? A Two weeks ago.

20 *Mr. Bain.* Refer to it as the guardrail, and he will understand you.

*The Witness.* You refer to the ribbon guard which is laid on top of the ties to keep them from buching together.

*Mr. Souter.* I don't refer to that.

*The Witness.* This ribbon guard runs parallel to the walk and is alongside of the walk; it is 15 inches from the rail.

30 Q Do you recall how much higher that girder or ribbon guard extends above the level of the walk? A I never measured it, but I should judge it would be four inches; it is the ordinary height.

Q And it immediately touches the edge of the walk as it goes over the draw of the bridge, doesn't it? A Maybe along close to it it would; I think the plank does abut up against it.

40 Q How far is the southerly side of this ribbon guard from the north rail of the southerly set of tracks? A About fifteen inches.



*Allen N. Knowles, cross.*

Q When you speak of a two and a half foot overhang of standard equipment, from where do you begin to measure? A From the center of the rail.

Q So that standard equipment extends two and a half feet from the center of the rail, each rail? A Yes, sir.

Q On the Newark side of the bridge is there a planking similar to that on the Kearny side of the bridge? A Yes, sir. 10

Q How wide is that? A The same as the other is.

Q How far is that carried from the bridge; how far does it extend from each end of the draw? A To the end of the approach spans.

Q How far is that? A I think it is about 60 feet.

Q So that from the end of the span on the Newark side there extends this planking construction, eight feet wide, for a distance of 60 feet? A Yes, sir. 20

Q Is the distance from the end of the span on the Kearny side that this planking construction extends, approximately the same—60 feet? A It is about 120 feet on the Kearny side.

Q So that when you say that this planking is down there for the purpose of carrying your own employees across the bridge, that is not exactly the situation, is it? A It is absolutely the case.

Q You built a planking eight feet wide, 120 feet long, at the approach of this bridge for the purpose of carrying your employees across? A Yes, sir. 30

Q What does it say on these signs? A I have not read them carefully recently myself, but I know they are there.

Q But you don't know what the words are? A No, sir.

Q So you don't know what is on the signs? A I know what it means.

Q You don't know what it says? A No, sir. 40



*Allen N. Knowles, cross.*

Q You don't know what words are on the sign? A No, sir.

Q When you used the word "approximate" in speaking of the width on the planking of the span between the truss and the northerly rail of the southerly tracks, you use that word "approximately" advisedly, don't you?

10 A It is an inch, more or less.

Q You would not say that it might be five and a half feet from the truss? A No, sir.

Q What part of the truss are you measuring from? A From the side of the truss.

Q Now, the truss you speak of, that is the truss that carries the bridge? A Yes, sir.

Q And trusses of that character are only at certain intervals on this walk? A Yes, sir.

20 Q And between these large trusses, in the space between these, the distance is considerably widened, isn't it; the distance from the track to the bridge construction— A No, sir; I would not say so.

Q Would you say that if you measured from the center of the northerly rail of the southerly tracks to the nearest bridge construction that it would not be a greater distance where there are no large trusses? A I don't know what you refer to as large trusses; this center truss that you refer to is 200 feet long, and is the only large truss there is there.

Q Is it on a level with the walk? A The truss extends above the walk.

Q Do they at any place come in contact with the walk? A There may be a space between the planking and the truss itself.

Q At how many points on the draw does this truss come in contact with the walk? A The planking may come up within four or five inches of the truss; I think that is the fact, and continues so all the way across.



*Allen N. Knowles, cross.*

Q Please describe where this truss is that you are speaking of, where it is located on the bridge. A Well, you have been to the bridge?

Q Yes. A You have seen the large numbers of trusses that stand up, one on each side, and one in the middle?

Q Yes. A The truss is a steel frame which has three supports in this instance, one on the pier on the Kearny side, and one on the pier on the Newark side, and a third support on the pivot or middle pier; that is the one the bridge swings on; and there are three such trusses in this bridge; one on the north side and one on the south side, and one in between the tracks, and they extend about 30 feet in height and are connected across the bottom by means of steel floor beams which carry the track. 10

Q When you say they extend 30 feet in height, do they extend above the level of the walk across the draw? A Yes, sir. 20

Q How much above the level? A About 30 feet.

Q Are they of solid construction? A They are steel trusses. What you refer to is the lower part of the truss, that is what we term in engineering the lower chord, which is made up of steel plates and angles, forming a solid construction for a certain height.

Q Would you say, then, that a person walking west on the walk now located over the draw—that is, walking towards Newark—would have on his right an iron truss 30 feet in height, like a wall, without any opening? A No, sir; a truss is not solid without openings; it has openings. 30

Q Just explain the construction; how large are the openings; what part of the truss extends above this walk?

A The lower chord of the truss, made up of solid plates and angles, etc., probably extends, as I recall it, on this bridge, about 15 inches above the floor—then extending from that to the top chord are the members running diagonally connecting the two; and also vertically connecting the two. 40



*Allen N. Knowles, cross.*

Q Now, when you say that the distance from the rail—the central rail of the southerly tracks—to the truss, is approximately four and a half feet, do you mean to say from these irons that connect the top of the truss and the bottom of this truss? A Certainly; either this or the lower chord, either one.

10 Q Doesn't it make any difference? A Not much.

Q About six inches? A No, sir—less than six inches.

Q How wide is the truss? A That center truss is about 28 inches or 30 inches wide.

Q How thick are these irons that run on an angle connecting the upper and lower trusses? A They are made of separate bars, and these bars individually are not over one inch thick.

Q Where do they connect? A They connect some in the middle of the truss.

20 Q Most of them? A No, sir.

Q How far from the center of the truss do these connect? A The bigger part of them would be at least eight or ten inches from the center of the truss.

Q And at what distance are these connecting bars brought down from the upper to the lower truss; what was the distance between each of these bars or trusses? A Between seventeen and twenty feet.

30 Q So that in that space, seventeen or twenty feet distant, the distance from the center of the northerly rail of the southerly tracks over to the center of the truss is increased by fifteen inches, isn't it? A It is increased anywhere.

Q Without obstruction? A No, sir.

Q There is no obstruction, is there? A Yes, sir; there is.

Q What is the obstruction? A It is the lower chord of the bridge above the floor.

Q You don't remember how much higher than the floor of the walk that truss is? A It is about fifteen inches.



*Allen N. Knowles, re-direct.*

Q But you don't know? A I cannot tell you exactly; no, sir.

Q Do you know that it extends at all above the level of the walk? A Yes, sir.

Q And did you get that information from your examination two weeks ago? A No, sir; I have always known it. 10

Q Because bridges are usually built that way? A No, sir—this one is.

Q You know that? A Yes, sir.

*Cross examination by Mr. Lindabury.*

Q How wide is the draw in this old bridge? A The distance, center to center, of the outside trusses is about 30 feet.

Q I mean, how long is the draw? A The draw span is 200 feet. 20

*Re-direct examination by Mr. Bain.*

Q When was the present bridge built? A In 1879 and 1880.

Q I am speaking now not of any rebuilding, but when was the present bridge built? A In 1871; the present draw span was built in 1879 and 1880.

Q Are you familiar with the condition of the present bridge? A Yes, sir. 30

Q What is its condition? A Its condition is that it is very light and is considerably worn and not capable of carrying only light equipment.

Q Is it sufficient for the present requirements of the Newark and Hudson Railroad? A No, sir.

*The Court.* I don't think you need to go into that.

Q Is it necessary to build the new bridge? A Yes, sir. 40



*Allen N. Knowles, re-direct.*

Q Have you received any complaints from the Board of Public Utility Commissioners as to the condition of the present bridge? A Yes, sir.

Q Have you got those complaints with you? A Yes, sir.

10       *The Court.* I suppose they are all in writing—  
offer them.

*Mr. Bain.* I offer in evidence the complaints produced by the witness.

Marked "Exhibits B. 5, B. 6 and B. 7."

Q Is the present bridge of the Newark and Hudson Railroad to be removed after the Newark bridge is to be completed? A Yes, sir.

20       Q What was the reason for building the proposed new bridge in this location rather than in the place of the old bridge? A So that we could maintain traffic over the present bridge until the new one was constructed and ready to be put in service.

Q You have spoken of some planking on the approaches to the present bridge, where is that? A Between the two tracks only.

Q Is there a railroad yard of the Erie Railroad in the City of Newark at the westerly end of the present bridge? A Yes, sir.

30       Q And does that planking between the tracks run from the bridge into the yard? A Yes, sir.

Q How far does that yard extend? A It extends down to the station and a little past.

Q Is there any planking on the approach to the bridge other than between the tracks? A No, sir.

Q Referring to the diagonal members of the central truss on the draw of the present bridge, what is the distance between the bases of those members? A They vary at different points through the bridge.

40       Q What is the extreme? A I should say the extreme point would be about eight inches.



*Allen N. Knowles, re-cross.*

Q The bottom member of the truss, of course, is horizontal? A Yes, sir.

Q How far above the floor of the bridge is the top of that bottom member of the truss? A I should say, from my recollection, about 15 inches.

Q Now, coming back again to these diagonal members of the truss, what is their angle? A They are a little straighter than 45 degrees. 10

Q Not as much as 55 degrees? A No, sir.

*Re-cross examination by Mr. Souter.*

Q Did you state that the bottom of these diagonal members, or the bases of these diagonal members, were eight inches apart? A Eight inches from the center of the truss.

Q So that when you answered that question just now for Mr. Bain, you understood that he wanted to know the distance from the center of the truss? A Yes, sir. 20

Q You did not understand that he wanted to know the distance between any two separate diagonals? A No, sir.

Q That would be 17 feet? A No, sir, it would be about 16 inches.

Q The two diagonals entering the truss at approximately the same location? A These diagonals that you speak of, are symmetrical with the center of the bridge. Where one of those is located there will be either a pair or more than two; there might be four; there might be six or eight at a point. 30

Q You refer to the distance between them as they came in at that location? A Yes, sir.

Q Now, then, the distance between that point where they come in and another point where another group come in is 17 feet, is that right? A Yes, sir. 40



*Orville V. Derr, direct.*

*Re-direct examination by Mr. Bain.*

Q Mr. Knowles, does the railroad company contemplate some slight changes in the method of the construction of the bridge? A Yes, sir.

Q Those changes will not necessitate the taking of any additional riparian lands? A No, sir.

10 Q And that, of course, is subject to the approval of the Secretary of War? A Yes, sir.

ORVILLE V. DERR, being duly sworn, testified as follows:

20 *Mr. Lindabury.* I would like it to be noted on the record, that the statement that there was no objection to this proposed bridge plan by the Board of Commerce and Navigation, of course cannot go to any changes made in the plans since they were submitted to the board.

*Direct examination by Mr. Bain.*

Q What is your occupation? A Civil engineer.

Q Employed by what company? A The Erie Railroad.

30 Q What, if anything, have you to do with the building of the proposed new bridge of the Newark and Hudson Railroad? A I am the engineer in charge of the construction.

Q You are a civil engineer? A Yes, sir.

Q How long have you been engaged in that business? A Sixteen years.

Q What do you say as to whether or not the proposed new bridge over the Passaic River will interfere with the sewer? A It will not, with the sewer.

Q On the riparian lands immediately north of the bridge? A It will not interfere with the sewer.

40 Q You say that the new bridge will not interfere with the use of the sewer? A It will not.



*Orville V. Derr, direct.*

Q Are you familiar with the character of the sewer?

A Yes, sir.

Q And its outlet? A Yes, sir.

Q What, if anything, has been done to take care of the outlet of the sewer? A Nothing has been done in view of the fact that we have done nothing to interfere with the sewer.

Q Does the new bridge interfere in any way with the sewer of the Town of Kearny? A No, sir. 10

Q And will it interfere after the new bridge is completed? A No, sir.

Q Are you familiar with the present bridge of the Newark and Hudson Railroad over the Passaic River? A Yes, sir.

Q Have you been over it many times of late? A Several times a day for six or eight months last past.

Q Are you familiar with the method of construction of that bridge? A Yes, sir. 20

Q You heard Mr. Knowles testify as to the planking on the bridge? A Yes, sir.

Q What do you say as to whether Mr. Knowles has correctly stated the planking? A What Mr. Knowles stated is substantially correct, except in regard to the planking on the center truss, where there are three planks.

Q What is the width of those planks? A 2 by 10 plank.

Q How close is the nearest edge of that planking to the central truss on the draw? A It will run four or five inches from the south side of the center truss. 30

Q That is, there is an open space of four or five inches between the edge of the planking and the truss? A Yes, sir.

Q Do you agree with Mr. Knowles as to the distance between the nearest rail and the central truss? A Yes, sir.

Q Have you made any accurate measurement of that distance between the nearest rail and the center truss? 40



*Orville V. Derr, direct.*

A I think they have been made, but I have no measurements with me at the present time.

Q What do you say as to whether there is sufficient room for a person walking across the draw between the nearest rail and the central truss, during the passage of a train?

10

*Mr. Souter.* I object to that—this witness cannot answer that with any sincerity in his answer; it would depend largely on the size of the individual—the position in which he stood—the particular kind of train that was passing.

*Mr. Bain.* I will withdraw the question.

20

Q As a train is passing over the bridge, what is the distance between the train and the central truss of the bridge? A With the class of equipment that is used over there generally, it is about two feet two inches from any obstruction on the train or locomotive to the edge of the center truss.

Q Are you familiar with the class of bridges of this Newark and Hudson Railroad over the Passaic River? A Yes, sir.

Q What do you say as to whether planking between the tracks on such bridges is customary?

30

*Mr. Souter.* I don't think that is at all material. It appears to me that there is nothing yet in evidence that this particular bridge is of any particular type, kind or character; therefore, any question that is directed to whether it is customary is immaterial and improper.

A I would say it is customary to use planking.

Q Why? A In this particular case.

Q I am speaking generally. A Generally in cases of this kind bridge tenders have to be out and around the bridge, to set the necessary navigation lights; in order to

40



*Orville V. Derr, direct.*

make it possible for them to get across the bridge, planking is necessary.

Q Do you mean then, that the planking on such bridges is for the use of employees of the company? A Yes, sir.

Q What about the operators of trains having to get off as the train stops on the bridge; is a place provided for them? 10

*Mr. Souther.* Perhaps it would be better for the witness to testify.

*The Court.* The questions are leading.

*Mr. Bain.* Question withdrawn.

Q What do you say as to whether a place is ordinarily provided on such bridges upon which the trainmen may alight?

*Mr. Souther.* Objected to as leading. 20

*Mr. Bain.* This witness is a bridge engineer of many years' standing; I have asked him what he can say as to whether it is customary to provide a place on such bridges for trainmen to alight.

*The Court.* I will allow the question.

A It is customary to have planking between the tracks on bridges for trainmen to alight; also for any men walking from one end of the train to the other. 30

Q Do you know whether there are any signs on each side of the present bridge spoken of? A Yes, sir.

Q Have you examined those signs? A Yes, sir.

Q What wording is there on the signs? A I have them here.

Q Read the wording. A On the Newark end of the bridge there are three signs—two of them—

*Mr. Souther.* The witness is using a memorandum, and I must object to the use of it. 40



*Orville V. Derr, cross.*

Q Did you make that memorandum itself? A It was made under my directions. There are two signs on the Newark end which warn people to keep off the bridge.

*Mr. Souther.* I ask that that part of the answer be stricken out.

10 Q Have you read the signs yourself? A Yes, sir.

Q Can you tell us what were on the signs? A No, sir; not without referring to the notes.

Q Can you by referring to the notes? A Yes, sir.

Q Did you verify the notes which were made, so far as the wording on the signs is concerned? A Yes, sir.

Q State as nearly as you can recall what there appears on the signs. A There is one sign which warns people in the name of the Erie Railroad Company not to enter upon the right of way, tracks, bridges, of the Erie Railroad property. That is the best of my recollection.

20 *Mr. Souther.* That is open to the same objection; it is his conclusion.

*The Court.* I will let it stand for what it is worth.

*Mr. Bain.* I would like to reserve the right to photograph signs.

*Cross examination by Mr. Souther.*

30 Q On this type of bridge of which this bridge under discussion is one, is it customary to place a planking eight feet wide on the approaches of the bridge for the purposes which you have called to our attention? A I cannot say as to the distance; it is customary to fill in the entire space between the end of the ties of any two tracks, the intervening space, with planking, from the ribbon guard on the one track to the ribbon guard on the other.

Q Why is not that done on the draw span of this bridge? A The lower chord of the center truss extends above the level of the planking, and it would be physically

40



*Orville V. Derr, cross.*

impossible to fill up that space without making a step (?) in there which is absolutely unnecessary.

Q You say it is usual to fill up the entire space between the tracks? A Yes, sir; on open girder construction, but the span is the truss construction.

Q How does that differ? A The first girders have nothing above the level of the top of the girder, which is 12 feet below the top of the rail; while the truss construction extends 30 feet above the top of the rail. 10

Q There is no walk between the center truss of this bridge and the northerly tracks, is there? A No, sir.

Q So that that space is not filled up, whether it be truss construction or girder construction? A No, sir.

Q So that there is an open space there? A Yes, sir.

Q And any person alighting from a train on that side of the bridge must needs cross the open space there? A Except for the center, where the entire northerly track is planked over. 20

Q That is because that is the point at which the bridge tender turns the bridge? A Yes, sir.

Q At the place where that is not planked over for that purpose there is this open space? A Yes, sir.

Q And one alighting from the train must needs cross over the open space? A Yes, sir.

*Mr. Souter.* We will admit that at either end of the bridge approach there is a sign reading: "Danger—all persons are forbidden to go upon this railroad bridge." 30

*Mr. Bain.* Do you admit those signs have been there for many years?

*Mr. Souter.* No, we don't admit that.

*The Court.* I will permit counsel to put in anything that is overlooked.

*Mr. Bain.* We rest. 40



*Discussion.*

10 *Mr. Souter.* I wish to direct the Court's attention to Section 8 of the Act of 1864, supplemented by the Act of 1869, page 1017, which is the section making it necessary for the Town of Kearny, having the upland lands, to have the first opportunity to take the riparian lands. Then I will beg your Honor's attention to the Laws of 1917, Chapter 152, Article 28 and Section 3, which provides that any construction in the nature of this bridge construction cannot be put up without application to the municipal governing body in the locality where erected. (Reading.)

I am perfectly satisfied by the proof which has been adduced by the railroad that the bridge was constructed under the Act of 1871.

20 I now propose to introduce testimony of persons from the City of Newark, and East Newark, and the Town of Kearny, located at either end of this bridge, of their use of the bridge in such a way as to create a prescriptive right.

*The Court.* Now, you want to offer evidence to show they used this bridge as a public passageway across the bridge?

30 *Mr. Souter.* Now, I wish to raise a point of law.

*Mr. Bain.* There is no issue raised by the pleadings as to whether the Town of Kearny is still entitled to a riparian grant as a riparian owner. That is not the issue the town makes by its counter-claim; it claims the ownership of the lands absolutely. It is admitted that the town does not own the land; the counter-claim was to the effect that it owned the land; now it admits that it does not own the land. The question is, whether we have got to pay compensation to the State.

40



*Discussion.*

*Mr. Souther.* We believed we did own the land until that examination showed that we did not.

*The Court.* So there is no dispute of title here.

*Mr. Souther.* I ask permission to amend the pleadings so as to raise the point that we do say that a property right is taken from us if the railroad is permitted to take this land without our first having been notified that somebody desired the riparian lands. 10

*Mr. Bain.* You claim, that as the riparian owner, under the riparian Acts, that the town is first entitled to an action, and that the railroad company has no right to use this riparian land for the purpose of this bridge unless it gives notice to the Town of Kearny, and the Town of Kearny does not take advantage of its right and the railroad company then acquires it. I think it has been held that that right of the owner of the upland is a matter of grace and not of right. 20

*The Court.* I will take note of your motion and will amend if necessary to do so, unless the argument that Mr. Bain now advances prevails.

30

40



*Exhibit B. 1.*

**EXHIBIT B. 1.**

Form "A."

(Form of Application for Permit.)

BOARD OF COMMERCE AND NAVIGATION,  
State House, Trenton, N. J.

10

GENTLEMEN:—Application is hereby made, in accordance with Chapter 123 of the Laws of 1914, for a permit to carry out the following works:

Applicant.

(Name) *Newark and Hudson Railroad Company.*

(Address) *Jersey City, New Jersey.*

(Business) *Railroad corporation.*

Where work is contemplated.

(City or Municipality) *Town of Kearny and City of Newark.*

20

(County) *Hudson and Essex respectively.*

(Name of Waterway) *Passaic River.*

(Location) *Between Kearny and Newark.*

What the structures are to be used for.

*Railroad bridge.*

General description of work contemplated.

*Double track railroad bridge of the Straus Bascule type, to be substituted for the present roller swing draw bridge.*

30. How work is to be done, contract, etc.

*By contract.*



*Exhibit B. 1.*

Estimated cost.

\$512,000.00.

Date when work is contemplated to be started or contract advertised.

*Immediately.*

Length of time to complete work.

*One year.*

10

Name of owners of adjoining property on each side.

*On the Newark side Walter D. Van Riper on both sides; on the Kearney side Newark and Hudson Railroad Company on the south side and the Town of Kearney on the north side.*

General Remarks.

*The following enclosures are attached hereto: 1. Abstract of title of land on west side of river acquired from George C. Nevers and wife. 2. Abstract of title on east side of river acquired from John Williams. 3. Detailed plans and specifications in duplicate. 4. Copy of permit or license from United States Government to construct this bridge.*

20

There are submitted herewith, in addition to the above information, detailed plans and specifications in duplicate, of the work for which permit is herewith requested; together with abstract of title to property on which the work is contemplated to be done, also copy of any special permits or licenses from the United States Government which are necessary to the carrying out of this work.

30

Respectfully yours,

NEWARK AND HUDSON RAILROAD COMPANY,  
By H. P. ACKER, Asst. Sec'y.

*Dated, 50 Church St.,  
New York, Nov. 9, 1918*

40



*Exhibit B. 1.*

November 11, 1918.

Board of Commerce and Navigation,  
Trenton, New Jersey.

Gentlemen:—

10 The following is a statement of the right of the Newark and Hudson Railroad Company, a corporation of the State of New Jersey, to build the bridge along the route of its railroad, over the Passaic River, between the Town of Kearny and the City of Newark in the State of New Jersey, mentioned in the foregoing application for permit, and of the title of said Company to the land and land under the waters of said river which are necessary therefor.

20 1. The Newark and Hudson Railroad Company was incorporated by an act of the legislature of the State of New Jersey entitled "An Act to incorporate the Newark and Hudson Railroad Company," approved March 17, 1870, which act was supplemented by an act approved February 22, 1871.

2. The sixth paragraph of said act of incorporation provides as follows:

30 "And be it enacted, that it shall be lawful for the  
"said company to lay out and construct a railroad,  
"not exceeding one hundred feet in width, from a  
"point in the City of Newark, in the County of  
"Essex, in this State, at or near Goveneur Street,  
"in said City, to a point in the County of Hudson,  
"where the said railroad may connect with the New  
"Jersey Railroad and Transportation Company, or  
"with some other railroad in said County of Hud-  
"son, running to the waters of the Hudson River,  
"and may connect the same with the New Jersey  
"Railroad and Transportation Company, and other  
"railroads in the Counties of Essex and Hudson,  
"upon such terms as may be agreed upon, and for  
"that purpose the said company may erect and  
"maintain bridges over the Passaic and Hackensack  
"Rivers, the said bridges to be provided with draws  
"at least seventy feet in width."



*Exhibit B. 1.*

3. Section 8, of an act of the legislature of the State of New Jersey entitled "An Act concerning railroads (Revision of 1903)," approved April 13, 1903, provides as follows:

"Whenever the railroads of any railroad companies shall intersect or cross or shall approach each other within a distance of one mile, either company may construct and operate a branch to effect a connection of such railroads, and may take and hold the land and property necessary for that purpose, on filing a map and description of the survey of the route of such branch, in the office of the Secretary of State, and make the required deposit with the State Treasurer; the connection shall be made upon such terms as may be agreed by the companies operating such roads, and in case of failure to agree, either party may apply to the Supreme Court, whose duty it shall be to appoint three disinterested citizens of the state who shall determine and fix the terms, which, when approved by the court, shall be conclusive and such companies shall be required to carry into effect."

4. The railroad of the Newark and Hudson Railroad Company was duly built and lies partly in the County of Essex and partly in the County of Hudson. The railroad of the Paterson, Newark and New York Railroad Company lies partly in the County of Essex. The two railroads approach each other within a distance of one mile.

5. The Newark and Hudson Railroad Company for the purpose of connecting its railroad with the railroad of the Paterson, Newark and New York Railroad Company in the City of Newark, filed in the office of the Secretary of State a map and description of the survey of the route of Branch B of its railroad, and made the required deposit with the State Treasurer, on September 13, 1918. The Paterson, Newark and New York Railroad Company has consented to said connection. Said Branch is less than one mile in length and the bridge mentioned is to be built on the route thereof.



*Exhibit B. 1.*

6. The Newark and Hudson Railroad Company has the right to make such connection, and for that purpose to build the bridge mentioned, and use the lands under the waters of the Passaic River necessary therefor, by virtue of the act incorporating said company. The connection is supported also by the act entitled "An Act concerning  
10 railroads (Revision of 1903)" above mentioned.

7. The lands of the Town of Kearny, back of the pier-head and bulkhead lines on the Passaic River, which are to be used for the easterly approach of said bridge consist partly of the right of way of the railroad of said Newark and Hudson Railroad Company, title to which was acquired by deed from John Williams to said Newark and Hudson Railroad Company, dated April 1, 1873 and recorded in the office of the Register of Hudson County on the 13th day of August, 1875 in book 364 on page 708,  
20 but originally recorded May 21, 1873 in Book Z-16, page 519, Essex County Register's office, and partly of land between the original high water line and said pierhead and bulkhead lines, lying in front of upland owned either by the Town of Kearny, John Carter or John Watts Kearny.

8. The land in the City of Newark back of the bulkhead line on the Passaic River which is to be used for the westerly approach of said bridge is owned by Newark and Hudson Railroad Company, title thereto having been  
30 acquired by deed from George G. Nevers and wife to Newark and Hudson Railroad Company dated January 29, 1872 and recorded in the office of the Register of Essex County on the 21st day of February, 1872 in book H-16 on pages 111 and 112.

This statement is without prejudice to any other rights the Newark and Hudson Railroad Company may have in the premises.

Respectfully yours,

NEWARK AND HUDSON RAILROAD COMPANY,

By *H. P. ACKER*,

*Asst. Secretary.*



*Exhibit B. 1.*

Erie Bridge over Passaic River, Newark, File 8900  
West Side

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ABSTRACT OF TITLE

of

THE NEWARK AND HUDSON RAILROAD COMPANY

10

To lands in the City of Newark, Essex County, New Jersey, shown on the annexed Diagram, being known as Lots 324 to 334 inclusive, and parts of Lots 323 and 335 on a Map of Whiting & Wakeman's property, which lots are more particularly described as follows, viz:

Beg. in E. Line of Passaic St. at a point 746 ft. 6 in. Nly. from intersection of said line of Passaic St. with the range of the centre line of Clark St.; Th. along Passaic St. N. 14 degrees 50' E. 300 ft: Th. Ely, at right angles to Passaic St. 290 ft. to the adopted Dock line of Passaic River; Th. Sly. along Dock Line of Passaic River 300 ft.; Th. Wly. at right angles to Passaic St. 300 ft. to E. line of Passaic St. & place of beginning.

20

Being Lots Nos. 324 to 334 both inclusive & part of lots Nos. 323 and 335 on Map of W. L. Whiting & I. P. Wakeman &c.

The premises in question are part of lands which were devised by Isaac Gouverneur, dec'd to Gouverneur Kemble, many years ago.

30

May 1st, 1835, Gouverneur Kemble, unmarried, by deed of this date conveyed a tract of land, of which the premises in question are part, and described as containing 35,99/100 acres to Wm. I. Greive. Book C-4, 155.

September 12, 1839, Wm. I. Greive & wife conveyed same 25,99/100 acres to Joseph W. Duryee. F.5, 602 and

April 24, 1851, Joseph W. Duryee & wife conveyed same tract to Winslow L. Whiting. 0-7, 505.

The property thus conveyed to Winslow L. Whiting was laid out into building lots by him and a map thereof made

40



*Exhibit B. 1.*

by Dunn & Thompson, Surveyors, 1851, entitled "Map of property belonging to Messrs. W. L. Whiting & I. P. Wakeman, surveyed May 1851 by Dunn & Thompson, Surveyors."

Winslow L. Whiting conveyed eighteen Lots North of Gouverneur St. to Davis J. Whiting, Sept. 15, 1860. (G.11, 10 96.)

The wife of Winslow L. Whiting did not join in this deed. The certificate of acknowledgment was defective and the interest of W. L. Whiting in the whole tract of 25, /100 acres was levied on under several executions against W. L. Whiting and sold by the Sheriff to Edward C. Drake, July 30, 1863, as shown fully in annexed searches. Z-11 83.

Edward C. Drake & wife, by their deed dated Aug. 5, 1863, conveyed said 25, -/100 acres of land to Davis J. 20 Whiting (Z-11, 87) thus perfecting the title in him subject to the dower right of W. L. Whiting's wife.

Davis J. Whiting & wife conveyed lots 313 to 340 inclusive situate between Passaic St. and the Passaic River, with other to George G. Nevers by deed dated April 29, 1868, V-13, 276. But the certificate of acknowledgment to this deed was also defective and was insufficiently stamped.

AND September 1, 1868, Davis J. Whiting & wife executed another deed of Warranty to George G. Nevers 30 dated September 1, 1868, & recorded Sept. 23, 1868, conveying the same lands and reciting that it was intended to perfect the title of said George G. Nevers in said lots, the former deed in V-13, 276, being defective.

This deed recites that the whole property was conveyed subject to two mortgages, one thereof held by Richard Ienniss, on which was due \$6000., and the other thereof dated April 30, 1868, made by George G. Nevers to Davis J. Whiting for \$31,200.



*Exhibit B. 1.*

The mortgage stated to be held by Richard Ienniss has been paid and cancelled. The other for \$31,200., made to Davis J. Whiting as aforesaid was by him assigned to John S. Ienniss, June 18, 1869. No. 12 of Assignments of Mortgs., p. 164.

AND February 28, 1872, John S. Ienness executed a release from said mortgage of the premises in question to George G. Nevers and Ann Eliza, his wife. 10

IT WILL be seen, therefore, that the premises in question became vested in George G. Nevers.

HE conveyed same, Jany. 29, 1872, to the Newark and Hudson *River* Rail Road Company by the following deed:

|                         |                           |
|-------------------------|---------------------------|
| George G. Nevers & Wife | H-16, 11,                 |
| to                      | Deed Dated Jany. 29, 1872 |
| The Newark and Hudson   | “ rec'd Feby. 21, “       |
| Railroad Company        | Consn. \$67,500.          |

Conveys Lots 324 to 334, both inclusive & part of lots No. 323 and 335 on Map of W. L. Whiting & I. P. Wakeman & C. 20

The Newark and Hudson Rail Road Company were incorporated under and by virtue of an Act of the Legislature of the State of New Jersey approved March 17, 1870.

On said 29th day of January, 1872, the said Company executed two mortgages on said property—one on the Southerly and the other on the Northerly half thereof to said George G. Nevers to secure a part of the purchase money, as follows: 30

|                       |                        |
|-----------------------|------------------------|
| The Newark and Hudson | A-6, 514               |
| Rail Road Company     | Mortgage for \$25000.  |
| to                    | “ dated Jany. 29, 1872 |
| George G. Nevers.     | “ rec'd Feby. 21, “    |

Beg. in Ely. line of Passaic St. at a point distant 746 ft. 6 in. Nly. from centre line of Clark St.; Th. al. Passaic St. N. 14 degrees 50 minutes E. 160 ft.; Th. Ely. at right angles to Passaic St. 295 ft. to adopted Dock line of Pas- 40



*Exhibit B. 1.*

saic River; Th. Sly. al. said Dock line 160 ft.; Th. Wly. 300 ft. to Beg. being given to secure a part of the purchase money.

- The Newark and Hudson      A-6, 515  
 Rail Road Company      Mortgage for \$22500.  
                                          to      "      dated Jany. 29, 1872  
 10      George G. Nevers.      "      Rec'd. Feby. 21, "
- Beg. in Ely. line of Passaic St. 906 ft. 6 in. Nly. from Clark St.; Th. al. Passaic St. N. 14 degrees 50 E. 140 ft; Th. Ely. at right angles to Passaic St. 290 ft. to the adopted Dock line of Passaic River; Th. Sly. al. said Dock line 140 ft.; Th. Wly. at right angles to Passaic St. 295 ft. to E. line of Passaic St & place of Beginning. Being given to secure the payment of a part of the consideration money thereof.

- 20      We approve of the title to the land conveyed to The Newark & Hudson Rail Road Company by George G. Nevers & wife January 29th, 1872.

The annexed searches do not disclose any encumbrance on the property at the time of the conveyance to the Company as aforesaid.

There are two Mortgages for purchase money, given by the Company to Mr. Nevers.

PARKER & KEASBEY.

- 30      Jan. 29, 1872.

- WHEREAS, By Section 9 of an Act of Congress, approved March 3rd, 1899, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes", it is provided that bridges, dams, dikes, or causeways may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are sub-
- 40



*Exhibit B. 1.*

mitted to and approved by the Chief Engineers and by the Secretary of War before construction is commenced;

AND WHEREAS, THE ERIE RAILROAD COMPANY LESSEE, on behalf of the NEWARK AND HUDSON RAILROAD COMPANY, having authority of the State of New Jersey to construct a bridge across the Passaic River, near Newark in said State, to replace an existing bridge at the locality, has submitted a map of the location and plans of the same, which have been approved by the Chief Engineers; 10

NOW THEREFORE, This is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions:

1—That the engineer officer of the United States Army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with. 20

2—That all work shall be conducted in such manner as not to interfere with the free navigation of the waterway or impair the present navigable depths.

3—That it is understood that this instrument simply gives permission under Act of Congress to do the work herein authorized; that it does not give any property rights and does not authorize any injury to private property or invasion of private rights. 30

4—That this approval shall not be construed as a waiver by the War Department of the right to require any alteration of said bridge in the future which, in the judgment of the Secretary of War, may be necessary in the interests of navigation.

5—That the time for the completion of the new bridge shall be two years from the date of this instrument, and for the removal of all of the old piers, temporary bridge, false work, or other material placed or remaining in the river by reason of this work, shall be ninety days from date of completion of the new bridge. 40



*Exhibit B. 1.*

6—That the piers of the old bridge, temporary bridge, false work, or material excavated and deposited in the river during reconstruction of the bridge shall be entirely removed in accordance with law, and be subject to the inspection of the Supervisor of New York Harbor.

10 7—That the building of this bridge and the removal of the present bridge shall be so conducted as to permit of compliance with the existing War Department rules and regulations governing the opening of drawbridges across Newark Bay and its navigable tributaries.

20 8—That suitable power-operated machinery shall be installed for the opening of the draw, such that the draw may be fully operated for the passage of a vessel in not more than one minute and thirty seconds, this period to include the closing of the gate and the operation of all other safety devices; and that auxiliary hand-power apparatus shall be installed for emergency use by which the draw may be opened within a reasonable period.

9—That the permittee shall maintain a tug at the draw bridge while the new bridge is being constructed and until the old bridge is removed, to control and aid in the passage of vessels.

WITNESS my hand this 17th day of April, 1916.

(Signed) NEWTON D. BAKER,  
*Secretary of War.*



*Exhibit B. 1.*

(Copy)

22489/55 Engrs.

STH/ame

WAR DEPARTMENT  
WASHINGTON.

February 23, 1918.

Mr. G. B. Owen,  
Chief Engineer, Erie Railroad Co.,  
Hudson Terminal Building,  
50 Church St.,  
New York, N. Y.

10

Dear Sir:

In compliance with request of the 4th inst., I beg to inform you that the time for completing the reconstruction of the Newark and Hudson Railroad bridge across the Passaic River, near Newark, N. J., plans of which were approved by the Department April 17, 1916, is hereby extended to April 17, 1920, other conditions of the instrument of approval dated April 17, 1916 to remain in full force and effect.

20

Very respectfully,

(signed) BENEDICT CROWELL,  
*Assistant Secretary of War.*

30

40



*Exhibit B. 2.*

**EXHIBIT B. 2.**

(Copy)

10 SURVEY AND DESCRIPTION of the route and location of Branch B of the railroad of the Newark and Hudson Railroad Company located in Town of Kearny, County of Hudson and State of New Jersey, and the City of Newark, County of Essex and State of New Jersey, showing the center line of the location of said Branch B by the Board of Directors of said Company.

20 Beginning in the Town of Kearny, Hudson County, State of New Jersey at a point in the center line between present main tracks of the Newark and Hudson Railroad Company, (said point being distant 5.54 feet northerly from the original center line of said railroad and vertically above the face of backwall of west abutment of Passaic Street bridge and called Station O+O of this survey); thence by a curve to the right with a radius of 1273.57 feet and a central angle of  $10^{\circ} 0'$  (spiraled for a distance of 135 feet at each end) said curve extending for a distance of 357.04 feet to a point called station 3+57.04 (said point being distant about 30 feet northerly from the original center line of said railroad); thence by a straight line N.  $42^{\circ} 23'$  W. (intersecting the easterly pierhead and bulkhead line of the Passaic River at about station 3+77.02, crossing from Town of Kearny, Hudson County, into the City of Newark, Essex County, State of New Jersey, at about station 5+81, and intersecting the westerly pierhead and bulkhead line of said river at about station 7+85.60), for a distance of 611.75 feet to a point called station 9+68.79 (said point being distant about 120 feet easterly from the original center line of said railroad); thence by a curve to the right with a radius of 410.28 feet and a central angle of  $75^{\circ} 48'$  (spiraled for a distance of 140 feet at each end) said curve extending for a distance of 681.46 feet to a point called station 16+50.25 situated in the center line between present main tracks of The Paterson, Newark and New York Railroad Company (said point being distant

40



*Exhibit B. 2.*

5.85 feet easterly from the original center line of The Paterson, Newark and New York Railroad Company.)

The length of said Branch B is 1650.25 feet, and the same is located entirely within the Town of Kearny, County of Hudson and State of New Jersey, and the City of Newark, County of Essex and State of New Jersey.

The foregoing survey and description of the route and location of Branch B of the railroad of the Newark & Hudson Railroad Company was adopted by the Board of Directors of said Company and ordered filed by resolution duly passed on August 14th, 1918. 10

IN WITNESS WHEREOF, the Newark and Hudson Railroad Company has caused these presents to be executed by its President under its corporate seal and attested by its Secretary and Chief Engineer this 14th day of August, 1918.

NEWARK AND HUDSON RAILROAD COMPANY,  
By F. D. UNDERWOOD,  
President. 20

Attest:

DAVID BOSMAN, Secretary,  
R. C. FALCONER,  
Chief Engineer.

The Paterson, Newark and New York Railroad Company hereby consents to the foregoing location of the route of Branch B of the railroad of the Newark and Hudson Railroad Company, and consents that the railroad of said Company be constructed on the foregoing route and location and a connection made with the railroad of this Company as aforesaid. 30

Dated August 14th, 1918.

THE PATERSON, NEWARK AND NEW YORK  
RAILROAD COMPANY,  
By F. D. UNDERWOOD,  
President.

Attest:

DAVID BOSMAN,  
Secretary. 40



*Exhibit B. 2.*

STATE TREASURER'S OFFICE

Trenton, N. J., Sept. 13th, 1918.

Received from the NEWARK AND HUDSON R. R. Co.,  
Branch "B", the sum of Six hundred & forty #———  
Dollars (\$640.#) being an amount equal to Two Thou-  
sand Dollars (\$2,000.00) per mile of the Branch Rail-  
road, proposed to be constructed, the same being de-  
posited with me, as required by "An act concerning  
Railroads" (Revision of 1903), approved April 14, 1903,  
and the supplements thereto.

WM. T. READ,  
State Treasurer.

Endorsed:

"Filed and Recorded Sept. 13, 1918.

THOMAS F. MARTIN,  
Secretary of State."

STATE OF NEW JERSEY,

DEPARTMENT OF STATE.

I, THOMAS F. MARTIN, Secretary of State of the State  
of New Jersey, DO HEREBY CERTIFY that the foregoing is  
a true copy of Description of the Route and Location of  
Branch B of the Railroad of the NEWARK AND HUDSON  
RAILROAD COMPANY, and the endorsements thereon, as the  
same is taken from and compared with the original filed  
in my office on the Thirteenth day of September, A. D.  
1918, and now remaining on file and of record therein.

IN TESTIMONY WHEREOF, I have hereunto set my hand  
and affixed my Official Seal at Trenton, this Thirteenth  
day of September, A. D. 1918.

THOS. F. MARTIN,  
*Secretary of State.*

(SEAL)



*Exhibit B. 3.*

**EXHIBIT B. 3.**

NEW JERSEY, ss.

The State of New Jersey to our Sheriff  
(SEAL) of our County of Union. GREETING:

We command you to summon The Newark and Hudson  
Rail Road Company to be and appear before the Supreme 10  
Court of the State of New Jersey, to be held at Trenton,  
in and for said State, on the thirtieth day of October,  
instant, to answer unto Joseph J. Meeker and Viner J.  
Hedden of a plea of trespass on the case upon promises to  
their damage five thousand dollars and have you then and  
there this writ.

WITNESS, Mercer Beasley, Esquire, Chief Justice at  
Trenton aforesaid, the sixteenth day of October, A. D.  
one thousand eight hundred and seventy-two.

CHARLES P. SMITH, 20  
*Clerk.*

McCARTER & KEEN,  
*Attorneys.*

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*Exhibit B. 3.*

## NEW JERSEY SUPREME COURT.

|                                                                                                       |   |                                                                                                            |
|-------------------------------------------------------------------------------------------------------|---|------------------------------------------------------------------------------------------------------------|
| JOSEPH J. MEEKER and VINER J. HED-<br>DEN,<br><br>vs.<br>10 THE NEWARK & HUDSON RAILWAY COM-<br>PANY. | } | <i>In Case.</i><br><i>On Postea, &amp;c.</i><br><i>McCarter &amp;</i><br><i>Keen,</i><br><i>Attorneys.</i> |
|-------------------------------------------------------------------------------------------------------|---|------------------------------------------------------------------------------------------------------------|

As yet of the thirtieth day of October, A. D. eighteen hundred and seventy-two.

WITNESS, Mercer Beasley, Esq., Chief Justice.

Benjamin F. Lee, Clerk.

ESSEX COUNTY, ss.

20 The Newark and Hudson River Railway Company, the defendants in this suit, were summoned to answer unto Joseph J. Meeker and Viner J. Hedden of a plea of trespass on the case upon promises and thereupon the plaintiff by McCarter & Keen, their attorneys, complain for that the said plaintiffs heretofore to wit on the twenty-first day of January, eighteen hundred and seventy-two, were partners in trade under the name and firm of Meeker & Hedden and that the said defendants and the said plaintiffs as such partners on the day and year last aforesaid, 30 at Newark aforesaid made and entered into an agreement whereby the said plaintiffs for and in consideration of the payments agreed to be made by the said defendants agreed with the said defendants to build and construct in a good substantial and workmanlike manner within a reasonable time thereafter the draw over the Passaic River, to wit: the draw of a certain Rail Road bridge then being constructed by and for the said defendants over the said Passaic River at Newark aforesaid in the City of Newark, the said draw to be two hundred feet in

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*Exhibit B. 3.*

length and in accordance with a certain plan or diagram which was prepared and adopted by both said parties as the plan of said draw. And the said plaintiffs did thereby guarantee that the said draw should sustain and carry with safety any two Erie Railway locomotives their tenders and trains on each track at the same time and should turn on or off with the same ease and speed as the draw then in use by the Morris and Essex Railroad at Newark. 10

And in consideration of the work so agreed to be completed and executed by said plaintiffs the said defendants thereby agreed to pay or cause to be paid to said plaintiffs on or before the fifteenth day of next March after the making of such contract such sums as might be due on the certificate of the engineers in charge and on the completion testing and acceptance of the said work by the superintendent of the defendants and the engineer in charge; any further amount necessary to make the total payment for said draw twelve thousand dollars. 20

And the plaintiffs in fact say that although they did proceed forthwith after making said contracts to do and perform the said work and did within a reasonable time after making said contract build and construct in a good substantial and workmanlike manner a draw over the Passaic River of a rail road bridge then being constructed by and for the said defendants in the City of Newark two hundred feet long and in accordance with the said plans or diagram so as aforesaid prepared and adopted by both parties as a plan for said draw and although said draw was completed in all respects before the first day of September, eighteen hundred and seventy-two, which was within a reasonable time after the making of said contract and said draw when completed would and did sustain and carry with safety any two Erie Railway locomotives, their tenders and trains on each track at the same time and would and did turn on and off with the 30 40



*Exhibit B. 3.*

same ease and speed as the draw in use at the time of making said contract by the Morris and Essex Rail Road in Newark, and although the said draw was on the day and year last aforesaid taken and accepted by the superintendent of the said defendants and the engineer in charge and has at all times thereafter, hitherto been used and enjoyed by the said defendants, and although the said plaintiffs have in all respects performed the said contract on their part and have performed all conditions precedent on their part to be performed already to the true intent and meaning of the said contract, and although the said defendants did from time to time during the progress of said work pay to said plaintiffs divers sums of money on account thereof, yet the plaintiffs in fact say that at and after the completion testing and acceptance of said work as aforesaid, there remained due and unpaid to the said plaintiffs to make up the sum of twelve thousand dollars a large sum of money, to wit: the sum of two thousand five hundred dollars. Yet the said defendants although often requested so to do have not, as yet paid to the said plaintiffs the said sum of two thousand five hundred dollars or any part thereof but have therein wholly failed and made default.

And whereas also the defendants heretofore to wit on the first day of October in the year of our Lord one thousand eight hundred and seventy-two at Newark in the County of Essex were indebted to the plaintiffs in the sum of five thousand dollars for goods wares and merchandise before that time sold and delivered by the plaintiffs to the defendants at their request; and in five thousand dollars for work and labor before that time done and performed and materials furnished by the plaintiffs for the defendants at their request; and in five thousand dollars for so much money by the plaintiffs before that time lent and advanced to the defendants at their request; and in five thousand dollars for so much money by the plaintiff before that time paid for the use of the defendants at their



*Exhibit B. 3.*

request; and in five thousand dollars for so much money by the defendants before that time had and received for the use of the plaintiffs; and in five thousand dollars for interest upon and for the forbearance by the plaintiffs to the defendants at their request of divers large sums of money before that time due and owing from the defendants to the plaintiffs; and in five thousand dollars for so much money then and there found to be due from the defendants to the plaintiffs on an account stated between them, and being so indebted the defendants in consideration thereof then and there promised the plaintiffs to pay them the said several sums of money on request. Yet the defendants have disregarded their said several promises and have not paid the said several sums of money nor any of them or any part thereof although often requested so to do, but to do so have hitherto wholly refused and still do refuse to the damage of the plaintiffs five thousand dollars and therefore they bring their suit, &c. 10 20

And the said defendants by Parker & Keasbey, their attorneys, come and defend the wrong and injury when &c., and say that they did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them and of this they put themselves upon the country, &c.

And the plaintiffs do the like.

Afterwards, that is to say, on the eighth day of May in the year eighteen hundred and seventy-three, and at the place within contained, before David A. Depue, Esquire, one of the Justices of this same court within named, according to the form of the statute in such case made and provided come as well the within named Joseph J. Meeker and Viner J. Hedden as the within named The Newark and Hudson Railway Company by their respective attorneys within mentioned, and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters 30 40



*Exhibit B. 3.*

within contained being chosen, tried and sworn, say upon their oath that the said The Newark and Hudson Railway Company did undertake and promise in manner and form as the said Joseph J. Meeker and Viner J. Hedden have within complained against it, and they assess the damages of the said Joseph J. Meeker and Viner J.  
10 Hedden on occasion of the not performing the promises and undertakings within mentioned, over and above their costs and charges by them about their suit in this behalf expended to twenty-five hundred and twenty-seven dollars and thirty-five cents and for those costs and charges to six cents.

Therefore it is considered that the said Joseph J. Meeker and Viner J. Hedden do recover against the said The Newark & Hudson Railway Company their said damages by the jurors in form aforesaid and found to two  
20 thousand, five hundred and twenty-seven dollars and thirty-five cents and also seventy-six dollars and fourteen cents for their costs and charges aforesaid by the court now here adjudged to the said plaintiffs and with their assent which said damages and costs and charges in the whole amount to two thousand, six hundred and three dollars and forty-nine cents.

Judgment signed this third day of June, A. D. 1873.

By the Statute,

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MERCER BEASLEY,  
C. J.

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*Exhibit B. 3.**To the Clerk of the New Jersey Supreme Court.*

WHEREAS, Joseph J. Meeker and Viner J. Hedden heretofore to wit, on the third day of June, eighteen hundred and seventy-three obtain final judgment in the Supreme Court of New Jersey against the Newark & Hudson Railroad Company for the sum of two thousand, six hundred and three dollars and forty-nine cents as by the record thereof will more fully appear. 10

ALSO WHEREAS, the said Joseph J. Meeker and Viner J. Hedden have received satisfaction for the same, these are therefore to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said court and for your so-doing, this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, I, one of the attorneys of record have hereunto set my hand and affixed my seal this third day of September, A. D., eighteen hundred and seventy-three. 20

OSCAR KEEN.

Signed, sealed and delivered  
in the presence of  
C. PARKER.

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*Exhibit B. 3.*

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

BE IT REMEMBERED, that on this third day of September, eighteen hundred and seventy-three, before me, the Subscriber, personally appeared Oscar Keen to me known to be the person described in the foregoing warrant, and I  
10 having first made known to him the contents thereof, he  
..... acknowledged that he executed the same as his voluntary act and deed, for the uses and purposes therein expressed.

CORTLANDT PARKER,  
*Master in Chancery, N. J.*

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing  
20 is a true copy of the summons, judgment and satisfaction piece in the above-stated cause as the same remain on file in my office.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this seventh day of May, A. D.  
(SEAL) nineteen hundred and twenty.

ENOCH L. JOHNSON,  
*Clerk.*

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Insert at page 110.

P. L. of 1870, page 1274.

**An Act to Incorporate the Newark and Hudson Railroad Company.**

Names of  
Corporators.      "1. BE IT ENACTED by the Senate  
and General Assembly of the State of New  
Jersey, That Gasherie De Witt, Gustavus N. Abeel, Hugh 10  
Holmes, Nehemiah Perry, John Hopper, and such other  
persons as may hereafter be associated with them, shall  
be and are hereby constituted and declared to be a body  
politic and corporate in fact and in name, by the name  
Corporate Name of the "Newark and Hudson Railroad Com-  
and Powers.      pany," and shall be capable of purchasing,  
holding and conveying any lands, tenements, goods and  
chattels whatsoever, necessary or expedient for the ob-  
jects of this corporation.

Amount of  
Capital Stock.      "2. AND BE IT ENACTED, That the  
capital stock of said company shall be two 20  
hundred and fifty thousand dollars, with liberty to increase  
the same to five hundred thousand dollars, and shall be  
divided into shares of one hundred dollars each, which  
shall be deemed personal property, and transferable in  
such manner as the said corporation shall by their by-laws  
direct.

Directors, When  
and How Chosen.      "3. AND BE IT ENACTED, That the  
above named persons may open books to  
receive subscriptions to the capital stock of the said cor-  
poration, at such time or times, or place or places, as  
they or a majority of them may think proper, and as soon 30  
as the same shall be subscribed, to give notice for a meet-  
ing of the stockholders, to choose five directors, a majority  
of whom shall be residents and citizens of this state; and  
such election shall be made at the time and place ap-  
pointed by such of the stockholders as shall attend for  
that purpose, either in person or by lawful proxy, each  
share of the capital stock entitling the holder thereof to  
one vote; and the above named persons, or a majority of  
them, shall be inspectors of the first election of directors  
of the said corporation, and shall certify, under their  
hands, the names of those persons duly elected, and de-  
liver over the subscription books to the said directors, 40



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and the time and place of holding the first meeting of directors shall be fixed by the said persons named in the first section of this act, or a majority of them, and the directors chosen at such meeting and at the annual election of said corporation shall, as soon as may be after every election, choose out of their own number a president, who shall be a resident and citizen of this state, and in case of the death, resignation or removal of the president or any director, such vacancy or vacancies may be filled for the remainder of the year wherein they may happen, by the said board of directors, or a majority of them; and in case of the absence of the president, the said board of directors, or a majority of them, may appoint a president, pro tempore, who shall have such power and functions as the by-laws of the said corporation shall provide.

Not Dissolved by  
Failure to  
Elect of.

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“4. AND BE IT ENACTED, That in case it should happen that an election of directors should not be made during the day when, pursuant to this act, it ought to be made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time, and the directors for the time being shall continue to hold their offices until others shall have been chosen in their place.

Powers of  
Directors.

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“5. AND BE IT ENACTED, That a majority of directors of said corporation shall be competent to transact all the business of said corporation, and shall have power to call in the capital stock of said company by such installments and at such times as they may direct; and in case of non-payment of such installments or any one of them, to forfeit the share or shares upon which such default shall arise; and to make and prescribe such by-laws, rules and regulations as to them shall appear needful and proper, touching the management and regulation of the stock, property, estate and effects of the said corporation, and also shall have power to appoint a secretary and so many clerks and servants as to them shall seem meet, and to establish and fix such salaries to them and also to the president of said company as to the said board shall appear proper.

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Route of Railroad. "6. AND BE IT ENACTED, That it shall be lawful for the said company to lay out and construct a railroad, not exceeding one hundred feet in width, from a point in the city of Newark, in the county of Essex, in this state, at or near Gouverneur street, in said city, to a point in the county of Hudson, where the said railroad may connect with the New Jersey Railroad and Transportation Company, or with some other railroad in said county of Hudson, running to the waters of the Hudson river, and may connect the same with the New Jersey Railroad and Transportation Company, and other railroads in the counties of Essex and Hudson, upon such terms as may be agreed upon, and for that purpose the said company may erect and maintain bridges over the Passaic and Hackensack rivers, the said bridges to be provided with draws at least seventy feet in width. 10

Opening of Draws. "7. AND BE IT ENACTED, That it shall be the duty of said company to keep or cause to be kept at such bridges careful persons, to open said draws for the free passage of vessels, day and night, and shall at night, during the period of navigation, cause to be kept lights at said draws, and for each neglect to open said draws, and keep said lights, the said company shall forfeit and pay the sum of fifty dollars, to be recovered in any court having jurisdiction thereof, by any person who may sue for the same, within three months after such neglect, but this section shall not be deemed to prevent the company from being liable for all damage which may be incurred by reason of such neglect. 20

May Enter on Lands. "8. AND BE IT ENACTED, That it shall be lawful for the said company, their agents, engineers, or others in their employ, to enter upon all lands and waters for the purpose of exploring, surveying, leveling, or laying the said route of said railroad, and to make and erect all necessary works therefor, doing no unnecessary injury to private property, and when the general route of said railroad shall have been determined on, and a survey of said route shall have been deposited in the office of the secretary of state, then it shall be lawful for said company or its servants to enter upon, take possession of, hold, use, occupy and excavate, any such lands, and to erect embankments, bridges and 30 40



all other works necessary to lay rails, and to do all other things which shall be suitable or necessary for the completion or repair of said road, subject to such compensation as is hereinafter provided; PROVIDED, that the payment or tender of the payment of all damages for the occupancy of lands through which the said railroad may be laid out, be made before the said company or its servants shall enter or break ground thereon, except for the purpose of surveying or laying out said road, unless the consent of the owner or owners of said land be first had and obtained.

Proceedings When  
Company and  
Owners of Land  
Cannot Agree.

“9. AND BE IT ENACTED, That when the said company or its agents cannot agree with the owner or owners of land or materials required for the use of said railroad, or when, by the legal incapacity or absence of such owner or owners, no such agreement can be made, a particular description of the land or materials so required for the use of the said company in the construction of said railroad, shall be given in writing, under the oath or affirmation of some engineer or proper agent of the company, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners, if known, and their residence, if the same can be ascertained, to one of the justices of the supreme court of this state, who shall cause the said company to give notice thereof to the persons interested, if known and in this state, to make publication thereof as he shall direct, for any time not less than six days, and to assign a particular time and place for the appointment of the commissioners hereinafter named, at which time, upon satisfactory evidence to him of the service and publication of such notice aforesaid, he shall appoint under his hand and seal three disinterested, impartial and judicious freeholders, resident in the county in which the lands or materials in controversy lie, or the owners reside, commissioners to examine and appraise the said land or materials, and to assess the damages, upon such notice, to be given to the persons interested, as shall be directed by the justice making such appointment, to be expressed therein, not less than six days; and it shall be the duty of said commissioners (having first taken and subscribed an oath or affirmation before some person duly authorized to administer an oath,



faithfully and impartially to examine the matter in question, and to make a true report according to the best of their skill and understanding), to meet at the time and place appointed, and proceed to view and examine the said land and materials, and to make a just and equitable estimate or appraisal of the value of the same, and assessment of damages aforesaid, which report shall be made in writing, under the hands and seals of such commissioners, or any two of them, and filed within ten days thereafter, together with the aforesaid description of the lands or materials, and the appointment, and oaths or affirmations aforesaid, in the clerk's office of the county in which the land or materials are situate, to remain on record therein; which report or a copy thereof, certified by the clerk of said county, shall at all times be considered as plenary evidence of the right of the said company, to have, hold, use, occupy, possess and enjoy the said land; and either of the justices of the said court shall, on application of either party, and on reasonable notice to the others, tax and allow such costs, fees and expenses to the justices, commissioners, clerks, and other persons performing any of the duties proscribed in this section, as he shall think equitable and just, and to order and direct by whom the same shall be paid.

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Proceedings in  
Case of Appeal.

“10. AND BE IT ENACTED, That in case the said company or owner or owners of the said land or materials, shall be dissatisfied with the report made by the commissioners named in the preceding section, the party so aggrieved may appeal to the circuit court of the county in which the land or materials lie, at the first term after filing of said report, by proceeding in form of petition to said court, which proceeding shall vest in said court full right and power, to direct a proper issue for the trial of the said controversy between the said parties, and order a jury to be empaneled and sworn, as in other cases, and a view of the premises, if either of the parties desire it, and the issue to be tried at the same term of said court to be holden in said county, upon like notice, and in the same manner as other issues in the said court are tried; and it shall be the duty of the jury to assess the value of said land and the damages sustained, and if they shall find a greater sum than the commissioners have awarded or the company have offered

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- to the said owner or owners, then judgment thereon, with costs, shall be entered against the said company and execution awarded thereon, and if said appeal shall be applied for by the owner or owners, and the jury shall find the same or a less sum than the commissioners awarded or the company offered, then the said costs shall be paid by the said applicant or applicants, and either deducted out of the said sum found by the said jury, or execution awarded therefor, as the court shall direct, and the sum awarded by the commissioners, or in case of an appeal from the award of the commissioners, then the sum assessed by the jury and such costs as the court shall direct, shall be paid by the company to the owner or owners of the land in controversy, but such application shall not prevent the company from taking the said land upon filing the aforesaid report, the value and damages being first paid, or upon a refusal to receive the same upon a tender thereof, or the owner or owners thereof being under legal disability, the same being first paid into the court of chancery; **PROVIDED**, that the taking by the
- 10
- 20 owner of the sum awarded by said commissioners, shall not preclude the taking of an appeal from said award, and in case the sum assessed by the jury shall be less than the award, then the company shall have judgment in their favor for the difference, and execution therefor.

- Bridges to Be Constructed and Kept in Repair. "11. AND BE IT ENACTED, That it shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad, where any public or other road shall cross the same, and to alter or grade the said roads, so that the passage of carriages, horses and cattle passing and repassing, shall not be impeded thereby, and also where the said railroad shall intersect any farm or land of any individual, to provide and keep in repair, suitable wagon ways over or under said railroad, so that the same may be conveniently passed.
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- Rates of Fare and Transportation. "12. AND BE IT ENACTED, That the president and directors of said company shall have the power to have constructed, or to purchase with the funds of the company, all machines, engines, wagons, carriages or vehicles, for the transportation of
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persons or any species of property on their railroad, as they may think fit, reasonable, expedient or right; Proviso.

PROVIDED, they shall not charge more than at the rate of six cents per mile for the transportation of property on the said railroad which is usually weighed by the ton, or three cents per mile for carrying each passenger on said railway.

Dividends.

“13. AND BE IT ENACTED, That the president and directors shall, within one year after the said railroad shall have been completed, declare and make such dividends as they may deem prudent and proper from the net profits thereof, and shall in like manner, semi-annually, thereafter, declare such dividends and pay the same to the stockholders of the said company, in proportion to the amount of shares held by them respectively, as they may deem prudent and proper. 10

Penalty for Injury to Property.

“14. AND BE IT ENACTED, That if any person shall wilfully impair, injure, destroy or obstruct the use of any railroad enjoyed under the provisions of this act, or any of their necessary works, wharves, bridges, carriages or machines, such person or persons so offending shall forfeit and pay to the said company the sum of fifty dollars, to be by them recovered in any court having competent jurisdiction in an action of debt, and further, shall be liable for all damages. 20

May Have and Hold Real Estate.

“15. AND BE IT ENACTED, That the said company may purchase, have and hold real estate at the termini of their railroad, and at any intermediate depots upon the line of the same, not exceeding five acres at each place; and may erect and build thereon such houses, warehouses, machine shops and other buildings and improvements as they may deem expedient for the safety of property, and the construction and repairing of cars, carriages, steam engines, and for other necessary uses. 30

Statement of Costs and Expenses to Be Made and Filed.

“16. AND BE IT ENACTED, That as soon as the said railroad or any part of it is in operation, the president of the said company, shall file under oath or affirmation a statement of the amount of the cost of the said railroad, including equipments, appendages, and all ex- 40



penses in the office of the secretary of state, and annually thereafter on the first Monday in January of each year; he shall under oath or affirmation, make a statement to the secretary of state, of the cost, equipments, appendages, and expenses of said road, and after the said railroad, or any part thereof shall be in operation, the said corporation shall pay to the treasurer of this state a State Tax. tax of one-half of one per cent. on the cost, equipments and appendages of said road, to be annually thereafter on the first Monday in January of each year, and such other taxes as may be assessed from time to time by a general law applicable to all railroads, over which the legislature shall have power for that purpose at the time of the passage of such law or laws, and until the said railroad or any part thereof shall be in operation, the said corporation shall be regularly assessed and pay tax for the value of its real estate, including improvements thereon and personal property as now taxed in the city or cities, township or townships wherein it lies, at the same time and rate, and in the same manner, for the same purpose, and by the same person or persons, as other taxes are assessed in said city or cities, township or townships, provided that no other tax or impost shall be levied or assessed upon said company.

May Borrow  
Money.

“17. AND BE IT ENACTED, That the said corporation shall have power to borrow such sum or sums of money, from time to time, as shall be necessary to build, construct or repair said road, and furnish the said corporation with all the necessary engines and machinery, for the uses and objects of the said company, and to secure repayment thereof by bond and mortgage, or otherwise, and the said road, land, privileges, franchises and appurtenances, of or belonging to said corporation, at a rate of interest not exceeding seven per centum per annum; PROVIDED, that it shall be lawful for the said company to plead any statute or statutes of this state against usury in any court of law or equity, in any suit instituted to enforce the payment of any bond or mortgage executed under this section.



Legislature May  
Elect to Take  
Road at an  
Appraised Value.

“18. AND BE IT ENACTED, That at any time after the expiration of thirty years from the completion of the said road, the legislature of this state may cause an appraisement of the said road and the appendages thereof, to be made by six persons, three of whom shall be appointed by the chief justice of this state for the time being, the remaining three by the company, who, or a majority of them, shall report the value thereof to the legislature within one year from the time of their appointment, or, if they cannot agree, they shall choose a seventh, who, with the aforesaid six, or any three of the said six, shall report as aforesaid, or in case the said company shall neglect or refuse to appoint the said three persons on their part for two months after their said appointment by the said chief justice, then the three persons so appointed by him shall proceed to make such appraisement, which shall be binding on said company; or in case the said six commissioners shall be appointed as aforesaid, and they cannot agree on the seventh man, then, upon two weeks' notice to the said company, the said chief justice shall appoint such seventh man as aforesaid, to make such appraisement as aforesaid, and, thereupon, the state shall have the privilege, for three years, of taking the said road upon payment to the company of the amount of the said report within one year after electing to take the said road; which report shall be filed in the office of the secretary of state, and the whole property and interests of said railroad, and the appendages thereof, shall be vested in the state of New Jersey upon the payment of the amount so reported to the said company; PROVIDED the sum so to be paid shall in no case exceed the original cost of said road; and that it shall be the duty of the president of the company to lay before the legislature, under oath or affirmation, when they shall so request, a full and fair statement of the cost of said road, and of all the receipts and disbursements of the company.

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Persons Who May  
Ride Free.

“19. AND BE IT ENACTED, That the governor, the chancellor, the justices of the supreme court and the judges of the court of errors of this state, whilst travelling for the purpose of discharging the duties of their offices, and the members and officers of both houses of the legislature of this state, dur-

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ing the year or years for which they are elected, shall pass and repass on said railroad, in the cars, free of charge.

“20. AND BE IT ENACTED, That this act may be altered, amended or repealed whenever the legislature may deem the public good requires the same.

10 “21. AND BE IT ENACTED, That this act shall be a public act, and shall take effect immediately.  
“Approved March 17, 1870.”

P. L. 1871, page 302.

**A Supplement to an Act Entitled “An Act to Incorporate  
the Newark and Hudson Railroad Company,”**

**Approved March Seventeenth, One Thou-  
sand Eight Hundred and Forty.**

20

May Take 200  
Feet of Land.

“1. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That where it shall be necessary for said railroad to locate their line over lands where the cutting or filling shall require a greater width than one hundred feet, the said company shall have power to take such land, not to exceed two hundred feet in width, as may be necessary for a double track with slopes and berms.

Act May Be  
Revised.

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“2. AND BE IT ENACTED, That the said Company shall pay into the Treasury of the State of New Jersey the fees required by law to be paid for the passage of the act to which this is a supplement, and that upon such payment being made, the said act and the proceedings already taken under it shall be and continue in full force and effect.

Public Act.

“3. AND BE IT ENACTED, That this act shall be a public act, and take effect immediately.  
“Approved February 22, 1871.”

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*Memorandum of Vice-Chancellor.*

IN CHANCERY OF NEW JERSEY.

*Between*

THOMAS F. McCran, Attorney General of the State of New Jersey,  
*Informant,*

*and*

ERIE RAILROAD COMPANY, *et als.,*  
*Defendants.*

10

**MEMORANDUM.**

Filed January , 1922.

On information, pleadings and proofs.

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Mr. Thomas F. McCran, Attorney General, and Mr. Harrison P. Lindabury, special counsel, for informant.

Messrs. Collins & Corbin, by Mr. Robert J. Bain, for defendants, Erie Railroad Company and Newark and Hudson Railroad Company.

Mr. Clyde D. Souter, for defendant, Town of Kearny.

LEWIS, V.-C.:

This case comes before the Court upon an information filed by the Attorney General of the State of New Jersey to enjoin the Newark and Hudson Railroad Company and the Erie Railroad Company, its lessee, and the Director General of Railroads (the railroads then being operated by the United States Railroad Administration), from building a bridge for their tracks across the Passaic River, between the City of Newark and the Town of Kearny, a short distance north of the railroad bridge theretofore in use for that purpose. The injunction was sought upon the ground that the bridge, as planned,

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*Memorandum of Vice-Chancellor.*

would occupy certain of the riparian lands belonging to the State, without that right having been granted by the appropriate State officers; and without compensation to the State having been made therefor. An order to show cause with *ad interim* restraint was allowed, but upon the preliminary hearing the temporary restraint was vacated,  
 10 and the railroads were permitted to proceed with the construction of the bridge upon their paying into court the sum of \$11,372.42, which was the amount fixed by the Board of Commerce and Navigation as the price that should be paid for the riparian lands occupied by the new structure, and for the permission to build the bridge. The deposit thus exacted was paid into court and the building of the bridge was proceeded with, the necessary approval by the Secretary of War having been obtained, as provided by the Act of Congress pertaining thereto.

20 The railroad companies answered setting up their right to build the bridge and use such riparian lands as were necessary therefor, without compensation to the State, by virtue of their charter and of the General Railroad Act of 1903. They also set up that some part of the riparian lands for which the State demanded compensation were claimed by the Town of Kearny, and that, therefore, they could not safely pay compensation to the State. The Newark and Hudson Railroad Com-  
 30 pany also filed with its answer a counter-claim against the Town of Kearny, specifying the lands claimed by both the State and the town, so that the respective claims might be determined and the compensation, if any, fixed.

The town answered the railroad company's counter-claim and set up its claim to the lands involved. It also, in turn, counter-claimed against the railroad companies for the purpose of enjoining the building of the new bridge, unless it was so constructed as to provide  
 40 a passageway for pedestrians over it, claiming that the



*Memorandum of Vice-Chancellor.*

public had acquired a prescriptive right to such a passageway over the old bridge, which should be transferred to the new bridge. It also asserted that the consent of the town to the construction of the new bridge, pursuant to Chapter 152, Laws of 1917, the Home Rule Act, had not been obtained.

A preliminary order, with temporary restraint, was made on this counter-claim of the Town of Kearny, but upon the hearing the restraint was discharged, except as to interference with a sewer of the town on certain of the lands to be occupied by the bridge; and the town was enjoined from interfering with the building of the new structure.

The railroads denied the prescriptive right to the passageway over the bridge, and the necessity for the consent of the town under the Home Rule Act or otherwise.

The proofs show that there will be no interference with the sewer of the Town of Kearny by the new bridge. A very small part of the town's land immediately adjoining the right of way of the railroad on the north, will be taken for the new structure. The town concedes that it does not own the riparian lands, but contends that it should be compensated for the small portion of its own land which has been actually taken. The town also concedes, that should the Legislature direct the removal of the old bridge, its alleged prescriptive right to the passageway over it would terminate with the rights of the railroad, but insists that so long as the bridge remains, the alleged prescriptive right in the bridge continues.

The State concedes that the railroads have the right to occupy the riparian lands without compensation, so far as the original bridge is concerned, under the charter



*Memorandum of Vice-Chancellor.*

of the Newark and Hudson Railroad Company, which provides:

10        "It shall be lawful for the said company to lay out and construct a railroad \* \* \* and for that purpose the said company may erect and maintain bridges over the Passaic and Hackensack Rivers."

And that such has been the construction of similar grants, where the question has arisen, by the courts.

*P. R. R. Co. v. N. Y. & L. B. R. R. Co.*, 23 N. J. Eq., 157;

*Attorney General v. E. J. Water Co.*, 78 N. J. Eq., 329;

*Allen v. Jersey City*, 53 N. J. Law, 522;

*Am. Dock, etc., Co. v. Trustees, etc.*, 12 Stewart 409, at 425.

20        It is the State's contention, however, that the railroad's right to thus occupy riparian lands without compensation was exhausted with the location of its right of way and construction of its original bridge; and that compensation must now be made to the State for whatever riparian lands are acquired for the purpose of the new structure; that the railroad cannot claim the implied right to the gratuitous acquisition of riparian lands for bridges to such extent and at such locations as may suit  
30        its pleasure or desire; that it must pay the State for whatever riparian lands it now takes and occupies for the new structure.

In support of this contention it relies upon the provisions of the General Railroad Acts of 1873 and of 1903, both of which, however, were enacted subsequent to the charter of the Newark and Hudson Railroad Company, which became effective March 17, 1870.

40        It is true that this charter is subject to alteration, amendment or repeal, by virtue of Section 20 thereof;



*Memorandum of Vice-Chancellor.*

but the railroads urge that the general provisions of the Railroad Acts of 1873 and 1903, do not have the effect of altering, amending or modifying the provisions of the special charter of 1870.

Section 16 of the Act of 1903 (P. L. 1903, p. 465) contains this proviso:

“Provided that such company shall not take any  
land under water belonging to this State until the  
consent of the Riparian Commissioners shall first  
be had and obtained (unless the said land is at  
least 25 feet under the bed of the water) who are  
hereby authorized to convey same on receiving such  
compensation as they may fix.” 10

By Section 88 of the Act of 1903, the Act is made to  
apply to all railroad companies, however formed, created  
or organized under any law of this State, and by Section  
89, all Acts and parts of Acts, general and special, in- 20  
consistent with this Act, are repealed.

The theory, therefore, upon which the State bases its  
present claim to compensation for the riparian lands oc-  
cupied by the new structure is, that the General Railroad  
Act of 1903, requiring compensation, has intervened to  
abrogate the implied gratuitous grant in the charter of  
1870; and that even though this effect has not resulted,  
the railroad companies are no better off under the charter,  
because they have exhausted the gratuitous right on the 30  
first location, and must now make compensation on the  
taking of the riparian lands for the new structure.

The fallacy in the second phase of the State's theory,  
it seems to me, is this: that by the change of location of  
the new bridge, and the consequent shifting of the posi-  
tion of the line of the railroad, the old structure will  
pass away, leaving the riparian lands, heretofore occupied  
by it, to the State, for future disposition. The railroad  
takes, in the new location, simply the equivalent of what it 40



*Memorandum of Vice-Chancellor.*

abandons in the old; and the State receives in the old location the equivalent of what is taken in the new. If the railroads must now pay the State for what they take in the new location, the State, upon ultimately disposing of what is left in the old, will receive double compensation. I feel, therefore, that the State is made whole and  
 10 loses nothing by the change in location.

But aside from this, it seems to me that the general provisions of the Act of 1903 are not to be taken as abrogative of the special grants of the charter of 1870 (P. L. 1870, p. 1274).

*North Hudson County Railway Co. v. Hoboken,*  
 41 N. J. Law, 71,

where the Court said that:

20 “No canon of construction is more firmly established than that a general statute will not supersede or repeal a statute conferring special privileges unless there be clear language expressive of such an intent.”

See also:

*West Jersey Traction Co. v. Camden Horse R. R. Co.,* 52 N. J. Eq., 452,

where Vice-Chancellor Pitney said:

30 “The Act of March 14, 1893, does not attempt to resume any previously granted franchise, to repeal any charter, or in anywise to interfere with the chartered rights of any corporation already existing. There is not in it a word indicating an intention to interfere with any vested rights, or to stop any enterprise in course of execution. Such intent will not be inferred unless plainly declared.”

The State, therefore, is not entitled to receive the \$11,372.42 paid into court by the railroads upon the preliminary hearing.



*Memorandum of Vice-Chancellor.*

There is no evidence determinative of the value of the small part of the small tract of land of the Town of Kearny, occupied by the new structure; and it seems to me, in any event, that whatever compensation the town should receive for the land so taken, and for damages, is a matter to be disposed of by condemnation, pursuant to the provisions of the charter of 1870 of the Newark and Hudson Railroad Company. This Court will not now interfere with the structure that has been erected upon those lands, either because the preliminary steps in the condemnation have not been taken or because the consent of the town, even if required, as contended, was not obtained. 10

So far as the alleged prescriptive right to the use of the bridge by pedestrians is concerned, I feel that the right to cross the bridge has not been established, although it has been in use by the public for many years. There were signs on the bridge forbidding them to cross. 20

Furthermore, the use referred to was unlawful. Section 55 of the Railroad Act (Comp. Stat. p. 4255) provides that:

“It shall not be lawful for any person other than those connected with, or employed upon, the railroad, to walk along the tracks of any railroad except when the same shall be laid upon a public highway.” 30

At most, the use of the foot-path, primarily provided for the convenience of the railroad employees, was permissive only as to others. If originally permissive it could not ripen into a prescriptive right.

*Penn. R. R. Co. v. Hulse*, 59 N. J. Law, 54.

A mere passive acquiescence by an owner in a certain use of his land by others, involves no liability.

*Dieckman v. D., L. & W. R. R. Co.*, 81 N. J. Law, at p. 463. 40



*Memorandum of Vice-Chancellor.*

Both the unlawfulness of the use under Section 55 of the Railroad Act, and the signs forbidding the use, placed on the bridge, repel the presumption of an intention on the part of the railroad to subject its fee to the public use.

*Wood v. Hurd*, 34 N. J. Law, 87.

10        "There is nothing in mere user without objection, to constitute an invitation."

*Drelich v. Erie R. R. Co.*, 91 N. J. Law, 600, and cases cited.

20        As to whether a railroad right of way, which is a public highway for the purposes to which it is devoted, is subject to the burden of a grant to a dominant user longitudinally or the prescriptive right based upon such a presumed grant, seems not to have been specifically adjudicated in this State, although it was considered by the Supreme Court in *P. R. R. v. Hulse*, 59 N. J. Law, 54 (*supra*); and by the Court of Errors and Appeals in *Dickinson v. D., L. & W. R. R. Co.*, 87 N. J. Law, 264.

30        But it seems plain, however, that an easement cannot be acquired by the public longitudinally along the railroad right of way by user, particularly in cases where such user, except at the point indicated by the statute, is unlawful, and where the railroad company plainly indicates by signs that the passageway is not a public thoroughfare. A railroad company ought not to be obliged to patrol its tracks from one end to the other to keep off trespassers, and to prevent those who use it longitudinally from claiming a prescriptive right or license, on the ground of acquiescence.

*Elliott on Railroads*, 2nd Ed., Vol. III, Sec. 1250, p. 589.

40        In *Brooks v. P. R. R. Co.*, 92 N. J. L., 394, it was contended that a user by prescription had been established across certain railroad tracks. The testimony upon this



*Memorandum of Vice-Chancellor.*

point was summed up by the statement of a certain witness who testified that "You would come down the street or go up the street and walk right across the railroad tracks you found there." The Court of Errors and Appeals, in holding that no prescriptive right was thereby acquired to cross the tracks, so as to impose a duty upon the railroad to warn persons thus proceeding when trains approached, said: 10

"The testimony goes no further than to show such crossing of a railroad track as is common. Probably as strong a case could be made to establish a highway by user at every rod of the railroad, certainly every rod in populous communities where the tracks are anywhere near grade. Such user, if known to the railroad company, is permissive, not under claim of right, and, therefore, not adverse; \* \* \* "

20

" 'Relying for right of way on use, the right could not extend beyond the use, or as it has been expressed "If the right of way depends solely upon user then the width of the way, and the extent of the servitude is measured by the character of the user; the easement cannot be broader than the user." *District of Columbia v. Robinson*, 180 U. S., 92, 100.' "

Even assuming *arguendo* that a prescriptive right to the foot-path across the bridge had been established over the old bridge, I do not see how that could be transferred to the new structure at an entirely different location, and to say that the railroad company should be put to the burden of maintaining the old bridge after it had ceased to use it for its railroad purposes simply for the use of pedestrians who had assumed to use the foot-path across it, contrary to law, and to the express prohibition of the railroad, would seem to me to be absurd. 30

I will advise a decree in accordance with these views. 40



*Final Decree.*

**FINAL DECREE.**

Filed September 25, 1922.

This cause coming on to be heard, together with the causes alleged in two counter-claims filed therein, one by the Newark and Hudson Railroad Company, defendant, 10 against The Town of Kearny, a municipal corporation, third party, and the other by said Town of Kearny against said Erie Railroad Company, Newark and Hudson Railroad Company, and the Director General of Railroads, defendants, in the presence of Harrison P. Lindabury, of counsel with said informant, Robert J. Bain, of cotunsel with said Erie Railroad Company, Newark and Hudson Railroad Company and the Director General of Railroads, defendants, said Newark and Hudson Railroad Company being also complainant as aforesaid, and Clyde 20 D. Souter, of counsel with said Town of Kearny, defendant and complainant as aforesaid; and said Director General of Railroads having been succeeded by James C. Davis, agent designated by the President of the United States under section 206 of an Act of Congress approved on February 28, 1920, known as the "Transportation Act, 1920"; and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard, and the Court having duly considered said pleadings, proofs and arguments; and it appearing to the 30 Court that said informant is not entitled to the relief sought and prayed for by him in his information; and it also appearing that said Town of Kearny has no right, title or interest, as against said Newark and Hudson Railroad Company, in and to certain lands and premises in said Town of Kearny described in the counter-claim of said Newark and Hudson Railroad Company against said Town of Kearny, which have been occupied and used for the purposes of the new bridge mentioned and described in said information and several counter-claims, 40



*Final Decree.*

except such part thereof as was back of the original high water line of the Passaic River, which said Newark and Hudson Railroad Company and said Town of Kearny, by their respective solicitors, have agreed has a value of \$25 for the purpose of fixing the compensation to be paid therefor by said Newark and Hudson Railroad Company to said Town of Kearny in this cause; and it also appearing that said new bridge will not interfere with a certain sewer constructed and now used by said Town of Kearny on said lands and premises; and it also appearing that said Town of Kearny is not entitled to the relief sought and prayed for by it in its counter-claim against said Erie Railroad Company, Newark and Hudson Railroad Company and the Director General of Railroads: 10

It is on this                      day of                      One Thousand Nine Hundred and Twenty-two, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, that the information in said cause be and the same is hereby dismissed: 20

And it is further ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this Court, does hereby ORDER, ADJUDGE and DECREE, that said Town of Kearny has no right, title or interest, as against said Newark and Hudson Railroad Company, in and to the lands and premises in said Town of Kearny described in the counter-claim of said Newark and Hudson Railroad Company against said Town of Kearny, except such part thereof as was back of the original high water line of the Passaic River described as follows: 30

Beginning at a point in the present northerly right of way line of the Newark & Hudson Railroad Company, said point being distant forty-two (42) feet measured along said right of way line in a northwesterly direction from the intersection of said right of way line with the westerly line of Passaic avenue; thence along said right of way line North fifty-three degrees (53°) forty-one minutes 40



*Final Decree.*

(41') West a distance of fifteen (15) feet to the original high water line of the Passaic River; thence in a north-easterly direction along said high water line a distance of four (4) feet more or less to a point; thence South forty six degrees (46°) nineteen minutes (19') East a distance of twelve (12) feet to the point or place of beginning containing twenty (20) square feet more or less.

10. And it is further ORDERED, ADJUDGED and DECREED that the compensation to be paid by said Newark and Hudson Railroad Company to said Town of Kearny for said lands and premises owned by it as aforesaid, be and it hereby is fixed at the sum of Twenty-five Dollars (\$25):

And it is further ORDERED, ADJUDGED and DECREED that the counter-claim of said Town of Kearny against said Erie Railroad Company, Newark and Hudson Railroad Company and the Director General of Railroads, be and the same is hereby dismissed:

20. And it is further ORDERED and DECREED that the clerk of this court shall forthwith pay to said Newark and Hudson Railroad Company the sum of \$11,372.42 deposited by it, or the Director General of Railroads, with said clerk pursuant to an order made in said cause on July 8, 1919, together with any and all accumulations of interest thereon.

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed October 23, 1922.

Thomas F. McCran, Attorney General of the State of New Jersey, the above-named informant, hereby appeals from that part of the final decree made in this Court on the twenty-fifth day of September, 1922, dismissing the information. 10

Dated, October 2, 1922.

THOMAS F. McCRAN,  
*Solicitor for Informant-Appellant.*

I conceive there is good cause for appeal in the above-stated cause.

HARRISON P. LINDABURY,  
*Of Counsel.* 20



*Petition of Appeal.*

**PETITION OF APPEAL.**

Filed October 24, 1922.

**New Jersey Court of Errors and Appeals**

10

*Between*

THOMAS F. McCran, Attorney General of the State of New Jersey,  
*Informant-Appellant,*

*and*

ERIE RAILROAD COMPANY, THE NEWARK AND HUDSON RAILROAD COMPANY, and the DIRECTOR GENERAL OF RAILROADS, *et als.*,

20

*Defendants-Respondents.*

*Petition.*

*Appeal from Decree*

*Advised by Vice-Chancellor Lewis.*

*To the Honorable Court of Errors and Appeals in the last resort in all causes:*

30 The petition of Thomas F. McCran, Attorney General of the State of New Jersey, appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the twenty-fifth day of September, 1922, wherein the said Thomas F. McCran, Attorney General of the State of New Jersey, was the informant, and the said Erie Railroad Company, The Newark and Hudson Railroad Company and the Director General of Railroads, *et als.*, were defendants, in this respect, to wit:



*Petition of Appeal.*

That the said decree adjudges in the first paragraph of the ordering part of the said decree, as follows:

“It is, on this twenty-fifth day of September, one thousand nine hundred and twenty-two, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, that the information in said cause be, and the same is hereby dismissed.” 10

And your petitioner appeals from the said part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have ordered that certain riparian land which the defendants required for their exclusive use and occupation in the construction of a new railroad bridge across the Passaic River, between Kearny in the County of Hudson, and Newark, in the County of Essex, was the property of the State of New Jersey, appropriated to the support of free public schools, and could not be taken for such sole and exclusive use without making compensation for such riparian lands. 20

Your petitioner therefore prays, that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

THOMAS F. McCRAN, 30  
*Attorney General.*

By H. P. LINDABURY,  
*Special Counsel.*



*Answer to Petition of Appeal.*

**ANSWER TO PETITION OF APPEAL.**

Filed 1922.

The answer of ERIE RAILROAD COMPANY and NEWARK and HUDSON RAILROAD COMPANY, above-named respondents to the petition of appeal of the above-named appellant.

- 10 These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the 25th day of September, 1922, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the part of
- 20 said decree mentioned in said petition of appeal is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

COLLINS & CORBIN,

*Solicitors for and Counsel with Erie Railroad Company and Newark and Hudson Railroad Company, Respondents.*



*Answer to Petition of Appeal.***ANSWER TO PETITION OF APPEAL.**

Filed 1922.

The answer of JAMES C. DAVIS, agent designated by the President of the United States under Section 206 of an Act of Congress approved on February 28, 1920, known as the "Transportation Act, 1920," successor of the Director General of Railroads, above-named respondent, to the petition of appeal of the above-named appellant. 10

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the 25th day of September, 1922, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the part of said decree mentioned in said petition of appeal is agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this respondent. 20

COLLINS & CORBIN,  
Solicitors for and of Counsel with  
the Above-named Respondent. 30



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

## New Jersey Court of Errors and Appeals

*Between*

THOMAS F. McCran, Attorney General of the State of New Jersey,  
*Informant-Appellant,*

*and*

ERIE RAILROAD COMPANY, NEWARK  
AND HUDSON RAILROAD COMPANY,  
and the DIRECTOR GENERAL OF  
RAILROADS, *et als.*,  
*Defendants-Respondent.*

*On Information, etc.*

Advised by  
Lewis, V. C.,  
Dismissing the  
Information.

### BRIEF FOR INFORMANT-APPELLANT.

The Newark and Hudson Railroad Company claims the right to build a railroad bridge across the Passaic River, to be located in part outside of its original right-of-way, on riparian lands of the State, basing the right on its charter obtained in 1870.

The State contends that the Railroad Company, having built a bridge at the location shown on its adopted route, filed with the Secretary of State, on May 27, 1871, exhausted its power, as to location and cannot now build such a bridge at a location outside the right-of-way so adopted without further authority from the Legislature. The Railroad was successful in the lower court.

By act of the Legislature of the State of New Jersey approved March 17, 1870, Session Laws of the year 1870, page 1274, the Newark and Hudson Railroad Company was chartered. In the following year there was a supplement to this charter approved February 22, 1871, found at page 302 of the Session Laws of 1871, which were offered in evidence and will be found in the record at page 110. Sections 6 and 8 of the charter are impor-



tant. The Newark and Hudson Railroad Company prepared a survey of its route and filed a map thereof with the description of the route set forth thereon with the Secretary of State, pursuant to the provisions of Section 8 of the Charter, which map was offered in evidence as "Exhibit B. 4," a copy of which is attached to the record.

The location of the route of the Railroad as authorized by Section 6 of the Charter is definitely fixed as running from a point in the City of Newark, near Gouverneur Street, to a point in the County of Hudson, where said Railroad may connect with the New Jersey Railroad & Transportation Company or some other railroad in said County of Hudson running to the waters of the Hudson River, and may connect the same with the New Jersey Railroad and Transportation Company and other railroads in the Counties of Hudson and Essex, and for that purpose the Company was authorized to erect and maintain bridges over the Passaic and Hackensack Rivers.

By the description of the route as set forth on the survey filed in the office of the Secretary of State, pursuant to the provisions of the act (Exhibit B. 4), which was filed with the said Secretary of State on May 27, 1871, the beginning point is given as a stake on the depot grounds of the Paterson and Newark Railroad, corner of Fourth Avenue and Passaic Street, in the City of Newark.

The Newark and Hudson Railroad Company was built pursuant to this plan or route so filed with the Secretary of State (Book, p. 67, l. 38) and (Book, p. 68, ll. 1-12), and runs from the west end of the Bergen Tunnel to a point near Gouverneur Street in the City of Newark, about 104 feet west of Fourth Avenue, Newark, N. J., (Book, p. 64, l. 35) and connects with the Paterson & Newark Railroad in the City of Newark (Book, p. 65, l. 13). A bridge was constructed across the Passaic River between Kearny and Newark, which is located on the site as proposed on the survey filed with the Secretary of State in 1873.



The Newark and Hudson Railroad Company now finds it necessary to replace this bridge with a new structure of a more modern type, and of a sufficient strength to carry the trains of the present day, such proposed bridge to be located across the Passaic River northwardly of the original structure connecting with the original route near the bank of the River on the Kearny side, and extending in a curve northwardly to a point on the Paterson and Newark Railroad on the Newark side of the River, which new construction is designated as "Branch B" of the Newark and Hudson Railroad, and is particularly described in "Exhibit B. 2" appearing at page 100 of the record, and is shown on a map with a plan of the new bridge and its relation to the old structure as to location as "Exhibit B. 4½" attached to the record. The original bridge now to be replaced by the new structure was completed some time prior to October 1872, as in that year a suit was instituted against the Newark and Hudson Railroad Company to recover the cost of the construction of that bridge, the transcript of the record of that suit being given as "Exhibit B. 3" appearing at pages 103-110 of the record.

Application was made to the Board of Commerce and Navigation as the authorized agent of the State of New Jersey, for a permit to build the new bridge, but this permit was refused because the new structure would occupy riparian lands belonging to the State of New Jersey which had been appropriated to the support of free public schools, which riparian lands lie under the waters of the Passaic River outside of the original right-of-way or route of the Newark and Hudson Railroad. (Book, p. 58, l. 10, and p. 61, l. 18.)

An application was made by the Railroad Company for the riparian lands needed for the new structure, and a price was fixed by the Board of Commerce and Navigation and accepted by the Railroad Company. Thereafter the plans were modified, resulting in a relocation of the



bridge as shown on "Exhibit B. 4½," which would occupy a less area of riparian lands; the Railroad Company withdrew its application for a riparian grant, and asserted a right to build said bridge at the proposed location by virtue of its original charter and without being required to pay the State for the additional lands so to be occupied.

By the modified plans, the additional occupation of riparian lands along the bulkhead line being reduced, the price therefore was reduced by the Board of Commerce and Navigation and fixed at the sum of \$11,372.42 as the reasonable value therefor. Claiming the right to locate its bridge at the proposed new site by virtue of the authority given in the original charter and without the necessity of making compensation for the riparian lands so occupied, the Company started its building operations, whereupon when this information was filed an order to show cause with temporary restraint was granted, and by an order made on the 8th day of July 1919, this order to show cause and the restraint were discharged upon the Newark and Hudson Railroad Company depositing with the Clerk of the Court of Chancery \$11,372.42, such moneys to be held by the Clerk of the Court of Chancery until it was determined whether or not the Newark and Hudson Railroad Company was required to make compensation for the lands so proposed to be occupied.

All of these facts were set up by appropriate allegations in the information, and upon hearing before Vice-Chancellor Lewis, he concluded that the State was not entitled to receive the sum of \$11,372.42 paid into Court by the Newark and Hudson Railroad Company (Book, pp. 111-119), and by decree the information was dismissed. (Book, p. 121, l. 18.)

From this decree an appeal was taken praying that the same be reversed upon the ground that the Court erred in making the decree, in that these riparian lands so to be occupied by the new railroad bridge were the



property of the State of New Jersey appropriated to the support of free public schools and could not be taken for such sole and exclusive use without making compensation for the same.

## **POINTS.**

### **Point I.**

That the Newark and Hudson Railroad Company, having located and built its railroad under and by virtue of the Charter of 1870, as supplemented by the Act of 1871, exhausted its power and could not change its railroad to any degree which might require relocation outside of the old right-of-way without additional authority from the Legislature.

### **Point II.**

That the only authority for building Branch B as proposed, is found in the General Railroad Act of 1903, which specifically requires compensation to be made for any riparian lands taken and occupied.

### **Point III.**

That even though the original charter as supplemented authorized the occupation of more lands than were taken and occupied at the time the road was located and built, the Railroad Company may not now increase its occupation, as the right originally possessed, but not exercised, has been lost through non user.

### **Point IV.**

The Railroad has lost any right it may have had to occupy additional riparian lands by virtue of the Act of 1894 appropriating all riparian lands to the State for the support of free public schools.



## POINT I.

That the Newark and Hudson Railroad Company, having located and built its railroad under and by virtue of the Charter of 1870, as supplemented by the Act of 1871, exhausted its power and could not change its railroad to any degree which might require relocation outside of the old right-of-way without additional authority from the Legislature.

The Newark and Hudson Railroad Company claims the right to build the new bridge at the proposed location by virtue of the authority contained in its charter. The power of the Company to take and occupy land for the purpose of constructing a railroad so far as given by its charter will be found in Sections 6 and 8 (Session Laws of 1870, 1274, at p. 1276), as follows:

## Section 6.

*"And be it enacted,* That it shall be lawful for the said company to lay out and construct a railroad, not exceeding one hundred feet in width, from a point in the City of Newark, in the County of Essex, in this state, at or near Gouverneur Street, in said city, to a point in the county of Hudson, where the said railroad may connect with the New Jersey Railroad and Transportation Company, or with some other railroad in said County of Hudson, running to the waters, of the Hudson river, and may connect the same with the New Jersey Railroad and Transportation Company, and other railroads in the counties of Essex and Hudson, upon such terms as may be agreed upon, and for that purpose the said company may erect and maintain bridges over the Passaic and Hackensack rivers, the said bridges to be provided with draws at least seventy feet in width."

## Section 8.

*"And be it enacted,* That it shall be lawful for the said company, their agents, engineers, or others in their employ, to enter upon all lands and waters for the purpose of exploring, surveying, leveling, or laying the said route of said railroad, and to



make and erect all necessary works therefor, doing no unnecessary injury to private property, and when the general route of said railroad shall have been determined on, and a survey of said route shall have been deposited in the office of the secretary of state, then it shall be lawful for said company or its servants to enter upon, take possession of, hold, use, occupy and excavate, any such lands, and to erect embankments, bridges, and all other works necessary to lay rails, and to do all other things which shall be suitable or necessary for the completion or repair of said road, subject to such compensation as is hereinafter provided; *provided*, that the payment or tender of the payment of all damages for the occupancy of lands through which the said railroad may be laid out, be made before the said company or its servants shall enter or break ground thereon, except for the purpose of surveying or laying out said road, unless the consent of the owner or owners of said land be first had and obtained."

And in the supplement to the original charter, as contained in the Session Laws of 1871, page 302, which reads:

"1. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That where it shall be necessary for said railroad to locate their line over lands where the cutting or filling shall require a greater width than one hundred feet, the said company shall have power to take such land, not to exceed two hundred feet in width, as may be necessary for a double track with slopes and berms."

The extent of the authorized occupation under these sections is limited to a right-of-way extending from a point in the City of Newark, County of Essex, at or near Gouverneur Street to a point in the County of Hudson, where the said railroad may connect with the New Jersey Railroad and Transportation Company, or some other railroad in said County of Hudson, running to the waters of the Hudson River, with power to connect the same with the New Jersey Railroad and Transportation Company



and other railroads in the Counties of Hudson and Essex, with the further power to erect and maintain bridges over the Passaic and Hackensack Rivers containing suitable draws.

In the original Act, the width of the right-of-way is limited to one hundred feet; by Section 1 of the supplement the width is increased not to exceed two hundred feet where necessary, because of cuts, fills, or for a double track with slopes and berms.

The exact location of this route is not fixed, except as to the terminal points, but Section 8 of the chapter contains a provision which upon compliance makes definite the location of the route, by requiring that the general route shall be surveyed and deposited in the office of the Secretary of State of New Jersey. A map of this railroad route, as required by Section 8, was filed with the Secretary of State of New Jersey on May 27, 1871 (Exhibit B. 4), and by description of the route as set forth thereon the Newark terminal is fixed as beginning at a stake on the depot grounds of the Paterson and Newark Railroad, corner of Fourth Avenue and Passaic Street in the City of Newark, which point is near Gouverneur Street, about 104 feet west of Fourth Avenue (Record, p. 64, l. 35), and the road was actually built according to this map as filed with the Secretary of State in 1871. (See testimony of Walter M. Dawley, pp. 64-68.) The Newark and Hudson Railroad Company has never had but one bridge over the Passaic River (Record, p. 66, l. 8), and that bridge was the bridge as shown upon the original route of the railroad as filed with the Secretary of State when the road was built (p. 68, ll. 1-12).

The new bridge proposed, located northwardly of the old bridge, forms a connecting link with the Newark and Paterson Railroad in the City of Newark, with which railroad the Newark and Hudson Railroad Company connected when built according to its original route so filed (Record, p. 65, l. 15), and although the new construction



is designated as branch "B" it is not a branch in fact, but is a relocation of the right-of-way.

The decisions do not support the contention of the Railroad Company.

*Lusby v. Kansas City, &c., R. R. Co.*, 36 L. R. A. 510 (73 Miss. 360, 1896).

Due to various suits for injuries to lands and crops because of improper construction of railroad, the Railroad Company sought to resurvey and relocate their line, claiming the right to do so under their charter, which provided, among other things:

Sec. 2. "The purposes for which said corporation is formed are the construction, maintenance and operation of a line of railroad, with one or more tracks, and a telegraph line in connection therewith, extending from some point in DeSoto County on the boundary line between this state and the state of Tennessee, thence through and across the state of Mississippi in a southeasterly direction to a point in the boundary line between this state and the state of Alabama, and running in the general direction of the city of Birmingham in the last named state \* \* \*. And for the purpose aforesaid, said corporation is hereby vested with power \* \* \*. (2) To cause such examination and survey for its proposed railroad and telegraph line and branches to be made as may be necessary for the selection of the most advantageous route, and for such purpose, by its officers, agents, or servants, to enter upon the land or waters of any persons; but shall be liable for all damages that may be done thereto by reason thereof \* \* \*. (4) To lay out its roads and branches not exceeding 100 feet in width and to construct the same; and for the purpose of cutting and embankments to take as much more land as may be necessary for the proper construction and security of its road and telegraph line, and to cut down any standing tree that may be in danger of falling thereon, making compensation as hereinafter provided for land, taken for the use of the company."



Sec. 6. "So soon as the corporation shall have located its line or lines of railroad or branches authorized by this act, it shall make and file in any office of the Secretary of State a map showing the general route thereof \* \* \*."

Sec. 7. "That the right of way is hereby granted to said company to pass in and through the state of Mississippi, and to enter upon and use, in a continuous width of 100 feet, all such lands belonging to the state which may be found on the route of said railroad company, and the title to such right-of-way shall vest in said company, its successors and assigns, and said company is hereby authorized to enter upon and appropriate all such lands or material as may be private property which may be convenient or necessary for said road, together with not exceeding 50 feet on either side of the center of such road, branches, sidings, switches, and turnouts, and in case the company fails to agree with the owner of such lands or materials upon the price to be paid for the fee simple thereto, or in case the owner is under any disability in law to contract, or is absent from the county where such land or material is situated, or is unknown, the company may proceed to condemn such land or materials as hereinafter provided."

The 8th and 9th sections of the charter then proceed to provide the mode of condemnation in such cases as are referred to in section 7.

The question was: Was the original selection and location of the route and the actual construction of the railroad in its entirety, many years ago, final, and was the power to exercise the right of eminent domain exhausted by the one exercise of it, in such original selection and location of the route and the actual construction of the road? The court held:

"In no part of the charter, either as recited by us or elsewhere, is there to be found any express grant of any powers to reselect or relocate the line after the most advantageous route has been once adopted, nor any hint of power conferred to change the route shown to have been located and selected



by the map required to be filed in the office of the secretary of state, and to reconstruct the line, in whole or in part, on any other route slightly or widely different and distant from the original line of selection and location and actual construction of the road. If any such power to relocate and reconstruct can be successfully asserted by the corporation, resort must be had to the doctrine of implied powers.

"It will be well to recur for a moment to first principles and remind ourselves that all grants of power—and pre-eminently grants of powers of sovereignty—to private corporations are to be strictly construed; that every doubt as to the proper construction of every such grant is to be resolved against the grantee; and that, to quote the language of the great English judge, widely borrowed and approved 'silence is negation.' Thus guarded it may be safely and wisely conceded that one original act of selection, location and construction would not exhaust the power to exercise the right of eminent domain in those two exceptional classes of cases where a subsequent exercise of the right is shown clearly to be necessary to subserve the very ends for which the corporation was created. The first of these classes recognized by us in *Ewing v. Alabama & V. R. Co.*, 68 Miss. 551, and recognized by courts generally, are cases in which the ends of the corporation being imperatively required and not a second condemnation of a new line, and the relocation and reconstruction of another and different line of railway, but the securing of additional terminal facilities for turntables, sidetracks, water tanks, station houses, etc. Referring to cases of this character, we said in that case: 'We do not forget that grants of power, of the character under consideration, are to be strictly construed. But that is not a strict construction which denies to the agency created the very means which are indispensable to the accomplishment of the ends of its creation. That is the destruction of the agency, and not a construction of the grant of the powers conferred.' (The second class of exceptional cases arises when, not by consideration of the corporation's convenience,



or of economy in the expenditure of its moneys, or of a more advantageous location, and reconstruction on a new and different line, by imperious necessity, some change of the line must be made, or the road abandoned, and the ends of its creation fail of fulfillment because of some insurmountable obstacle interposed by nature to the further operation of the road on its original line. If some appalling cataclysm should swallow in a yawning chasm the right-of-way, roadbed, and track, and leave a bridgeless gulf where solid earth had been, then, in this and other like cases, the deviation of the line from its original location would be within the implied powers of the charter because to relocate and reconstruct to the extent indicated would be absolutely necessary in order to the accomplishment of the ends for which the corporation was created. But these classes of cases do not embrace the case presented by the present appeal). Here, in the case at hand, no uncontrollable and not to be foreseen convulsion of the earth had rendered the continued use of the line impossible, nor was there any overpowering necessity which required a new location and reconstruction of the road. It does not appear that, as originally located and constructed the line was not, as the selection and location by appellee declared it to be, by its original action, the most advantageous route. But if the location was not the most advantageous, and if damage had resulted to lands and crops by reason of improper location, yet we are at a loss to conjecture why sufficient culverts, trestles, and bridges for the passage of the flood waters would not have prevented such damage, and, in addition, and chiefly, the corporation, having once made its election, and constructed and for years used its road according to such election, is bound thereby. Having elected to take its original route, such election is final, and no change, from motives of convenience or expediency or economy could be made, without another legislative grant authorizing the change. If, to avoid litigation by landowners for damages resulting from an original improper location and construction and not the most advantageous, as may now be thought by the corporation, or others, the railroad company may re-



locate 1 or 2 miles of its line, it is difficult to see why the corporation may not, from motive of expediency, relocate and construct its entire line in Mississippi, for nothing short of prescience will enable anyone to foresee or foretell what a railway corporation might think to be most advantageous, or what means might not be employed to generate the belief in the corporate mind that any given change might be advantageous to it. We can never consent that it is within the already great powers conferred on this corporation, by any sort of strained construction of the rights clearly given, to abandon its original line and begin a new one in DeSoto county, 10, 20, or 30 miles from the present initial point, and, changing the southeasterly direction of the line, carry its road through a wholly different region, and enter the state of Alabama 25 miles from its present point of entrance, for the reason that such new route would seem to be, or in fact really is, more advantageous to the corporation than its original line.

“Unable to consent to any such violent application of the doctrine of implied power in the case supposed, on principle, we must be equally unable to consent to any resort to implied power to relocate, change and reconstruct a single mile, except in the extraordinary cases where imperious necessity requires deviation from the original line, in order that the ends of the corporation created may not perish. It would be amazing if any high authority could now be found, holding that a corporation, under such a charter as that of appellee could continue indefinitely to exercise the state’s sovereign right of eminent domain whenever and wherever it would be more advantageous to it to change, relocate, and reconstruct an established and long used line of railway, than to stand by its original selection, location and construction.”

In *Lake Shore, &c. v. B. & O. & Chic. R.*, 149 Ill. 272, 37 N. E. 91 (Sup. Ct. Ill. 1894), a suit was brought by B. & O. & Chicago R. *vs.* Lake Shore R. R. to condemn right of way over track of the latter company so as to connect with a third railroad. Judgment of condemnation and appeal. The main line of the B. & O. & Chicago R. R.



had been constructed some 19 years before under chartered power, "to construct, own, operate and maintain a line of railroad from a point on the boundary line between Cook County, Illinois, and the State of Indiana to and into the City of Chicago," the line extending into the City to 70th Street and from thence on it had used the tracks of the Illinois Central Railroad. It now sought to build a side or Y track as an appendage or side track to another railroad and in so doing it was necessary to cross a Y track of the Lake Shore Railroad.

The Court held: "It is well settled that when the termini and general route of a railroad are prescribed by the charter of the company, leaving the determination of details to its discretion, the power of the company to fix location of the road is exhausted after such discretion has been exercised, and thereafter the location cannot be changed without specific legislative authority, which, when granted, is to be construed strictly. *People v. Louisville & N. R. R.*, 120 Ill. 65; 10 N. E. 657."

But the construction of a sidetrack in this case was held not to be a relocation of the main road and the grant of power to locate and construct a railway carries with it right to construct turnouts, switches and such conveniences as are usual for necessary operation of road.

Judgment of condemnation affirmed.

*People v. Louisville & Nashville R. Co.*, 120 Ill. 65; 10 N. E. 657.

Proceedings in mandamus were begun to compel defendant to stop trains at an old depot in accordance with terms upon which subscriptions, &c. by county were made to St. Louis & S. E. Ry., which through various consolidations, foreclosure proceedings, &c., had finally come into the hands of defendant in this suit as lessee. Upon coming into possession of property, defendant used the old depot for four years, and then constructed a new one some distance away and connected with old depot by two accommodation trains a day which were inefficient and in-



convenient. *Held:* That defendant railroad assumed obligations, &c., of the original railroad which had large discretion in locating its road; but as the town where the old depot was, was made a terminal point in its charter, it was imperative that the road extend to that town. It was within the discretion of the railroad whether it should extend to the town or into it, and also at what point entry should be made, but once discretion was exercised these questions were finally and irrevocably settled.

“This the company did by the erection of a depot in the town, building tracks to it and stopping of all its trains there, with a trifling exception, for a period of thirteen years.”

A railroad company with a terminus at a county seat is vested with discretion as to points of location of its tracks and stations in that town; but when it has once exercised such discretion by locating the track and stations, and maintaining them as located for thirteen years, it cannot remove them, or refuse to stop its regular passenger trains at such stations. Cites *Pierce, on Railroads*, pp. 254, 255, where it is said:

“The power of the company to determine its location when once exercised is exhausted. It may have a discretion as to its termini or the selection of its intermediate points or its route between certain fixed points; but, having exercised the discretion, it cannot change the location without legislative authority.”

In *Illinois Central R. R. Co. v. People*, 143 Ill. 434; 19 L. R. A. 119. Proceedings in mandamus to compel railroad trains to stop at designated depot maintained and used by railroad for more than 36 years. *Held:*

“Where a railroad company has constructed its road through or in a county seat, and located a passenger station there, and maintained such passenger station for years, it is required by this proviso (Sec. 25 of the R. R. Act of Illinois), (*i. e.*, ‘Every railroad corporation shall cause its passenger train to stop, upon its arrival at each station advertised by such corporation as a place for re-



ceiving and discharging passengers \* \* \* "provided, all regular trains shall stop a sufficient length of time at the railroad station, &c."), to continue to go there and stop there."

The charter of the railroad empowered it to conduct, maintain and operate a road "from the southern terminus of the Illinois & Michigan Canal to a point at the City of Cairo." It is, the court holds, required by charter to operate its road to point selected, used and maintained by it as southern terminal of road and cannot establish a new terminus and treat the old one as if it were on a side track or spur.

In *C. B. & Q. R. Co. v. Chicago*, 149 Ill. 457; 37 N. E. 78, the city sought to condemn railroad property for the purpose of crossing it with a street. Deeds conveying certain portions of the railroad's right of way to railroad, including part to be crossed by the street, were introduced, and the railroad sought to prove the market value of this property for sale or use for any lawful purpose in case tracks should be removed as a basis upon which to compute condemnation value. The court in denying that this was the value of the property for condemnation purposes and rejecting the evidence, held:

"In this case the descriptions of the strips of land conveyed to the appellant (the railroad) \* \* \* show that the strips were purchased for a railroad right of way and they have been ever since so used. Where a railroad company has once exercised the power to determine the location of its road, that power is exhausted. It cannot change the location without legislative authority after it has exercised its discretion as to the selection of the route of its road between certain fixed points. *Ill. C. R. Co. v. People, supra*. It is manifest that the appellant is restricted in its use of the right of way \* \* \* to those purposes for which such right of way is now used. The future use must be the same as the present use \* \* \* unless the legislature shall permit it (the railroad) to change its route."



*Brigham v. Agricultural Branch R. Co.*, 1 Allen 316, (Mass. 1861).

Defendant railroad incorporated under statute, (St. 1847, c. 269, sec. 2), providing:

"Said corporation is empowered to locate, construct and maintain, with one or more tracks, a branch railroad, commencing at some point near the village of Northborough; thence running to a point near the center village of Southborough; thence to connect with any branch of the Boston and Worcester Railroad, near the centre village of Framingham; and such branch railroad on its way from said point near the village of Northborough, to such point near the centre village of Southborough, shall be required to pass to the north of the house of Willard Newton, Esq., in the southerly part of Marlborough; *provided*, a feasible route shall be found therefor with grades not exceeding 42 feet to the mile, and which can be constructed at a cost per mile, &c."

and also under statute 1853, c. 185, sec. 2, containing the provision:

"the said corporations are hereby authorized to construct their railroad in sections."

The railroad located its railroad as authorized in charter and following general plan there laid out. Subsequently they continue the railroad a mile and a half northerly from point of angle to village of Marlborough and took plaintiff's lands for this purpose. The Court, in holding this taking unauthorized, said:

"Having thus legally located and established their road between the termini prescribed in their charter, their whole power had been exerted and exhausted. They had \* \* \* an undoubted right of choice as to the general course and direction of their road; limited only by the obligation \* \* \* to carry it north of the house of Willard Newton, Esq. But this right cannot be construed to be wholly without limitation. \* \* \* It is to be exercised in a reasonable and proper manner, and in conformity to the clear and mani-



fest purpose of the legislature, as developed in the provisions of the charter, in creating the corporation and conferring upon it specific and definite powers. \* \* \* If in the exercise of their right to select one of several practicable routes, it would originally have been competent to the defendants to adopt a line passing through or near to the village of Marlborough, they ceased to possess any such authority after they had legally and actually made a location of their road."

*Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358, (Sup. Ct. N. Y. 1860).

The Brooklyn Central Railroad Company held by assignment the rights and franchise of the Brooklyn & Jamaica Railroad Company, incorporated by legislative act of 1832, giving it the right to construct a railroad from an eligible point in the City of Brooklyn to any point in the village of Jamaica with lateral railways to villages of Flatbush and Fleming. The Company located its railroad between two points and adhered to it for years. In 1859 the plaintiff desired to extend its road through another street and was given permission to do so by resolution of common council, due to failure of defendant company to complete its construction in that street according to an agreement with the common council. An injunction was sought by the latter road and the court held that if a street railroad is located and the location adhered to for many years the company has no right to streets over which it might have originally located, but which it did not include within its location.

*Hudson & Delaware Canal Co. v. N. Y. & Erie R. R. Co.*, 9 Paige 322, (N. Y. Chan. 1841).

Injunction sought to restrain railroad from laying route along margin of complainant's canal, one of the contentions being that in the route proposed to be laid out there was a departure from the line of the railroad surveyed and adopted by the company, and the court said:

"If the charter of a railroad company requires the whole line to be located and a certificate of



location to be filed in the clerk's office before the commencement of work the company cannot change the route after it has been once located and a certificate of such location filed."

However, it was found that the railroad did not come within the class mentioned (*i. e.* its charter did not require the whole line to be located, &c.), and the only question left to be determined was the measure of damage that would be done by the railroad's act.

*Re Providence & W. R. Co.*, 17 R. I. 324; 21 Atl, 965, (Supreme Ct. R. I. 1891). The company was authorized by charter to construct a railroad. When it had located the railroad, or any part thereof, it was authorized to make report of same to the Court of Common Pleas, which was to appoint commissioners to condemn a right of way. The charter was to be void if the location was not filed prior to June 1, 1847, or if the road was not completed by June 1, 1850. By an amendment to the charter in 1845, the company was authorized to alter the location, and to make a new location, in whole or in part, provided that the time allowed for the completion of the road should not be extended. If land covered by the abandoned location had been taken and used, the company was to be allowed to prove the abandonment in mitigation of damages, &c. The act of 1870 authorized the company to construct a branch railroad, to be located, &c. under the same powers, restrictions, &c. as in original charter and amendments. Assuming that the power of relocation given by the amendment of 1845 extended to the branch authorized by act of 1870, *held*, that the power to relocate and to condemn land for that purpose was not a continuing one, but was exhausted when the branch road was completed and put in operation.

*Moorhead v. The Little Miami R. R.*, 17 Ohio, 340, (Supreme Court of Ohio, 1848). The question presented in this case was whether the railroad having once located and constructed its road had the power to relocate and



reconstruct it on other and distinct ground, the road claiming the right to do so under the 12th section of its charter which gave authority

“To vary the route and change the location after the first selection had been made (1) whenever a better and cheaper route could be had; (2) whenever any obstacle to continue said location was found either by difficulty of construction or procuring the right of way at a reasonable cost.”

The charter also gave the right to enter upon, take possession, etc. of all such lands and real estate as might be indispensable for the construction and maintenance of the road, after proper condemnation, &c. The court held:

“The corporators had the power to locate and construct a railroad. They could exercise this right but once without a further grant. To accomplish this object a most important attribute of sovereignty was bestowed upon them by the legislature, the extraordinary reserved power of subjecting the property of private individuals to a public use. If it was intended that this should be a continuing power, one that might be exercised and re-exercised again and again, as often as might suit the convenience of this company, the legislature should have so declared in express terms. They have not done so.”

The court went on to show that the right to relocate, &c., was subject to two restrictions quoted in the charter and they clearly implied that such an option was to be exercised before the road was completed. Further,

“The completion of this road upon the route first located exhausted all the power of the company. The force of the grant was then spent; and no matter how necessary the change of location may be at present the company must seek authority to make that change in some legislative enactment aside from their act of incorporation.”

*Erie Railroad Company v. Steward*, 170 N. Y., p. 172, 63 N. E. 118, (Court of Appeals of New York, 1902), affirming 61 N. Y. Appellate Division 480.



In this case the Erie Railroad Company, which had been organized in 1895, under the Stock Corporation Law of New York of 1892, as successor to the New York & Erie, after various re-organizations of the old company, was possessed of all the New York & Erie Railroad Company's rights, privileges, franchises, etc., and thereafter attempted to condemn additional lands for the purpose of laying out a new line or route with two tracks, retaining the then present main line in order to operate more economically, and a map was accordingly filed extending through one village two different lines, and the Court held that—

“The effect of a designation by the directors of the line of a road is the same as if it had been specifically designated in the charter, and where the company has located the line between its terminal points, it is concluded by that location, and no change of route can thereafter be made without legislative authority.”

It was further contended by the railroad company that even though this power was not enjoyed by virtue of its original special charter obtained in 1832, it had the power to re-locate its route under the General Railroad Act of 1850, relying upon certain sections of that act, which provided among other things, by Section 4, Sub-Division 2, the power

“To take and hold such voluntary grants of real estate \* \* \* as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate as may be necessary for such construction and maintenance in the manner provided by law.”

The section contains further general powers to railroads which the Court did not consider to be of any importance. As to the part so quoted above, the Court said:

“The power to acquire property by condemnation for construction and maintenance had already



been exercised by the original railroad and exhausted."

Section 7 was also considered, which provides among other things, that where it shall require any further rights to lands or use of lands for switches, turn-outs, or for filling in any structures of its road, or for widening or completing any embankment or road bed, and such land shall be contiguous to such railroad and reasonably accessible to the place where same are to be used, it should have the right to take the same. As to this section, the Court held that the proposed new line was not a switch or turn-out, but a projection of main line over new and straighter way, and lands of the defendant were not contiguous to the railroad.

The Court also considered Section 13 of said General Railroad Act which provided for relocation of road, with the proviso that

"No alteration of the route of any railroad after its construction shall be made, or new line or new line or route of road laid out or established, as provided in this section, in any city or village unless approved by a vote of two-thirds of the Common Council or Trustees of the Village."

In this section the Court found that the plaintiffs were empowered to condemn further land, but that the section had to be strictly complied with, which the railroad company had not done.

And it was further held in this case that the General Railroad Act of 1850 applied to this road organized by special act of 1832 as well as the plaintiff, its successor, organized under the laws of 1892.

This question has been considered by the New Jersey Supreme Court in the case of *Morris & Essex R. R. Co. v. Central R. R. Co. of New Jersey*, 31 N. J. L. 205. The facts are stated in the opinion, and may be briefly restated as follows:

The Central Railroad Company had built its line from Elizabethport to the Delaware River, at Phillipsburg,



and had been so located for many years prior to May 29, 1860, at which time the Morris & Essex Railroad Company filed a survey in the office of the Secretary of State, under their charter and its supplements, of a route for an extension from Hackettstown to the Delaware River, and in December 1863, the Morris & Essex Company purchased lands in Phillipsburg on the line of said route and adjoining land of the Central Railroad Company upon which they constructed a road bed for their said railroad. Afterwards, the Central Railroad of New Jersey, filed in the office of the Secretary of State, a survey or location of its railroad in the Village of Phillipsburg, which route crossed the previous location of the extension of the Morris & Essex Railroad, and thereafter presented a petition to one of the Justices of the Supreme Court for the appointment of Commissioners to examine and appraise the lands intended to be taken from the Morris & Essex Railroad, claiming the right to cross the road so laid out by the Morris & Essex Railroad Company. This proposed construction by the Central Railroad Company was a branch to their road at Phillipsburg, which afforded a new access to the Delaware River. The claim of the Central Railroad Company was resisted upon the ground that it had no legal authority to make the branch road in question. It was claimed by the Central Railroad Company that the power to build this branch road was conferred by the original act of incorporation. This charter was passed February 26, 1847, and provides in Section 6, among other things that the corporation be authorized to construct a railroad or lateral roads, together with a certain branch road between certain termini, and the 13th section provides that the Company shall also have the privilege and authority "to erect, build and maintain at the Delaware River or within 13 miles of the borough of Easton, such wharves, piers, bridges and other facilities as they may think expedient and necessary for the full enjoyment of all the benefits conferred by this act."



The branch road projected was not part of the original plan in making the road, but had become necessary by reason of the development of its business which had not been anticipated. In disposing of this claim the Court said, at page 208 of the opinion:

"The principle of law applicable to such a condition of affairs appears to me to be entirely indisputable. And if the question was one absolutely unaffected by authority, and had to be settled solely by the ordinary criteria of statutory construction, I must think it clear that the only result which could be reached, would be the rejection of this claim of this company, to add a branch or spur to their road by force of any of the provisions of their charter. To sanction such a claim would be to decide that this company may, as occasion presses, for all time to come practice similar encroachments. Such a view would be equivalent to holding, that all the land along the line of the road is subject to the seizure of the corporation, whenever such land becomes convenient for its purposes; and that this great power of eminent domain, is forever to remain in abeyance in the hands of the company, to be exercised at its will. And it is also to be remembered, that if the Central Railroad Company has been the recipient of this formidable grant of power, so has, in all probability, every railroad now in existence in this state.

"I can find nothing either in the language of this statute or in the object the legislature had in view, or in the general maxims of jurisprudence, which will justify the construction which is claimed. The language of the act, in all its parts, is plain and intelligible. It authorizes the making of a road or roads and one branch road, and the acquisition and construction of certain convenient adjuncts. This is the entire scope. The company may do, at their option, one or more things; they do the act or acts and thus signify their election; and that is final. Any other conclusion would leave the scheme authorized by the legislature forever unsettled and undetermined. Any private right in the vicinity of the road, would be subordinated to it. There is not a word in the act which seems to in-



timate the transmission of the right to alter the road, when once laid, or to add to or extend it; and it is scarcely necessary to say that such a prerogative cannot be the creature of intendment. The claim of a power so much in derogation of common right and public interests, could only be sustained by the most manifest intention on the part of the legislature to confer it. But there is nothing in the language of this act which, fairly dealt with, tends in that direction."

"Nor can it be justly said that this power of alteration or addition, was at all necessary for the accomplishment of the purpose within the view of the framers of the law. As a general thing it is not difficult for a company, in the exercise of ordinary sagacity, to foresee and provide for the increase of its business. Practically, there has been no difficulty on this head: or if the power originally obtained has proved to be insufficient, the remedy has been an application to the legislative authority for relief."

"Neither will the ordinary rules of law sustain the defendant's assumption. If A grant to B a right of way over his farm, such way to be laid out by B, it could not be plausibly pretended that after such way had once been located and maintained by B, it could afterwards be relocated, or altered or added to by him. It was the very sensible rule of the common law 'that if a man once determines his election it shall be determined forever, Com. Dig. tit. Election, C 2. This maxim has been deemed particularly applicable to acts done under the authority of the State, and it has been held repeatedly, that the powers given to a corporation to take lands, when once exercised are exhausted. Thus the right of the railroad company, after their road was actually located, to make a relocation or to abandon the route adopted by them for a more eligible one, was entirely repudiated in the case of *Moorhead v. The Little Miami R. Co.*, 17 Ohio 340. And the same principle was applied in the case of *Blakemore v. The Glamorganshire Canal Company*, 1 My. & Keene 154. This company was empowered to construct a canal, the dimensions of which were not



fixed by the act authorizing the enterprise, nor the amount of water which might be appropriated by the company. After the completion of the canal the company determined upon its enlargement; this was resisted, and Lord Eldon in denying the right of the company to make the projected alteration, asserted, with emphasis, the general rule above stated. His language was—"but if that is done and the canal is completed in the sense which the act of Parliament means by the word *completed*, and the sense put upon the word by these defendants themselves, (as is shown by their going about to levy their tolls on the whole course of the canal) and if, notwithstanding, they may afterwards widen and deepen the canal, what is there to hinder them from carrying it from sea to sea? Why, there would be no end to it. When the canal is completed the powers of the company are exhausted, and in making the canal, the proprietors are not at liberty afterwards to injure the interest of the parties by making what is quite a different canal.'

"To this the defendants, by laying out their road, with its appendages, to their own satisfaction, in the sense in which they understood their charter, entirely exhausted all the powers conferred upon them to take land under their charter."

There was another point in the case made by the Central Railroad Company to the effect that under a supplement to its charter they had the power to build the proposed branch as provided in the 7th section to the act-- "That it shall be lawful for the said company to change or alter the location of their said railroad, or to locate new lines when additional tracks shall be required, at any point or points between Phillipsburg and Elizabethport, not varying in any case over one mile from the line as located and filed."

Under this section of the supplement to the charter the Court held that the Central Railroad had power to build the branch in question.

In the case at bar, the Newark and Hudson Railroad Company was authorized by charter to build a road between two different points, and it was further provided



by the charter that it should file a route of this railroad, and then and only then could the road be constructed. This had been done, and "Branch B" as now proposed to be built is not shown on that route, and is in fact a relocation of the road.

There is no provision in the charter to make any such alteration or change, and under the decision of the Supreme Court referred to, and the other authorities cited, the charter power has been exhausted by building the original road, and this "Branch B" cannot now be constructed without further legislative authority.

## POINT II.

**That the only authority for building "Branch B" as proposed, is found in the General Railroad Act of 1903, which specifically requires compensation to be made for any riparian lands taken and occupied.**

The Legislature of New Jersey in 1903, passed a general act as Chapter 257 of the Laws of 1903, page 645, entitled, "An act concerning railroads, Revision of 1903," and under the provisions of Section 8 of that act railroads are empowered to build branches connecting with other railroads if within a distance of one mile of each other.

Section 10 of that act provides the procedure, and requires that a sum equal to \$2,000 for each mile shall be deposited with the Secretary of State when the survey of the route is filed. The defendant railroad company proceeded under these sections, and it appears by "Exhibit B. 2," pages 100-101-102 of the record that the moneys were deposited pursuant to the act of 1903 referred to. There are other provisions in the act, under one or more of which it would seem this company is empowered to build the branch as proposed.

By Section 16 of the act, any railroad company is empowered to build and maintain over such streams as the road may cross, bridges as it may deem expedient, and



may build viaducts over any navigable or other river, stream or bay of water, provided any such viaduct shall contain a pivot draw with two openings, each of no less width than the widest opening of any viaduct or bridge now built over any such river, stream or bay of water, at right angles to the main channel, located at a point convenient for navigation, and then further provides—

“provided that such company shall not take any land under water belonging to the State until the consent of the Riparian Commissioners shall first be had and obtained (unless the said land is at least twenty-five feet under the bed of the water) who are hereby authorized to convey the same on receiving such compensation as they may fix.”

Not only must this Railroad Company look to the General Railroad Act of 1903 for authority to build this branch, but by Sections 88 and 89 of that act it is specifically provided that the provisions of the act shall apply to all railroad companies whether chartered by special act or under any previous general act and all acts and parts of acts, general and special, inconsistent with the General Railroad Act of 1903 were repealed, such repealer not to work a dissolution of the company, but any company organized under any previous law, whether special or general, should continue to enjoy the rights, power and privileges conferred by their charters. Sections 88 and 89 referred to are set forth at length as follows:

“88. The provisions of this act, except as herein otherwise restricted, shall apply to all railroad companies however formed, created or organized under any law of this state; any company organized under the act for the formation of railroad companies and to regulate the same, approved April second, one thousand eight hundred and seventy-three, shall be included within the description in this act of companies organized under this act; the provisions of this act, so far as applicable, shall extend to any receiver, trustee or person operating a railroad in this state under a franchise; the railroad and property of any company organized, leased or consolidated under this act,



shall be subject to taxation under the general laws of the state; a certified copy of any certificate or survey or other document filed or recorded in the office of the secretary of state, pursuant to this act, shall be evidence in all courts and places of such certificate, survey or document and of the filing and recording thereof.

"89. No franchise heretofore granted to construct a railroad or build or establish bridges or ferries or operate any line of travel and take tolls or fares therefor shall hereafter continue to be or be considered to remain exclusive, and no like franchise hereafter granted shall be or be construed to be exclusive unless in such grant heretofore or hereafter made it be so expressly provided, and all corporations organized under this act shall be subject to all general laws now or hereafter to be passed, regulating railroads and their operation; all acts and parts of acts, general and special, inconsistent with this act, are hereby repealed; such repeal shall not, however, work a dissolution of any railroad company, but the charter, certificate of incorporation, or articles of association thereof, and the rights, powers and privileges conferred thereby, shall continue unaffected and unimpaired; this repealer shall not, however, revive any act heretofore repealed."

Being obliged to look to the General Railroad Act of 1903 for authority to build this "Branch B," it must accept all of the provisions of that act which impose conditions or restrictions upon any company wishing to exercise power obtained therefrom, and therefore the Newark and Hudson Railroad Company in filing its route pursuant to the provisions of the General Railroad Act of 1903 and depositing the money as required by that act becomes obligated to pay to the State of New Jersey for the riparian lands that it would take and occupy in building this branch, the value of which has been fixed by the Board of Commerce and Navigation, as successor to the Riparian Commission, at the sum of \$11,372.42.

It is contended by the State that the Newark and Hudson Railroad Company has exhausted its charter power,



and the Railroad Company by its action in filing its route under the provisions of the General Railroad Act of 1903 has indicated that it sees the necessity of looking outside of its charter for authority to build the proposed "Branch B," and its action in so doing is inconsistent with the claim now made that the power to build this branch is given by the original charter. No specific authority is contained in the original charter to do the work now contemplated, and therefore it can only find such power in the original charter by implication. The construction of "Branch B" does not fall within that class of work which is necessary to the existence of a railroad bringing it within either of the two exceptions recognized in the case of *Lusby v. Kansas City &c. R. R.* (*supra*), which are generally designated, first, as those things imperatively required for terminal facilities, such as turntables, side tracks, water tanks, station houses, etc., and second, those changes which must be made, not through consideration of the corporation's convenience, or of economy in the expenditure of its moneys, or of a more advantageous location and reconstruction, or a new and different line, but those necessary changes which must be made or the line abandoned.

Under the law of the State, there is no necessity for these implied powers to do those things necessary in order that the road may be continued to be conducted as a railroad, because the General Railroad Act of 1903 expressly gives power to do those things, and having expressly given such power there is no necessity for the implication, and furthermore by the express provision of the General Railroad Act of 1903, Section 88, the provisions of the act are made applicable to all railroads, however formed, created, or organized under any law of this state, and by Section 89, all acts and parts of acts, general and special, inconsistent with the act are repealed, save only the right to continue the railroad.

If it is contended that this works any change or alteration in the original charter of the Newark and Hud-



son Railroad Company, the attention of the Court is directed to Section 20 of that charter, in which it is provided that the charter shall be subject to alteration, amendment or repeal by the Legislature, and by virtue of Section 16 of the General Railroad Act of 1903, which expressly provides that no riparian lands of the State shall be taken without compensation, the Legislature has taken away the right to take these lands without compensation, as it can do by virtue of the power preserved in Section 20 of the original charter referred to.

To hold the saving clause in Section 89 of the Act of 1903 as having a greater scope than that of merely preserving for the defendant railroad company the right to continue to be a corporation and possess and operate the lines so built and established by it under its original charter and prior to the establishment of the General Railroad Act of 1903, would render that act of 1903 of no effect whatsoever as to this defendant, and it is respectfully submitted that under the authority of the cases of this State the saving clause would become void.

In the case of *Jensen v. Woolworth Co.*, 106 Atl. 808, it was held:

“That where a saving clause in a statute, if good, would render the statute of no effect, the saving clause is void,”

and in the later case of the *Combination Rubber Mfg. Co. v. Court of Common Pleas in and for Essex County*, 115 Atl. 138, it was held that

“Where a general rule is provided by the Legislature to cover an entire subject matter, all earlier and different rules touching the subject matter are to be discarded,”

and therefore it is respectfully submitted that if the power to build “Branch B” was given by the original charter, that power has been taken away so far as the original charter is concerned, and the railroad company must look to the General Railroad Act of 1903 for the power to do this work.



## POINT III.

Then even though the original charter as supplemented authorized the occupation of more lands than were taken and occupied at the same time the railroad was located and built, the Railroad Company may not now increase its occupation, as the right originally possessed, but not exercised, has been lost through non user.

Conceding for the purpose of this argument that the Railroad Company could have located its bridge and built the approaches thereto as now roposed in the construction of "Branch B" under the power given by its charter of 1870, this power was discretionary in the Railroad Company and it exercised its discretion and located its bridge and completed its road and took lands for that purpose, not including the lands which are the subject matter of this controversy. The charter expressly provides in Section 6 that it could connect with other railroads in Essex County, and it did connect with the Newark and Paterson Railroad in Essex County at the time the road was originally constructed at a definite location, and while it might have fixed upon a different location within the terminal limits fixed by the statute in the exercise of that discretion, per chance adopting the exact location now proposed for "Branch B," it did not do so, and having exercised that discretion it may not now change, alter or amend the location so as to include the additional area now sought to be taken.

A similar case came before the Court in the case of *Spottiswoode v. The Morris & Essex Railroad Company*, reported in 61 N. J. L., page 322, affirmed by the Court of Errors and Appeals in 63 N. J. L. 667.

In that case, one Gildersleeve had made a grant to the Morris & Essex Railroad Company, and to its successors forever

"the right, liberty and privilege of entering upon the said tract of land above described, by its officers, agents \* \* \*."



for the purpose of completing and repairing its railroad (p. 338). And the grant of power to the Railroad Company to take lands

“so as to include a strip of land not to exceed two rods wide on each side of the center stakes through any of the lands of the said Ezra Gildersleeve in the Township of Orange” (bottom of p. 324).

Under this deed the Railroad Company actually entered upon and took possession of a strip of land for railroad purposes three rods in width (p. 326). This deed was executed on December 24, 1835, and recorded in 1836, and the controversy arose over the attempt of the Railroad Company to take an additional half rod on each side of the strip so enclosed making the full measurement of two rods from the center line.

This matter came before the trial court after verdict for the plaintiff in ejectment against the defendant railroad company, on rule to show cause, which was certified to the Supreme Court for its advisory opinion, and the Court directed that the rule be discharged for the reason stated by Mr. Justice Depue; the trial Justice considered the matter at length in the opinion, and reviewed the authorities on the question of adverse possession which was raised in the case, and after referring to the fact that fences were erected at a distance of one and one-half rods from the center line and so continued for a period of fifty-six years, definitely locating as the strip taken to be three rods wide, the Court finds the rule to be that where the true location of the premises conveyed by a deed is doubtful, a practical location by consent of the parties will aid in the construction of the deed, and in some instances be conclusive as to the boundaries thus fixed, although the acquiescence be for a less period than twenty years, but in that case the Court held that the railroad company could not be concluded by its selection in the first instance because of the fact that the company was authorized by its charter whenever its business or convenience required it to occupy for a roadbed the full



width of four rods (p. 339 of the opinion), but finally concluded that although the railroad company had this charter power by reason of failure to take possession of this additional width of one-half rod on each side of the enclosed strip, adverse possession had run against it and it was not then entitled to occupy the additional land.

While it was not necessary for the Court to determine what the rule of law was in a case where the occupation was less than that which was admittedly authorized, nevertheless the Court does go into that question and undoubtedly the decision would have been against the railroad company upon that ground if it had not been for the charter provision permitting the taking of additional land to a full width of four rods as the business or convenience of the company required it.

In this case the Company had the right under its original charter to occupy a strip not to exceed 100 feet in width, and by the supplement this area was increased, not, however, to exceed 200 feet in width where such additional land was required for embankments, etc., made necessary because of the condition of the land over which the railroad was located, so that the right to extend the width of the road outside of the 100-foot strip was limited by conditions making such additional width necessary.

The charter of the Newark and Hudson Railroad Company does not contain any provision empowering it to take additional lands as its business or convenience might require either within or without the maximum limit as fixed by the charter and its supplement, and there is nothing in this case to take it outside of the general rule as found applicable by Mr. Justice Depue, as well as the other cases cited under Point I.

Furthermore, in this case we are dealing with a grant by the sovereign, whereas the grant in the Spottiswoode case was by an individual, and in this case the grant of the right to occupy the riparian lands of the State (im-



plied by virtue of the authority given by the charter to bridge this tidal stream, the Passaic River) must be strictly construed it being the rule of law (as stated in *American Dock & Improvement Co. v. Trustees of Public School*, 39 N. J. Eq. 425),

“Public grants whether they be of lands or franchises, are strictly construed. Herein public grants differ from grants between private persons. Grants between individuals are construed favorably for the grantee. Public grants are construed most favorably for the public and against the grantee. The grantee takes nothing not clearly given.”

By its charter the Newark and Hudson Railroad Company was empowered to bridge the Passaic River, and under the authorities there was an implied grant to it to occupy such riparian lands as might lie below high water mark and under the waters of the Passaic River as necessarily occupied by the bridge structure, and this implied grant only extended to such occupation as might be definitely fixed by the filing of a route; the route was filed, the bridge was built upon the route so designated and adopted by the Railroad Company in the exercise of its discretion, and by so doing the boundaries of the grant were definitely fixed and the power of the railroad in this respect exhausted. This was the only right of occupation clearly given by the charter, and therefore is the only right of occupation which the defendant company can assert under its charter.

In the case of *Pennsylvania Railroad Co. v. New York & Long Branch Railroad Co.*, reported in 23 Eq. 157, the Court had under consideration this very question. There the railroad company had been authorized to extend its railroad by special act, in order to cross the Raritan River. The particular provision of the act to which the Court gave consideration provides as follows:

“and shall have in relation to such extension all the rights, powers, privileges and restrictions contained in the act to which this is a supplement,



with power to cross the said river by means of a bridge or a ferry as may be most convenient,"

and the Court commenting upon this section of the act, said at page 159:

"The Act of March 30, 1869, authorizing the defendant to build a bridge over the Raritan between South Amboy and Perth Amboy gave it the right to enter upon and occupy so much of the lands of the State in the river as should be required for the bridge or of the width at which it was authorized to lay out its road. This act vested the right in the defendant."

So in that case the Chancery Court dealing with this question of implied grant limited it to an extent not greater than its authorized right-of-way width or to such area as should be required for the bridge.

In this case, the bridge having been built, the area required for that purpose was fixed and determined, and the structure so built was the one authorized to be built by the charter, and there is nothing in the charter authorizing the Newark and Hudson Railroad Company to build the bridge required in the construction of "Branch B."

#### POINT IV.

The railroad has lost any right it may have had to occupy additional riparian lands by virtue of the Act of 1894 appropriating all riparian lands to the State for the support of free public schools.

By Chapter 71 of the Session Laws of 1894, page 123, all of the riparian lands owned by the State of New Jersey were appropriated for the support of free public schools, and by virtue of Paragraph 6 of Section 7 of the Constitution of the State of New Jersey this power was irrevocable, and these lands passed beyond the control of the Legislature so far as devoting them to any other purpose or in any manner contrary to the provisions of that act.



The act of 1894 provides as follows:

"1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That all the lands under water belonging to this state be and the same hereby are irrevocably appropriated for the support of free schools in this state, and that all moneys hereafter received from the sales and rentals of such lands under water belonging to this state, shall be paid over to the trustees of the school fund, and appropriated for the support of free public schools, and shall be held by them in trust for that purpose, and shall be invested by the treasurer of the state, under their direction, in the same manner as the funds now held by them are invested, the same to constitute a part of the permanent school fund of the state, and the interest thereof to be applied to the support of free public schools in the mode which now is, or may hereafter be directed by law, and to no other purpose whatever."

"2. *And be it enacted*, That all leases which have been made by this state or any board or officer of this state, in pursuance of the provisions of an act entitled 'An act to provide for the use of the proceeds of riparian sales, grants and leases,' approved March nineteenth, one thousand eight hundred and ninety, of lands belonging to the state now or formerly lying under water, be and the same hereby are transferred to the trustees of the school fund of this state, to become a portion of the free school fund, and that the income arising from such leases shall be distributed by the said trustees for the support of free public schools in the same manner that other moneys are now distributed for that purpose."

The appropriating act expressly provides for the sale or leasing of said lands, the proceeds of any sale and the rental to be paid over to the Trustee of the school fund.

Under its charter power the Railroad Company by its action made certain the lands comprehended within the grant implied from the power given to build the bridge. In effect it says to the public: "These are the lands



granted by the charter," and the remaining riparian lands of the State became free from any right of occupation, and the State was free to grant, lease or otherwise dispose of the lands not so occupied.

If this were not true, then we have exactly the situation pointed out to Chief Justice Beasley in the case of *Morris & Essex Railroad Company v. The Central Railroad Company*, 31 N. J. L. 205 (middle of page 208), where he says:

"Such a view would be equivalent to holding, that all the land along the railroad is subject to the seizure of the corporation, whenever such land becomes convenient for its purposes; and that this great power of eminent domain is forever to remain in abeyance in the hands of the company to be exercised at its will. And it is also to be remembered, that if the Central Railroad Company has been the recipient of this formidable grant of power, so has, in all probability, every railroad now in existence in this state."

If this is a power which can now be exercised by occupying additional riparian lands, it is a power which would continue as against private owners who may have purchased such lands from the State, and their right of possession and enjoyment would be defeated at any time that the Railroad Company might find it convenient or necessary to erect railroad properties thereon and could be defeated only through adverse possession arising against the railroad's claim, as in the *Spottiswoode* case, and the evidence of adverse possession is not possible to a great extent by virtue of the nature of the property. Being navigable waters it has no value, and is not capable of any beneficial enjoyment unless those waters are kept open and free as necessary for purposes of navigation and the maintenance of slips and docks prevents any fixed structure giving notice to the world of the property claim such as may be placed upon fast land in the form of fences and the like.



And it therefore becomes necessary that the Court recognize that the action of the sovereign in granting such land shall be recognized as adverse to any such claim as is made by the defendant railroad company. The State of New Jersey, in the exercise of its sovereign power, has granted and conveyed all of the riparian lands of this State owned by it on April 24, 1894, when the act appropriating such lands to the public school fund was approved and took effect, and this being by act of the Legislature was notice to the world that these lands were so taken and appropriated, and the defendant railroad company being charged with notice of this act and remaining quiescent for a period of over twenty-five years is in laches, and has lost its right (if it ever existed) through non user.

In conclusion, it is respectfully submitted that the riparian lands of the State of New Jersey which must be used and occupied in the construction of "Branch B" of its railroad can only be so taken under the provisions of the General Railroad Act of 1903, and upon compensation made, the amount of which compensation has been fixed and determined as \$11,372.42, which amount is now on deposit with the Clerk of the Court of Chancery, and that the State of New Jersey is now entitled to the receipt of that sum.

There should be a reversal.

Respectfully submitted,

THOMAS F. McCRAN,

*Attorney General.*

HARRISON P. LINDABURY,

*Special Assistant to the Attorney General.*

*Of Counsel with Informant-Appellant.*







## New Jersey Court of Errors and Appeals

*Between*

THOMAS F. McCran, Attorney-General of the State of New Jersey,  
*Informant-Appellant,*

*and*

ERIE RAILROAD COMPANY, NEWARK  
AND HUDSON RAILROAD COMPANY  
and THE DIRECTOR-GENERAL OF  
RAILROADS,  
*Defendants-Respondents.*

*On Appeal  
from Chancery.*

### BRIEF FOR RESPONDENTS.

The bridge on the Newark Branch of the Erie Railroad over the Passaic River between Newark and Kearny was worn out and its use became dangerous. It was condemned by the Board of Public Utility Commissioners and had to be replaced. During the year 1918, when the railroad was controlled by the Director-General of Railroads appointed by the President of the United States, under Act of Congress, he determined to replace it. The railroad is an important one and transportation over it could not be halted while a new bridge was being built. Therefore, it was decided to build the new bridge immediately north of the old bridge.

The old bridge was on the route of the railroad of the Newark and Hudson Railroad Company, which was incorporated by an act of the Legislature of this State, approved March 17, 1870 (P. L. 1870, p. 1274). Section 6 of that act provides as follows:

“That it shall be lawful for the said company to  
“lay out and construct a railroad, not exceeding  
“one hundred feet in width, from a point in the  
“City of Newark, in the County of Essex, in this



“state, at or near Gouverneur street, in said city, to  
 “a point in the county of Hudson, where the said  
 “railroad may connect with the New Jersey Rail-  
 “road and Transportation Company, or with some  
 “other railroad in said county of Hudson, running  
 “to the waters of the Hudson river, and may con-  
 “nect the same with the New Jersey Railroad and  
 “Transportation Company, and other railroads in  
 “the counties of Essex and Hudson, upon such  
 “terms as may be agreed upon, and for that pur-  
 “pose the said company may erect and maintain  
 “bridges over the Passaic and Hackensack rivers,  
 “the said bridges to be provided with draws at  
 “least seventy feet in width.”

The Newark and Hudson Railroad was constructed about fifty years ago. It was connected in Newark with the Paterson, Newark and New York Railroad and in Jersey City with the railroad of the Long Dock Company. The Erie Railroad Company, as lessee, has, for many years past, operated over those three railroads what is called its Newark Branch running from Paterson to Jersey City.

The new bridge is on a branch of the Newark and Hudson Railroad called “Branch B” which merely effects a new connection between that railroad and the Paterson, Newark and New York Railroad in Newark.

The plans for the new bridge were submitted to and approved by the Secretary of War in accordance with the Act of Congress which gives him paramount control over navigable waters. Application was also made to the Board of Commerce and Navigation of this State for its permission to build the new bridge as required by Chapter 123 of the Laws of 1914 (P. L. 1914, p. 205).

The Board of Commerce and Navigation approved the plans but refused to permit the building of the new bridge unless the company paid the State for the riparian lands which would be occupied or affected thereby and for the right to build it across the river.



The Newark and Hudson Railroad Company contended that it had power to build the new bridge under its charter without paying the compensation demanded by the Board of Commerce and Navigation and the Director-General of Railroads proceeded to build it. Thereupon the information in this case was filed and an order made requiring the Director-General of Railroads, Newark and Hudson Railroad Company and Erie Railroad Company, its lessee, to show cause why they should not be restrained from proceeding with the work. The application for temporary restraint was heard by Vice-Chancellor Foster who advised an order permitting the building of the bridge upon payment by the defendants, or one of them, to the Clerk of the Court of Chancery of the sum demanded by the Board of Commerce and Navigation which was fixed at \$11,372.42, to abide the final determination of the case. That sum was paid to the clerk and the bridge was built.

The Town of Kearny also sought to prevent the building of the new bridge, but was unsuccessful both on application for preliminary restraint and on final hearing. The town has not appealed and the issues between the town and the defendants to the information presented by the several counter-claims and answers thereto are not before this Court.

The case was referred to Vice-Chancellor Lewis who held that the State is not entitled to the compensation demanded by the Board of Commerce and Navigation and that the information should be dismissed. Decree of dismissal was made and an appeal therefrom taken by the Attorney-General. The present question is whether the State is entitled to such compensation.



## I.

The charter powers of the Newark and Hudson Railroad Company were not exhausted by the laying out and construction of its railroad, and it was unnecessary to have additional legislative authority for the location of the new bridge.

Appellant regards the new connection between the Newark and Hudson Railroad and the Paterson, Newark and New York Railroad, upon which the new bridge was built, as a re-location of the first named railroad, but it is not. There has been no re-location. The railroad remains as it was before the new connection was made, except that the old bridge has been abandoned. That does not effect a re-location.

The cases cited in the brief for appellant in which it was held that a railroad can not be re-located after it has been constructed, except by express legislative authority, are not in point. In most, if not all of those cases there was an actual re-location which varied materially from the original lay-out, while in the present case the new connection merely accomplishes a purpose for which the railroad was originally intended, which was to connect with the Paterson, Newark and New York Railroad.

The principal question in this case is whether the charter power of the Newark and Hudson Railroad Company to connect its railroad with other railroads in Essex and Hudson Counties is a continuing power. If it is, the company had power to make the new connection and build the new bridge thereon without compensation to the State for the riparian lands taken; but if it is not, and the new connection could be made and the new bridge built only under the General Railroad Act of 1903, such compensation may be required.

The charter of a railway company in common with those of other private corporations is to be strictly but reasonably construed in favor of the public and against the company whenever their interests conflict. This rule



is, however, subject to the qualification that inasmuch as railway corporations are created to further great public interests, their charters will receive a liberal interpretation in furtherance of those interests, when they are apparent to the courts, instead of the strict construction usually given to the charters of private corporations organized exclusively for pecuniary profit.

*Elliott on Railroads*; Third Edition; Vol. 1, Sec. 49.

The purpose of the legislature in chartering the Newark and Hudson Railroad Company, as shown by the sixth section of its charter, above quoted, was to authorize the building of a railroad which would connect railroads in Essex County with those in Hudson County, and as such a railroad could not be built and connections made without bridges across the Passaic River, the building of such bridges was expressly authorized.

The language of the sixth section of the charter of the company shows that the power to connect with other railroads and for that purpose to build bridges over the river was intended to be a continuing power. The company was not limited to one connection in Essex County and one in Hudson County nor to one bridge over the Passaic River, but was authorized to connect its railroad with other *railroads* in those counties and to build *bridges* over the river. That more than one bridge was contemplated is also shown by the seventh section of the charter which provides as follows:

“That it shall be the duty of said company to  
 “keep or cause to be kept at such bridges careful  
 “persons, to open said draws for the free passage  
 “of vessels, day and night, and shall at night, dur-  
 “ing the period of navigation, cause to be kept  
 “lights at said draws, and for each neglect to open  
 “said draws, and keep said lights, the said com-  
 “pany shall forfeit and pay the sum of fifty dol-  
 “lars.”

The building of bridges was authorized for the purpose of making connections as well as for the main line.



The charter of the company contains no limitation as to the time when such connections shall be made, and the power to make connections should be construed as a continuing power. The usefulness of the railroad to the public depends upon the connections it has made and may make. To deny the company a continuing power to connect its railroad with other railroads would be contrary to the plain purpose for which it was created.

The charter power to build bridges for the purpose of connecting with other railroads carries with it the power to use such riparian lands as are necessary therefor without compensation to the State.

It was said in the case of *Pennsylvania Railroad Co. v. New York and Long Branch Railroad Co.*, 23 N. J. Eq., 157, that:

“The universal understanding in the state, for  
 “near a century, has been that a statute that gives  
 “authority to bridge a navigable river, gives au-  
 “thority to appropriate the lands under water, be-  
 “longing to the state, without compensation.  
 “There are many railroad bridges thus authorized,  
 “and many more turnpike and county bridges.  
 “When the state authorizes a corporation or an  
 “individual to build roads or bridges upon its  
 “property, as the duty to be performed is that  
 “of the sovereign delegated to a citizen, it implies  
 “the right to proceed without compensation. The  
 “question has never been settled by the courts.  
 “In the cases of *The Att’y Gen’l v. Stevens*, Saxt.  
 “369; *The Att’y Gen’l v. The N. J. R. R. Co.*, 3  
 “Green’s Ch. 136; and *The Newark Plank Road*  
 “and *Ferry Co. v. The Att’y Gen’l*, 1 Stockt. 754,  
 “in all of which lands under tide waters were taken  
 “and occupied, the question was not alluded to by  
 “the Court or by counsel. In each case the want  
 “of compensation, if necessary, would have been a  
 “ground to stay the work.”



## II.

The Newark and Hudson Railroad Company had authority to build the new bridge under the General Railroad Act of 1903 as well as under its charter, but if the matter is controlled by the General Railroad Act alone, the State is entitled to the compensation demanded.

The Newark and Hudson Railroad Company had power to build the new bridge under its charter for the purpose of connecting its railroad with the Paterson, Newark and New York Railroad and to use the riparian lands necessary therefor without compensation to the State. The company also had power to build the new bridge under the General Railroad Act of 1903, but if compelled to rely upon that act alone, the State is entitled to the compensation demanded.

The Newark and Hudson Railroad and the Paterson, Newark and New York Railroad approach each other within a distance of one mile.

Section 8 of the General Railroad Act provides as follows (Comp. Stat., p. 4222):

“Whenever the railroads of any railroad companies shall intersect or cross or shall approach each other within a distance of one mile, either company may construct and operate a branch to effect a connection of such railroads, and may take and hold the land and property necessary for that purpose on filing a map and description of the survey of the route of such branch, in the office of the secretary of state, and making the required deposit with the state treasurer.”

Section 88 of the same act provides as follows (Comp. Stat., p. 4275):

“The provisions of this act, except as herein otherwise restricted, shall apply to all railroad companies however formed, created or organized under any law of this state.”

The Newark and Hudson Railroad Company, before proceeding to build the new bridge, filed in the office of



the Secretary of State a map and description of the survey of the route of "Branch B" of its railroad which connects the Newark and Hudson Railroad with the Paterson, Newark and New York Railroad. The new bridge is upon that branch.

The power of the Newark and Hudson Railroad Company to build the new bridge under the General Railroad Act is admitted by appellant, but he contends that the company had power to build the bridge under that act alone, and, therefore, that the state is entitled to the compensation demanded. If the company did not have charter power to build the new bridge and was compelled to rely upon the General Railroad Act alone, the state is entitled to such compensation, for Section 16 of that act provides as follows (Comp. Stat., p. 4228):

"Any railroad company may build and maintain  
 "over such streams as the road may cross, such  
 "piers and bridges as they may deem expedient,  
 "and may build viaducts over or tunnels under  
 "any navigable or other river, stream or bay of  
 "water which such railroad may cross; \* \* \*  
 "provided, that such company shall not take any  
 "land under water belonging to this state until the  
 "consent of the riparian commissioners shall first  
 "be had and obtained (unless the said land is at  
 "least twenty-five feet under the bed of the water),  
 "who are hereby authorized to convey the same on  
 "receiving such compensation as they may fix."

But the Newark and Hudson Railroad Company was not compelled to rely upon the General Railroad Act alone for authority to build the new bridge. The company had charter power to build it and such power was expressly preserved by the General Railroad Act, Section 89, of which provides as follows (Comp. Stat., p. 4258):

"All acts and parts of acts, general and special, inconsistent with this act, are hereby repealed; such repeal shall not, however, work a dissolution of any railroad company, but the charter, certificate of incorporation, or articles of association thereof, and the rights, powers and privileges conferred thereby, shall continue un-



“affected and unimpaired; this repealer shall not,  
“however, revive any act heretofore repealed.”

It is true that the company's charter is subject to alteration, amendment or repeal, but there is nothing in the General Railroad Act which alters, amends or repeals its charter power to build bridges. On the contrary that power was preserved by the last quoted section of the act. The power to build bridges conferred by the General Railroad Act is in addition to the charter power to do so. Appellant's argument that the General Railroad Act preserves only the charter power of the company to continue its railroad is untenable.

*North Hudson County Railway Co. v. Hoboken*,  
41 N. J. L. 71;

*West Jersey Traction Co. v. Camden Horse Railroad Co.*, 52 N. J. Eq. 452.

### III.

**The Newark and Hudson Railroad Company did not lose its charter power to use riparian lands for bridges necessary for connections with other railroads by non-user.**

Appellant's argument is in effect that if the Newark and Hudson Railroad Company had charter power to make connections with railroads, other than those originally made, such power was lost by failure to exercise it at the time the company's railroad was laid out and constructed. In other words, that the company is limited by its charter not only in respect of the location of its railroad but also to its original connections. Such is not the case.

The charter power of the company to make connections is a continuing power unlimited as to the time when it may be exercised.

It is hard to see how the decision in the case of *Spottiswoode v. Morris & Essex Railroad Co.*, 61 N. J. L. 322, affirmed 63 N. J. L. 667, cited by appellant has any bearing on the present case. The question in that case was



whether title by adverse possession could be obtained to lands conveyed to a railroad company for a right of way but not used by it for many years. That case is entirely foreign to the question whether the Newark and Hudson Railroad Company was limited by its charter to the original connections of its railroad.

#### IV.

The Newark and Hudson Railroad Company did not lose its right to occupy the riparian lands necessary for the new bridge by virtue of the Act of 1894 appropriating all riparian lands to the public school fund.

The acts of the legislature appropriating riparian lands for the support of public schools have no bearing on the present case (P. L. 1894, p. 123; P. L. 1903 (2nd Special Session), p. 63; Comp. Stat., p. 4779, pp. 168, 169). Those acts do not affect prior grants by the State, either of riparian lands or of the power to use them. They cannot impair the obligation of the State contained in the charter of the Newark and Hudson Railroad Company, by which the State expressly gave the company the right to build bridges across the Passaic and Hackensack Rivers and impliedly the right to occupy and use the riparian lands necessary therefor.

#### Conclusion.

We respectfully submit that the State is not entitled to compensation for the riparian lands occupied or affected by the new bridge and that the decree dismissing the information should be affirmed.

COLLINS & CORBIN,  
*Of Counsel with Respondents.*



