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New Jersey State Library

BILL OF COMPLAINT.

Filed August 30, 1927.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey.

The complainant, the Town of Harrison, a
municipal corporation, respectfully shows that:

1. The United New Jersey Railroad and
Canal Company, a corporation, is the owner of
a railroad right of way upon which is operated
freight and passenger trains through the Town
of Harrison.

2. The Pennsylvania Railroad Company, a 20
corporation, is the lessee of the said railroad
right of way and operates passenger and freight
trains over the said right of way in the Town
of Harrison.

3. The Public Service Electric and Gas Com-
pany, a corporation, owns and operates a gas
plant located in the Town of Harrison.

4. South Fourth street or Fourth street (here- 30
after called Fourth street) is a public highway
in the Town of Harrison running approximately
in a north and south direction. Said highway
is crossed by the aforesaid railroad right of way
by means of an overhead trestle and the said gas
plant of the Public Service Electric and Gas
Company is located on the west side of said
street and adjacent to the said railroad right of
way.

5. On or about January 6, 1927, Pennsylvania
Railroad Company, lessee of United New Jersey 40

Bill of Complaint.

Railroad and Canal Company, petitioned the Board of Public Utility Commissioners of the State of New Jersey for permission to construct a siding at grade to the said gas plant of the Public Service Electric and Gas Company across South Fourth street at a point 390 feet south of the southerly line of Somerset street, in the Town of Harrison. On or about the said date the Public Service Electric and Gas Company also submitted a petition for the construction of the said siding at grade.

6. The said petitions were set down for hearing and tried before the said Board of Public Utility Commissioners the Town of Harrison opposing the said petition.

7. On August 4, 1927, the Board of Public Utility Commissioners rendered its decision on the said petitions permitting the construction of the siding track at grade across Fourth street at the location as requested by the petitioners for a period of five years upon certain conditions as to time of operation, safety protection, speed of trains, etc., a copy of which decision is attached hereto. Said decision was ordered filed by said Board.

8. Under "An Act providing for the formation, establishment and government of Towns" Chapter 113 Laws of 1895, page 236, and a supplement thereto, Chapter 185 Laws of 1895, page 356, the governing bodies of Towns are given the power to "regulate the use of streets, highways, and public places by individuals, vehicles, railways, and engines of every kind;—and to regulate the speed and running of locomotives, engines and railroad cars through the Town" and under Chapter 152 Laws of 1917, page 404, the

Bill of Complaint.

Town of Harrison has the power to make, publish, enforce, amend or repeal ordinances "to prescribe the time and the manner in which and the terms upon which corporations or persons shall exercise any privileges granted to them in the use of any avenue, street, highway, alley or public place, or in digging up the same for laying down rails, pipes, conduits or any other purpose whatever."

9. The United New Jersey Railroad and Canal Company, the Pennsylvania Railroad Company, and the Public Service Electric and Gas Company, defendants in this matter have not received permission from the Town of Harrison to construct said siding at grade across Fourth street; (a public highway as above set forth).

10. That on the 25th day of August, 1927, the said defendants relying on the permission granted by the Board of Public Utility Commissioners (as above set forth) attempted to construct a siding at grade across Fourth street, in the Town of Harrison, without first obtaining the consent or permission of the Town of Harrison therefor, in accordance with the rights and power of the Town derived under the statutes above set forth. The Town of Harrison frustrated said attempt on the part of the said defendants, through the use of its police force. That it has been necessary since said attempt and still is necessary for the Town of Harrison to continue said public surveillance to guard against the construction of said siding at grade by the said defendants.

11. That the Town of Harrison on the 27th day of August, 1927, made application to the Chief Justice of the Supreme Court for a writ

Bill of Complaint.

of certiorari to review the said decision of the Board of Public Utility Commissioners which application was denied.

12. Complainant is without adequate remedy in the courts of law and therefore prays:

10 1. That the United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company, defendants to this suit, may answer this bill of complaint.

20 2. That the United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company, and their agents and servants, may be enjoined from constructing or attempting to construct a siding at grade across South Fourth street in the Town of Harrison and from operating freight or passenger trains thereon.

30 3. That the United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company, and their agents and servants, may be enjoined from constructing or attempting to construct a siding at grade across South Fourth street in the Town of Harrison and from operating freight or passenger trains thereon, pending final hearing of this suit.

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

FREDERICK J. GASSERT,
Solicitor for and of Counsel with Complainant.

ANDREW VAN BLARCOM,
Of Counsel.

Affidavit of Frederick J. Gassert.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

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On Bill, etc.

Affidavit.

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

FREDERICK J. GASSERT, of full age, being duly sworn according to law, upon his oath deposes and says:

I am Town Counsel of the Town of Harrison a municipal corporation located in Hudson County, New Jersey.

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The United New Jersey Railroad and Canal Company, a corporation, is the owner of a railroad right of way upon which is operated freight and passenger trains through the Town of Harrison.

The Pennsylvania Railroad Company, a corporation, is the lessee of the said railroad right of way and operates passenger and freight trains over the said right of way in the Town of Harrison.

Affidavit of Frederick J. Gassert.

The Public Service Electric and Gas Company, a corporation, owns and operates a gas plant located in the Town of Harrison.

10 South Fourth street or Fourth street (hereafter called Fourth street) is a public highway in the Town of Harrison running approximately in a north and south direction. Said highway is crossed by the aforesaid railroad right of way by means of an overhead trestle and the said gas plant of the Public Service Electric and Gas Company is located on the west side of said street and adjacent to the said railroad right of way.

20 On or about January 6, 1927, Pennsylvania Railroad Company, lessee of United New Jersey Railroad and Canal Company, petitioned the Board of Public Utility Commissioners of the State of New Jersey for permission to construct a siding at grade to the said gas plant of the Public Service Electric and Gas Company across South Fourth street at a point 390 feet south of the southerly line of Somerset street, in the Town of Harrison. On or about the said date the Public Service Electric and Gas Company also submitted a petition for the construction of the said siding at grade.

30 The said petitions were set down for hearing and tried before the said Board of Public Utility Commissioners the Town of Harrison opposing the said petition.

40 On August 4, 1927, the Board of Public Utility Commissioners rendered its decision on the said petitions permitting the construction of the siding track at grade across Fourth street at the location as requested by the petitioners for a period of five years upon certain conditions as

Affidavit of Frederick J. Gassert.

to time of operation, safety protection, speed of trains, etc.

The United New Jersey Railroad and Canal Company, the Pennsylvania Railroad Company and the Public Service Electric and Gas Company, defendants in this matter, have not received permission from the Town of Harrison to construct said siding at grade across Fourth street. 10

That on the 25th day of August, 1927, the United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company, relying on the permission granted by the Board of Public Utility Commissioners attempted to construct a siding at grade across Fourth street in the Town of Harrison without first obtaining the consent or permission of the Town of Harrison therefor. The Town of Harrison frustrated said attempt on the part of the said United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company, through the use of its police force. That it has been necessary since said attempt and still is necessary for the Town of Harrison to continue said police surveillance to guard against the construction of said siding at grade by the said United New Jersey Railroad and Canal Company, Pennsylvania Railroad Company and Public Service Electric and Gas Company. 20 30

That on the 27th day of August, 1927, the Town of Harrison made application to the Chief Justice of the Supreme Court for a writ of certiorari to review the said decision of the Board 40

Affidavit of Frederick J. Gassert.

of Public Utility Commissioners, which application was denied.

FREDERICK J. GASSERT.

10 Sworn and subscribed to before me
this 30th day of August, 1927.

ANGIE E. FEDERICI,
(SEAL) Notary Public of New Jersey.

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Decision of Board of Public Utility Com'rs.

STATE OF NEW JERSEY.

Board of Public Utility Commissioners.

In the matter of the application of the UNITED NEW JERSEY RAILROAD AND CANAL COMPANY and the PENNSYLVANIA RAILROAD COMPANY, lessee, for permission to construct siding track at grade across Fourth street, in the Town of Harrison, Hudson County. *Decision.* 10

Albert C. Wall for the United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company. 20

George H. Blake for the Public Service Electric and Gas Company.

Frederick J. Gassert for the Town of Harrison.

The United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company, lessee, applies for permission to construct a siding track at grade across Fourth street, in the Town of Harrison, Hudson County, running from a connection with tracks of the railroad on the easterly side of Fourth street into the plant of the Public Service Electric and Gas Company located on the westerly side of Fourth street. Supplemental application was filed by the Public Service Electric and Gas Company. 30

The Public Service Electric and Gas Company manufactures gas which is distributed to Harrison, Newark and other municipalities. In the manufacture of the gas a large quantity of coal, oil and other supplies are used, and with no rail 40

Decision of Board of Public Utility Com'rs.

connection direct to its plant it is necessary to transport the supplies by auto truck and coal by boat. 45,000 tons of coal and 1,000 tons of other materials per year are required for the present operation of the plant. When the plant is in complete operation it is contemplated the
 10 tonnage will be in excess of 100,000 tons per year.

Hearings were held at Newark and testimony taken of representatives of the Railroad Company and the Town of Harrison and plans submitted as exhibits.

The Harrison station, on the main line, is located on the southwest corner at the intersection of Fourth street and the railroad, with platform between the station building line and the south-
 20 erly passenger track. The bridge carrying the main line track is 13 feet 10 inches above the surface of the highway. The Town of Harrison opposes the construction of the proposed siding track at the grade of the highway, claiming that it could be carried over the highway on the same level as the main tracks adjoining the station platform. It is claimed by the Railroad Company that it would not be practicable to construct a freight siding track at such location, re-
 30 quiring same to be crossed by passengers boarding and alighting from trains, and, further, that the proposed plan for a new station at Newark involving the construction of two additional tracks to afford a six-track layout through Harrison and Newark will necessitate the use of the location that the Town of Harrison suggests could be used for the siding. In view of the proposed additional track construction through Harrison and the opposition to a freight track adjoining the station, the location of the siding
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Decision of Board of Public Utility Com'rs.

track, if at grade or over Fourth street, should be on the south side of the station building. This latter location would also be practically in line with an existing track east of Fourth street leading into the plant of the Crucible Steel Company and from which the extension could be constructed to the Gas Company's plant. 10

The construction of the siding track over Fourth street with necessary approach fills, retaining wall, alteration of tracks, etc., is estimated by the Board's chief engineer of bridges and grade crossings to cost approximately \$140,000. The estimate of the Railroad Company for the siding track at grade is approximately \$10,000. To construct an overhead track at the location proposed by the engineer of the Town of Harrison would cost considerably less than the
 20 estimate of the Board's engineer.

Fourth street is one of the main highways through Harrison and is a heavily-traveled thoroughfare. Trolley tracks in the highway are not now used, as buses have been substituted for the operation of trolley cars. It is contended by the Town of Harrison that the movement of freight trains across Fourth street would be a serious impediment to highway traffic. State-
 30 ments submitted, of highway traffic, shows the heaviest traffic between the hours of 10:00 A. M. and 7:00 P. M. and the travel between 2:00 A. M. and 5:00 A. M. exceedingly light. Between the hours of 2:00 A. M. and 3:00 A. M. the check shows twelve automobiles, two trucks and four pedestrians; 3:00 A. M. and 4 A. M., nine automobiles, five trucks and three pedestrians; 4:00 A. M. and 5:00 A. M., four automobiles, seven trucks and three pedestrians. It is evident that if trains were limited to move over the highway
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Decision of Board of Public Utility Com'rs.

between 2:00 A. M. and 5:00 A. M. only there could not result any material interference with highway traffic, as a train of six to eight cars passing over ninety feet, the distance between inside building lines, at a speed of six miles per hour, would occupy the highway space less than
10 one minute.

The jurisdiction of the Board relative to crossing of railroad tracks at grade is set forth in Section 21 of an Act creating the Board of Public Utility Commissioners, Chapter 195, Laws of 1911, as amended by Chapter 218, Laws of 1917:

“No highway shall be constructed across the tracks of any Railroad Company grade, nor shall any track over which locomotives, railroad or street railway cars are to pass be
20 laid across any highway, so as to make a new crossing at grade, nor shall the tracks of any railroad or street railway or traction company be laid across the tracks of any railroad or street railway or traction company without first obtaining therefor permission from the Board.”

The practice of the Board relative to the application for a new crossing at grade has generally been to require the consent of the local
30 municipality prior to the Board passing on the application. The passage of an ordinance, however, is not a necessary condition precedent to the Board's action upon applications of this kind. The authority is conferred upon it by statute to grant its approval when in its judgment conditions justify it. As the period in which movements would be made across the highway could be limited during early morning hours when the traffic is very light, it would seem there could
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Decision of Board of Public Utility Com'rs.

be no substantial objection to the construction of the track at grade. It is apparent, however, that there would be substantial ground for objection if high-speed movements were to be made across the highway or that freight movements would be made at any time during the day or
10 night.

While the Town of Harrison desires that the track crossing Fourth street should be elevated over the highway, it would not appear reasonable to require such construction at this time in view of the contemplated additional passenger tracks and the possibility that the re-arrangement of the definite track layout may permit the construction of an elevated track into the Gas Company's plant. As no material inconvenience will result if a temporary siding track at grade
20 is permitted for a period of five years, when the plans are finally prepared, which in all probability will be within said period, the continuing of the track at grade or elevating over the highway can then be definitely determined.

The Board, therefore, will grant permission to construct the siding track at grade across Fourth street at the location as requested by the petitioners for a period of five years upon the following conditions:
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That the speed of trains be limited to six miles per hour over the highway; that trains be brought to a full stop east or west of the property line; that a flagman be stationed in the center of the highway with red lamp and signal to engineer for train to proceed; that train movements be limited to the period between 2:00 A. M. and 5:00 A. M.; that the portion of track within the highway lines shall be laid and maintained at the highway level with standard
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Decision of Board of Public Utility Com'rs.

grooved rail on ties with concrete foundation; that the surface of the highway be adjusted thereto and properly paved and drained at curb lines.

Dated, August 4th, 1927.

10 BOARD OF PUBLIC UTILITY
COMMISSIONERS,
By (Signed) Jos. F. Autenreith,
President.

Attest:

(Signed) Emmett T. Drew,
(SEAL) Acting Secretary.

20 I HEREBY CERTIFY the foregoing to be a true copy of a decision rendered by the Board of Public Utility Commissioners and ordered filed by said Board.

EMMETT T. DREW,
Acting Secretary.

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ORDER TO SHOW CAUSE.

Filed August 30, 1927.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

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*On Bill, &c.
Order to
Show Cause.*

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This matter being opened to the Court by Frederick J. Gassert, solicitor of the complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavit thereunto annexed,

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It Is on this 30th day of August, 1927, ORDERED, that all the above-named defendants show cause before this Court at the Chancery Chambers, in the City of Newark, on Tuesday, the 6th day of September, 1927, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the above-named defendants should not be restrained and enjoined according to the prayer of said bill.

And It Is FURTHER ORDERED that true but uncertified copies of said bill of complaint and the

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Order to Show Cause.

affidavit thereunto annexed and of this order be served on the said defendants by serving on the solicitors of the defendants within three days from the date thereof.

E. R. WALKER,
Chancellor.

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Respectfully advised,

ALONZO CHURCH,
V.-C.

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ORDER DISCHARGING RULE TO SHOW CAUSE.

Filed September 17, 1927.

IN CHANCERY OF NEW JERSEY.

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Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

*On Bill, &c.
On Rule to Show Cause.*

Order Discharging Rule to Show Cause, etc. 20

This matter coming on to be heard before the Court on a rule to show cause heretofore granted herein on application of the above-named complainant, why the above-named defendants, their agents and servants, should not be restrained and enjoined according to the prayer of the bill of complaint filed in this cause, from constructing or attempting to construct a siding at grade across South Fourth street in the Town of Harrison and from operating freight or passenger trains thereon, and why they should not be so restrained and enjoined pending final hearing of this suit; and the Court having heard the arguments of counsel for the respective parties, and 40

Order Discharging Rule to Show Cause.

duly considered the pleadings and affidavits filed in the cause, and being of the opinion that the restraint prayed for should be denied,

It is, thereupon, on this 15th day of September, A. D. 1927, on motion of Wall, Haight, Carey & Hartpence, solicitors for and of counsel with the defendants, United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company, and Frank Bergen, Esq., and Charles S. Straw, Esq., solicitors for and of counsel with the defendant Public Service Electric and Gas Company, ORDERED that said rule to show cause be and hereby is discharged and the restraint prayed for denied, with costs,

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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ANSWER, COUNTER-CLAIM AND AFFIDAVITS.

Filed September 30, 1927.

IN CHANCERY OF NEW JERSEY.

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Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

On Bill, &c.

Answer and Counter-claim.

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The answer and counter-claim of the defendants, The United New Jersey Railroad and Canal Company, a corporation of the State of New Jersey, The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, and The Public Service Electric and Gas Company, a corporation of the State of New Jersey.

These defendants, answering the bill of complaint, say that:

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11 of the bill of complaint, together with the copy of the decision of the Board of Public Utility Commissioners of the State of New Jersey, re-

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Answer and Counter-claim.

ferred to in paragraph 7 and attached to and forming part of said bill, are admitted.

2. Paragraph 8 of the bill of complaint is denied.

10 By way of counter-claim against said complainant, these defendants say that:

1. Paragraphs 1 and 2 of the foregoing answer, are here repeated and made a part hereof.

20 2. Subsequent to the making and filing of the decision of the Board of Public Utility Commissioners of the State of New Jersey on August 4, 1927, of its decision granting defendants permission to construct the siding track at grade across
20 South Fourth street, in the Town of Harrison, New Jersey, and on or about August 25, 1927, said defendants commenced the construction of siding across said street, but were almost immediately stopped and prevented from proceeding with said construction by said Town of Harrison, its police officers, officials, agents, employees, and representatives, and that from thence hitherto said The Town of Harrison, its police officers, officials, agents, employees, and representatives,
30 have frustrated and prevented defendants from proceeding with the construction of said siding track across said South Fourth street, at the place so designated and permitted by said decision of said Board of Public Utility Commissioners, so attached to said bill of complaint herein, and which is here repeated and made a part hereof, and still continues so to frustrate and prevent defendants from proceeding with said construction, and have asserted that they
40 propose to continue to frustrate and prevent the

Answer and Counter-claim.

same, notwithstanding said permission of said Board of Public Utility Commissioners.

3. Defendants are irreparably injured by said acts of said complainant, its police officers, officials, agents, employes, and representatives in so frustrating and preventing said defendants from proceeding with the construction of said siding, and their respective business operations, in the service of the public, as well as in their private interests, are hampered, hindered, delayed, rendered ineffective, and prevented, not only to their own great private financial loss and damage, but also to the inconvenience and loss of the public, aforesaid. 10

These defendants are without adequate remedy in the courts of law, and therefore, pray: 20

1. That said complainant, The Town of Harrison, a municipal corporation of the State of New Jersey, may answer this counter-claim and each statement made herein.

2. That said complainant, its Mayor, its Town Council, and the Committees thereof, its Chief of Police and its police officers, and its officials, agents, servants, employes, and representatives, and any and all other persons or corporations acting for them or in their behalf, and each and every of them, may be enjoined and restrained from in any wise interfering with, molesting, preventing or frustrating, or attempting or advising so to do, said defendants or any or either of them, or any person or persons, corporation or corporations acting for them or in their behalf, in the constructing and laying of said siding track, with its necessary appurtenances, over and across said South Fourth street, in the Town of 30 40

Answer and Counter-claim.

Harrison, New Jersey, aforesaid, at grade, and from operating their trains thereon, at the place and in the manner designated by said Board of Public Utility Commissioners in its decision aforesaid; and also be so restrained and enjoined pending final hearing of this suit, and that a writ or writs of injunction may issue accordingly.

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3. That a writ of subpoena may issue, commanding said complainant to answer this counter-claim and to abide by such decree as this Court may make in the premises.

WALL, HAIGHT CAREY & HARTPENCE,
Solicitors for Defendants, The United New Jersey Railroad and Canal Company, and The Pennsylvania Railroad Company.

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FRANK BERGEN,
Solicitor for Defendant, The Public Service Electric and Gas Company.

WALL, HAIGHT, CAREY & HARTPENCE,
FRANK BERGEN,
Of Counsel.

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Affidavit of John F. Chandler.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

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and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

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*On Bill, &c.
Affidavit.*

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

JOHN F. CHANDLER, of full age, being duly sworn according to law, on his oath says, that he is Supervisor of The Pennsylvania Railroad Company, one of the defendants in the above-stated cause, and that he has been actively in charge of the construction and laying of the track or siding at grade across South Fourth street, in the Town of Harrison, Hudson County, New Jersey, in pursuance of the permission granted by the Board of Public Utility Commissioners of the State of New Jersey, by its decision dated August 4, 1927, and that on August 25, 1927, one of his foremen, Frederick W. Worzel, in accordance with his directions through deponent, with a force of workmen under him, commenced to lay and construct said track or siding over

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Affidavit of John F. Chandler.

and across said South Fourth street, in said
Town of Harrison, aforesaid, but, as deponent is
informed and verily believes, said construction
work across and over said street was stopped by
the police force of said Town of Harrison a few
minutes after said work was so commenced by
10 said Frederick W. Worzel and his men as afore-
said; deponent further says that said construc-
tion was thus frustrated and prevented by said
police force, and that a police patrol has been
maintained by said Town of Harrison ever since
said date last aforesaid, and is still being so
maintained, at said point where said track is to
be constructed, for the purpose of preventing
defendants by force from laying and construct-
ing said track.

20 Deponent further deposes and says that he has
inquired concerning the names of the Mayor and
other officials of said Town of Harrison, and
that he has been informed and verily believes
that, among others, they are as follows:

Mayor, Matthew L. O'Brien;

Members of Street Committee of Town Coun-
cil;

Lawrence F. Fagan,

William J. Desmond,

30 Harry J. McLinden,

William F. Kenney,

Town Clerk, Francis J. McDonald;

Chief of Police, Peter F. Brady;

Building Inspector and Street Commissioner,
Daniel F. Maher.

40 Deponent further deposes and says that the
work of laying and constructing said track or sid-
ing can be completed across and over said South
Fourth street, Harrison, N. J., within a period
of one or two days, and that within a few days

Affidavit of John F. Chandler.

thereafter cars can be operated over same for
the purpose for which it is to be constructed,
namely, to deliver fuel and supplies to said The
Public Service Electric and Gas Company, to be
used in the manufacture and supply of gas for
and to the public, in the exercise of the public
functions of said defendants, as well as in the
10 conduct of their private interests and business;
deponent further deposes and says that the pre-
venting and stopping of the construction of said
track and the operating of cars over it for the
purposes and in the manner provided in said
decision of said Board of Public Utility Com-
missioners, will entail great financial loss daily
to said defendants as well as interference with
the efficient and effective performance of their
20 public duties, and that unless the complainant
be restrained from interfering with the laying
and construction of said track and the operating
of cars and trains over it, irreparable injury and
damage will result to said defendants.

JOHN F. CHANDLER.

Sworn to and subscribed before
me, this 30th day of Septem-
ber, A. D. 1927.

30 PHILLIP FORMAN,
M. C. C. of N. J.

Affidavit of Frederick William Worzel.

IN CHANCERY OF NEW JERSEY.

Between

10 TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

20 UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

On Bill, &c.
Affidavit.

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

FREDERICK WILLIAM WORZEL, of full age, being duly sworn according to law, on his oath says:

I reside in the Town of Harrison, Hudson County, New Jersey, and have resided there since 1910.

30 I am a Track Foreman employed by The Pennsylvania Railroad Company, one of the above-named defendants, and have been employed as such by said Company for nearly eighteen years last past. On Thursday, August 25, 1927, at about 7:45 A. M., Daylight Saving Time, I commenced work with six men and a sub-foreman on the east side of South Fourth street, in the Town of Harrison, Hudson County, New Jersey, just south of the main passenger tracks of said Railroad Company and across the street, from the
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Affidavit of Frederick William Worzel.

Fourth street, Harrison Passenger Station of said railroad, for the purpose of constructing a track across said South Fourth street in a westerly direction into and upon the property of the Public Service Company where the gas tanks are located. We had worked about ten minutes and had taken up two or three pieces of flag sidewalk, when two police officers of Harrison, in uniform, came to where we were working as aforesaid, and one asked me what we were doing. I told him we were constructing a track across South Fourth street. He said you have to have a permit for that. I said we have a permit and I showed him a certified copy of the paper from the Board of Public Utilities of New Jersey granting permission to lay said tracks across said street, which had been given to me by my superior, N. M. Lawrence, Track Supervisor of said railroad company, prior to the time we commenced work on said track at South Fourth street. The policeman examined said paper and then said to me that this permit is no good and you will have to get a permit from the Town Hall. He then said to me you will have to stop digging. A man from the Public Service Company, Mr. James Downey, who was there, then said to the policeman, are you going to arrest us, and the officer said, no, I only had orders to make you stop digging, but you will have to go with me to the Town Hall. We three then went up to the Harrison Town Hall together, and the officer told a man there at the desk that we had been digging up the sidewalk at Fourth street. The man at the desk told us to sit down. The policeman left a few minutes later, and shortly afterward Mr. Downey left. He was not held, but I was. I stayed there
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Affidavit of Frederick William Worzel.

until a few minutes after 9 o'clock, when the police judge came in and said, come up here and I'll make a short case out of this. You are charged with tearing up the sidewalk of the Town without a permit; you know you need a permit to do that. I said I have a permit. He said
 10 let me see it. I then showed him the paper above referred to. He examined it, and then said, that is no good; we can't let the Public Utilities give permits to tear up our streets. I'll postpone the case for a week.

FREDERICK W. WORZEL.

Sworn to and subscribed before
 me this 29th day of September, 1927.

20 ALFRED F. CONWAY,
 Master in Chancery of New Jersey.

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Affidavit of Robert H. Phillips, Jr.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,

Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,

Defendants.

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*On Bill, &c.
Affidavit.*

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

ROBERT H. PHILLIPS, of full age, being duly sworn according to law, says:

I am the engineer of manufacture, Essex Division, of the Public Service Electric and Gas Company, one of the above-named defendants, and have been such since April 1, 1927. I have been locally in charge of the construction of the laying and constructing of the railroad tracks within the boundaries of the property of the Public Service Electric and Gas Company of their Harrison plant to connect with the railroad tracks of the Pennsylvania Railroad and the United New Jersey Railroad and Canal Company, which are to be constructed across South Fourth street, Harrison, New Jersey, just south of the main tracks of the said Railroad Company

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Affidavit of Robert H. Phillips, Jr.

under a judgment or determination made by the Board of Public Utility Commissioners of the State of New Jersey on or about August 4, 1927. I was present at the location at which said tracks were to be constructed across South Fourth street, Harrison, on Thursday, August 25, 1927, and saw the aforesaid Mr. Frederick W. Worzel, the foreman of the Pennsylvania Railroad Company, who accompanied a policeman of the Town of Harrison and Mr. James N. Downey, my superior officer in said corporation aforesaid to the Town Hall, in Harrison. Another policeman of said Town of Harrison remained at the said location to prevent any further work being done on said railroad tracks across South Fourth street. I have been in that locality personally every day since and I know that one or more policemen of said Town of Harrison has been stationed at that location throughout the day and night, patrolling said location continuously for the purpose of preventing said tracks being laid across said South Fourth street, and that he was still there this day.

ROBERT H. PHILIPPS, JR.

Sworn to and subscribed before me this 29th day of September, A. D. 1927.

ALFRED F. CONWAY,
Master in Chancery of New Jersey.

Affidavit of James N. Downey.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

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and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

*On Bill, &c.
Affidavit.*

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

JAMES N. DOWNEY, of full age, being duly sworn according to law, on his oath says:

I am the engineer of construction of the Public Service Electric and Gas Company, one of the defendants in the above-stated suit, and have been such for about a year and a half last past. I am in charge of the construction work at the Harrison plant of said company now in progress with relation to the construction of a railroad siding or track across South Fourth street in the Town of Harrison, New Jersey, to connect with the line of the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, defendants in the above-stated cause; said work is being done pursuant to a judgment or determination of the Board of

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Affidavit of James N. Downey.

Public Utility Commissioners of the State of New Jersey, made on or about August 4, 1927. On Thursday, August 25, 1927, about 7:45 A. M. (Daylight Saving Time), I was present at the place where said railroad track was to be constructed across South Fourth street, in the

10 Town of Harrison, at the time when the workmen of the Pennsylvania Railroad Company commenced to lay the track across the street, and at the time when a few minutes later two policemen of the Town of Harrison aforesaid arrested the Pennsylvania Railroad foreman, Mr. Frederick W. Worzel, and I accompanied said policeman and Mr. Worzel to the Town Hall of the Town of Harrison, where Mr. Worzel was held for a hearing on the charge of having opened a

20 street in the Town of Harrison without a permit from said Town. One of the said policemen asked Mr. Worzel by what authority he was tearing up the street and Mr. Worzel showed him a certified copy of the said determination or judgment of the said Board of Public Utility Commissioners, whereupon the policeman said that was not sufficient, and that he would have to have a permit from the Town, and thereupon told Mr. Worzel that he would have to stop work.

30 One of the policemen remained at the place where the tracks were to be so constructed in order to see that no further work was done. I have been present or in touch with the engineers at said location personally every day since said arrest was made, and I know that one or more policemen of said Town of Harrison has been stationed there continuously for the purpose of preventing the construction of said railroad track across said South Fourth street, and that

40 said policemen was still so stationed there this day.

Affidavit of James N. Downey.

Deponent further says that subsequent to the making of said judgment or determination of the Board of Public Utility Commissioners and prior to the said arrest of Mr. Frederick W. Worzel, deponent went to Mr. Daniel F. Maher, Building Inspector and City Commissioner of said Town of Harrison, New Jersey, and applied for a permit in behalf of all of the above-named defendants, to cross South Fourth street and to construct said tracks over the same, and that said Daniel F. Maher referred him to the members of the Street Committee of the said Town of Harrison, and he took him to see Mr. Lawrence F. Fagan, Chairman, and Mr. William F. Kenney, member of said Street Committee. They refused to grant their consent to the construction of said railroad tracks across said

10 Fourth street.

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JAMES N. DOWNEY.

Sworn to and subscribed before
me this 29th day of September,
A. D. 1927.

ALFRED F. CONWAY,
Master in Chancery of New Jersey.

Certified a true copy.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Defendants
United New Jersey Railroad and Canal Company
and The Pennsylvania Railroad Company.

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ORDER TO SHOW CAUSE.

Filed September 30, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*
 TOWN OF HARRISON, a Municipal Corporation,
Complainant,
and
 UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
 20 *Defendants.*

On Bill, &c.
Order to Show Cause, &c.

This matter being opened to the Court by Wall, Haight, Carey & Hartpence, and Frank Bergen, solicitors for and of counsel with the respective above-named defendants; and upon reading and filing the answer and counter-claim and affidavits presented therewith,

30 It is, on this 30th day of September, A. D. 1927, on motion of Wall, Haight, Carey & Hartpence and Frank Bergen, solicitors for and of counsel with the said respective defendants, ORDERED that the above-named complainant, The Town of Harrison, a municipal corporation of the State of New Jersey, do show cause before the Chancellor, at the Chancery Chambers, in the Industrial Office Building, in the City of Newark,
 40 New Jersey, on Tuesday, the 4th day of October,

Order to Show Cause.

A. D. 1927, at 10:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, why said complainant, its officials, officers, agents, servants, employees and representatives and any and all other persons acting for or in their behalf, should not be restrained and enjoined in accordance with the prayer of said counter-claim;

And IT IS FURTHER ORDERED that copies of this order and of said answer, counter-claim and affidavits (which may be certified by the solicitors for said defendants or either of them) may be served on the solicitor of said complainant by delivering the same, either personally or by leaving same at the office within one day from and after the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Certified as a true copy,

WALL, HAIGHT, CAREY & HARTPENCE,
 Solicitors for Defendants United New Jersey Railroad and Canal Company and Pennsylvania Railroad Company.

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REPLICATION AND ANSWER TO COUNTER-CLAIM.

Filed October 7, 1927.

IN CHANCERY OF NEW JERSEY.

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Between

TOWN OF HARRISON, a Municipal Corporation, Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation, Defendants.

On Bill, &c. Replication and Answer to Counter-claim.

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Complainant joins issue with the defendants in the answer filed by the defendants to the bill of complaint.

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By way of answer to the counter-claim of the defendants, this complainant says that:

1. Paragraph 1 of the counter-claim is admitted with the exception of the denial of paragraph 8 of the bill of complaint by the defendants as contained in defendants' answer and said paragraph 8 of the bill of complaint is hereby repeated and reasserted.

2. Paragraph 2 of the counter-claim is admitted.

3. Paragraph 3 of the counter-claim is denied.

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FREDERICK J. GASSERT, Solicitor of Complainant.

OPINION OF VICE-CHANCELLOR.

Filed October 19, 1927.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, Complainant,

and

UNITED NEW JERSEY RAILROAD & CANAL COMPANY, et als., Defendants.

Opinion.

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On final hearing, for injunction.

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The Public Utility Commission has exclusive jurisdiction to grant permission for railroad grade crossings over streets and highways and to regulate the same. All previous powers delegated to cities and towns in this respect are superseded.

For complainant, Frederick J. Gassert, Andrew Van Blarcom.

For defendants, Wall, Haight, Carey & Hartpence.

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BACKES, V.-C.

The Board of Public Utility Commissioners granted the defendant railroad the right to lay a freight track across South Fourth street in the Town of Harrison; a spur to the works of the Public Service Company. The town filed a bill to restrain the construction, and upon motion for

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Opinion of Vice-Chancellor.

an injunction *pendente lite* this memorandum was filed:

10 “Under Sec. 21 of the Public Utilities Act, the Commission has exclusive jurisdiction of the location of railroads over the highways of the State. Previous delegation by the State of power to regulate granted to municipalities or other State agencies is superseded and abrogated by the act. In 98 Law 106 it was held that municipal consent was not a condition precedent to the judgment of the Utility Commission. Municipal concurrence is not a condition precedent to the execution of that judgment. 89 Eq. 95 is not an authority to the contrary. Injunction denied.”

20 Thereupon the railroad filed a counter-claim to enjoin police interference by the town and the cause is on final hearing on the case made by the pleadings, there being no disputed questions of fact. The town's claim is that its consent is necessary, in concurrence with that of the Public Utility Commission, before the spur can be laid. The views stated in the memorandum are adhered to, but amplified. The control of highways of the State is in the Legislature by virtue of its sovereign power, and their devotion to general public use cannot be diverted except by its consent, directly or through agencies to which it may delegate the power. By Section 27 of the Railroad Act of 1903 (C. S. 4232), the Legislature delegated to the governing bodies of cities and towns through which railroads pass the authority to consent to grade crossings. Later, in 1911, the Legislature created the Board of Public Utility Commissioners to “have general supervision and regulation of, jurisdiction and

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Opinion of Vice-Chancellor.

control over, all public utilities, and also over their property, property rights, equipment facilities and franchises” so far as may be necessary for the purpose of carrying out the provisions of the act (C. S. C. S. 2878). The act particularizes the powers of the Board and, among others, by Section 21, authorizes that body to grant to railroads the right to cross public highways at grade. The legislative scheme, creating the Utility Commission as an institution in our governmental system, and conferring upon it sovereign supervision and control over railroads, clearly comprehends exclusive jurisdiction over the manner in which such railroads may cross public highways of the State. Section 21 substitutes that body for cities and towns theretofore exercising the power to make the determination and supersedes the method of regulation provided for by the railroad act. It would be entirely out of harmony with the scheme if cities and towns retained the power to nullify the judgment of the Board. This view of the effect of the Utility Act was entertained by the Supreme Court in Atlantic City R. R. Co. v. Pleasantville, 99 N. J. L. 328, aff'd 100 N. J. L. 394, a case involving the violation of a town ordinance regulating the speed of trains through the town, the Court being of the opinion that the right to regulate is now vested in the Commission. In Perth Amboy v. Board of Public Utility Commissioners, 98 N. J. L. 106, it was sought to set aside an order of the Commission granting permission for a railroad grade crossing over a public street on the ground that the city had not consented, and it was held that the consent was not necessary as a condition precedent to the exercise of the power by the Board. Meaning, obviously, that the con-

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Opinion of Vice-Chancellor.

sent was not necessary either to the exercise of the power or the enjoyment of the permission. Hudson County *v.* Central Railroad Co., 68 N. J. Eq. 500, and United New Jersey R. R. & C. Co. *v.* Freeholders of Hudson, 89 N. J. Eq. 95, relied upon by the complainant, are not in conflict. The earlier case was decided before the Utility Act came into being, and in the latter the statement by Vice-Chancellor Griffin, that the municipal consent was necessary, was discussion, not decision of the question before him. That was not a grade crossing case.

The additional ground alleged in the bill that under "An act providing for the formation, establishment and government of towns," Chapter 113 of the Laws of 1895, and under Chapter 152 of the Laws of 1917 (C. S. C. S. 2071), known as the Home Rule Act, the town has concurrent jurisdiction, was not pressed on the argument or in the briefs, and is treated as abandoned.

A perpetual injunction will issue according to the prayer of the counter-claim.

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FINAL DECREE.

Filed October 20, 1927.

IN CHANCERY OF NEW JERSEY.

Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,

Defendants.

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On Bill, &c.

Final Decree.

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This cause coming on to be heard in the presence of Frederick J. Gassert, solicitor of the complainant, and Wall, Haight, Carey & Hartpence, solicitors of the defendants United New Jersey Railroad and Canal Company and Pennsylvania Railroad Company, and Frank Bergen, solicitor for Public Service Electric and Gas Company, and the Court having examined the pleadings and proofs, and there being no disputed questions of fact, and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the Court that the complainant, the Town of Harrison, has stopped and prevented the defendants from proceeding with

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Final Decree.

the construction of a siding across South Fourth street, in the Town of Harrison, New Jersey, notwithstanding the decision and order of the Board of Utility Commissioners of the State of New Jersey, on or about August 4, 1927, granting permission to the defendants to construct said siding pursuant to the terms and conditions in said order provided;

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And it appearing that the said town still continues to prevent the said defendants from proceeding with the said construction, and that the defendants are entitled to the relief prayed for by them in their answer and counter-claim heretofore filed herein;

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IT IS, on this 20th day of October, 1927, ORDERED, ADJUDGED and DECREED that the said Town of Harrison, its mayor, its town council and the committees thereof, its chief of police, its police officers, officials, agents, employees and representatives, and any and all other persons or corporations acting for them or in their behalf; and each and every of them be and they are hereby enjoined and commanded henceforth and forever to desist and refrain from in anywise interfering with, molesting, preventing or frustrating, or attempting or advising so to do the above-named defendants, or either of them, or any person or persons, corporation or corporations acting for them or in their behalf in the constructing and laying of said siding track, with its necessary appurtenances, over and across said South Fourth street, in the Town of Harrison, New Jersey, aforesaid, at grade, and from operating their trains thereon at the place and in the man-

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Final Decree.

ner designated by said Board of Public Utility Commissioners in its decision above mentioned.

E. R. WALKER,
C.

Respectfully advised,

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JOHN H. BACKES,
V.-C.

Service acknowledged this 20th day of October, 1927. Frederick J. Gassert, Town Counsel, Town of Harrison.

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ORDER.

Filed December 13, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

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UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

On Bill, &c.
Order.

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Application having been made for a stay of execution of the final decree of this Court in the above matter and the defendants through counsel having in open court agreed to remove from Fourth street, in the Town of Harrison, the tracks now thereon which were the subject matter in the above cause, in the event that the Court of Errors and Appeals or the Chancellor shall order such removal,

Order.

It Is, on this 20th day of October, 1927, ORDERED that the application for a stay of execution of the said final decree be denied.

E. R. WALKER,
C.

Respectfully advised,

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JOHN H. BACKES,
V.-C.

December 8, 1927. I consent to the above order.

FREDERICK J. GASSERT,
Sol'r for Complainant.

December 7, 1927. I consent to the above order.

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FRANK BERGEN,
Sol'r for Defendant Public Service
Electric and Gas Company.

December 1, 1927. We consent to the above order.

WALL, HAIGHT, CAREY & HARTPENCE,
Per Wall,
Sol'rs for Def'ts.

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NOTICE OF APPEAL.

Filed November 25, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*

TOWN OF HARRISON, a Municipal Corporation,
Complainant,

and

20 UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants.

On Bill, &c.
Notice of Appeal.

30 The complainant, Town of Harrison, a municipal corporation, hereby appeals from the final decree made in the above-entitled cause on October 20, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, October 31, 1927.

FREDERICK J. GASSERT,
Solicitor for Complainant, Town of Harrison, a Municipal Corporation.

Notice of Appeal.

I conceive there is good cause for appeal in the above-entitled cause.

ANDREW VAN BLARCOM,
Of Counsel with Complainant, Town of Harrison, a Municipal Corporation.

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Service of the within notice is hereby acknowledged this 2nd day of November, 1927.

WALL, HAIGHT, CAREY & HARTPENCE,
Solrs. for United New Jersey Railroad and Canal Company, a corporation, and Pennsylvania Railroad Company, a corporation.

Service of the within notice is hereby acknowledged this 2nd day of November, 1927.

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GEO. H. BLAKE,
Solr. for Public Service Electric and Gas Company.

Endorsement:

Sat below: Chancellor, by John H. Backes,
V.-C.

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PETITION OF APPEAL.

Filed December 4, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant Appellant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants-Appellees.

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On Appeal from Court of Chancery.

Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the last resort of all causes:

30 The petition of TOWN OF HARRISON, a municipal corporation, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 20, 1927, in a certain cause in said Court of Chancery wherein the said Town of Harrison, a municipal corporation, was complainant and the said United New Jersey Railroad and Canal Company, a corporation; Pennsylvania Railroad

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Petition of Appeal.

Company, a corporation, and Public Service Electric and Gas Company, a corporation, were defendants, in this respect, to wit, that the said decree adjudges that the complainant is not entitled to the relief prayed for in its bill of complaint; that the defendants are entitled to the relief prayed for in their answer and counter-claim; and that the said Town of Harrison, its Mayor, its Town Council and the Committees thereof, its Chief of Police, its police officers, officials, agents, employees and representatives, and any and all other persons or corporations acting for them, or in their behalf; and each and every of them be and they are hereby enjoined and commanded henceforth and forever to desist and refrain from in anywise interfering with, molesting, preventing or frustrating, or attempting or advising so to do, the above-named defendants, or either of them, or any person or persons, corporation or corporations acting for them or in their behalf in the constructing and laying of said siding track, with its necessary appurtenances, over and across said South Fourth street, in the Town of Harrison, New Jersey, aforesaid, at grade, and from operating their trains thereon at the place and in the manner designated by said Board of Public Utility Commissioners in its decision above mentioned.

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And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that

(1) The relief prayed for in complainant's bill should have been granted;

(2) The relief prayed for in defendants' answer and counter-claim should have been denied; and

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Petition of Appeal.

(3) It adjudges that the Town of Harrison, its Mayor, its Town Council and the Committees thereof, its Chief of Police, its police officers, officials, agents, employees and representatives, and any and all other persons or corporations acting for them, or in their behalf; and each and every of them be and they are hereby enjoined and commanded henceforth and forever to desist and refrain from in anywise interfering with, molesting, preventing, or frustrating, or attempting or advising so to do, the above-named defendants, or either of them, or any person or persons, corporation or corporations acting for them or in their behalf in the constructing and laying of said siding track, with its necessary appurtenances, over and across said South Fourth street, in the Town of Harrison, New Jersey, aforesaid, at grade, and from operating their trains thereon at the place and in the manner designated by said Board of Public Utility Commissioners in its decision above-mentioned.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

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FREDERICK J. GASSERT,
Solicitor for Appellant.

ANDREW VAN BLARCOM,
Of Counsel.

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Petition of Appeal.

Service of the within petition of appeal is hereby acknowledged this 25 day of November, 1927.

WALL, HAIGHT, CAREY & HARTPENCE,

Per Wall,
Sol'rs for United New Jersey Railroad
and Canal Company, a corporation, 10
and Pennsylvania Railroad Company,
a corporation.

Service of the within petition of appeal is hereby acknowledged this first day of December, 1927.

FRANK BERGEN,
Sol'r for Public Service Electric
and Gas Company. 20

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ANSWER TO PETITION OF APPEAL.

Filed December 14, 1927.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

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Between

TOWN OF HARRISON, a Municipal Corporation,
Complainant-Appellant,
and

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UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants-Appellees.

On Appeal from Court of Chancery.

Answer to Petition of Appeal.

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The answer of the United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company, two of the above-named appellees to the petition of appeal of Town of Harrison, the above-named appellant.

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These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on October 20, 1927, made and entered in the Court of Chancery of New Jersey in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of

Answer to Petition of Appeal.

said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity, and pray that the same may be affirmed with costs to be taxed in favor of these appellees.

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WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Appellees United New Jersey Railroad and Canal Company and Pennsylvania Railroad Company.

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ANSWER TO PETITION OF APPEAL.

Filed January 26, 1928.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

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Between

TOWN OF HARRISON, Municipal Corporation,
Complainant-Appellant,

and

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UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants-Appellees.

On Appeal from Court of Chancery.

Answer to Petition of Appeal.

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The answer of Public Service Electric and Gas Company, a corporation, defendant-appellee, to the petition of appeal of the above-named appellant.

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This defendant-appellee, 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 twentieth day of October last past, 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 defendant-appellee prays to refer thereto when the same shall

Answer to Petition of Appeal.

be produced. And this defendant-appellee is advised and believes, that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this defendant-appellee.

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Solicitor for and of Counsel with Defendant-Appellee, Public Service Electric and Gas Company.

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20 MAY.T.1928

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

New Jersey Court of Errors and Appeals

Between

TOWN OF HARRISON, a municipal corporation,
Complainant-Appellant,

and

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, a corporation; PENNSYLVANIA RAILROAD COMPANY, a corporation, and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation,
Defendants-Appellees.

On Bill, &c.

On Appeal from Court of Chancery.

BRIEF FOR APPELLANT.

Facts.

This is an appeal from a decree of the Court of Chancery denying the injunction prayed for in appellant's bill of complaint and allowing the injunction prayed for in the appellees' counterclaim.

The Board of Public Utility Commissioners under date of August 4, 1927, granted to the appellees permission to lay a freight track at grade across South Fourth street, a public highway in the Town of Harrison; a spur to the works of the appellee Public Service Electric and Gas Company (C., pp. 9 to 14). The order of the Board was based upon Section 21 of the act creating the Board of Public Utility Commissioners (P. L.

1911, p. 674, as amended by P. L. 1917, p. 768), which provides as follows:

“No highway shall be constructed across the tracks of any railroad company at grade, nor shall any tracks over which locomotives, railroad or street railway cars are to pass be laid across any highway, so as to make a new crossing at grade, nor shall the tracks of any railroad or street railway or traction company be laid across the tracks of any other railroad or street railway or traction company without first obtaining therefor permission from the board; provided, however, that this section shall not apply to the replacement of lawfully existing tracks.”

Relying on said order, and on the 25th day of August, 1927, the appellees attempted to construct said siding at grade across South Fourth street, but were prevented from so doing by the appellant, because the said appellees had not obtained its consent to the laying of said grade-crossing (C., p. 3, ll. 12 to 37).

No proofs were offered at the trial, the Court disposing of the case on the pleadings.

It appeared from the pleadings that the consent of the appellant to the laying of the said tracks at grade had not been obtained by the appellees (C., p. 3, ll. 12 to 20) and that South Fourth street is one of the main highways and arteries of travel in the Town of Harrison (C., p. 11, ll. 22 to 25).

POINT I.

The Board of Public Utility Commissioners has no exclusive jurisdiction to grant permission for railroad grade-crossings over streets and highways. Section 27 of the Railroad Act is not repealed by Section 21 of the Act creating the Board of Public Utility Commissioners.

The legal right of a railroad to construct a grade-crossing is found in Section 27 of the Railroad Act (3 C. S., p. 4232), which provides as follows:

“Where any railroad shall cross any street or highway in any city or town it shall be either above or below the grade thereof, at such distance as shall not interfere with the free and uninterrupted use of such street or highway, unless the common council or other governing body of the city (or town, incorporated as such) in charge of the streets, shall grant permission to the railroad to cross such street or highway at grade. * * *”

The Legislature has not passed any act expressly repealing Section 27 of the Railroad Act. The learned Vice-Chancellor, however, in his opinion decides that Section 21 of the act creating the Board of Public Utility Commissioners supersedes and abrogates it. This, we submit, is not so and that an examination of the statutes shows an intent on the part of the Legislature that both acts should be effective.

Section 27 of the Railroad Act was passed in the year 1903 and was amended in 1906 (P. L., 1906, p. 663).

In the year 1907 there was created a Board of Railroad Commissioners having general supervision over all railroads operating within the State (P. L. 1907, p. 448); and in the year 1909

Section 177 of the Railroad and Canal Act was passed, which provided that

“Nor shall any Railroad Company lay tracks across any street or highway so as to make a new crossing at grade without obtaining therefor permission from the Board of Railroad Commissioners” (C. S., p. 4288).

and in the year 1910 there was passed Section 185 of the Railroad and Canal Act which provides that “No privilege or franchise hereafter granted to any public utility, as herein defined, by any local, municipal or county governing body shall be valid until approved by said Board, whenever it shall, after due hearing, determine that such privilege or franchise is necessary and proper for the public convenience” (C. S., 4289).

We submit that a reading of these statutes shows a grant by the Legislature to the Board of Railroad Commissioners only of supervision over railroads and not over the public highways of the municipalities. There is an express recognition that local governing bodies still retained the right to grant to railroads privileges and franchises, among which we submit was the permission to construct grade-crossings, and that the Legislature left it with the Board to say whether or not public convenience could best be served by the exercise by the railroad of such privilege or franchise; that instead of taking from local governing bodies the right to grant the permission mentioned in Section 27 of the Railroad Act, it put upon the railroads the additional burden of obtaining both the permission of the municipality and the permission of the Board. If this latter were not so we feel that the Legislature, in enacting Section 177 three years after it amended Section 27, would have expressly stated that Section 27 was repealed.

The above-quoted sections of the act creating the Board of Railroad Commissioners are, so far as the question herein involved is concerned, almost identical with the pertinent sections of the act creating the Board of Public Utility Commissioners.

Section 15 of the act creating the Board of Public Utility Commissioners sets forth the jurisdiction of the Board and defines “Public Utility” as follows:

“The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities and also over their property, property-rights, equipment, facilities and franchises * * * The term ‘Public Utility’ is hereby defined to include every individual, co-partnership, association, corporation * * * that now or hereafter may own, operate, manufacture or control within the State of New Jersey any steam railroad * * * under privileges granted or hereafter to be granted by the State of New Jersey, or by any political subdivision thereof” (P. L. 1921, p. 390).

Section 21 of the act provides as follows:

“No highway shall be constructed across the tracks of any railroad company at grade, nor shall the tracks of any railroad company, street railway or traction company be laid across any highway, so as to make a new crossing at grade, nor shall the tracks of any railroad or street railway or traction company be laid across the tracks of any other railroad or street railway or traction company without first obtaining therefor permission from the board; provided, however, that this section shall not apply to the replacement of lawfully existing tracks” (P. L. 1911, p. 674).

Section 21 was amended in 1917, but not in any particular which is involved in this proceeding, as appears herein under “FACTS.”

Section 24 reads as follows:

"No power or franchise hereafter granted to any public utility as herein defined, by any political subdivision of this State shall be valid until approved by said board, such approval to be given when, after hearing, said board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests, and the board shall have power in so approving to impose such conditions as to construction, equipment, maintenance, service or operation as public convenience and interests may reasonably require" (P. L. 1911, p. 384).

As above stated, these sections are almost identical with the above-quoted sections of the act creating the Board of Railroad Commissioners. Nowhere is the Board given the right to regulate the use of public highways. The right to regulate is of the privileges and franchises of the public utility. The prohibition on the public utility not to construct a grade-crossing without the Board's permission is not a grant to the Board of any legal rights in the public highways which it can in turn convey to a public utility.

In the present case and until the permission required by Section 27 of the Railroad Act is acquired, the appellees have no property-rights or franchises, the use of which the Board can regulate or over which it can exercise supervision. The appellees have no inherent right to construct grade-crossings, but must obtain the same in accordance with Section 27 of the Railroad Act.

Both Section 15 and Section 24 of the Utility Act recognize the fact that there are certain privileges and franchises which a municipality may grant to a public utility.

There is no implied repealer of Section 27 of the Railroad Act by Section 21 of the Utility Act, because the provisions of these acts are not inconsistent, nor are they repugnant to each other. Moreover, the Legislature has shown that it was not its intention to repeal the Railroad Act by amending certain sections of it after the passage of the Utility Act; Sections 1, 6 and 13 being amended in 1914 and Section 15 being amended in the year 1915.

In the case of *Freeholders of Atlantic v. Bugbee*, 98 N. J. L. 423, Katzenbach, J., concerning a similar situation, says the following:

"The act entitled 'An Act concerning tuberculosis' is not expressly referred to either in chapter 147 of the laws of 1918 (the revision of the law), or in chapter 281 of the laws of 1918 (the repealing statute). This is significant. It is evidence that no implied repealer was intended and evidence that it was the legislative purpose to leave the act concerning tuberculosis unaffected by the revision of the acts expressly repealed. It is also to be noted in this connection that the same legislature which enacted the revision referred to amended the act concerning tuberculosis, one of these amendments being made subsequent to the enactment of the revised act. This is strongly evidential of the intent of the 1918 legislature to leave unrepealed the tuberculosis act."

In the case of *County of Essex v. Civil Service Commission*, 98 N. J. L. 671, Kalisch, J., at page 674, says:

"It is axiomatic in the law that a repeal of a statute by implication is not favored."

In the case of the *Board of Chosen Freeholders of the County of Hudson and the Boulevard Commissioners of the County of Hudson v. Central R. R. Co. of N. J.*, 68 N. J. Eq. 500 (affirmed

per curiam opinion 70 Eq. 806), Garrison, V.-C., in dealing with the question as to whether or not Section 27 of the Railroad Act was repealed by the acts giving the complainants certain rights in the Hudson County Boulevard, says the following at page 512:

“The fact that the complainants have been invested by the legislature with certain rights, duties and privileges with respect to the Boulevard does not in my judgment detract from the exercise by the City of Bayonne of other rights, duties and privileges with respect to the said road the power to do which has been vested in the City by the legislature.”

In the case of *Atlantic City R. R. Co. v. Pleasantville*, 99 N. J. L. 328 (affirmed 100 N. J. L. 394), the fact that the Railroad Act is not repealed by the Utility Act is recognized. The Court on page 309 says:

“But this seems plainly to be controlled by the General Railroad Act of 1903 (C. S. 4230, Section 22).”

The last cited case is cited by the learned Vice-Chancellor as supporting his opinion that the Utility Act took away from the municipalities the power to regulate which they formerly had. It was a case involving the violation of a Town Ordinance regulating the speed of trains through the Town. The Court held that under Section 22 of the Railroad Act a Railroad may run its trains at any speed it deems proper if its right-of-way is properly protected, and that under the provisions of P. L. 1914, page 340, the Board of Public Utility Commissioners has been given the express authority to determine what is sufficient protection.

In such a case regulation by a municipality would be repugnant to the provisions of the Railroad Act and the provisions of the Utility Act.

Other cases cited by counsel for the appellees on the argument below, involve the fixing of rates. This power is expressly given to the Board by Section 16-C and 17-H of the Utility Act (Cum. Sup. Com. St., pp. 2881 and 2884).

Obviously any attempt by a municipality to fix rates would also be repugnant to those provisions of the Utility Act.

The provisions, however, of Section 27 of the Railroad Act, and Section 21 of the Utility Act are not repugnant to each other. The provisions of both acts may be carried out and given full effect.

A situation similar to the one here involved was presented in the case of *Oakland v. Bayonne*, 98 N. J. L. (Court of Errors and Appeals), 806, where it was decided that the City of Bayonne had to obtain the consent of both the Board of Conservation & Development and of the North Jersey District Water Supply Commission before it could obtain an additional water supply from the Ramapo River Shed.

The case of *Perth Amboy v. Board of Public Utility Commissioners*, 98 N. J. L. 106, cited by the learned Vice-Chancellor, is not an authority to the contrary. That case merely decides that the consent of the municipality is not necessary as a condition precedent to action by the Board.

In this case we do not question the validity of the order of the Board. We concede that it is as valid and effective as Section 21 of the Utility Act can make it.

We submit, however, that the order of the Board does not give to the appellees the legal right to construct a crossing at grade, but that before they can obtain that right they must ob-

tain in addition to the permission of the Board the concurring permission or consent of the appellant.

Section 27 of the Railroad Act has been construed in the case of *Hudson County v. Central Railroad Company of New Jersey* (*supra*), as vesting in the municipality the power to grant permission to cross public highways at grade. Vice-Chancellor Garrison, in deciding said case at pages 511 and 512, says:

“The twenty-seventh Section of the General Railroad Act is, in my opinion, declaratory of a legislative purpose to safeguard the public in cities by providing for other than grade crossings except in such cases as shall seem to the city authorities as safe cases in which to permit grade crossings.

“It would, in my view, be perfectly lawful for the legislature to provide that there should be no grade crossings in cities excepting in such cases as should be permitted by the police commission or any other municipal authority designated as the body from whom consent should be obtained, and I think that the language used in the section under consideration is indicative of a purpose to vest in the body named the right to grant the consent, because that body presumably, would have knowledge of the conditions of travel and of safety or danger with respect to travel in its municipality.

“The same rules of construction which require us to hold that the boulevard is a street or highway in a city, within the meaning of the first part of the section in question, logically lead us to hold that the latter part of the section vests the power to grant permission to cross such street in the body named.”

The above case dealt with a bill filed by the Board of Freeholders of the County of Hudson and by the Boulevard Commissioners of the

County of Hudson to restrain the Central Railroad Company of New Jersey from constructing a crossing at grade across the Hudson Boulevard in the City of Bayonne. The Court held that since the *City of Bayonne had given its consent to the construction of said crossing at grade that the Railroad had the legal right to construct said crossing and, therefore, dismissed the bill.*

In the case of *United New Jersey Railroad & Canal Company, et al. v. Freeholders of Hudson and Essex*, 89 N. J. Eq. 95 (affirmed in a *per curiam* opinion 105 Atl. 895), a bill was filed to restrain the Hudson and Essex Boards of Freeholders from interfering with the Railroad in the construction of a bridge across the Newark Plank Road forming a connecting link with a Railroad laying on both sides thereof. The Court held, on the authority of the case of *Freeholders v. The Railroad Company*, 68 N. J. Eq. 500 (above cited), that the Railroad had the legal right to erect said bridge, and consequently ordered the defendants restrained from interfering. In deciding this case the Vice-Chancellor uses the following language (p. 97):

“The right of the complainants to build the road and carry it across the plank road *with an overhead bridge is absolute*. No consent of the municipal or county authorities is necessary. It is only when it desires to cross at grade that a consent becomes necessary; and that consent must be obtained from the municipality, and not from the county, even when crossing a county road.”

It would appear, therefore, that the appellees had no legal right to construct said grade-crossing without first having obtained appellant's consent thereto.

It is respectfully submitted that the decree of the Court of Chancery should be reversed and

the appellant awarded the injunctive relief prayed for.

FREDERICK J. GASSERT,
Attorney for Appellant.
ANDREW VAN BLARCOM,
Of Counsel.

May Term, 1928.

20 MAY. 1. 1928

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New Jersey Court of Errors and Appeals

Between

THE TOWN OF HARRISON,
a municipal corporation,
Complainant-Appellant,

and

THE UNITED NEW JERSEY RAIL-
ROAD & CANAL COMPANY, THE
PENNSYLVANIA RAILROAD COM-
PANY, and PUBLIC SERVICE ELEC-
TRIC & GAS COMPANY,
Defendants-Appellees.

(ON BRIEFS.)

On Bill, etc.

On Appeal from
Court of
Chancery.

BRIEF FOR THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY.

Facts.

The facts are as stated by appellant.

The Question Involved.

Has the Board of Public Utility Commissioners the power to grant permission to a steam railroad company to lay tracks or spurs across a highway over which locomotives are to pass, without obtaining the consent of the municipality in which such highway is located?

**The Manner in Which the Question
is Raised.**

On August 4th, 1927, the Board made its order authorizing the laying and use of the spur track under certain restrictions (Case, p. 9).

On August 25th, 1927, the appellees attempted to construct the spur track under the order (Case, p. 3, Par. 10). The Town stopped the construction by its police force.

On August 27th, 1927, the Chief Justice denied the Town's application for writ of certiorari to review the order of the Board.

On August 30th, 1927, the Town filed its bill of complaint to enjoin construction of the spur, etc. (Case, p. 1), and obtained order to show cause.

On September 15th, 1927, order to show cause was discharged.

On September 30th, 1927, defendants filed answer and counterclaim (Case, p. 19) praying injunction restraining Town from interfering with construction, etc., of spur. Order to show cause was made on counterclaim.

On October 19th, 1927, on final hearing, BACKES, V.-C., rendered decision in favor of defendants.

On October 20th, 1927, final decree perpetually enjoining Town from interfering with construction, etc., was entered (Case, p. 41).

On October 31st, 1927, Town appealed to this Court.

POINT I.

The Board of Public Utility Commissioners had jurisdiction to make the order of August 4th, 1927, without obtaining the consent of the Town.

It was so decided in *Perth Amboy v. Bd. of Pub. Utility Commrs.*, 98 N. J. L. 106.

The opinion was by BLACK, J., sitting with Jus-

tices KALISCH and KATZENBACH. The first head-note of the decision is:

"1. The Board of Public Utility Commissioners have power to grant permission to a steam railroad to lay tracks or spurs across a highway over which locomotives are to pass without first obtaining the consent of the municipality in which such highway is located, under Pamph. Laws 1911, p. 383, Par. 21, as amended by Pamph. Laws 1917, p. 768."

On page 108 Justice BLACK points out that the act creating the Board evidently meant to give full control of all public utilities to the Board thereby created so far as it could be done by legislation, citing cases.

"So when the Legislature entrusted this power to a board created by it for that purpose, it is exclusive of any such alleged power given to a municipality. So the consent of the municipality is not necessary as a condition precedent to action by the Board of Public Utility Commissioners."

BACKES, V.-C., in his decision (p. 39, line 22) says:

"It would be entirely out of harmony with the scheme if cities and towns retained the power to nullify the judgment of the Board. This view of the effect of the Utility Act was entertained by the Supreme Court in *Atlantic City R. R. Co. v. Pleasantville*, 99 N. J. L. 328; affirmed 100 N. J. L. 394,—a case involving the violation of a town ordinance regulating the speed of trains through the town, the Court being of opinion that the right to regulate is now vested in the Commission."

In the above case (99 N. J. L. 330) it is stated that by a course of legislation beginning in 1911 and continuing to the present time, the supervision and regulation of railroad crossings throughout

the state have been substantially turned over to the Utility Commission, and that when the various acts on the subject, including that conferring power to abolish grade crossings entirely, are examined, it will be apparent that the regulation of railroads in such manner as to preserve the safety of the public, has been entrusted to the Commission, and that this is a general legislative scheme and as such supersedes other inconsistent legislation, citing *Harrington v. Jersey City*, 78 N. J. L. 610.

The *Pleasantville* case was affirmed by the Court of Errors on the opinion of the Court below.

The second head-note of the opinion in the Supreme Court is:

“The legislation creating the Public Utility Commission and investing it with power to regulate the operation of railroads and to protect and if necessary abolish grade crossings, —Held, a general scheme superseding former statutory regulation within its purview.”

The case was heard before JJ. TRENCHARD and PARKER, and the opinion was delivered by PARKER, J.

The method adopted in the decision of the Commissioners (Case, p. 13, line 30) was to limit the use of the crossing to three hours between 2 A. M. and 5 A. M.; to have the train crossing Fourth Street come to a full stop and to have a flagman stationed in the centre of the street. If, as the opinion in the *Pleasantville* case says, the regulation of railroads in such manner as to preserve the safety of the public has been entrusted to the Commission, it would seem that in the present instance it has been most solicitous in its duty of protection. For twenty-one hours out of the twenty-four, the railroad cannot use the crossing.

POINT II.

The decree of the Chancellor should be affirmed.

Respectfully submitted,

ALBERT C. WALL,
Of Counsel with The United New Jersey
Railroad & Canal Company and The
Pennsylvania Railroad Company.

