

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between)
THE BOROUGH OF ME-) **10**
TUCHEN,)
Complainant,) On Appeal by
and) Both Parties.
THE PENNSYLVANIA)
RAILROAD COMPANY,)
Defendant.) **20**

BRIEF FOR COMPLAINANT.

The bill was filed to specifically enforce the contract obligations of the defendant with respect to a road crossing. This contract is found in the Charter of the N. J. R. and Trans. Co., P. L. 1832, p. 96, and is as follows:

Sec. 20. AND BE IT ENACTED, That it shall **30**
be the duty of the said company to construct and
keep in repair, good and sufficient bridges or pas-
sages over or under the said railroad or roads, where
any public or other road shall cross the same, so
that the passage of carriages, horses and cattle on
said road shall not be impeded thereby; and also,
where the said road shall intersect any farm or lands
of any individual, to provide and keep in repair suit-
able wagon ways over or under said road, so that
they may pass and repass to and from the same. **40**

A like provision is found in all our railroad charters and in Sec. 26 of the general railroad law of 1903.

The duty created by this provision was defined in *Central R. Co. vs. State*, 3 Vr., 220, 224, where Chief Justice Beasley held that it created a continuing duty which, as travel increased, might make it the duty of the company to turn a grade crossing into an undergrade crossing. In *Clark vs. Elizabeth*, 32 Vr., 565, 575, 588, this was approved by both the majority and minority opinions, the former, however, holding that there must be compensation to abutting owners injured by the change of grade.

The duty being a contract obligation into which the Railroad Company entered by the acceptance of its charter, is enforceable by a court of equity under its general jurisdiction to specifically enforce contracts. The exercise of the discretionary jurisdiction thus existing is made compulsory by a statute which is found in Section 29 of the Revision of the general railroad law (P. L. 1903, p. 660).

In the year 1889 the defendant changed a grade crossing of its tracks by Main Street in Metuchen (then part of Raritan Township) by excavating a trench for the street under its tracks, and carrying the street under a railroad bridge. This made a deep pocket under the bridge from which the grade was steep, rising in both directions. To the north the ascent is short and easy, but to the south where the ground rises above the level of the railroad, the ascent was made long and very steep, exceeding seven feet per hundred feet (p. 46). The trench necessarily draws into it the water from these two slopes. In addition to this the railroad to the east passes through a cut some 15 feet deep and the drainage of this cut for half a mile flows west and falls into this pocket of the road. To care for all this water the company in 1889 built a receiving basin and a deep

pipe drain along the right of way westerly for about a thousand feet to an outlet near a brook.

The Borough asks redress for three grievances. FIRST, the abutments supporting the railroad bridge encroach upon the highway, leaving it only 44 instead of 66 feet wide. SECOND, the provision for drainage of the depressed road under the tracks is inadequate, and the result is that in heavy rains the pocket fills up and the water stands several feet in the road, and traffic is blocked for hours in Main street, which is the chief business street of Metuchen. There is no other street near enough to afford a convenient substitute for crossing the railroad. THIRD, the surface of the road under the railroad bridge has been badly constructed with uneven stone blocks, and has not been kept in repair by the company. It is not only dangerously rough, but is left for months coated deep with mud carried in by the water from the artificial slopes created by the depression of the road, and from the railroad right of way.

The Vice Chancellor has granted full relief as to the first two grievances, and has denied it as to the third, and both parties appeal.

I.

30

THE ABUTMENTS ARE AN UNLAWFUL ENCROACHMENT WHICH IT IS THE COURT'S DUTY TO ENJOIN.

In *Raritan Township vs. Port Reading Co.*, 4 Dick., 11, 16, McGill, C., said that when the railroad crosses the highway above its grade, the railroad bridge must clear the entire width of the highway, and that encroachments by abutments were not authorized. His language is (pp. 18 and 19):

“When the railroad is so built as to cross a highway above the grade, it must bridge the entire width of the highway, whatever the expense may be.” In that case, however, the Chancellor held that as the highway was unimportant, and the abutments were nearly completed, he would, in his discretion, leave the Township to its remedy by indictment. This decision, so far as it denies the right to encroach, has been often cited with approval. So far as it refers

10 the public to the remedy by indictment, it has been overruled by the case of *Gray vs. Greenville and Hudson R. Co.*, 14 Dick., 372, 388, affirmed on this point 17 Dick., 768, 772. (Note that the reference on p. 772 is a reporter’s blunder; it should be 14 Dick., 372).

In that case, Emery, V. C., said (foot of p. 387):

“The uncertainty of protecting the public rights in highways by indictments against nuisance was one

20 “reason for the establishment of the doctrine that “these public rights should also be protected by “ejectment and by injunction pursued by the municipal bodies vested with control of the highways.” And he cites a law case overlooked by Chancellor McGill, where Depue, J., said, in sustaining ejectment by the municipality: “To deny this form of “relief and remit the public to a remedy by indictment for nuisance, would result in subjecting public rights of property to the varying moods of

30 “Grand Juries.”

The case of *Gray v. Greenville & Hudson R. Co.*, further holds that the Attorney General may interfere without evidence of actual injury to the public, where there has been excessive use of public powers affecting the public rights (14 Dick., 387).

The same principle applies to a suit by a municipal corporation. In the same case, (p. 388), Emery,

40 V. C., said: “In cases involving the protection of

“private rights and municipal rights against excessive use of power of a public corporation, preliminary injunction is always granted where necessary for the complete protection to which they are entitled on undisputed facts. The public rights now asserted against the same kind of injury, are entitled to the same protection, and the information does not come within the rule, equally well established, where the rights to be protected and the injury complained of involve private property¹⁰ or rights only, that irreparable injury must be shown in order to award a preliminary injunction.”

The authority cited by Emery, is that of *Township of Franklin v. Nutley Water Company*, 8 Dick., 601, where the suit was by the Township and not by the Attorney General.

The case which we bring before the Court is one of an abuse of corporate power and a neglect of corporate duty imposed by statutory contract. It is not merely a case of a nuisance in the highway committed by one under no public duty to take care of the highway.²⁰

In *Palmyra vs. Penn. R. Co.*, 17 Dick., 601, 617, Gray, V. C., cites the *Port Reading* case as correctly defining the duty of a railroad company crossing a highway, and affirms the jurisdiction conferred by the Act of 1898, which directs the Court of Chancery to order gates and signals, and says that this is³⁰ “consistent with its general equity powers.” This case was affirmed, 18 Dick., 799. The Act of 1898 is now Sec. 36 of the Revision of 1903, while that on which we rely in this case is Sec. 29, but the jurisdiction is essentially the same. The duty of the Court of Chancery, recognized in *Gray vs. Greenville & Hudson R. Co.*, 14 Dick., 388, to enforce the highway rights of the public against railroad encroachment, is made imperative by Sec. 29 of the General Railroad Act of 1903 (P. L. p. 660). In view of this⁴⁰

decision and statute, we submit that the Court cannot decline to exercise the jurisdiction and to give full relief. The appropriation of a part of the highway by abutments is an improper and unlawful construction of the crossing. The right to have the crossing properly constructed, and to have a decree therefor and for the removal of these abutments, is as substantial and unqualified as the right to have a decree in foreclosure. The Court can no more
 10 compromise this right than it can give to a complainant a decree for half the amount justly due on his mortgage.

Whether the Borough Council would insist upon an immediate enforcement of a decree to remove the abutments would be for them to say. They might be willing to enter into some arrangement with the company, or even to vacate the land occupied by the abutments on fair terms; but they are
 20 entitled to a full decree if it appears that the abutments are an encroachment.

The remedy by specific performance is not only given by the statute, but is within the proper exercise of the ordinary powers of the Court. An early case of the exercise of a jurisdiction similar in principle is that of *D. L. & W. R. R. Co. vs. Erie R. R. Co.*, 6 C. E. G., 298, 311. There the Court by preliminary
 30 injunction directed the parties to run their trains through the Long Dock Tunnel in accordance with certain regulations. The Chief Justice, sitting for the Chancellor, said that it did not seem necessary to appoint a receiver of the tunnel, but evidently considered that he had power to do so if necessary to procure the enforcement of his direction. In *Joy vs. City of St. Louis*, 138 U. S., p. 1, ~~where~~ the Court affirmed a decree of Judge Brewer in the Circuit Court, providing for an enforcement of a general
 40 stipulation for the joint use by two Railroad Companies of a right of way across a public park, and for

the use of a union depot. When the case came before Judge Brewer in the Circuit Court, the objection was made that the contract was general and did not provide for the details of use. Brewer, J., said (29 F. R., 558):

“If the right is absolutely contracted for,
 “and the details are of a nature which courts
 “may properly fix and settle, then I take it,
 “the courts should not hold the contract in- **10**
 “complete, but determine the right, and also
 “prescribe and settle the details. An act of
 “the legislature might be passed giving to one
 “company the right to use the tracks of an-
 “other, and prescribing all the terms and con-
 “ditions,—the details for the use. I take it,
 “an act of the legislature would also be valid
 “which simply declared that one company
 “should have the right to use the tracks of
 “another upon such terms and conditions as **20**
 “the parties might agree upon, or should be
 “prescribed by the courts; and, if such a legis-
 “lative act would have to be adjudged valid
 “and complete, I see no satisfactory reason
 “why courts may not also hold sufficient and
 “valid a mere contract for the right, and, de-
 “termining the right, also settle and prescribe
 “the terms of the use. It is true that such a
 “decree cannot be executed by the perform-
 “ance of a single act. * * * In a quali- **30**
 “fied sense, it may be true that the case never
 “is ended, but remains a permanent case in
 “the court, performance of whose decree may
 “be the subject of repeated inquiry. * * *
 “It is also true that in the changing condi-
 “tions of business the details of the use may
 “require change, * * * but other de-
 “crees are subject to change.” * * *
 “Clearly the public interests justify if they do
 “not compel the enforcement of this right.” **40**

When this case came before the United States Supreme Court, the remedy of specific performance was carefully considered. Blatchford, J., said:

10 "It is argued that the Court will be called
 "upon to determine from time to time what
 "are reasonable regulations for the running of
 "trains, but this is no more than a Court of
 "Equity is called on to do whenever it takes
 "charge of a railroad by a receiver. The de-
 "cree is complete in itself, and disposes of
 "the controversy, and it is not unusual for a
 "Court of Equity to take supplemental pro-
 "ceedings to carry out its decree, and make
 "it effective under altered circumstances."

And again he says:

20 "The rights of the public in respect of these
 "great highways should be fostered by the
 "Courts, and it is one of the most useful func-
 "tions of a Court of Equity that its methods
 "are capable of being made such as accommo-
 "date themselves to the development of the
 "interests of the public in the progress of
 "trade and traffic by new methods of trans-
 "portation."

30 This decision was approved and followed in the
 case of *Union Pacific R. Co. vs. Chicago, &c., R. Co.*,
 163 U. S., 562, 601. There the Court affirmed a de-
 cree of Judge Brewer in the United States Circuit
 Court, which compelled the specific performance of
 a contract for the joint use of the Omaha bridge,
 and of a portion of the track of the Union Pacific.

See also *City of Oshkosh v. Mil., &c., R.*,
 74 Wis., 534; 43 N. W., 489.

II.

THE DUTY TO MAINTAIN A GOOD AND SUFFICIENT CROSSING IS CONTINUING AND REQUIRES THE REMOVAL OF THE ABUTMENTS.

We have presented this case on the theory that the complainant has an absolute right to the immediate enjoyment of the full use of the street, whether such width is actually needed for public travel, or not. The argument of the Railroad Company is, that Chancellor McGill was wrong in the Port Reading case (4 Dick., 16) and that the company may encroach with their abutments so long as the crossing is left wide enough to be "good and sufficient." Taking this view, they admit that the conditions at this crossing are not good, but they say that the reason is that the Street Railway Company have been permitted to lay a track here, thus congesting the traffic. Our reply is that the Street Railway use is in itself a part of that public travel for which the Railroad Company must provide. The use of the road for street railroad purposes is one of the public uses for which it is laid out. The Railroad Company is as much bound to provide room for the trolley cars and track as for wagons and automobiles. The duty is a continuing one, which increases with increasing travel (3 Vr., 224). We are not asking them to build any part of the structure of the Street Railroad Company, but simply to take away obstructions to travel, of which travel that carried on by the Street Railroad Company is a lawful part.

The growth of the lawful use of the street is such that it is all now needed for the public convenience. The Railroad Company has located an entrance to its platforms on this road, so that carriages often stop at the foot of the stairs to deliver or receive passengers. This does not leave room enough for two

teams to pass between such standing carriages and the trolley cars. The place is one where the trains passing on the girder bridge overhead, tend to frighten the horses, and where there ought to be all the room available.

Even, therefore, if we repudiate the view of Chancellor McGill in the Port Reading case, that a railroad encroachment by an abutment is unauthorized, **10** we still insist on the removal of the abutments, because the evidence shows that the public need the space. Whatever may have been the case when the construction was made, the public needs it now, and the company is required to remove the abutments in the exercise of the continuing duty asserted in *Central R. R. Co. vs. State*, 3 Vr., 220, and often recognized since.

20

III.

THE TOWNSHIP AUTHORITIES COULD NOT AND DID NOT AUTHORIZE THE ENCROACHMENT.

There is produced a resolution of the Township Committee, assenting to a proposal of the railroad company to make the road-way south of the railroad of a certain width and the sidewalks of a certain **30** width, the whole amounting to less than the full width of the highway (p. 111). It is contended that this relieves the Railroad Company, for all time, from ever widening the undergrade crossing.

(a) The resolution does not authorize the encroachment by abutments. It does not relate to the land within the railroad right of way. It assents to a proposal that the Railroad Company shall improve for travel at first, a part only of the whole width of **40** 66 feet of the approach south of the railroad; it does

not either expressly or impliedly consent to the appropriation of the residue by the Railroad Company. The proper inference is that the Company shall improve the residue for the public when needed.

(b) The defendant relies upon the special Act of 1868 (P. L. 1037) for authority to encroach, with the consent of the local authorities. This Act gives no power to the township at all. It gives certain powers to the Company, provided the local authorities consent. One power is to change the route of a highway, but this was not exercised and so need not be considered. The material power is to change the grade of an existing highway with the consent of the local authorities. There is no grant of power in this Act to narrow a highway or encroach upon it, or place abutments in it. The Railroad Company has no such power. **10**

Neither had the Township authorities any such power. Their action was limited to a consent to the exercise by the Company of its power to change grades; neither had power to change boundaries, or sanction encroachments. The Township Committee had no power of vacation. By Act of 1884 (G. S., 3632, Sec. 279) they were given the powers of overseers of the highway under Section 49 of the Road Act, but these powers are merely to open highways and remove obstructions. The power to make and repair roads was not conferred until 1891 (G. S. 2735, Sec. 144). The Borough of Metuchen, formed in 1897, has power to vacate streets (P. L. 1897, p. 296; P. L. 1905, p. 88), but the Raritan Township officers had no such power to vacate any part of Main Street, or to permit any encroachment thereon. **20** **30**

IT IS THE DUTY OF THE COMPANY TO
KEEP THE HIGHWAY IN GOOD REPAIR.

We come now to that part of the decree from which we appeal, namely, the denial of our prayer for relief with respect to the surface of the highway at the crossing.

10

The Railroad Company depressed the street in 1889, and has built and maintained a block pavement under the railroad bridge. This pavement has long been out of repair and is so rough as to be dangerous. It is also left for long periods covered with deep mud carried in by floods from the adjacent slopes. It clearly is not a "good and sufficient passage" such as is required to be maintained by the charter quoted at the head of this brief. (Case, p. 20 15, l. 20 to 40; p. 17, l. 9; p. 19, l. 1 to 12; p. 56, 57; p. 59; p. 69.)

The Vice Chancellor says that the statutory duty of the company "to construct and keep in repair good and sufficient bridges or passages over or under the railroad where any public or other road shall cross the same," applies solely to "bridges over," and not at all to "passages under the railroad." In other words, he strikes out the words
30 "passages under" and reads the statute precisely as if it did not contain those words. Such dealing with a statute is not permissible. Another judge might with equal plausibility strike out the words "bridges over," and thus limit the statute to passages under the railroad. It applies to both. All the words of the statute must be given full effect, if possible. The obligation is not only to construct, but to keep in repair, and it applies clearly to all kinds of crossings, including bridges, grade crossings and undergrade
40 crossings.

The reading of the Vice Chancellor would release the railroad companies from their duties to maintain and repair both grade and undergrade crossings.

The general practice of railroads, supported by the opinions of their counsel, has been to care for the highway crossings within the bounds of their right of way. It is a privilege as well as a burden. The Company can change ~~x~~ from time to time.

The crossing

In this case the Company has used it for drain pipes and receiving basins. To admit the local authorities would establish a troublesome conflicting jurisdiction over a part of the highway which it is highly important to the railroad company to completely control. It is a very serious thing for the Court to release railroad companies all over the State from the care of their undergrade crossings, and to throw it upon the municipalities. The railroad companies are now acquiescing in the duty and caring for the roads all over the State. The statute warrants if it does not require the imposition of that duty, and the Court should not disturb the settled doctrine at this late day.

In this case the railroad company in order to remove a grade crossing, took possession of the highway and excavated a deep trench in it under the right of way, making steep approaches to it from both directions. Both these approaches as well as the road under the railroad bridge, constitute the good and sufficient passage under the tracks which the company has constructed, and is charged with the duty of "keeping in repair,"—a duty which the change of grade has made much more onerous than when the road followed the natural surface of the soil.

If it is the duty of the Company to provide for drainage of the road at the crossing, it is also its duty to provide a surface suitable for travel. Both duties

are imposed for the same end stated in the statute, namely, "so that the passage of carriages, horses and cattle on said road shall not be impeded."

Our interpretation is sustained by the terms of the statute, by the general opinion of the bar, by the acquiescence of railroad companies, and by authority. In *Newark v. D. L. & W. R. R.*, 15 Stew., 197, the duty was declared to be to keep the highway
 10 "at all times in a condition for safe and convenient use."

A similar duty is recognized in other States.

Where a railroad company crosses a highway and interferes with its former use, there is not only a statutory duty, but also a common law duty, to restore the highway, so far as to make it convenient for travel. *Gale v. N. Y. Cent. R.*, 76 N. Y., 594. This
 20 duty is a continuous one, and extends to the approaches constructed by the railroad company. These approaches must be constructed and kept in repair by the Company.

"Having taken possession of the old highway, and substituted a new and different one, they must pre-serve it in a state, as far as practicable, of original
 "usefulness."

People v. N. Y. C. & H. R. Co., 74 N. Y.,
 30 392, 306.
Elliot on Railroads, Sec. 1097, Sec. 1107.

In other States, as well as New Jersey, it is well settled that the liability is continuing, and that as traffic increases, the Company must improve the crossing, if necessary to make it safe and convenient.

Cook v. Boston & Lowell R. Co., 133 Mass.
 185, 188.

Boston & Albany R. R. v. County Commissioners, 164 Mass., 551, 554.
 40

We submit, therefore, that we are entitled to the performance by the Company of its statutory duty to keep the roadway in repair, and to a reversal of the decree so far as it denies this relief. In addition to the relief granted us by the decree, we ask for a further decree requiring the Company to maintain the road so as to conform to the standard of the macadamized street of which the crossing is part. It is now far below that standard. It is proved that this crossing is the "worst place in any traveled road around Metuchen." (Case, p. 57, l. 30.)

10

The defendant should be required to pave and keep in repair and suitable for travel the whole width of 40 feet with a smooth pavement, either of macadam, asphalt or brick. Stone blocks ought not to be used because they do not make a surface as smooth as that of the adjoining macadamized streets, nor do they make a surface capable of being thoroughly cleaned. The wash of the slope in the road to the south will require frequent cleaning here.

If Belgian blocks are permitted to be used, they should be required to be laid on a concrete foundation and made true and even.

20

The duty of a railroad company to keep a road crossing in repair extends to the approaches.

Newton v. Chi. R. R., 66 Iowa, 422.

Titcomb v. Fitchburg R. R., 12 Allen, 254.

White v. Quimby, 97 Mass., 430.

Carter v. Boston, &c., R. R., 139 Mass.,

101.

Equity is the proper forum to determine and enforce the relative duties of the railroad company and town in a crossing.

30

Atty. Gen. v. Ry. Co., L. R., 3 Ch. 100, 105; 22 Eng. R. R. Cases, 64.

Pinkum v. Eau Claire, 81 Wis., 301, 310.

Penn. R. v. Bogert, 59 Atl., 100, 105.

V.

THE LEGAL REMEDIES ARE NOT EXCLUSIVE OR ADEQUATE.

As to the removal of the abutments, the legal remedies suggested are indictment, ejectment and

40

mandamus. As to the grievances caused by the drainage into the crossing, they are indictment and mandamus.

In our first point we have shown that indictment is no remedy at all for the Borough, because the Borough cannot compel the Grand Jury to act on the case, or if they do act, cannot demand an adequate remedy from the Judge, on conviction.

- 10 We think that ejectment will not lie at all because the company is entitled to possession and the Borough has not here the usual right of entry for maintenance of the highway. Further, the writ of execution in ejectment would merely put the Borough in possession of the abutment, but would not empower the Borough to remove it to the destruction of the use of the railroad tracks.

- 20 There remains to be considered the writ of mandamus. No doubt, part of the relief sought might be obtained by mandamus, but the effect of the writ of mandamus is exhausted when a particular thing is directed and done. The Court of Equity can prescribe not only what should now be done, but the continuing duty of defendant. It would be a poor remedy which would merely require the Company to fix up the drainage and the pavement to last for six months, and then renew the present evil conditions by neglect. We refer to the decisions in the U. S. Supreme Court cited in our first point, on the power of the Court of Equity to provide a continuing remedy.

- 30 A further suggestion is made that the equity jurisdiction rests on the ground of a common easement, and that the care of the roadway at an undergrade crossing does not raise a case of the regulation of a common easement.

- 40 We contend that where two parties have rights to use the same piece of land for different purposes, the regulation of their mutual rights and duties is a proper function of a Court of Equity. It makes no difference whether the common use by either is called an easement or not. In fact, the fee in this

case is in the Railroad Company, and the public have a highway easement. The Company have interfered with that easement in their operations.

The jurisdiction, however, by no means depends solely upon the theory of an easement. This is a case of specific performance of the contract duties imposed upon the Railroad Company by their acceptance of their charter, to maintain a good and sufficient crossing. The remedy exists without the Statute, but Section 29 of the General Railroad Laws, Revision of 1903, requires the Court of Chancery to exercise a jurisdiction which before was discretionary. ¹⁰

The cases of *Easton & Amboy R. Co. v. Greenwich Township*, 10 C. E. Gr., 565,—Court of Errors and Appeals. *Raritan Township v. Port Reading R. Co.*, 4 Dick., 11, and *Grey v. Greenville & Hudson R. Co.*, 14 Dick., 372, 388, are all authorities for the equity jurisdiction, apart from the statute; and the Federal authorities cited in our ~~original brief~~ *first point* affirm a similar jurisdiction as unquestionable. ²⁰

See also *City of Oshkosh v. Mil., &c., R.*, 74 Wis., 534; 43 N. W., 489.

The Act which is now substantially embodied in Sec. 29 of the General Railroad Law, (being an Act of 1887), was sustained by Chancellor McGill in *Montclair v. N. Y. & G. L. R. Co.*, 18 Stew., 436. ³⁰ It is true that the Court of Errors and Appeals reversed, but that reversal was on the notion that there was a defect of title, and it was not held that the Act was otherwise invalid. By the Revision of 1903, this objection is removed. (The reversal decision was based on an outright blunder of the Court of Errors and Appeals. The Act under consideration was a supplement of 1887 to the Act found on p. 245 of the Laws of 1882. The Court of Errors and Appeals got the notion that it was a supplement ⁴⁰

to another Act of a similar title, on p. 232 of the Laws of 1882, not relating to road crossings, and actually threw out the Act of 1887 on that blunder, without noticing that there was such an Act as that on p. 245 ~~while~~ it was a proper supplement.

*to which

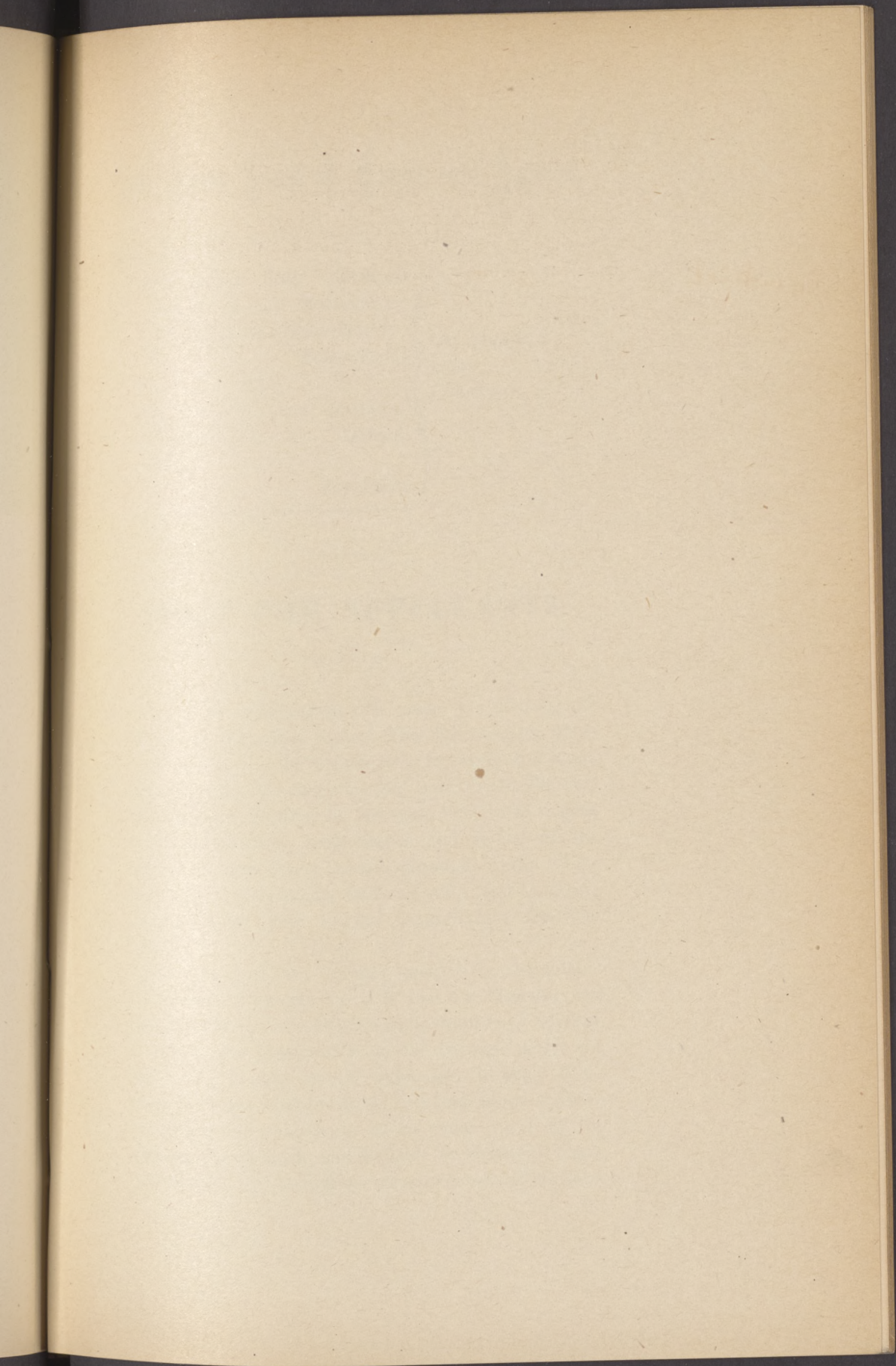
Section 29 of the Act of 1903 is a valid provision, imposing upon the Court of Chancery an imperative judicial duty, within the scope of its discretionary **10** equity powers. It is a statute of great importance to the public, which has no other adequate remedy.

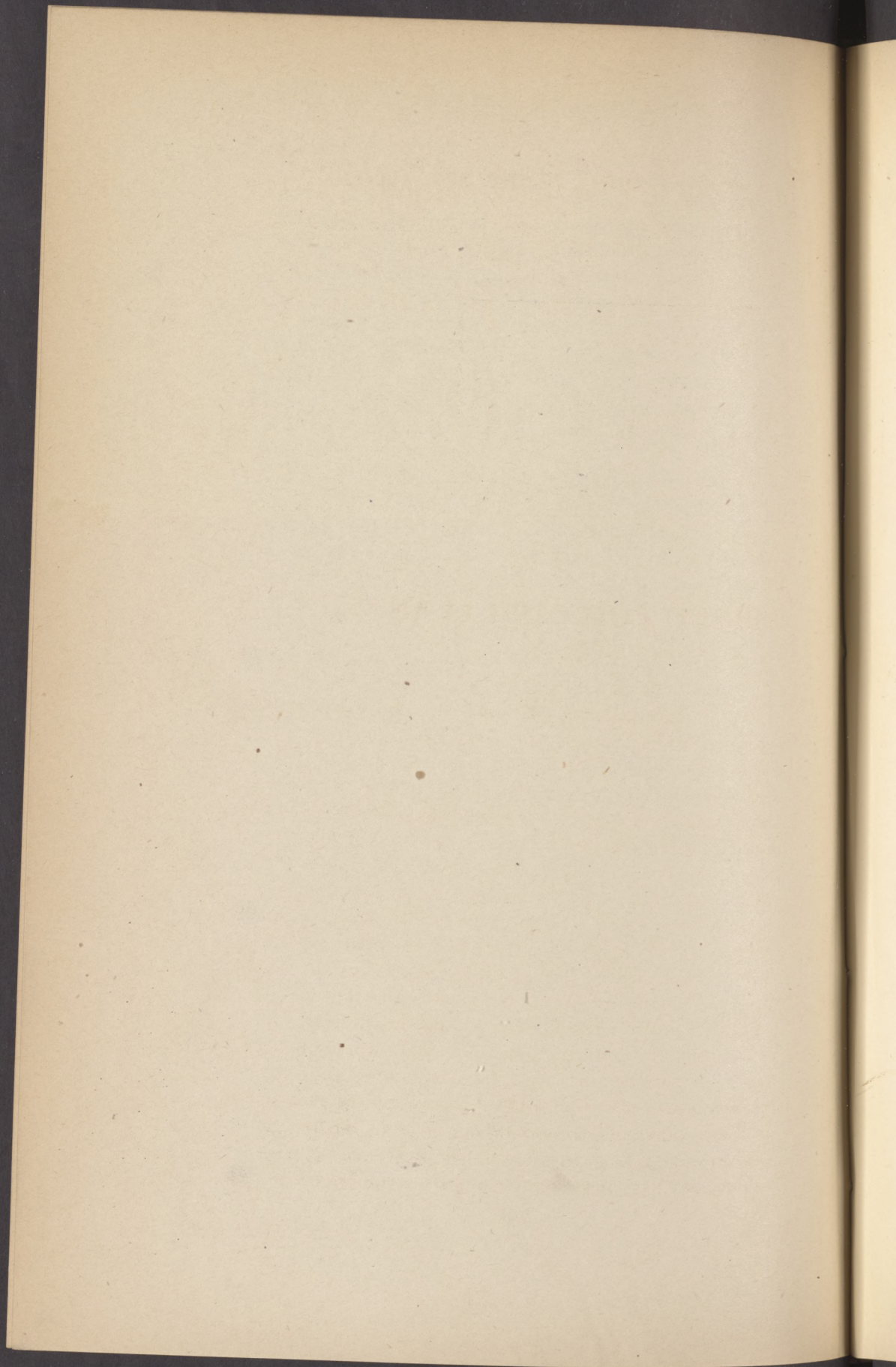
We must resort to equity, and we ask for no compromise; we want all and not half of our rights. We are beginning to realize in New Jersey that our common highways are after all more important to the people of the State than the railroads, and that a wide roadway and a properly prepared surface, are essential. While the State and Counties and towns **20** are spending millions on their part of the roads, the Railroad Companies should be held to keep up their part of the common standard.

CHARLES L. CORBIN,
Of Counsel for Borough of Metuchen.

30

40





New Jersey Court of Errors and Appeals.

Between

THE MAYOR AND COMMON
COUNCIL OF THE BOROUGH OF
METUCHEN (Complainants),

Respondents,

and

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL. (Defend-
ants),

Appellants.

On Appeal
from
Chancery.

BRIEF FOR APPELLANTS.

The bill of complaint in this cause was filed by the Borough of Metuchen against The Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, praying that they may specifically perform the duties imposed by law upon them with respect to the construction, maintenance and repair of the crossing of Main street in said borough by the tracks of the United New Jersey Railroad and Canal Company operated under lease by the Pennsylvania Railroad Company.

The neglect of duty claimed against the defendants was three-fold, namely: (1) in that the highway had been narrowed by the Pennsylvania Railroad Company in 1886 in the construction of the passage under the tracks; (2) in that surface water and drainage along the right of way of the railroad had been conducted into the undergrade passage so as to make travel on the highway inconvenient and difficult in times of heavy rainfall; and (3) in that the pavement of the highway

under the tracks had not been kept in repair by the Railroad Company, but had been allowed to become rough and uneven.

The decree (page 129) adjudges and decrees that the defendants shall within ninety days from its date, remove their abutments and embankment from said street within their right of way, leaving the street sixty-six feet in width with a clear roadway of forty feet and sidewalks on each side of thirteen feet, with leave to place bridge supports on the curb line upon contributing an equivalent width to the sidewalk as authorized by the General Railroad law; and that the said defendants shall so construct their drainage system that they shall not discharge water from their right of way into the highway in such quantities as to accumulate and make pools in the roadway or to flow over the surface of the sidewalk or roadway.

The application of the complainant that the defendants be required to pave and keep in repair the surface of the street was denied.

This appeal is from the portion of the decree directing the removal of the abutments and embankment, leaving the street and roadway and sidewalks of the width respectively aforesaid; and from the portion of the decree which requires that the defendants shall construct their drainage system so as not to discharge water from their right of way into the highway in such quantities as to accumulate therein or to flow over the surface thereof.

I.

THE JURISDICTION EXERCISED IN THIS CASE RESTS WHOLLY UPON SECTION 29 OF THE GENERAL RAILROAD LAW.

The bill is framed under Section 29 of the General Railroad Law, Revision of 1903, P. L. 1903, page 660, which reads as follows:

“When any company shall not properly construct and maintain the bridges or other crossings of highways by

its railroad tracks as required by law, it shall be lawful for the governing body of the township or municipality wherein such crossings are located, within a reasonable time, after notice to the company, to construct or repair such bridges or other crossings, and the cost thereof may be collected from the company, whose duty it is to make such construction or repair, by action in any court of competent jurisdiction; or in lieu of such construction or repair the township or municipality may proceed by a suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings, and the court shall prescribe the crossing to be constructed or the repairs to be made; and in order to enforce obedience to its decree or mandate, the court may restrain the exercise of any of the franchises of the company or adopt such other remedies as may be in accordance with the practice of the court."

It is upon this section that the right to relief was rested by the Vice Chancellor in his opinion (Case, page 114, &c.), and it is upon this section that it must be sustained, if at all.

In the case of *N. Y. &c. Ry. Co. v. The Inhabitants of the Township of Montclair*, 2 Dick. 591, there was an appeal from a decree overruling a demurrer to a bill filed by the township to compel the railway company to construct a bridge across a cut, which cut impeded public travel along a highway, the right to such relief in equity being based upon the provisions of an act substantially the same as the present section 29, providing that the municipal authorities may institute proceedings in the Court of Chancery to compel the specific performance of the duties imposed upon them in respect to the construction and keeping in repair of bridges and passages over and across public roads.

This court reached the conclusion that the enactment thus involved was invalid because of a defect in the title and reversed the decree which had been made in the court below in favor of the complainant.

The opinion of the Court by Justice Reed contains the following language:

"In the argument, the right of the township to invoke the aid of a court of equity was rested upon the terms of the statute. This seems to have been the only course which could have been taken. I can conceive of no ground for equitable interference under the rules which ordinarily control courts of equity in administering its jurisprudence.

"The doctrine, that a court of equity will not act in any instance where the common law courts possessed adequate power to afford the relief asked for, is fundamental.

"The power of the common law courts to compel the performance of duties of the kind under consideration, which were imposed upon railroad companies, was and is complete.

"The appropriate writ for the accomplishment of that purpose is the writ of *mandamus*. *High Extr. Rem. sec. 319*; *State v. Paterson, Newark and New York R. R. Co.* 14 *Vr.* 505, and cases cited.

"I know of no case which holds—certainly no case can hold by the application of correct principle—that a court of equity will issue a mandatory injunction in any instance in which the duty imposed is of that official or corporate quality where a court of common law is competent to adequately compel its execution." (2 *Dick.* 593.)

It was thus decided by this court that there was no basis independently of statute for such relief as was granted by the decree in the present case. It cannot be said that the language above quoted was obiter dictum, for it was essential to the reversal which was ordered in the case, since the decree could not have been reversed, even though the statute was declared invalid, if it might be supported upon equitable grounds aside from the statute.

II.

SECTION ~~29~~ IS UNCONSTITUTIONAL BECAUSE IT SEEKS TO TRANSFER TO THE COURT OF CHANCERY A PURELY LEGAL JURISDICTION.

It is entirely clear that mandamus would lie to compel the proper construction of a highway crossing by a railroad company.

In re Trenton Water Power Co. Spencer, 659.
Mercer Freeholders v. Penna. R. R. Co. 12 Vr. 250; 13 Vr. 490; 16 Vr. 82.
High on Extraordinary Legal Remedies, sections 319, 320.

The fact that a structure exists which is not a compliance with the duty of the Company, does not prevent the granting of a mandamus to compel the Company to erect a structure which will comply with its duty in the premises.

An attentive reading of the section in question is sufficient in itself to show that it is an attempt to transfer to the Court of Chancery the enforcement of purely legal rights. In lieu of itself constructing or repairing the bridges or other crossings and collecting the cost from the Company upon failure of the Company to construct or repair the same, the act says the "municipality may proceed by suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings," &c.

The duties imposed by law are undoubtedly legal, as distinguished from equitable, obligations.

The enforcement specifically of just such obligations is the peculiar function of the writ of mandamus. On the other hand it is a function which equity never has exercised.

N. Y. &c. Ry. Co. v. Montclair, 2 *Dickinson*, 591, 593.

There is moreover the further remedy of indictment and abatement as a nuisance *State v. Smith*, 3 Zab. 130; *State v. Morris & Essex R. R. Co.* 3 Zab. 360; *Freeholders v. State*, 13 Vroom, 263; *State v. Addy*, 14 Vroom, 515), a remedy so ample and efficient that the Court of Chancery has uniformly refused to take jurisdiction in cases of public nuisance, even on the application of the Attorney General, in the absence of the most urgent considerations,

Township of Raritan v. Port Reading R. R. Co.
4 Dick. 11, 16.

And a third remedy for an unlawful encroachment upon a highway is an action of ejectment.

Hoboken Land and Imp. Co. v. Hoboken, 7 Vr. 540.

The effort to confer this jurisdiction upon a court of equity is contrary to those provisions of the State Constitution whereby the boundaries of the jurisdiction of the Supreme Court and Court of Chancery respectively are defined.

In *Brady v. Cartaret Realty Co.* 64 Atlantic, 1078, this Court said: "It cannot be doubted that it is entirely settled in this State that it is beyond the competency of the Legislature to confer a purely legal faculty upon the Court of Chancery or a purely equitable faculty on a court of common law. *Jersey City v. Lembeck*, 31 N. J. Equity, 255, 266."

In the Lembeck case, as in the Brady case, the question involved the jurisdiction of the Court of Chancery under the act to Quiet Title (3 Gen. Stat. 3486), and the principle established in the earlier case was that the Legislature could not transfer to the Court of Chancery the right to adjudicate upon a legal title in a case where the complainant had in his own hands an adequate remedy by an action at law.

So also in *Sheppard v. Nixon*, 16 Stew. 627, 633, this Court, speaking of the jurisdiction of the Court of Chancery upon a bill *quia timet* irrespective of statute,

said: "The foundation of the jurisdiction of the equity court is the inability of the complainant to obtain relief by an action at law, or the inadequacy of the legal remedy. Hence it is the settled law that, where the estate is legal in its nature, and the remedy at law is adequate, and full and complete justice can be done thereby, the party will be left to his legal remedy. The exception to this rule is where the case presents some special ground for equitable interposition, such as fraud, accident or mistake, requiring the setting aside or reformation of deeds or instruments of conveyance. If those elements be wanting, a bill to establish the complainant's title is an ejectment bill, pure and simple; and if the situation of the parties be such that the complainant may have an action at law to establish his title his remedy is in a court of law." Accordingly in that case, the decree in favor of the complainant was reversed and the bill dismissed because the complainant had it in his power to determine the title by an action of ejectment.

Upon the same constitutional principle it is thoroughly settled in this State that the Legislature cannot confer even upon a court of common law other than the Supreme Court, any part of the peculiar jurisdiction of the Supreme Court exercised by its prerogative writs of Mandamus, Certiorari, or Quo Warranto. *Green v. Heritage*, 35 *Vroom*, 567; *McCullough v. Essex Circuit Ct.* 30 *Vroom*, 103; *Conger v. Conway*, 23 *Vroom*, 417, 440; *Green v. Jersey City*, 13 *Vroom*, 118, 122; *Traphagen v. West Hoboken*, 10 *Vroom*, 232 (affirmed 11 *Vroom*, 193); *Harris v. Vanderveer*, 6 *C. E. Green*, 427; *Flanagan v. Plainfield*, 15 *Vroom*, 118.

The case of *Palmyra v. Penna. R. R. Co.* 17 *Dick.* 601, is not in point. That case arose under the act of 1898 (now Section 36 of the General Railroad Act of 1903), authorizing the Chancellor upon petition on behalf of the municipality to order that gates or flagmen be placed at a railroad crossing if he shall decide that protection of the crossing is reasonable and necessary.

It was pointed out in the opinion that in cases under

that act there is no pre-existing clear legal right and therefore Mandamus will not lie (17 Dick. 616).

It was held also in the Palmyra case that there was another ground of equity jurisdiction under which the powers sought to be conferred by the act of 1898 might be exercised, namely, the regulation of the enjoyment by different parties of several easements in common property. That ground manifestly does not exist where the crossing is not at grade and the parties do not use the same physical space. It is the conflicting *use* which is the basis of jurisdiction under this head. But in the present case the use of the railroad does not conflict or interfere with the use of the highway, nor does the use of the highway interfere with the use of the railroad.

III.

THERE HAS BEEN NO FAILURE TO PROPERLY CONSTRUCT OR MAINTAIN THIS CROSSING WITHIN SECTION 29.

(1)

The section in question does not apply to a case of a mere alteration of the bridge or passage.

It applies only where there has been no construction (or no substantial construction) originally, and where it has not been properly maintained and kept in repair.

It is declared lawful for the municipality, after notice, &c. "to *construct or repair* such bridges or other crossings, and the cost thereof may be collected from the company *whose duty it is to make such construction or repair, or in lieu of such construction or repair* the township or municipality may proceed by suit in equity," &c.

The suit in equity therefore lies only in cases where there was a duty on the railroad company "to make such construction and repair."

The statute has no reference to the *alteration or reconstruction* of a crossing; certainly it cannot apply to a crossing completely constructed and in repair where

the only grounds of complaint are that the construction made twenty years previously has somewhat narrowed the width of the highway, and that the right of way is drained into the undergrade passage.

Decisions under the Mechanics Lien Law illustrate the distinction between "construction" and "alteration."

Moreover, the suit in equity authorized by this section lies only where the municipality, if it had been so minded, might itself have constructed or repaired the bridge or crossing. The municipality can do nothing by the aid of the Court of Chancery which it might not have done without such aid if it had elected so to proceed. It is reasonable that the municipality should be authorized to construct a crossing where the railroad company had wholly failed to do so, or to repair a crossing which the company had neglected; but is it *conceivable* that it was intended that the municipality might *ex mero motu* alter or remodel an existing structure according to what the municipal taste or wisdom might consider to be "suitable to the locality in which it is located"?

(2)

So far as concerns the width of the undergrade crossings the companies have fully discharged their duty in the premises.

The obligation originally imposed upon them arose from the 20th section of the Charter of the New Jersey Railroad and Transportation Company (P. L. 1832, page 96, &c.), which, so far as relates to highways, is in these words: "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 or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said railroad shall not be impeded thereby."

Since the passage of the revised Railroad Law in 1903 however the duty of the companies has been measured by section 26 of that act (as restrained by its proviso), which section reads as follows:

"It shall be the duty of every railroad company owning, leasing or controlling any right of way for a railroad within the State, to construct and keep in repair good and sufficient bridges and passages, over, under and across the railroad or right of way where any public or other road, street or avenue, now or hereafter laid, shall cross the same, so that public travel on the said road shall not be impeded thereby, and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are located; and also where said railroad shall intersect any farm or land of any individual, to provide and keep in repair suitable and convenient wagonways over, under and across said railroad, and to construct and maintain suitable and proper cattle guards at all road crossings; *provided*, that this section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before the second day of April, eighteen hundred and seventy-three."

In the case of *Township of Raritan v. Port Reading R. R. Co.* 4 Dick. 11, 14-15 (decided in 1891), Chancellor McGill construed this section as follows (after referring to *People v. N. Y. N. H. & H. R. R. Co.* 89 N. Y. 266): "The case just cited treats of the exercise of the duty of restoration when the highway has been necessarily and therefore lawfully injured, and not of the right to injure it in the first instance. If a railway cross the highway at grade its rails must necessarily obstruct the road; so if it cross below grade, the necessary cut will be a barrier to public travel; so also it may be after a railroad is built across a highway at grade, the frequency of trains or multitude of tracks will render it necessary for public safety and convenience that the highway shall be passed under the railroad.

"In each of these cases a passage must be provided to take the place of that which has necessarily been taken away or obstructed.

"To remedy the injury which the railroad thus does, an active duty is contemplated. The railway company

must 'construct' a bridge or passage. *It is when it is called upon to perform this active duty that the bridge or passage may be of a width suitable to the locality.* The duty extends to two classes of cases: where a highway necessarily injured in building the railroad is to be restored, and where a road is laid across a railway after the latter has been built. It will not be necessary at this time to consider the latter class of cases. The purpose of imposing the duty, in reference to the former class, is to secure a substitute for that which is necessarily and lawfully taken away, *and the law requires no more than that such substitute shall be sufficient to accommodate public travel at its location.* If the substitute shall not originally be made of equal capacity with the highway, it must, from time to time, be enlarged as public accommodation demands, until it shall reach the full capacity of the road. *Central R. R. Co. v. State, 3 Vroom, 220.*"

The construction so put upon the statute by Chancellor McGill in 1891 has never been disapproved, and it is noticeable that the same language was continued in the revision of the railroad act in 1903 (section 26), thus indicating acquiescence on the part of the Legislature in this construction; a circumstance of especial value when the distinguished authorship of that revision is remembered.

It would seem to be impossible to misunderstand the language of Chancellor McGill above quoted. The effect of it is that where the railroad company *substitutes a passage* for the highway previously existing, such a substitute need not be of the full width of the highway, but is only required to be of sufficient width to accommodate the public travel. On the other hand, when the railroad crosses the highway by a bridge without altering the grade of the highway, it must bridge the entire width.

Independently of any decision construing it, the language of section 26, that said bridges and passages "*shall be of such width and character as shall be suitable to the locality in which the same are situated,*"

plainly implies that they need not be of the full width of the highway.

It is not necessary for the defendants to establish the strict legality of the depression of the highway when it was done in 1886; the question is now whether there is any duty on the part of the companies to widen this passage. The only statute which can be referred to as creating that duty is this section 26, and that only requires that the passage shall be of such width and character as is suitable to the locality.

What evidence is there then, of the insufficiency of the passage under the tracks as it now exists?

The entire width between the abutments is 45 feet, of which 25 feet is roadway, there being a sidewalk 10 feet in width on each side (p. 34, l. 21, &c.).

There is a single track of a trolley road along the westerly side of the roadway over which a car passes every half hour (p. 83, l. 24).

The case is absolutely barren of any evidence of congestion of travel or of insufficiency of space in the passage under the tracks.

Aside from the general statement that the crossing in question is the principal means of communication between points on opposite sides of the railroad, the only evidence to show the amount of travel is that of a single witness (page 83), who made a count on one day of the number of wagons and of foot passengers between 6 a. m. and 7 p. m. The result was 394 wagons and 1,459 foot passengers. That is to say, at the rate of 30 wagons per hour and 112 foot passengers per hour during the 13 hours—*a wagon every two minutes and not quite two foot passengers every minute!*

Can there be any pretence that the existing roadway of 25 feet and the two sidewalks of 10 feet each are insufficient to accommodate this amount of travel?

If any such claim is made on the part of the complainant, the insincerity of it may perhaps best be shown by the following, which I copy from the brief submitted in this cause to the Vice Chancellor by the counsel for complainant. It is said in this brief: "Whether the

borough council would insist upon an immediate enforcement of a decree to remove the abutments would be for them to say. They might be willing to enter into some arrangement with the company, *or even to vacate the land occupied by the abutments on fair terms*; but they are entitled to a full decree if it appears that the abutments are an encroachment."

I think it has been shown that the complainant is *not* entitled to a decree for the removal of the abutments merely because they may be within the lines of the highway as originally laid out, but only in case the existing passage is not of sufficient width for the present public needs; and the brief of the complainant itself shows that they do not really need the increased width given them by the decree and involving an expenditure by the defendants which will be simply enormous.

It would seem that the suit in this branch of it is not prosecuted in good faith, but for the purpose of extorting some concession from the companies as a consideration for abandoning an unconscionable claim.

(3)

The discharge of water from the right of way into the highway is not ground for a suit under section 29, but amounts at most to a public nuisance, for which there is adequate remedy by indictment.

The decree requires the defendants to "so construct their drainage system that they shall not discharge water from their right of way into the highway in such quantities as to accumulate" therein, &c., and directs an injunction to that effect (p. 129, l. 29, &c.).

This is not compelling specific performance of duties imposed by law with respect to the construction, maintenance or repair of the crossing (in the language of section 29 authorizing such a suit).

It involves no change in the crossing, but in the drainage system by which the water is conducted to the crossing.

It is not enforcing performance of anything, but is a prohibition of an act which may amount to a public nuisance, and might have arisen from the act of any other party just as well.

The fact that the drainage comes from the right of way of a railroad creates no greater right to maintain a suit to enjoin it than would exist if it came from the adjoining field of a farmer.

This branch of the suit therefore is not sustained by the statute relied upon.

Nor can it be sustained independently of statute upon the idea of restraining a public nuisance.

Because of the complete and thorough nature of the remedy by indictment the Court of Chancery in this State has uniformly refused to take jurisdiction in cases of public nuisance.

In *Township of Raritan v. Port Reading R. R. Co.* 4 Dick. 11, 16, Chancellor McGill declared it to be settled that in the absence of some special and urgent reason, equity will not exercise jurisdiction where the object sought may be as well obtained in the ordinary tribunals; and that where the grievance is a misdemeanor subject to indictment, equity will interfere with great reluctance even though its intervention be sought by the Attorney General, and then only to prevent a very serious public injury.

All the cases are to the same effect.

Attorney General v. N. J. R. R. Co. 2 Green Chy. 136.

Attorney General v. Heishon, 3 C. E. Gr. 413.

Attorney General v. Brown, 9 C. E. Gr. 90.

Attorney General v. Del. & Bound Brook R. R. Co. 12 C. E. Gr. 26.

Inhabitants of Woodbridge v. Inslee, 10 Stew. 307.

Allen v. Board of Freeholders, 2 Beas. 68, 75.

Morris & Essex R. R. Co. v. Prudden, 5 C. E. Gr. 530, 536.

The rule against interference by a court of equity in such cases is especially strict where the relief sought is not by way of prevention of a threatened injury, but to remove conditions already existing and which have existed for a considerable period.

In *Attorney General v. N. J. R. R. Co.* 2 Green Chy.

140, it was held that when the nuisance has been completed the remedy by injunction is gone.

Attorney General v. Hudson River R. R. Co. 1 *Stockton*, 526, 562, and in *Inhabitants of Woodbridge v. In-slee*, 10 *Stew.* 397, a general demurer under such circumstances was sustained.

In the case of *Township of Raritan v. Port Reading R. R. Co.* 4 *Dickinson*, 11, the railroad company was constructing the abutments of a bridge to carry its railroad above the highway in such manner as to encroach thereon, and the court held such erection to be unlawful, but nevertheless refused to restrain it, saying that the remedy by indictment was sufficient to abate the nuisance and to restore to the public the entire highway; citing *State v. Smith*, 3 *Zab.* 130; *State v. Morris & Essex R. R. Co.* 3 *Zab.* 360; *Freeholders v. State*, 13 *Vroom*, 263; *State v. Addy*, 14 *Vroom*, 115.

The supposition on the part of the counsel for complainant that the case of *Township of Raritan v. Port Reading R. R. Co.* 4 *Dickinson*, 11, was overruled by the case of *Gray v. Greenville & Hudson R. R. Co.* 14 *Dick.* 372, is clearly erroneous. Vice Chancellor Emery, who decided the case last referred to, in his opinion therein says (14 *Dick.* 387):

"The cases relating to the right of the Attorney General to intervene in the public interest, which are numerous, show that the distinction is between cases in which a public nuisance by reason of interference with ordinary public travel is the sole basis of complaint and cases where the real injury on which the Attorney General's information is based, is an illegal act on the part of a public company in excess of its powers, through which illegal act the public generally is affected."

"In cases of the first class based on nuisance to travel or passage, it is settled that the Attorney General, in order to obtain the aid of a court of equity, must show a serious public injury which cannot be remedied in the ordinary tribunals. *Raritan Township v. Port Reading Railroad Co.* 4 *Dick. Ch. Rep.* 11, and cases cited at page 18."

"In cases of the latter class, excess of public powers

affecting the public rights, the rule is settled by many authorities that the Attorney General is justified in interfering without legal evidence of actual injury to the public."

The case of *Raritan Township v. Port Reading Railroad Co.* 4 Dick. 11, is thus expressly relied upon by Vice Chancellor Emery for the statement that in cases of this class, serious public injury *which cannot be remedied in the ordinary tribunals* must be shown.

The Vice Chancellor in his opinion in the present case (page 125) says that there has been a change of sentiment of the bench and bar within late years as to the adequacy of indictment in such cases which has led the courts to sustain an action of ejection in cases where there has been encroachment upon public highways.

The fact remains, however, that the Court of Chancery of this State has always and consistently refused to enjoin a public nuisance, even at the instance of the Attorney General, unless to prevent a very serious public injury; and so strictly has the rule been held that there is scarcely to be found an instance (if indeed there be one) where such a decree has been made.

Certainly the present case does not call for a remedy in equity. The conditions are just such as have existed for years,—for two years since the suit was begun,—without serious public inconvenience, except in times of excessive rainfall, and then lasting only a few hours.

For such a case at least the remedy in the ordinary course by indictment is entirely adequate.

The objection that there is an adequate remedy at law is taken in the answer and will therefore be sustained at the hearing if such remedy exists.

Barcalow v. Totten, 8 Dick. 573.

The answer prays the benefit of a demurrer for want of equity, and such demurrer should have been sustained.

The decree should be reversed and the bill dismissed with costs.

ALAN H. STRONG,
Of Counsel with Appellants.

INDEX

	PAGE
Bill of Complaint	2
Answer	7

TESTIMONY FOR COMPLAINANT.

	Direct	Cross	Re-Dir.
John Robinson	11	17	22
Josiah Tice	23	40	49
Josiah Tice (recalled)	80	—	—
Charles Monaghan	50	51	51
George M. Hahm	52	53	—
Charles L. Corbin	54	59	—
Alexander C. Litterst	59	65	—
Thomas F. Van Siclen	68	—	—
Alfred L. Ellis	70	—	—
Robert Egan	83	83	—

TESTIMONY FOR DEFENDANTS.

William M. Jackson	84	95	—
Joseph P. Savage	98	103	—
John Robinson	109	—	—
Thomas L. Dixon	110	—	—
Opinion of Vice Chancellor Pitney			114
Final Decree			129
Appeal			131
Petition of Appeal			133

INDEX

Bill of Complaint
 Answer

TESTIMONY FOR COMPLAINANT

	11	17	23	29
John Robinson				
Joseph Rice				
Joseph Rice (recalled)				
Charles Abingdon				
George M. Habun				
Charles L. Corbin				
Alexander C. Carter				
Thomas H. Van Sicken				
Abel F. Ellis				
Robert Dean				

TESTIMONY FOR DEFENDANTS

	84	103	100	110
William M. Jackson				
Joseph E. Savage				
John Robinson				
Thomas E. Dixon				
Opinion of Vice Chancellor Pring				
Final Decree				
Appeal				
Opinion of Appeal				

New Jersey Court of Errors and Appeals.

Between

THE MAYOR AND COMMON
COUNCIL OF THE BOROUGH OF
METUCHEN (Complainants),

Respondents,

AND

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL. (Defendants),

Appellants.

On Appeal
from Chancery.

20

CASE.

30

ALAN H. STRONG,
For Appellants,

and

GEORGE S. SILZER

and

CHARLES L. CORBIN,
For Respondent.

IN CHANCERY OF NEW JERSEY.

*To His Honor, William J. Magie, Chancellor of the
State of New Jersey.*

Complaining, shows unto your Honor your orators, The Mayor and Common Council of the Borough of Metuchen, in the County of Middlesex, as follows:

1. Your orators are a municipal corporation, incorporated under the General Borough Act of 1897, and have within their territory, and under their control, an ancient public highway, called Main street, originally laid out four rods wide and which is crossed by the right of way of the United New Jersey Railroad and Canal Company, formerly the New Jersey Railroad and Transportation Company, of which the Pennsylvania Railroad Company is now lessee, which crossing is within the limits of said Borough.

The New Jersey Railroad and Transportation Company was consolidated with other companies to form the United New Jersey Railroad and Canal Company under an act entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia, approved March 14, 1872," which act was accepted by said companies by certificate, printed in the Pamphlet laws of 1872, on page 1402. By virtue of said consolidation, the United New Jersey Railroad and Canal Company became charged with all the duties and obligations of the New Jersey Railroad and Transportation Company under its charter. The property and franchises of the United New Jersey Railroad and Canal Company were leased to the Pennsylvania Railroad Company by lease and contract filed in the office of the Secretary of State, and dated June 30th, 1871, and ratified by act of the Legislature, approved March 27, 1873, by virtue of which lease, the Pennsylvania Railroad Company assumed, and agreed to carry out all the obligations and duties of the United New Jersey Railroad and Canal Company, and became char-

geable with all the duties imposed on its lessor, with reference to the maintenance and care of public highways.

2. At the time of the construction of the said railroad, and for many years thereafter, the crossing was a grade crossing of the tracks of the Railroad Company. About the year eighteen hundred and eighty-six, the United New Jersey Railroad and Canal Company and its lessee, acting under powers conferred upon them, by the charter of the New Jersey Railroad and Transportation Company, undertook to change said grade crossing to a crossing under grade, and accomplished this by excavating and depressing the highway so that the same passes under a bridge on which the tracks of the railroad are carried. In making such constructions the Railroad Company narrowed the highway, and unlawfully placed the easterly abutment,—on which said railroad bridge is supported,—within the lines of the highway, encroaching thereon for a distance of twenty feet or upwards, and also encroached on said highway, although to a lesser extent, on the southwesterly side thereof. 20

3. By the construction of said excavation and undergrade crossing, the surface water and the drainage along the right of way of the Railroad Company, for a distance northwesterly of nearly half a mile, was drawn into the highway and a deep drain was constructed on the westerly side of the highway to carry away the water thus drawn into it, but the provision for taking care of the water is so inadequately constructed and so carelessly maintained on the part of the Railroad Company, that the water in times of heavy rains is thrown into the excavation and upon the highway in great quantities, so that the use of the highway is greatly impaired and quantities of soil and mud are deposited in the roadway, making passage inconvenient and difficult. 30

4. The Railroad Company has undertaken the care of the highway across their right of way, as required by law, and has paved the street on their right of way

for a part of the distance with stone block pavement, but the same have not been properly laid or cared for and the surface of the pavement is extremely rough and full of depressions, whereby the crossing is made difficult and dangerous at a point where, in view of the passage of trains overhead, it is of special importance that a smooth and safe surface should be maintained on the highway.

5. Since the construction of said crossing there has
 10 been a material growth of population in the Borough of Metuchen and in the vicinity and a still greater growth of travel on the highway. A street railroad track has been laid on this crossing and street cars are operated continuously and the space occupied by the street railroad track has been left by the Railroad Company unpaved and difficult of travel, and the entire width of the present roadway is no longer adequate for the accommodation of public travel, and it has become
 20 necessary for the proper accommodation of travel that the abutments, or at least the northwesterly abutment, should be set back to the proper line of the street and that the roadway should be widened accordingly and properly paved. Main street is the principal business street of the Borough and the one upon which the travel is greatest. It is the only street in the Borough crossing the railroad tracks at a point convenient for travel. The nearest crossing to the west is distant from Main street crossing over one thousand feet and the
 30 nearest crossing to the east is a very dangerous grade crossing, distant from Main street crossing over half a mile, and neither of the crossings is much used. And your orators *show* that by the 20th Section of the act entitled "An act to incorporate the New Jersey Railroad and Transportation Company, passed March 7, 1832," it is provided "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 or roads where any public or other road shall cross the same, so that the passage of carriages, horses
 "and cattle on said road shall not be impaired thereby";

and your orators *show* that the passage on Main street under said railroad is not a good and sufficient passage and has not been kept in repair or properly constructed and that the passage of carriages, horses and cattle on said road is impeded by the encroachment of said abutments and by the unsuitable construction and by the neglect to keep the same in repair.

6. Your orators on the third day of April, nineteen hundred and five, adopted a resolution of which the following is a copy: 10

Resolved, That notice be given to the Pennsylvania Railroad Company, pursuant to Section 29 of the act "concerning railroads, Revision of 1903, that their crossing of Main street in the Borough of Metuchen has not been properly constructed and is not properly maintained in the following respect:

"1st. The eastern abutment of the railroad bridge encroaches on the highway, and this encroachment constitutes a serious obstruction to public travel.

"2d. The Pennsylvania Railroad Company has drawn large quantities of water into the crossing and has made insufficient provision for its disposal, whereby the crossing is made unsafe and inconvenient and unsuitable. 20

"3d. The surface of the crossing is not properly paved or graded but is left so rough and uneven as to be unsafe, and unsuitable and inconvenient for travel.

Resolved, That unless the said crossing is forthwith properly constructed by said Railroad Company, the attorney for the borough shall prepare proceedings in law and equity to procure the proper construction and maintenance of said crossing, and that he be authorized to employ Collins & Corbin, of Jersey City, counsel to assist him." 30

A copy of this resolution, duly certified by the Borough Clerk, was served upon the defendants on the tenth day of April, nineteen hundred and five, but they have neglected and refused to take any measures to improve the crossing or to make the same suitable and safe as required by law.

Your orators therefore pray that the Pennsylvania Railroad Company and the United New Jersey Railroad Company and Canal Company may answer the premises and that they may specifically perform the duties imposed by law upon them, or either of them, with respect to the construction, maintenance and repair of the crossing of Main street in the Borough of Metuchen by their tracks, and that your Honor will prescribe the crossing to be constructed and the repairs to be made, and that they may be required to remove the abutments placed by them within the lines of Main street, and to properly improve said street to the full width thereof, and that your orators may have such other and further relief in the premises as may be equitable.

10
20
May it please your Honor, the premises considered, to grant unto your Honor the writ of subpœna to be addressed to the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, commanding them on a certain day and under a certain penalty therein expressed, to be and appear before your Honor and to answer the premises and to abide the order of the Court.

GEORGE S. SILZER,
Solicitor of Complainant.
CHAS. L. CORBIN,
Of Counsel.

ANSWER.

[Filed September 9, 1905.]

IN CHANCERY OF NEW JERSEY.

The joint and several answer of the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, defendants, to the bill of complaint of the Mayor and Council of the Borough of Metuchen, complainant.

10

These defendants for answer unto the said bill say, that they are informed and believe it to be true that the complainant is a municipal corporation under the general borough act of 1897 and the acts supplementary thereto or amendatory thereof, and that there is within the limits of said borough a public highway called Main street, which is crossed by the right of way of the railroad formerly of the New Jersey Railroad and Transportation Company now owned by this defendant, The United New Jersey Railroad and Canal Company and 20 leased and operated by this defendant the Pennsylvania Railroad Company, and that said crossing is within the limits of said borough, but these defendants deny that the said highway was originally laid out four rods wide at the said place of crossing said railroad right of way.

And these defendants admit that the said highway and said railroad down to about the year eighteen hundred and eighty-six, crossed each other upon the same grade or level, and that in or about the said year these defendants or one of them under due statutory author- 30 ity undertook to change or did change the said crossing by excavating and depressing the said highway so as to afford a passage for the same under a bridge upon which the tracks of said railroad were and are carried; but these defendants deny that in making said changes these defendants or either of them narrowed said highway or unlawfully placed the easterly abutment or any abutment within the lines of said highway or encroached thereon for a distance of twenty feet, or any other distance, and they also deny that there was an encroach-

ment upon said highway or the southwesterly side thereof.

These defendants further answering deny that by the construction of said undergrade crossing the surface water along the right of way of said railroad was drawn into said highway; they admit however that a drain was constructed on the westerly side of said highway in order to carry away any water which might find its way into said excavation, and these defendants say
 10 that the provision so made was in all respects sufficient and proper for that purpose, and that the same has been well and properly maintained, and they deny that in times of heavy rains or at any time water accumulates in said excavation in any considerable quantities or that thereby the use of the highway is impaired or interfered with or that quantities of soil or mud are deposited in the roadway making passage inconvenient or difficult.

And these defendants deny that they have assumed
 20 the care of the highway under their said railroad or crossing said right of way, and they deny that by law they are required so to do; they admit, however, that they did have the said undergrade passage with stone blocks, and they say that the said pavement was properly laid and is now in good condition except so far as it has since been disturbed by the laying of the tracks of an electric railway upon said highway; and these defendants insist that no obligation rests upon them to keep the said pavement in repair or to remedy defects
 30 therein caused by the laying of said railway.

And these defendants further answering say and insist that the said roadway and undergrade passage is entirely adequate for the accommodation of public travel and that there is no necessity that the said abutments thereof should be set back, or that said roadway should be widened, and further that the same cannot be widened without taking the private property of these defendants; and they further insist that the said undergrade passageway is a good and sufficient passage for the said highway and is properly constructed and fully

answers all public needs and requirements, and that these defendants have fully discharged all obligations in that behalf imposed upon them by statute or otherwise.

And these defendants further insist that the said complainant has a full, complete and adequate remedy at law in the premises, and that the said complainant in and by its said bill has not made or stated such a case as entitles it to any relief against these defendants in this Honorable Court; and these defendants pray the same benefit as though they had demurred to the said bill; and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained. 10

ALAN H. STRONG,
Solicitor for and of Counsel with Defendants.

THE PENNSYLVANIA RAILROAD COMPANY.
By SAM'L REA, Vice-President.
[Seal of The Penna. R. R. Co.] 20
Attest: A. J. CONATY, Asst. Secretary.

UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.
By JOHN C. BARNES, President.
[Seal of United N. J. R. R. & Canal Co.]
Attest: LEROY H. ANDERSON, Secretary.

State of Pennsylvania,
Philadelphia County, ss. 30

The answer of the defendant, The Pennsylvania Railroad Company, was taken this fifth day of September, in the year nineteen hundred and five, before me, under the common seal of said corporation as by their said seal thereto affixed appears.

HUGH B. ELY,
Master in Chancery of New Jersey.

State of New Jersey,
Mercer County, ss.

The answer of the defendant, The United New Jersey Railroad and Canal Company, was taken this ninth day of September, in the year nineteen hundred and five, before me, under the common seal of said corporation as by their said seal hereto affixed appears.

JOHN SYKES,

Master in Chancery of New Jersey.

10

20

30

Mr. Corbin We offer the copy
Mr. Strong I have no objection
Mr. Corbin We offer it, the copy

IN CHANCERY OF NEW JERSEY.

January 3, 1906.

Between

BOROUGH OF METUCHEN,
Complainant,

AND

PENNSYLVANIA RAILROAD COM-
PANY, ET ALS.*Defendants.*

10

Transcript of shorthand notes of testimony taken in the above entitled cause before Hon. Henry C. Pitney, Vice-Chancellor, at Chancery Chambers, Newark, New Jersey, on January 3, 1906, in the presence of Charles L. Corbin and George S. Silzer for the complainant, and Alan H. Strong for the defendants. 20

John Robinson, sworn.

Direct Examination, by Mr. Silzer.

Q. You are the clerk of the Borough of Metuchen?

A. Yes, sir.

30

Q. And have with you the minutes of that borough?

A. Yes, sir.

Q. Turn to the meeting of April 3, 1905. Do you find a resolution passed referring to the Pennsylvania Railroad crossing at Main street? *A.* Yes, sir.

Q. I show you a paper. Is that the original resolution? *A.* Yes, sir.

Mr. Corbin: We offer the copy.

Mr. Strong: I have no objection.

Mr. Corbin: We offer it, the copy.

The Court: Received in evidence.
Marked Exhibit C 1.

The Court: This is a series of resolutions that are set out and copied in the bill?

Mr. Corbin: Yes, sir.

Q. Was that copy of that resolution sent to the Pennsylvania Railroad Company by you?

A. Yes, sir.

10 Q. (By the Court) How was it served?

A. Served by mail.

Q. And did you receive acknowledgment?

A. Had acknowledgment of it; yes.

Q. I show you a letter dated April 24; is that the letter that you received in reply to the notice you sent?

A. Yes, sir; "replying to your favor of April 10th."

Q. Who was it addressed to?

The Court: Never mind. It shows for itself.

20 Q. I mean the letter you addressed?

A. Pennsylvania Railroad Company; yes, sir.

Q. At what place, Jersey City or Philadelphia?

Mr. Strong: Or New Brunswick or Metuchen?

The Court: Does it make any difference. Have you any objection to that letter?

Mr. Strong: I think not, sir; no objection to the letter.

The Court: Received in evidence.

Marked Exhibit C 2.

30 Q. Mr. Robinson, have you any business beside being borough clerk? A. Yes, sir.

Q. What is that business? A. Grocerman.

Q. And as such do you have occasion to drive over the crossing or under the crossing of the Pennsylvania Railroad at Main street, Metuchen? A. Yes, sir.

Q. And how frequently? A. Well, some days perhaps I might go through there a dozen times.

Q. And how long have you been such grocer?

A. Twenty-seven years.

Q. What other crossings are there in Metuchen, either over or under the Pennsylvania Railroad, beside this Main street crossing? A. Well, there is an undergrade on Lake street and overhead on Grove avenue.

Q. How far is Grove avenue—

Mr. Corbin: Overhead, you mean grade?

A. Grade crossing; yes, sir. It is about a quarter of a mile or more.

Q. (By the Court) Which way, west? A. East. 10

Q. (By the Court) East? A. Yes, sir.

Q. (By the Court.) You mean there is a grade crossing before you get to Metuchen station going this way (indicating)? A. Yes, sir.

Mr. Silzer: Then this one, your Honor.

The Court: Then this crossing, and then the one beyond?

A. Yes, sir.

Q. (By the Court) After you cross the other rail- 20 way? A. Yes, sir; that is, there is one undergrade west of Main street, that is within, it is over an eighth of a mile.

Q. Now, this Main street crossing, where is that with reference to the station? A. It is direct to the station, the Main street.

Q. (By the Court) How near the station is it? Got a map here? A. Why, about a hundred feet.

Q. Does the platform of the station run right to this crossing? A. Yes, sir. 30

Q. (By the Court) Which does the most work— which is used most of the three you have mentioned, which crossing is used most by the population?

A. Why, Main street.

Q. Where are the business houses of the city?

A. On Main street.

Q. And the post office? A. Post office right near the depot; yes, sir.

Q. As you come to the crossing where the tracks are overhead how do you approach that going north and

starting toward what is known as the Ayres property what is the situation? *A.* Well, it is very abrupt.

Q. Is it uphill, or down, or level? *A.* It is down.

Q. (By the Court) That is, they dropped the level of the street in making their crossing, there is a sag in the street made by the railroad in order to accommodate—

A. Yes, sir.

Q. (By the Court.) As you come to the crossing you come down hill and as you come out from the crossing
10 you go up hill? *A.* Yes, sir.

Q. You say you drove over this road frequently. Now, under this crossing how do you find it when you drive there, how have you found it?

The Court: Now, let me see. I understand as you approach the crossing from south going north you go down a steep pitch?

A. Yes, sir.

Q. (By the Court) Then do you go under, do you
20 rise again on the other side? *A.* Yes, sir.

Q. (By the Court) Then there is a steep, sharp descent into the crossing from either side? *A.* Yes, sir.

Q. (By the Court) Due to the excavation of the earth to make head room? *A.* Yes, sir.

Q. Now, as you drive in there with your wagon what do you find is the condition of the highway under this crossing and at this crossing? *A.* Very bad condition.

Q. In what way? *A.* It is very uneven and rough.
30

Mr. Strong: I object. The company has nothing to do with that. The company has nothing to do with the unevenness of the undergrade crossing.

The Court: I cannot keep the evidence out. You make your objection that is a question of law, as I suppose, one of those that struck me at once, whose duty it is to keep the road in repair under the crossing, and under this letter that is put in another question of law is, whether if the city did

agree, the corporation, I call it a city—I suppose it is a municipal corporation, isn't it?

Mr. Strong: Township at that time.

The Court: Township. Well, if they did agree to having the railroad practically narrow the street, whether they are bound by it now, or whether the city is bound by it.

Mr. Corbin: Whether they could agree.

The Court: Whether they could agree; all that sort of thing, was within the thoughts that ran through my mind when I said it was principally questions of law. It is proper, however, Mr. Strong, for them to show that the road is in condition that would be considered bad for a road in the center of a thriving town.

Mr. Strong: I wish my objection to be noted.

The Court: Certainly.

Q. (Question read.)

The Court: What is the condition? Tell it quickly and briefly.

A. Just as I say, it is very uneven, and a man driving through there with a horse that has any spirit at all in him is liable to have his wagon broke, and perhaps in some case would be upset. I know I had that happen to myself not later than yesterday when I went under that bridge.

Q. (By the Court) Have your wagon upset?

A. Not upset. I say I have seen times—and my horse got frightened and threw me off the seat and my head struck the top of the wagon; that is how uneven it is.

Q. (By the Court) It isn't in as good condition as the rest of the streets? A. No, sir.

Q. (By Mr. Corbin) Could you any where within five miles of that point on Main street find as bad a place?

Mr. Strong: I object.

A. No, sir.

The Court: It was incited by what I said. If the town kept all the streets in bad order, they might be estopped, so to speak, coming in this Court with very bad grace to ask the railroad company to keep a piece of road in first rate order, if the railroad company's duty is to do so, at the same time they did not attend to their own business. A man must come into equity with clean hands, you know, is the old story. Proceed. You have your
 10 objection. I think the evidence is competent.

Q. What have you to say as to the gathering of surface water, or water of any kind, at that point that has come under your observation? A. Well, I have seen it there myself, although I have never seen it when it was the deepest, at least eighteen inches.

Q. (By the Court) Eighteen inches deep in this cut, in this sag? A. Yes, sir.

Q. Did you see where this water come from?

A. Yes, sir.

20 Q. Where? A. It comes from the east down under the embankment; the pipes bursted.

Q. (By the Court) From what ground does it come, from what land? A. The surrounding land.

Q. On whose land, that is what I want to know?

A. Pennsylvania Railroad.

Q. And from which direction, east or west?

A. It runs west.

Q. (By Mr. Corbin) Running west, you say?

A. Yes; running west.

30 Q. (By the Court) Comes from the east?

A. Comes from the east.

Q. (By the Court) There is a down grade as you go from this way toward Metuchen, isn't there?

A. Yes, sir.

Q. Ditches both sides of the track, aren't there?

A. Yes, sir.

Q. After you get to this crossing where did you see the water come or go? A. Right down into the street.

Q. Did it carry anything with it? Did you see any-

thing come with it? *A.* Yes, sir; I have seen several load of earth go with it.

Q. And how frequently have you seen that condition exist? *A.* Several times.

Q. (By the Court) That is after a heavy rain, I suppose? *A.* Yes, sir.

Q. Now, after these rains, what would be the condition of the street, after the water had actually or partly gotten off? *A.* Well, I have seen mud all the way across the street six inches deep. 10

Q. And in on the sidewalk? *A.* Yes, sir.

Q. When did you see that last?

A. Well, I don't remember the date.

Q. Well, how recently have you seen any water or dirt washed out of this? *A.* This last early fall I think it was.

Cross Examination, by Mr. Strong.

Q. Have you in your possession as borough clerk the agreement under which this overhead crossing or undergrade crossing was made? *A.* No, sir. 20

Q. When was the borough formed, of Metuchen, Borough of Metuchen? *A.* In 1900.

Q. Before that what government was there in this locality; just the township government?

A. Yes, sir; township committee.

Q. (By the Court) What is the name of the township? *A.* Raritan Township.

Q. There is a trolley road that runs under this crossing, is there not? *A.* Yes, sir. 30

Q. (By the Court) How many tracks?

A. One track.

Q. When was that located there?

A. Before the formation of the borough.

Q. Prior to 1900? *A.* Yes, sir.

Q. And you have no ordinance relating to the trolley company in your possession then giving authority to lay their track through that street?

A. That was done by the township.

Q. (By the Court) Nothing in your possession about it? *A.* No, sir.

Q. The roughness that you speak of at that point, what is that due to, what causes the roughness?

A. Well, it has never been kept in repair, never been kept in proper repair, and the grade has been changed.

Q. Who changed the grade? *A.* I don't know.

Q. When was it done? *A.* Probably been four years ago.

10 *Q.* Well, how do you know it was changed?

The Court: Saw it, I suppose.

A. By observation.

Q. Did you see it changed? *A.* I have seen the—yes, the roadbed changed.

Q. Now, you don't know who did it?

A. I don't know who did it.

Q. Were you township clerk at that time?

A. No, sir.

20 *Q.* Have you any record in your township minutes of the change of the grade there? *A.* No, sir.

Q. How much of a change was made? What change was there? *A.* I can't say how much.

Q. (By the Court) Was the grade raised or lowered, or what? *A.* It was raised; yes.

Q. And this pavement which had been there before was of course taken up at that time, wasn't it?

A. Yes, sir.

Q. What? *A.* Yes.

30 *Q.* And has not been put back again?

The Court: Was it paved in there on each side of the trolley track?

Mr. Strong: The railway is on the west side, the trolley track—

The Court: Either side, was it block pavement?

A. It was Belgian pavement.

Q. There were Belgian blocks there prior to the change of grade, within three or four years ago, is that what you say? *A.* Yes, sir.

Q. And when the grade was changed the blocks were not properly put back; is that it? *A.* Well, they have never been smooth any how; they always sunk down, different parts of it.

The Court: The ground was not packed firm.

Q. Now, wasn't that done at the time that the trolley road was laid through there? *A.* No, sir; I don't think so; of course it was tore up, that part of it, when the trolley road first went there. 10

Q. Was it properly replaced then after the trolley was put there? *A.* No; it wasn't properly done.

Q. Well, then, after that, after the trolley road was put there, the road was uneven from that cause, you say, do you? *A.* Yes, sir.

Q. (By the Court) Let we ask you a question there, if you will excuse me, Mr. Strong. Was the trolley laid higher than the original level of the street at that point, or lower, or what? *A.* It was raised.

Q. (By the Court) Raised a little? *A.* Yes, sir. 20

Q. (By the Court) Then the street was not at the time the trolley was laid raised up to the level with the trolley, it wasn't, eh? *A.* When they first laid the track they laid it level with the railroad.

Q. (By the Court) Then what then? *A.* Then they raised that portion of the track under the bridge.

Q. (By the Court) The trolley did?

A. Yes, sir; trolley raised it.

Q. (By the Court) Then somebody had to raise the other part to kind of correspond? *A.* Yes, sir. 30

Q. The result of it all was, the work of the trolley company and whoever raised the rest of it, it was left in an uneven condition? *A.* It certainly is.

Q. And you don't know that the railroad company had anything to do with that, do you?

A. I don't know anything about that.

Q. Now then this surface water that you speak of which comes down there in time of very heavy rains, I suppose that soon passes off, doesn't it?

A. Well, the bulk of it does.

Q. Of course while the rain is falling and the water is accumulating rapidly it comes in there more rapidly than the drain will carry it off? *A.* Yes, sir.

Q. But when the rain stops, in a very short time the water does pass off, doesn't it? *A.* Most of it.

Q. Doesn't all of it? *A.* No, sir; does not.

Q. Now, speak up. *A.* Does not, I say.

Q. Does not? *A.* No.

Q. What do you mean? How much of it stands
10 there? How deep have you seen water standing there, say a few hours after the rain? *A.* Four inches.

Q. And how long will that remain?

A. In places it remains a day or two.

Q. It remains in the inequalities of the road where the blocks have been taken up, doesn't it? *A.* I suppose that is the cause of it, because it is uneven.

Q. (By the Court.) How big a drain is there to carry the water out?

20 *Mr. Strong:* Two foot, twenty-four inches.

Q. (By the Court.) How far does it carry it, do you know where it empties into the brook? *A.* Well, it runs through this pipe I should say a quarter of a mile, running west.

The Court: You don't know how much fall there is in that distance, do you?

Mr. Strong: Eight feet.

30 The Court: Eight feet in a quarter mile. If it was laid on a perfectly even grade let me see what that would be.

Mr. Strong: About eight feet in fourteen hundred.

The Court: Little over six inches to the hundred feet. A two foot tile drain if it is laid perfectly smooth and straight will carry a great deal of water under that head. I know from personal experience because I laid one myself through lands that I own. Now, right here—this is my own volunteer. As the town is improved by the hardening

of its roads, macadam, &c., and as more buildings are put up, and the water is dashed out by leaders and paved gutters to the street the quantity of water delivered will be increased immensely.

Mr. Strong: It accumulates much more rapidly.

The Court: It accumulates more rapidly—don't soak into the earth.

Q. Now, then, you say that you have seen water coming down from along the track. Do you mean this is the only direction the water comes from? 10

The Court: Some comes from the road itself, don't it?

A. Certainly.

Q. Why didn't you tell us about that?

The Court: That went without saying.

Q. There is no doubt about it. Have you ever seen any water coming down the roads? 20

The Court: Each way?

A. Certainly.

Q. Certainly; in large quantities, I suppose?

A. Well, quite a quantity; yes.

Q. Now, when was the occasion when you saw several loads of earth wash into this cut?

A. I don't understand the question.

Q. (By the Court.) When was it, what occasion was it, that you saw several loads of dirt wash down there? A. Why, I have driven right by it and saw it. 30

Q. Well, I ask you when? A. I state that I cannot say the date, but I have seen it several times.

Q. Several times? A. Yes, sir.

Q. And several loads each time? A. Yes, sir.

Q. Which direction did it come from?

A. It comes from the east.

Q. Several loads of dirt made quite a hole in the bank, didn't it? A. Yes, sir.

Q. You have seen that several times? A. Yes, I have.

Q. (By the Court.) Well, didn't the wash of the road come down there too, the ordinary surface accumulations on the road which makes what is called road wash, didn't that come down there too? A. Some, yes; yes, that would naturally go down too.

Q. Now, I want you to give me an occasion when you saw any wash coming from the east, that is, from the direction right there by the passenger station coming from the east into this cut?

10

The Court: From the railroad; railroad lands?

Mr. Strong: From the railroad, along the railroad?

A. I have stated, but I can't give you the date.

Q. Haven't you fixed it in your mind in some way, some particular occasion when you saw that? It doesn't happen every time of a shower, does it?

A. Oh, no; no, not on a shower.

Q. How many times have you seen it?

20 A. Several times.

Q. Well, what was one? A. I said that I saw it in the early fall once.

Q. This fall? A. Yes.

Q. Was that one of the times when you saw several loads of earth come down? A. Yes.

Q. And you have seen that occur several times?

A. Yes, sir.

Q. Within what period? A. Well, within the last four or five years.

30 Q. Never prior to the last four or five years?

A. I don't remember of the earth prior to that; of course I have seen lots of water under there before that.

Q. Now, that water that comes down along the track—well, I won't ask this witness that. I don't suppose he knows much about it.

Re-Direct Examination.

Q. After this water washed down that you have spoken of, have you observed the condition of the bank?

A. Yes, sir.

Q. What condition?

The Court: What bank do you mean?

Q. Bank of the Pennsylvania Railroad, railway bank?

A. Yes, sir; I have.

Q. What? A. It is all torn out; washed out.

Q. And what have you seen the section gang do after these washouts? A. Why, go there and throw it back, what was on the sidewalk.

Q. And the part that was in the road? A. The part 10 that was in the road, shovelled it along the side and leave it there.

Q. Within two weeks have you observed the north bank of this railroad, the northeast bank?

A. No, sir; I don't think I have.

Josiah Tice, sworn.

Direct Examination, by *Mr. Corbin*.

30

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

Q. And you have practiced in New Brunswick how long? A. Something over twenty years.

Q. Are you familiar with the Pennsylvania Railroad tracks in Metuchen? A. Yes, sir.

Q. What opportunity have you had to know about them?

The Court: Have you made any surveys and maps?

30

A. Yes, sir.

The Court: Let us have them right away.

Q. What is your means of knowledge of the Pennsylvania Railroads tracks at that point?

A. Present condition or former condition?

Q. Of the tracks generally, of the location? Ever work on the road? A. Oh, yes; I used to work on the road about twenty years ago.

Q. You are acquainted with the surroundings, surrounding territory? A. Yes, sir.

Q. Do you know where the water shed is there?

A. Yes, sir.

Q. Have you investigated to find where what is now called Main street, to find the lay out of Main street?

A. Yes, sir.

Q. Did you find the survey?

10 The Court: Original record?

A. Yes, sir.

Q. I produce the record. Do you identify that as being the survey of the road through Metuchen?

The Court: You want to identify that copy of a record with this place, I suppose?

Mr. Corbin: Yes.

The Court: I understand you. Go on. Have you looked at that before?

20 A. Yes, sir.

Q. (By the Court.) Recognize that as describing the Main street in Metuchen? A. Yes, sir.

30 The Court: I will call attention of counsel to something that was, to use a rough phrase, rubbed into me once. The township solicitor of Morristown hunted up an old case decided back, I think in Halstead's Law Reports, in which it held that all roads which were laid out without any definite width were presumed to be four rods wide. I don't know what strength there is in it, but I ran up against it.

Mr. Silzer: This fixes the four rods, your Honor.

Survey offered in evidence, dated 7th day of November, 1772.

Marked Exhibit C 3.

Q. That road begins near the Raritan salt meadows, does it not? A. Yes, sir.

Q. And runs northerly well on toward Plainfield?

A. Yes, sir.

Q. I see a reference there to the turn of the road to the Metuchen Meeting House. There is a cemetery there that identifies the old site, is there not, now?

A. It does.

Q. Now, you made a map which you have before you showing that section of the road that there is crossing of the Pennsylvania Railroad? *A.* I have.

Q. Now, will you show, point out where the Metu- 10
chen meeting house, the old site, is indicated?

A. The old site is now the cemetery opposite what used to be the old Woodbridge road. Here are the railroad tracks (indicating); this is to New York (this way to Philadelphia (indicating)).

Q. (By the Court.) Where is the line of the old road here? *A.* The red line is the line of the old road laid out according to the record.

Q. (By the Court.) Then the road would lay here (indicating)? *A.* Yes, sir.

Q. (By the Court.) Have you got dotted lines 20
where the four rods would come? *A.* The four rods are these red lines (indicating); this is the east side and this is the west side (indicating) this map is twenty feet to the inch.

Q. (By the Court.) This is trolley? (Indicating).

A. That is the trolley line; this is the curb line as at present located. (Indicating.)

Q. (By the Court.) These stairs are leading down?

A. From the platform down to Main street; the 30
depot is across here (indicating). This, of course, is the profile.

Q. (By the Court.) The general trend of the road is down toward the north, isn't it? *A.* Yes, sir.

Q. (By the Court.) Of the highway—and the pitch, the proclivity is steeper on the south side than on the north side? *A.* Yes, sir.

The Court: You have got it all right. *Quite intelligible, sir.

Q. (By the Court.) This map which you have just produced, and which I have just been looking over, is all made by actual measurements and levels?

A. Yes, sir; I made them, with my assistants, of course.

Q. Is Main street north of this crossing built up?

A. With houses?

Q. Yes. *A.* Yes, sir.

Q. Houses and stores? *A.* Yes, sir; houses; that
10 seems to be the business part of the town.

Q. (By the Court.) Let me ask you about that, because my knowledge of the location is only by riding through on the railroad. The body of the town is north or south of that point? *A.* It seems to be almost equally divided, the body of the town, but that would appear to be the business portion of the town that the other people from the other portion would have to go to get to the business part.

Q. (By the Court.) That is to say, the business part
20 is north? *A.* Yes, sir.

Q. Within two or three blocks of this crossing?

A. Within two or three blocks; yes, sir.

Q. Is there any other convenient access to the station from Main street, from the north? *A.* From the north there is no access to the station except through Main street.

Q. Unless you should go way around? *A.* You could go around and come in from the south.

Q. Go a long way around. No direct access?

30 *A.* No, sir.

Q. (By the Court.) Well, that station going west, the passenger station going west is on the north side, that is a mere shanty, so to speak?

A. Waiting room on the north side.

Q. The main room is on the south side?

A. The main room is on the south side.

Q. (By the Court.) Passengers by their tickets on the south side? *A.* On the south side.

Q. (By the Court.) There is a foot passageway for

passengers to go under the railway there from one side to the other? *A.* I didn't see any.

Mr. Silzer: Under this street, under this crossing.

The Court: Oh, the railway makes double use of this crossing, one for the accommodation of their passengers to get from one side of the track to the other, and the other for the railroad company.

Q. Is there any communication for passengers to pass from one side of the station to the other, except through this street? *A.* Not without they open the gates for them. 10

Q. The gates are kept for the use of the railway company? *A.* Yes, sir.

Q. And passengers do go down the steps?

A. That is the practice, down the steps.

Q. And up the other steps to the other platform?

A. Yes, sir.

Q. And there are stairs from the platform of the station down to the sidewalk of this street, are there not? 20

A. On each side of the railroad tracks.

The Court: They appear by the map, but I had supposed until you mentioned it that there was an independent underground passage.

Mr. Corbin: No; Nothing else.

Q. Is there any old map showing the location of the Metuchen Church and the surroundings, the old Metuchen Church that is gone for generations? 30

A. Yes, sir.

Q. What map is that? *A.* The map I used is a map of the division of the property of John Hampden, back in 1799, on file in the Surrogate's office, New Brunswick.

Q. Old Orphan's Court map made in 1779.

The Court: Did you make copy of that?

A. I made lead pencil copy of it simply for my own purpose; I didn't make any to bring here.

Q. That is filed September 19, 1799? *A.* Yes, sir.

Q. Have you got your pencil copy of it here?

A. Yes, sir.

Q. Please produce that. Is that the Daniel Hampden estate map? *A.* It purports to be; yes, sir.

Mr. Strong: Daniel or John?

Mr. Corbin: Daniel, not John. John is two generations later, I guess.

10 *Q.* (By the Court.) Was this made by laying it over the original map? *A.* The lines were made by laying it over the original map, and it was slid aside and the writing put on so they could see through—freehand drawing; no real scales or anything of that kind.

The Court: I understand. This is very good, but if it is of any consequence you better have an accurate, exact copy made. This is the scale of the map?

20

A. That is the scale of the map; that is taken right from the map as it is laid over and drawn from the hand, without rule, of course, to make straight line.

Q. (By the Court.) The meeting house is on one side of the road and Robert Ross' house on the other, and here is what, Bonhamtown is north of this or south? *A.* South.

Q. And the railroad came through in 1835 or thereabouts, and did it take any of the cemetery in of the church lot, or did it leave something? *A.* The land, I think it got some of the cemetery lot, but not immediately along Main street.

Q. There was a triangle left of the Hampden lot?

A. Of the Hampden property; yes, sir.

Q. What became of that triangle? *A.* That triangle was given by John Hampden to the trustees of the Second Presbyterian Church.

Q. They enlarged the cemetery, the cemetery front?

A. Yes, sir.

Q. (By Mr. Strong.) Have you shown that on this map of yours? A. I have; 30 of deeds, page 345.

Q. That triangle is on the south side of the railroad and on the west side of Main street, is it not? A. It is.

Q. And it is shown on that map that you have made?

A. It is.

Q. Just indicate it to the Vice Chancellor. A. It is marked in red; the name is on it as being given to Hampden.

Mr. Corbin: I want to offer the railroad deed. I haven't it here. I will ask leave to supply that full copy later. 10

The Court: You offer this pencil map of Mr. Tice?

Q. (By the Court.) I understand the witness to say, and if I am wrong the witness will correct me. I understand that was made by laying over the other map, and those pencil marks are intended to be directly over the corresponding marks below? 20

A. Yes, sir.

Q. (By the Court.) But they are a little in the rough? A. The ends are where the corners come and the drawing on it is done free hand, and the irregular line is the result of not being guided by rule; that is all; but the scale is right.

Mr. Corbin: I offer that.

The Court: Any objection?

Mr. Strong: No.

Mr. Corbin: I offer pencil copy of the Hampden map of 1799. 30

The Court: That is admitted, reserving to either side the right to supply a copy of the original map.

Marked Exhibit C. 4.

Q. This does not cover the whole estate?

A. I have the other part of the estate here.

Mr. Corbin: I now offer the map made by Mr. Tice showing the Main street crossing of the Penn-

sylvania Railroad, made from his own measurements.

Marked Exhibit C 5.

Mr. Strong: There is a good deal written on here.

The Court: What is written on goes for nothing until he testifies how it was put there.

10 Mr. Strong: I suppose the map was only an illustration, any way, in connection with his testimony.

The Court: It has the real effect of a map. A map don't prove anything. The witness can be asked at this time or some other time as to the written memoranda that he has put there.

Mr. Corbin: I desire to offer the deed made by John Hampden to the New Jersey Railroad and Transportation Company, dated December 7, 1835, and recorded in Book 32 of Deeds of Middlesex County, page 202, and I ask leave to produce the copy later.

20 The Court: Yes. There is no objection to that, Mr. Strong, I suppose?

Mr. Strong: No.

Mr. Corbin: I would like also to offer in evidence the charter of the New Jersey Railroad and Transportation Company, referred to in the bill. I am not sure whether it is general law or not.

Mr. Strong: Made public act.

30 The Court: It is very proper for you to call attention to such parts as you intend to rely on.

Mr. Corbin: It is referred to in the bill, section 20.

The Court: You have already referred to that in the bill.

Q. What is the grade of the main street from the crossing of the railroad south, without giving the exact figures? A. It is up hill.

The Court: He has stated that to me; but about

what grade, one to ten, or one to eight, or ten, or fifteen, or what, about?

Q. How much to the hundred? *A.* About seven feet to the hundred, parts of it.

Q. And that extends for how long a distance before you reach the summit? *A.* About four hundred feet; then there is quite a steep hill.

Q. Coming from the south to that? *A.* Yes, sir.

Q. And that is caused in part by the excavation of the undergrade crossing? *A.* Yes, sir. 10

Q. And it is also partly a natural condition, was it not?

The Court: It is a general grade from the south to the north. That grade is intensified on the south side of the railroad by the excavation necessary or convenient to carry out the overhead crossing, and on the north side the upgrade going north is altogether due to the excavation; is that right?

A. That is true; yes, sir. 20

Q. On the north side the grade is much shorter and easier, is it not? *A.* On the north side it is shorter and easier; yes, sir.

Q. Now, what drainage is drawn into that excavation apart from that which flows from the summit of those two levels where the excavation is?

The Court: All the surface water that falls on the street over the area between the summit of the two excavations runs into this hollow space? 30

A. Undoubtedly, sir.

Q. (By the Court.) No other way to get out?

A. No other way to get out.

The Court: Now as to the other?

Q. What other street comes in there on the south side? *A.* Woodbridge road comes in about a hundred—two hundred feet from the side of the railroad tracks, but the great body of water here, Mr. Corbin, comes

along the railroad tracks themselves, following the gutter on the embankment or on the track of the railroad.

Q. From which direction?

A. From east toward the west.

Q. (By the Court.) Do you mean to say there is more surface water to be drained into it from the railroad tracks than there is from the roads on each side?

A. Yes, sir; the railway tracks drain into it from way up toward Robinvale, way beyond the natural ridge of
10 the land, the original drainage area before the cuts were made in there.

Q. (By the Court.) There is a sharp cut in there?

A. Yes, sir.

Q. (By the Court.) What distance is that?

A. Very close to a half mile.

Q. (By the Court.) And the width?

A. The width of the cut?

Q. (By the Court.) Yes, the width of the railway area that cuts into that drainage? *A.* Forty feet.

20 *Q.* (By the Court.) Four tracks? *A.* Yes, sir.

Q. (By the Court.) Isn't there more than forty feet in four tracks? *A.* Yes, sir.

The Court: I thought it took eleven feet to a track.

Q. In addition to the track itself, what is the lay of the land on the north? *A.* The lay of the land is higher.

Q. It slopes in that way?

A. It slopes toward the railway.

30 *Q.* (By the Court.) Well, is the railway there constructed as most railways are, with a ditch or drainage space for drainage on each side? *A.* Yes, sir; and that ditch is carried down to Main street.

Q. (By the Court.) Is it paved or not?

A. No; I don't think it is paved.

Q. (By the Court.) Well, the capacity for soakage into the ground when there is no frost in the ground varies, of course, as you know? *A.* Yes, sir.

Q. (By the Court.) That is to say, on a grass field nearly level it will almost all soak in? *A.* Yes, sir.

Q. (By the Court.) On a hard surface like a macadam road it will all run off? A. Yes, sir.

Q. (By the Court.) Now, how is the railway for that? A. Well, the railway here seems to be of the hard kind; it delivers the water down.

Q. (By the Court.) Isn't it made of stone ballast?

A. The railway is made of stone ballast,—the drainage is below the stone ballast,—the gutters or ditch is below the stone ballast.

Q. (By the Court.) I understand that. Is the any- 10
thing peculiar in the soil under that stone ballast that will prevent it from absorbing water in the ordinary way, soaking in?

Q. This is red shale country, isn't it?

A. Red shale; yes, sir.

Q. (By the Court.) Do you mean to say the road-
bed of that road as it is now land runs down to the red
shale? A. It opens up red shale; yes, sir; some parts
of it there. I wouldn't say whether it cuts into red
shale between Robinvale and Metuchen or not. 20

Q. (By the Court.) That is the question; that is the
point we are after.

A. I wouldn't be positive about that, sir.

Q. That flow of the water that has gone into Main
street, is it the natural flow in that direction, or is it the
result of the construction of the railroad?

A. What do you mean by that?

Q. (By the Court.) How much of the natural sur-
face would run there if the road wasn't constructed?

Q. Where is the watershed? A. The watershed is 30
probably third of the way.

Q. (By the Court.) The easterly watershed, arti-
ficial watershed of the railroad is three times as long
as the natural one? A. Yes, sir.

Q. (By the Court.) That is, the natural watershed
stops at one-third the distance going east from the rail-
way crossing from what the actual surface drainage is?

A. Yes, sir.

Q. Is there a culvert for the water under the railroad near, east of Robinvale?

A. There is one east of Robinvale.

Q. That would be the natural outlet for a large part of this territory, but it is drained toward Metuchen instead? *A.* Yes, sir.

Q. And that water that runs south, that little brook east of Robinvale goes down into the Raritan, don't it?

A. I don't know where it empties; I think it does.

10 *Q.* Goes south? *A.* Yes, sir.

Q. That which runs toward Metuchen runs north toward Plainfield? *A.* Yes, sir.

The Court: Is that so?

Mr. Corbin: Yes; dividing line.

Q. (By the Court.) Do you know that, that the bulk of Metuchen drains north into Green Brook toward Bound Brook? *A.* Yes, sir; I know that the drainage, the ridge runs across through Metuchen, part
20 of it on the one side drainage and part on the other.

Q. Now, then, have you examined the condition of the road? First, how wide is it between the curb lines?

A. Twenty-five feet.

Q. (By the Court.) Twenty-five feet between the piers, you mean? *A.* Between the curbs, under the track.

Q. The railroad bridge is supported on iron columns, is it not? *A.* It is.

Q. How wide is it between abutments? Your scale
30 will show, won't it? *A.* Yes; it is forty-five feet.

Q. (By the Court.) You have got that on your map?

A. Yes, sir.

Q. (By the Court.) Twenty-five and forty-five?

A. Yes, sir.

Q. (By the Court.) Ten feet between the iron columns which are supposed to stand on the edge of the sidewalk? *A.* Yes; at the curb.

Q. Abutments?

The Court: Abutments. And for all practical and

absolute purposes the road is narrowed to forty-five feet? *A.* Yes, sir.

Q. And where is the street railroad located under the railroad at the crossing? *A.* On the west side of the roadway under the railroad crossing.

Q. And close to the curb line? *A.* Yes, sir; about three feet and a half from the curb line.

Q. But the railway travelers cross under there on the east side? *A.* On the east side on the sidewalk.

Q. The sidewalk is elevated a few feet above the 10 roadbed? *A.* Yes, sir.

Q. Now, then, what is the provision there for the carrying away of the water which comes into that pocket?

A. There is a basin opposite the stairway coming down from the platform on the south side of the track at the east side of Main street. From that basin a concrete box, stone laid over it, a flat box, not a pipe, as I understood it at the time, as I saw it at the time I made my map, runs across the roadway to the curb at the west side of Main street and empties into a basin there, from whence flows, runs a two-foot pipe, as I understand it; I don't know how big it is; two-foot pipe further west along the line of the railway tracks beyond the Metuchen cemetery grounds there, on out into the fields, where it empties I don't know how.

Q. Empties into a brook that runs north?

A. Yes, sir.

Q. Quite long drains? *A.* Yes, sir.

Q. Very deep, isn't it, at the beginning point; it is very deep under the cemetery? *A.* Yes, sir.

Q. Fifteen or twenty feet or so, isn't it? *A.* Yes, sir.

Q. (By Mr. Strong.) Do you know?

A. Yes; fifteen or eighteen feet.

Q. (By the Court.) You judge from the elevation of the road over where you know the tile must run?

A. Yes, sir.

Q. (By the Court.) You haven't taken the levels?

A. I haven't taken the levels at all.

Q. Now, how does the water from the railroad, from

the east, get to that pipe? What is the provision for the drainage of water coming east, coming from the east westerly along the railroad?

A. Under the platform on the north side of the tracks they have built a basin, from which pipes,—a pipe runs from the basin to a manhole along the curb on the east side of Main street north of the railroad tracks. How that gets into the drainage system on the south side of the railroad tracks I don't know.

10 *Q.* (By the Court.) Well, can you see where it empties out into the street under the crossing?

A. See where the pipe empties out?

Q. (By the Court.) Yes. *A.* No, sir; that system of pipe is covered. You can see where the water empties out on the street, where it washes over the basin and washes the earth down into this sidewalk, even after the pipe has been put there.

Q. (By the Court.) You imagine this pipe has been put there for the purpose of alleviating this?

20 *A.* Assisting the water to this basin in an underground manner, but it didn't work, because within the last ten days I was over there and saw where it had washed over the pipe.

Q. (By the Court.) And cut the earth?

A. Cut the earth, had gone into the sidewalk, even with this basin and pipe now in.

Q. (By the Court.) Then it comes out on the surface, it must spread over the surface before it can get to these basins, you think, in the road?

30 *A.* It has to run over the sidewalk first into the street, and then it would have to go fifty feet to the basins on the south side of the railroad track, eighty feet to those basins.

Q. (By the Court.) Eighty? *A.* Yes; that is, if it ever got there; it generally laid on the ground until it was picked up and carted away by some one.

Q. (By the Court.) Oh, the dirt? *A.* Yes, sir.

Q. (By the Court.) But the water?

A. The water would have to go to these basins.

Q. (By the Court.) The usual effect then was this.

The effect was the usual one, I mean, that where water runs with rapidity on the earth it washes and carries earth with it? *A.* Yes, sir.

Q. (By the Court.) As soon as its rapidity is checked it begins to run slow and drops the earth?

A. It deposits it.

Q. (By the Court.) Deposits it; and the water running with rapidity down the steep declivity washed the dirt down to the sidewalk and street, and then there the velocity was checked and the earth was dropped 10 and the water went on somewhere; is that it?

A. The water went on if it found a sufficient opening to take it away; but it was in the pocket there, and if more water came down than could be delivered into the pipe on the south side of the tracks going west, naturally it would stay there until the pipe had relieved itself.

Q. (By Mr. Strong.) Are you talking of the south or north side of the track? *A.* Both been talking about.

The Court: You started off talking of the north side; now you seem to be speaking of the south side. I understood him to say there was a basin connecting with the two-foot main on the north side of the railroad tracks or the north side of the culvert. Is that right? 20

A. There is a basin under the platform, under the platform up on the track; from this basin there is a pipe leading down into the street to connect with the basins on the south side of the track, but how it connects there I don't know. I think I made that direct 30 statement.

The Court: You stated that; yes.

Q. What is the character of the street paving north of the crossing? *A.* The pavement is in good condition.

Q. Macadam pavement? *A.* Macadam pavement on the street north of the railway.

Q. And what is the pavement south of the crossing?

A. Macadam also.

Q. Macadam? *A.* Yes, sir.

Q. (By the Court.) Good condition, the street, eh?

A. Pretty good condition there.

Q. What is the pavement within the right of way of the railroad?

The Court: Pavement? You mean the wagon-way?

10 *Q.* Street pavement?

The Court: Unless they are blocks, we don't call macadam a pavement.

Q. What is it? *A.* Belgian block; small Belgian blocks.

Q. What is there on the street railroad, on the track, street railroad track? Is that paved between the rails?

A. No; I think it is stone, broken stone; I wouldn't be positive.

Q. You are not sure that there is anything there?

20 *A.* No, not sure there is anything.

Q. Is there very much clearance for a trolley car?

A. No.

Q. Rather scant, isn't it? *A.* Scant.

Q. Is the trolley track lower or higher than the pavement? *A.* Lower than the pavement.

Q. Lower than the block pavement? *A.* Yes, sir.

Q. What is the condition of the block pavement as to smoothness? *A.* Rather humpy.

Q. All through, throughout? *A.* Yes, sir.

30 *Q.* What is the surface of the street as you have seen it as to its mud or cleanness? *A.* Very muddy; the mud stays in the pockets that is formed in the pavement.

Q. Have you made any levels to show, any cross sections to show the condition of the surface of the street there? *A.* Yes, sir.

Q. Will you please produce them? Did you take longitudinal sections? *A.* I did.

Q. And also sections across the street? *A.* Yes, sir.

Q. When did you make that? *A.* December 30, 1905.

Q. Vertical scale ten to one? *A.* Yes, sir; part of it is,—the plan is on a scale of one to ten, and the sections are—

The Court: Exaggerated ten times.

A. Exaggerated ten times; vertical section one inch to one foot, and horizontal section one inch to ten feet.

Profiles offered in evidence.

Marked Exhibit C 6.

Q. Mr. Tice, I see by reference to the yellow map, 10 the first map, Exhibit No. 5, you have marked here the present Woodbridge road laid out in 1888; that is the layout at the time of the change in the grade, was it not? *A.* It was; yes, sir.

Q. Now, what you call the vacated line of the Woodbridge road would be the line if the Woodbridge road were continued straight through? *A.* It would be the line, the Woodbridge road running so (indicating).

Q. That was a straight road? *A.* Yes, sir.

Q. Now there is a bend in it in order to strike Main 20 street higher up and get a better grade of the Woodbridge road. Now, the station has one front on that side? *A.* On the Woodbridge road; yes, sir.

Q. And the access to the station is through Woodbridge road, is it not, for teams? *A.* For teams it is.

Q. That is the only way to get there? *A.* Yes, sir.

Q. To get to the Woodbridge station from the north you have got to come up that hill and go up to get to the station,—you have got to go up that hill to get to the station? *A.* Cross these tracks along the Wood- 30 bridge road opposite the station and into the station.

Mr. Strong: Have you a copy of those vacation proceedings and laying out of the new road?

Mr. Corbin: No, I don't think we have. In fact I don't think there were any. The railroad did it without any proceedings. You can put them in if there were any.

Q. You have testified the map was made from your measurements? *A.* Yes, sir.

Q. This profile, that also was made from your measurements? A. Yes, sir; that profile happens to be one made without desideration too.

Cross Examination, by Mr. Strong.

10 Q. What do you know about the vacation of the road and the laying out of the new Woodbridge road that you have got put on here? A. Only that, that I read in the book of records, Book D, page 34, pertaining to that subject.

Q. So that there was a formal vacation by surveyors of the highway? A. Yes, sir.

Q. And laying out of a new road in place of it?

A. Yes, sir.

Q. And that occurred when? A. That occurred in 1888; filed March 29, 1889.

Q. (By Mr. Silzer.) That is the Woodbridge road you are speaking of?

A. Woodbridge road, not Main street.

20 Q. Referring to your yellow map, C 5, it appears that the roadway of Main street, or rather Main street itself to the south of this crossing, is considerably narrower than the four rods which you have indicated in red. That so, is it? A. As graded it is.

Q. Well, what do you mean by that? Why do you qualify it? A. Well, I qualify it because I think sixty-six feet wide was the width of the road, no matter how it was, until it was vacated.

30 Q. (By the Court.) What he wants to know, and what I want to know is, if it is of any consequence, whether as actually occupied and used by the public at this time it was clear of encroachments by buildings and the like?

A. No; there were some buildings encroached out on the road, and this bank on the sidewalk, that has not been cut down, the roadway there is partly the natural surface.

Q. (By the Court.) The roadway could not be worked to the full width without retaining walls?

A. That is it exactly; and there are retaining walls there actually in the road.

Q. What is the width of retaining walls to the south of this crossing? A. Forty-five feet.

Q. The same width that there is between the abutments in this cut? A. Yes, sir.

Q. And how far does that extend at the width of forty-five feet to the south of the tracks?

A. It does not extend from the tracks to the south at all; the retaining walls are south of the Woodbridge road as changed by the railroad company, and these retaining walls were built, as I recollect, by the railroad company at the same time. 10

Q. (By Mr. Corbin.) Built by the railroad company as part of the same scheme? A. Yes, sir.

Q. Do you know that? A. Yes, I know that as much as a man that knows.

Q. What did you see that convinced you of that? What knowledge have you of its being done by the railroad company? A. Saw them building it; saw them when they were working around the rest of the work there.

Q. Now, what is the width of the roadway as used immediately south of the abutments under the tracks? 20

The Court: He said forty-five feet.

Q. No; he says now it isn't continuous from the end of the abutments.

The Court: You mean from the end of the retaining walls built by the railroad?

Q. Yes. 30

The Court: You use the word "abutment."

Q. I mean abutment; that is, bridge carrying the tracks overhead. He is taking forty-five feet, he says now is South Woodbridge road. You can see by the map.

Mr. Corbin: Intervening space between the railroad there and cemetery.

Mr. Strong: I mean the intervening space be-

tween the ends of the abutments, extending thence south to the Woodbridge road.

A. What is it you wanted to know?

Q. I want to know the width of the roadway as used? *A.* About twenty-five feet.

Q. About twenty-five feet? *A.* Yes, sir; of the roadway.

Q. That means the— *A.* Yes; the roadway; yes.

Q. Now, the addition outside of the roadway that is
10 in use? *A.* Sidewalk.

Q. What is the width, including the sidewalk?

A. Sidewalk on there, on the west part of it isn't over five or six feet wide; on the east side along the Pennsylvania grounds carries its width for ten feet.

Q. Are you able to state what is the width of the road as in use, including the sidewalks to the south of the abutments under the track, immediately south?

A. Including sidewalks?

Q. Including sidewalks. *A.* It varies.
20

Q. Well, tell us how it varies; give us an idea about it. You haven't scaled it here at all, have you?

A. Yes; I showed curb line running along here on the north side.

Q. How is it shown? *A.* Shown on block line running from the basin.

Q. That is the curb line (indicating)?

A. That is the curb line; yes, sir.

Q. Now where is the sidewalk line? *A.* Sidewalk line there is shown by lead pencil line here (indicating).

Q. Shown by lead pencil line on the east side, is it?
30

A. Yes, sir.

Q. That seems to be uniform width?

A. Uniform width.

The Court: He said ten feet on the east side of the highway along what he called the railway line.

Q. Now do you mean that that is ten feet uniformly on that side up and down Woodbridge avenue?

A. Yes, sir.

Q. And what is the width of the sidewalk under the

tracks? *A.* Width of the sidewalk under the tracks, ten feet.

Q. Ten feet? *A.* Yes, sir.

Q. (By the Court.) Is the scale of that map put anywhere on it? *A.* Yes, it is twenty feet to the inch, put under the title.

Q. Now, what width of the sidewalk is there on the west side of Main street south of the tracks? *A.* It varies from ten feet wide near the railway to five or six feet wide further around up the hill.

Q. Have you shown that on your map? 10

A. No; I haven't shown the outside line of the sidewalk on my map there; I have shown the curb line on my map as the part that is used by the highway; this is the curb line on the west side, this line in black.

Q. Do I understand you that the roadway of the width of twenty-five feet extends about that same width southerly from the tracks to the Woodbridge road?

A. Yes, sir.

Q. And that the Woodbridge road southerly— 20

A. That Woodbridge road, it is more than twenty-five feet.

Q. Where does it begin to be more than twenty-five feet? *A.* Opposite Woodbridge road.

Q. It takes in the road, you mean, Woodbridge road?

A. No; I mean opposite Woodbridge road it begins to be more than twenty-five feet wide, and extends southerly from the Woodbridge road more than twenty-five feet wide until eventually it gets thirty-nine feet.

Q. (By the Court.) You mean to say that south of the Woodbridge road Main street is worked to its full width, sixty-six feet? *A.* No; pretty near; parts of it, 30
to its full width, sixty-six feet, and parts are not; there are encroachments all along.

Q. Let us get at that. What is the width of the roadway immediately south of the Woodbridge road?

Mr. Corbin: In where the abutments are?

Mr. Strong: No.

A. Thirty feet.

Q. Is that at the south side of the Woodbridge road?

A. Yes, sir; south side of the Woodbridge road, thirty feet.

Q. And how long does it continue at the width of thirty feet? *A.* It is more than thirty feet.

Q. How long does it continue at the same width which you have given us? *A.* It doesn't continue at that width at all; it gets wider at that point going south.

10 *Q.* Well, how does it widen?

The Court: Have you the measurements before you?

A. No. It widens by spreading out, I suppose. Is that what you mean?

Q. You understand it, don't you?

A. No; I don't understand what you mean at all. At a point 140 feet from the Woodbridge road it is thirty-three feet wide.

20 *Q.* (By the Court.) That is, between the curbs?

A. Between the curbs; yes, sir.

Q. And that is shown by a jog here?

A. No; this is the curb line here (indicating); that is the jog in there where the retaining wall sticks out in the street.

Q. Oh, yes. Where do you come to?

The Court: That is, where do you come to the point to the end of the cut which leads to the depression under the tracks?

30 *A.* About at this point at the west—no, about fifty feet south of the end of the retaining wall on the east side of Main street, south of Woodbridge road.

Q. Now, you have spoken of seeing certain things done there by the company, the building of this retaining wall I think you said, did you? *A.* Yes, sir.

Q. Was that all done at the time that the depot of the Pennsylvania Railroad Company was moved into its present location? *A.* No; it was not all done at that time.

Q. Wasn't this laying out, the depression of Main street under the tracks and the vacation of Woodbridge road partly, and changing its location, wasn't this all done as part of the scheme for the locating of the depot of the Pennsylvania Railroad Company as it is at present?

A. I do not know that to be so; I take it to be so.

Q. Take it to be so? *A.* Yes, sir.

Q. (By the Court.) That is, the elevation of the railroad tracks, the widening of the railway to a four track road, the depression of Main street so as to enable an overgrade crossing, and the location and building of the new passenger station, the change of the Woodbridge road at that point, was all one scheme, you think? 10

Mr. Corbin: No doubt about that, I guess.

A. I don't know that to be so, but I imagine; it looks reasonable.

Mr. Strong: I understand it is admitted to be so. 20

The Court: They admit it is all one scheme. The complainant admits it is all one scheme.

Q. Are you able to give us accurately the grades of this depression?

The Court: I suppose he has got it exactly on his map there.

Mr. Strong: No; I don't see it. Let us see; have you got it here? 30

A. Yes, sir.

The Court: There is a profile there, but it is not uniform for any forty or fifty feet; it varies.

A. It is uniform, this profile; the grades are given at every fifty feet and elevations every fifty feet, both of the curb and the center line,—got it marked on the map.

Q. You have given it on this map for the east and

west curb, have you, and gutter both? *A.* West curb and gutter and east curb and gutter; yes, sir.

Q. And these profiles show the grade at each fifty feet? *A.* Yes.

Q. Now, where is there any 7 per cent. grade?

A. At station 400 on plan, profile of the west curb and gutter to station 450, that 50 feet was the one I was looking at when I made the statement; that would be three feet and $57/100$, that 50 feet, and twice that for
10 a hundred feet makes something over seven feet.

Q. How far does that 7 per cent. grade extend, just within that fifty feet, don't it? *A.* I don't know; it might go further. We will take the next one. Next fifty feet, elevation at station 400 is 24.81; elevation of station 350 is 21.72; that is three feet and $9/100$ for fifty feet.

Q. So that is that 100 feet, taking the two together, you have got six feet and $66/100$ as the amount of that?

Mr. Corbin: More than that.

20 The Court: Over 13 feet in two hundred feet.

A. Each of these are fifty foot stations. He is right, Mr. Strong is, that is six feet and $66/100$ in one hundred feet between those two stations, taking them.

Q. Now, give us the next station? *A.* Station 350 is 21.72, and Station 300 is 17.88; that is three feet and $84/100$ for the fifty feet.

The Court: That is at the rate of seven feet
and—

30 *A.* And $6/10$ ths.

Q. What is the next one beyond that? *A.* Station 300 is elevation 17.88, and Station 247, which is three feet over the other, the fifty feet is fourteen feet and $16/100$ elevation, and that is three feet and $7/10$ ths of a foot in fifty-three feet; that comes pretty near being seven feet to the hundred.

The Court: Mr. Strong, I don't want to stop you. I can't see the importance of this, the neces-

sity for taking up the time of the Court with it. I will say I am very busy at present and cannot give you more than to-day at this time, and ask you if you cannot see the importance of it by not taking all this down on the stenographer's notes.

Q. The grade on the north side of the track is less abrupt? A. Yes, sir.

The Court : Yes; considerably.

Q. Where did you fix the natural watershed east of Main street? A. At the top of the hill, the fields east of there. I imagined that was about 800 feet or nine hundred from Main street, eight or nine hundred. 10

Q. Eight or nine hundred feet east of Main street?

A. Yes, sir; might be more, might be less; I am not positive; I am not giving it positive.

Q. What is there there that marks that spot? Where is it with reference to anything? A. Well, the ground is higher there, Mr .Strong. 20

The Court: He wants you to locate that point.

A. You mean by fence, building, or anything of that kind?

Q. Is there anything there to locate it? A. I can't locate it by any building, fence, or any fixed object,—simply see the top of the hill.

Q. That you say, as nearly as you can fix it, is eight or nine hundred feet away?

A. Giving that as a guess figure; yes. 30

Q. Now, how far away do you say that water is drawn,—from what distance is the water drawn into Main street from the east? Did you fix that?

A. Nearly to Robinsvale.

Q. How far is that then? A. Well, Robinvale, I guess on that, I should say Robinvale—

Q. If you are only guessing I would like to know whether you have measured it? A. I haven't measured it; no, sir. I have testified to that fact.

The Court: He says the area of drainage into this place is increased by the works of the railroad.

Mr. Strong: I want to know how accurate he is about that, that is all.

The Court: It is only guess; and that is all within your knowledge and capable of being rendered certain by measurements within your own control.

10 Q. Have you shown the basin that you referred to on the north side of the track, on your map have you shown it? A. No, sir; not on the yellow map, not on Exhibit 5, but it is shown on Exhibit 6.

A. (By the Court.) Shown on the second map you produced? A. Yes, sir; Exhibit 6, the profile sections; it is shown on that.

Q. (By the Court.) By a basin you mean any place in a street where the water disappears from the surface? A. Yes, sir.

Q. (By the Court.) Carried out of sight?

20 A. A receiver, reservoir to receive it in order to convey it somewhere else.

Q. Will you describe what that basin is in fact there? How large is it? A. I think it is about three feet across; I didn't measure that either.

Q. And apparently round? A. Apparently round; three or four feet deep.

Q. (By the Court.) On the railroad level?

A. Up on the railroad level, on their platform, where their gutter would be, the top of it would be where the railroad gutter would be.

30 The Court: And that also is within your reach for measurement, and opportunity will be given you, Mr. Strong, to meet it.

Q. Then the washing of dirt that you speak of is up at the top of the railroad embankment around adjoining this gutter, this basin? A. Between that basin and the east side of Main street north of the track.

Q. That is, the indications that you saw were that the gutter overflowed and washed the soil down from there to the highway below?

A. That is the indication.

Re-Direct Examination, by Mr. Corbin.

Q. The width of this road, Main street south of the retaining wall on the Ayer's place is wider?

The Court: Sworn that it widens right out.

Q. Widens as you go south? *A.* Yes, sir.

Q. And as you go north, is it wider there?

A. Yes, sir.

The Court: Some places he thinks that it is 10 used by the public without any encroachments; other places there are encroachments on it by the adjoining land owners?

A. Yes, sir.

Q. (By the Court.) Both north and south of the of the railroad. Is that right?

A. No; south of the railroad? *A.* Yes, sir.

Q. (By the Court.) No encroachments on it on the north? *A.* No, sir.

Q. (By the Court.) As far as you can see by the 20 eye? *A.* No; I have been up there; there are no encroachments. Yes, encroachment of two or three inches, building would stick out two or three inches.

Q. (By the Court.) I mean palpable encroachments? *A.* No; no encroachment of importance. Fences are out south of the railroad, that is, half a mile or three quarters of a mile, such as that, fences are out, but that is a common occurrence.

Q. (By the Court.) Any buildings on the encroachments on the south of the railroad? *A.* Yes; there are 30 two or three buildings that encroach out into the road two or three feet.

Q. (By the Court.) Not more than that?

A. Yes; one of them I think eight feet.

Q. As you go south from the abutments what lies within the true street line back of the sidewalks on either side? What is the construction of the banks there? *A.* It is hill side, terraced, that is it, beautifully terraced.

Q. Then the true street line would go back as far as the top of any embankment probably?

A. All might be.

Q. On one side is the railroad station land and on the other side is the cemetery, isn't it? A. Yes, sir.

The Court: The cemetery then as you go from here is to the left and southwest of the station?

Mr. Corbin: The cemetery; yes.

10

Charles Monaghan, sworn.

Direct Examination, by Mr. Silzer.

Q. You reside where? A. New Brunswick.

Q. And your business is what? A. Photographer.

Q. How long have you been there?

A. Several years, perhaps nine.

Q. Taken a great many views in that time?

20 A. Yes, sir.

Q. An appeared in court as a witness often?

A. Yes, sir.

Q. Did you take two views of the Main street crossing under the Pennsylvania Railroad at Metuchen?

A. I did.

Q. When? A. On August 15, 1905.

Q. Are those the views? (Showing witness photographs.) A. Yes, sir.

30 Q. What do they represent?

The Court: Just what you see on the face of them. You can tell from which points they were taken.

Q. Now, taking the one I hold in my hand, what direction was that taken, north or south? A. That was taken looking toward Metuchen, the main part of Metuchen.

Q. (By the Court.) Looking north? A. Yes, sir.

Q. Looking toward the main part of Metuchen?

A. Yes; looking toward the drugstore.

Marked Exhibit 3 7.

Q. I show you another photograph taken.

The Court: The other one taken looking south?

A. Yes; in the opposite direction.

Marked Exhibit C 8.

Cross Examination, by Mr. Strong.

Q. Can you tell us from what point you took the first of these Exhibit C 7? A. Yes; I was in the center of the road almost under the arch of the bridge. 10

Q. (By the Court.) Close to the bridge then?

A. Yes, sir; very close.

Q. Referring to number seven, which is the first one shown you, this is looking north. You were about to tell us where, from what point you took the photograph? A. I was in the middle of the road almost under the bridge; very close.

Q. You mean just at the edge of the bridge? 20

A. Yes, just at the edge.

Q. And now, as to the other one. Was your camera located similarly on the north side looking south?

A. Yes; I was a little further under this picture.

Q. Little further under? A. Yes; just at the edge.

Q. Both taken the same day? A. Both the same day.

Re-Direct Examination.

Q. What is that in the middle of the road?

A. Mud, water. 30

Q. (By the Court.) Had there been any rain shortly before that? A. It had not rained that day anyhow, very dry day; it might have rained the day before, but I don't remember, but it had not rained that day.

Q. (By Mr. Strong.) Do you remember that there was mud there then? A. I do; yes, sir.

George M. Hahm, sworn.

Direct Examination, by Mr. Silzer.

Q. Did you take that photograph? (Showing witness photograph.) *A.* I did.

Q. When? *A.* Well, I can't tell the exact date, but it was the date of the heavy downpour of rain.

Q. What month? *A.* Well, now, really I can't tell you the exact—

10 *Q.* How long ago? *A.* Middle of summer.

Q. And does that represent the situation at the time it was, at the time you took the photograph? *A.* That represents the situation at the time it was when I took the photograph.

Q. What was all this under the railroad?

A. That was all water (indicating), all water and oil floating around the top.

Photograph offered in evidence and marked Exhibit C 9.

20

Q. What place is this? *A.* That is Main street, Metuchen, and showing underneath the Pennsylvania Railroad bridge.

Q. It had evidently been raining that day?

A. That is what it had been, raining when I took that picture.

Q. (By the Court.) How long before you took the picture? *A.* While it was still raining.

30 The Court: Took it flying. The sun came out then.

Q. You and the rainbow appeared about the same time? *A.* I think so.

Q. You were not part of the rainbow, were you?

A. I hope not.

Q. You say there was oil on it? Where did the oil come from? *A.* I should judge it came from underneath the railroad tracks.

Q. You don't mean there was any great quantity of oil, but there was just a little oil on top of it all; is that

what you mean? *A.* All this shadow here, that is oil. You see that in there (indicating). That is all oil floating around in there.

Q. You don't recollect when that was, have no memorandum when you took it? *A.* Not the exact date. Perhaps the Mayor could enlighten me on that date.

Q. (By the Court.) The Mayor of the town, eh?

A. The Mayor of the town.

Q. (By the Court.) You did it at his request?

A. No; not necessarily. 10

Q. (By the Court.) Or with his knowledge?

A. With his knowledge.

Q. Was he there at that time? *A.* He stood by the steps of the bank, but I can't recollect the date.

Q. There had been a very heavy shower, hadn't there, that day? *A.* Very heavy.

Q. With emphasis on the "very"? *A.* Yes, sir.

Q. How did the street cars get along? Could they go through? *A.* No; it stopped it.

The Court: The water didn't stop it, did it, or the grease? *A.* The water. 20

Q. It would have been over the floor, wouldn't it, over the car floor? *A.* Oh, they couldn't get down there, they couldn't get anywhere near it.

Q. How was it as to the sidewalk?

A. About two feet above the sidewalk.

Q. (By the Court.) You think the water was two feet deep on the sidewalks, eh? *A.* I should judge it was two feet above the sidewalk; yes, sir; and the sidewalk is quite some lower. 30

Q. Has the stopping of the cars by floods happened more than once, to your knowledge?

A. Oh, several times; number of different times.

Cross Examination, by Mr. Strong.

Q. What way have you of estimating the height of the water above the sidewalk at the time these photographs were taken? *A.* By personally passing through on the sidewalk.

Q. Did you pass through? *A.* No, sir; I had no hip boots on.

Q. Now, will you look at your photographs and tell me the number of courses of the stone that are shown there in the abutment on the left of your picture above the water? *A.* The number of courses of the stone? Well, I should judge there were six that I count.

Q. Six shown above the water, are there?

A. Six shown above the water.

10 *Q.* (By the Court.) That is, in the abutment wall?

A. That is in the abutment wall.

Mr. Strong: Your Honor can see in this larger photograph how many there are there above the sidewalk and where the two feet would probably come in.

20 *Charles L. Corbin, sworn.*

Direct Examination, by Mr. Silzer.

Q. You reside in Metuchen? *A.* Yes, sir.

Q. Have for some time? *A.* Yes, sir.

Q. Have you occasion to use Main street under the Pennsylvania railroad? *A.* Every day, in taking the train.

Q. Driving? *A.* Yes.

30 *Q.* During the month of August last did you make observations of the crossing and make memorandums?

A. I did.

Q. Will you state what your observations were during the month of August?

A. I returned from my summer vacation on the 8th. At that time there was a thick, pasty mud over the pavements under the railroad tracks. I commenced my memoranda on Sunday, August 13th,—went through there in an automobile and found that condition on that day, in the afternoon. Monday, the 14th, I saw men at work on the railroad slope and throwing

mud from the sidewalk into the road; there were several inches thick of mud in the road.

Q. Could you tell where that came from? Did you see where that came from? *A.* It was from the embankment.

Q. (By the Court.) The railroad embankment?

A. The railroad embankment on the east side. At four p. m. on Sunday, August 13, there was a hard rain, and the next day I saw them repairing the embankment, and conditions in the road were even worse than they had been, several inches of thick mud. 10

Q. What became of part of that embankment after that rain?

A. I didn't take observations of the embankment. Next day, August 15, there was another hard rain, and I came back from Trenton that day by way of Rahway, and as I left the station on the north side, looking back I saw there was deep water on the crossing, apparently impassable, or nearly so.

Q. (By the Court.) Whereabouts do you live, on the north side? 20

A. I live on the north side. In driving away I looked back on Main street and saw there was a flood there on that day. On August 16, in the morning the crossing was wet and nasty and men were at work on the slope on the north side of the railroad on the east side of the street repairing it where it had been washed away.

Q. (By the Court.) You live on the north?

A. Yes, sir.

Q. (By the Court.) When you came east in the morning you drive through under the track and come up to the Main street station? *A.* Yes, sir. 30

Q. (By the Court.) When you come back you get out on the north side?

A. Yes; I don't have to pass through coming back. On August 17, in the morning the mud was deep between the rails on the trolley track. It was also piled up nearly two feet deep; east of the sidewalk under the bridge there was a narrow roadway left, with pools

and mud; nobody at work. In the afternoon I saw piles of mud still along the road.

Q. (By the Court.) That mud you imagined had been shoveled off the sidewalk? *A.* Piled up there and had not been taken away.

Q. And came from the railroad banks where it had been washed down?

A. Came from there partly, and partly shoveled in from the sidewalk, or else washed in by the water.

10 August 18, in the morning the mud piles were still on the trolley track and still along the east side of the road; there was not room for the teams to pass without running into mud piles, and there were pools of water also in that portion of the track which was cleared, and the surface extremely rough, so that we always have to drive carefully through there. On August 19, in the morning there was still mud between the rails on the trolley tracks and piles of mud still on the east side, and pools still in the cleared track.

20 day, August 21, the same conditions existed. My next memorandum is August 24; Thursday, August 24; in the morning the same conditions, except that the road in the center had become nearly dry. The mud pile on the east side was still there. August 25th there were showers during the night and in the morning I found pools of water in the roadway of the crossing and the mud piles still along the easterly curb line. Saturday, August 26, the mud was deep in the driveway, I should judge two inches thick, with pools in the low places,

30 and mud piles still along the curb line. Monday, August 28, there was still mud in the middle of the driveway, but nearly dry. I skipped Sunday. The piles stood along the curb line in the street, and mud on the street car tracks. August 29th there was a slight shower in the night and there was mud all over the road and pools in the low places in the morning. The piles of mud had not yet been removed along the east curb. August 31, in the morning there were two teams at work hauling off the mud piles. My next memorandum is September 6th, a hard shower Sunday

morning and Monday morning; mud on Wednesday morning several inches thick all over the roadway under the railroad bridge. I made no other memorandum until October 2, dry time; the roadway dry, except on the east side; the dust fills up the hollows in the pavement so that it is not so rough, and gang there carting off some dry dirt. October 3, rain in the night; pavement covered with pools and soft mud. These are all the memoranda I made.

Q. Do you use that road with automobile and wagon? *A.* Frequently use it with both, sometimes automobile, sometimes with carriage. 10

Q. What is the character of the road, and how do you find it as you travel over it?

A. It is very rough for either, especially so for the automobile because those wheels are not so broad a diameter; there are several rough places; it is a little dangerous, I think, to go through fast; we always have to go through carefully, because there is some risk of breakage if you don't. 20

Q. (By the Court.) How are the roads on each side? *A.* They are good. They are good for miles. The road on the north is excellent all the way to Plainfield; that is county road, except the first few blocks north of the crossing, which is built by the borough, and it is in excellent condition. The road south is a road built formerly by the township, macadam road, which is not in first-class condition, but is all through as far as Bonhamtown, a couple of miles of that very point, in better condition than this crossing. This crossing is the worst place of any travelled road around Metuchen. 30

Q. With this crossing as you have described it, with these piles of dirt—

The Court: I don't think I am going to try this case as if it was an indictment for a nuisance. Very likely you might have gone to the grand jury and got somebody indicted for leaving the road in the condition that Mr. Corbin mentioned. You are

asking this Court to remove it, prevent anything further of this kind, and you are asking the preventative remedy of this Court to prevent anything of the kind in the future; but is it worth while to go into anything further as to the nasty condition of this road?

10 Mr. Silzer: I desire to show one thing further with reference to the character of the crossing at this time, relating to the width, as to whether it is dangerous or not when the trolley car comes along these piles of dirt.

20 The Court: That is all nuisance, isn't it? That is indictable. I don't know why you didn't go before the grand jury. I have nothing to say about that at all. But the condition described by the other gentleman and Mr. Corbin is undoubtedly a public nuisance and indictable, or was thirty or forty years ago when I knew something about criminal law, which I do not pretend to know anything about now. Whether it was the township, or borough, or Pennsylvania Railroad, or all of them, I don't know. I am not learned at all now in criminal law at present, but that the road was impassable by these dirt piles seems to me plain enough. Mr. Corbin has already sworn there was a single track left there. As I interpret the evidence it stands this way:

30 This dirt washed down off the railroad track; it also to a greater or less degree washed in, mainly from the south, the ordinary surface dirt that accumulates by the wear of the macadam, and it piled up on the sidewalk. Well, that sidewalk on the east side was used by the railroad company for its passengers, and the first thing the railroad company does it sends down a lot of fellows and scoops the dirt off that sidewalk so that their passengers can go back and forth comfortably, and that fell right in the road. What do you want more than that?

Cross Examination, by Mr. Strong.

Q. From the 13th of August for the following week or ten days it was a pretty rainy period, wasn't it?

A. Yes; number of hard showers.

Alexander C. Litterst, sworn.

Direct Examination, by Mr. Corbin.

10

Q. You are cashier of the Metuchen National Bank?

A. Yes, sir.

Q. Were you formerly Mayor of Metuchen?

A. Yes, sir.

Q. Down to what period? A. For three years, ending January 1st, 1906; have been out three days.

Q. You are familiar with the Main street crossing?

A. Yes, sir.

Q. What was the condition of the surface construction? A. Very rough, uneven, holes all over it. 20
Coming down the hill from the south side of the railroad the pavement is six inches to a foot higher than the macadam which meets it. On the west side of the crossing itself the trolley tracks are six inches below the pavement, so that it is dangerous for a wagon to turn off the paved portion into the trolley track.

Q. (By the Court.) Can't get back again?

A. Hardly; it is dangerous.

Q. When the trolley comes down from the south do you think they are under perfect control there? It is 30
a steep grade, isn't it? A. Very steep.

Q. How does it come down, with speed? A. No; they have to slow up, hold back on account of the danger.

Q. (By the Court.) There is no curve in the trolley? A. There is a slight curve; they come from the center of the road over the hill to the side.

Q. (By the Court.) Never jump the track though? A curve at the bottom of a grade on a trolley is a very

dangerous affair, because the motorman is liable to lose control and they come down and jump the track. Do you know if it has? *A.* I have never seen it, but I believe the cars have jumped the track; I have heard so, but I have never seen it.

Q. Have you observed the drainage from that point?

A. Yes, sir.

Q. What is the character of it? The character of the drainage, the water as it comes into the cut, you
10 mean?

Q. Yes. *A.* Muddy.

Q. (By the Court.) Have you stood there at any time when it was raining hard or when it rained hard enough to make a surface flow in the basin under the bridge to see where the water came from and how it came at all? Did you ever stand there to see how much came in from the highway and how much came in from the railroad, and all that? *A.* Yes, sir; I have seen it come several times.

20 *Q.* (By the Court.) Did you see where it come from? *A.* Yes, sir; from the railroad.

Q. (By the Court.) Didn't it come down the road too? *A.* Yes, sir; both sides.

Q. (By the Court.) Comparative quantity, how much? *A.* It seemed to me more water was coming from the railroad above than down the road.

Q. (By the Court.) It came steeper, too?

A. Yes, it came steeper; it came over the banks, the bank down into the cut, especially on the side that you
30 walk on from one side of the station to the other, on that side, that is where the trouble is.

Q. (By the Court.) The trouble in the cut is not on the side where the trolley is, but on the east side where the passengers are supposed to walk?

A. Where the passengers walk; yes, sir.

Q. Have you occasion to drive under that?

A. Yes, sir.

Q. What is the surface you drive on?

A. Belgian block; very bad, full of holes.

Q. What is the importance of this crossing as com-

pared with other crossings? *A.* It is the most important crossing in Metuchen, and Metuchen is part of the township where the main roads between New York and Philadelphia cross each other.

Q. All the turnpikes go through Metuchen, and in order to get from one side of the town to the other you have got to cross through Main street, and to get from the Perth Amboy turnpike to the Newark and New Brunswick turnpike you have to come through Main street? *A.* Yes, sir; all that goes through Main street, 10
Metuchen.

Q. And the local travel? *A.* Very heavy; it is the most important point in Metuchen and in the township, and between the cities of Rahway and New Brunswick, Perth Amboy and New Brunswick, Perth Amboy and Plainfield, all come through Main street, Metuchen.

Q. How long has the trolley been there?

A. About seven years, I should judge.

Q. That complicated the situation? *A.* Some.

Q. What is the character of the road at other points 20
than Main street? *A.* Main street—the borough has improved Main street to the north from the railroad crossing to the Newark or Essex and Middlesex turnpike, a distance of a little over a quarter of a mile by macadamizing it thoroughly and guttering with Belgian blocks three feet wide on either side, curbing the street.

Q. And what is the condition of the pavement?

A. Excellent condition.

Q. And south? *A.* South it is good, but not as good as on the north side, because of the wash; the steep 30
hill, of course the water washes down there right along, you know, and the pavement is not as good as the north, but then it is a good pavement.

Q. (By the Court.) You mean the street work; you mean what pavement, the wagon macadam?

A. Macadam; yes, sir.

The Court: And it is perfectly well known to everybody that macadam work on a steep grade cuts and wears out very rapidly, and the public are

unwilling to resort to the only remedy, and that is to raise the curve of the street in the middle. They won't stand it; they want a level street on the side of a hill, and they can't have it and have it kept good, physical impossibility. I have seen the best road that you ever saw, and pretty good gutters at the side, gutters filled up with snow, big snow banks, and the snow begins to melt and the water run right down the middle of the road and cut it right out.

10

Q. Do you recall the conditions of Metuchen before the railroad was depressed, before Main street was depressed under the tracks in 1888? *A.* Yes, sir.

Q. There was a grade crossing at that time?

A. Grade crossing; yes, sir.

Q. Was there anything to indicate where the highway ended along the railroad tracks, anything on the tracks themselves, or was it all open?

20

The Court: Did they have any fence?

A. I have no recollection of a fence.

Q. All open; passed right in on the track?

A. Yes, sir.

Q. People did pass in to get to the station further west, did they? *A.* Yes, sir.

Q. (By the Court.) And there was no valley in the road? The road ran along on the surface; hadn't been depressed? *A.* No, sir.

Q. (By the Court.) So that there was nothing of this wash gathering of earth there then? *A.* No.

30

Q. Did you observe the flooding of the street at any time? *A.* Yes; frequently.

Q. When last? *A.* Well, within the last two or three weeks; I didn't take the date, but since the railroad company has attempted to alleviate the condition of the street by building a sluice-way or putting in a pipe on the north side; where they have put in the pipe, so much water came along there, and it wasn't a very heavy rain either, that the pipe couldn't take it; there-

fore where the pipe was laid and ground was soft it washed all that ground down over the road.

Q. (By the Court.) Since they put that pipe in?

A. Yes, sir.

Q. (By the Court.) When did they put that pipe in?

A. Within the last month, they tried to remedy this; even with this pipe, and it was a large one too,—it just shows the quantity of water that comes down there a distance of over half a mile from Robinvale.

Q. You don't know the exact distance from Robin- 10
vale? *A.* I don't know the exact distance.

Q. Pobably about half mile? *A.* Probably half mile.

Q. Water drawn west from that point? *A.* From the Robinvale station; I have gone down there to see where it come from purposely, and it comes from Robinvale station.

Q. Is the natural flow that way?

A. No, sir; the natural flow is the other way.

Q. The head waters of Mill Brook east of Robinvale station? *A.* Yes, sir. 20

Q. That is the natural flow? *A.* Yes, sir; south.

Q. The hills are quite steep there? *A.* Yes, sir; next to the Presbyterian Church quite a steep hill; there is a slope east from there.

Q. The Presbyterian Church now lies next east from the Pennsylvania station on Woodbridge avenue?

A. Yes, sir; and the railroad is in a deep cut back of the Presbyterian Church, and the water is drawn into this cut through Main street instead of its going east as it formerly did and as it naturally would but 30
for this cut; it is drawn east into this cut, Main street cut.

Q. (By the Court.) How big a stream,—was there a large, visible stream running there after a rain?

A. It was on the north side that I saw it.

Q. (By the Court.) What became of the water on the south side? *A.* I didn't see that; I didn't go down to see that.

Q. (By the Court.) You walked out on the north side? *A.* The bank on the north side of the railroad

and I looked down to see the water running off on the north side of the track where they made this improvement.

Q. (By the Court.) All the way from Robinvale did you say? *A.* Yes; that I saw during the summer some time, or probably a year ago in the spring; I went down there before we instituted the suit to see where this water came from.

Q. Were you there when this photograph was taken
10 by the photographer? *A.* By Mr. Monaghan?

Q. Yes. *A.* I was in the bank at the time.

Q. Can you remember the date? *A.* No; I didn't make a memorandum of it, but it was sometime in the month of August I should say; that is merely an impression; I wouldn't swear to the exact date.

Q. How often have you seen that street blocked with water? *A.* Oh, repeatedly, after every heavy rain,— and sometimes it depends upon the condition of the soil, you know; when it is frozen, you know, we have
20 it right along; when there is a thaw the water comes in there; we are troubled continually with this condition in that cut; the worst cut I ever saw anywhere; I don't know that I ever saw a cut like that.

Mr. Strong: I think I object to that.

The Court: That all goes for nothing. What he says about the condition of it is one thing. When he goes on to say it is the worst he ever saw, that goes for nothing.

30 *Q.* What is the clearance of the trolley cars there? Have you noticed the clearance of the trolley cars?

The Court: That is a matter of measurement. He couldn't tell.

A. I couldn't tell you exactly what the height is. The trolley people have claimed that they cannot send their improved cars through there.

Mr. Strong: I object.

Q. (By the Court.) Do you know anything of the trolleys actually being stopped by water there?

A. Yes, sir.

Q. The space is quite narrow between the top of the car and the trolley? A. Yes; I have stood there and seen, it almost touches the bridge, the top of the car, as it goes through.

Q. You couldn't get a larger car through?

A. No, sir.

Q. The cars that run there are small? A. Small. 10

Cross Examination, by Mr. Strong.

Q. Where was the pipe put in that you say was put in within the last month? A. On the north side of the track and on the east side of the street.

Q. And connecting how? A. Connecting the basin, which is up alongside of the track in the gutter under the platform with a basin, I believe, that they built in the street.

Q. (By the Court.) Under the— 20

A. Under the sidewalk; and they have run a pipe—I saw the open ditch, wasn't there when they closed it, and I wasn't there when they put in the pipe, but I saw the pipe there, saw an open ditch.

Q. What size pipe? Tell us that?

The Court: You know on your side. How can he recollect?

A. It was a large pipe, fifteen or eighteen inches, I should judge. 30

Q. You say that pipe does not suffice to carry the water? A. Well, it didn't on this occasion when I saw the water coming over the top of the embankment; I don't say that it doesn't, but I saw the water flowing over the bank.

Q. (By the Court.) Cutting out the loose dirt that they had put in on top of the pipe?

A. Yes, sir; putting it all out.

Q. (By the Court.) That was this last month?

A. Yes, sir.

Q. Was that a pretty heavy rain then?

A. Not a very heavy rain.

Q. The water that you observed coming from Robinvale station, I understand you to say it was on the north side of the track? *A.* On the north and on the south side.

Q. I want to understand whether you meant the south side too? *A.* Yes, south side; more particularly south side.

10 *Q.* (By the Court.) Where does that go to when it gets down to the station?

A. Under each platform of the station there is a basin, and formerly they connected the basin under the platform on the north side of the station under the track with a basin on the south side of the station, and from that basin down they got a small pipe connecting with the basin in the street. Then they found there was too much water running over. Now they have put a pipe from the basin on the north side down to the
20 street and have put a basin on the sidewalk into the street on the north side of the track and are connecting this basin on the north side with this basin on the south side, how. I don't know, but by pipes.

Q. And is that what you saw as having been done within the last month? *A.* On the north side.

Q. (By the Court.) Additional new pipe not before existing? *A.* No, sir.

Q. (By the Court.) Had been carried from the basin on the north side to carry the water down to the
30 road on the north side of the railway instead of carrying it under the tracks to the south side of the railway opposite the station and carrying it there in the pipe that formerly existed. Now, I am very conceited on engineering, and I find, and I think the engineers of the railway companies find that you cannot carry much water in a pipe that is on a level, and just in my own mind, reading between the lines, my prediction is that the difficulty of the thing in carrying the water from the north side across under the railroad to the south side didn't give it declivity enough, or the pipe wasn't big

enough to wash. You have got to have a certain amount of all to clear the sediment that settles in the pipe; it will fill up when nearly on a level and sediment gets into it; and then from there you want to run it down with the other to the road. And then they have been on the side of the railroad where the big two foot pipe starts, and in my own mind I have already come to the conclusion that they never can carry it across under that railway, the length of the highway under the railway from the north side there isn't fall enough to get it into that two foot pipe. I only say this to show you that my mind is at work on this thing. You have got an engineer to come on, and he will tell you all about it. See if he don't run right into that before he gets through. 10

Q. What I am going to ask the witness was whether he means to say they done it within a month, the water was carried from the north side of the track to the south side of the track under the track.

The Court: He supposed it was. 20

A. That is all I ever saw.

The Court: He supposed it was, but the engineer here says that before that it was plain that it ran over from the north side, didn't get across to the south side under the road, and went down this embankment.

A. Yes, sir.

The Court: Then they put a pipe there under ground to carry it, make it comfortable, smooth running for it. 30

Q. Do I understand you to say that there was no occasion—

The Court: You mean no law about it, and I am entirely impatient with your getting information out of this witness; it is all subject to being enlightened by your engineers hereafter.

Thomas F. Van Siclen, sworn.

Direct Examination, by Mr. Silzer.

Q. You are the present mayor of the borough?

A. Yes, sir.

Q. And have been in the council several years?

A. Yes, sir; ever since it was formed.

Q. Have you observed this Main street crossing?

A. Yes, sir.

10 Q. Have you made any memoranda of conditions as you found them? A. I have got a little data; yes, sir.

Q. Will you tell us what you found on the dates which you state? A. On Sunday, August 13, heavy rainfall; the water was fifteen inches above the sidewalk.

Q. Was that from actual observation?

A. By actual measurement.

Q. (By the Court.) On which sidewalk?

A. On the east sidewalk. The embankment on the
20 northwest side, that is, north side of the east embankment, that was washed away; it was put back on Monday morning, August 14th, by Pennsylvania Railroad men. Tuesday, August 15th, another heavy rain, and the same bank was washed away again.

Q. This is the north bank you speak of?

A. Yes, sir. There were photographs taken on the
30 15th of August in the afternoon by Mr. Monaghan, for I was down there with him while he was taking them. The roadbed was left in a coarse and poor condition.

Q. (By the Court.) What was the depth of the water on the sidewalk? A. I measured next morning, fifteen inches.

Q. (By the Court.) You measured from the water line on the wall? A. On the abutment.

Q. (By the Court.) Retaining wall? A. Yes, sir.

Q. This is the second time you speak of?

A. First time.

Q. (By the Court.) Were either of these measurements by actual measurement while the water was

there, or high water mark? *A.* High water mark is what I went by; I didn't get in there while it was there. On July 30th was heavy rainfall.

Q. What called that to your attention, July 30th?

A. There was a fire that night in South Metuchen.

Q. And what side of the track are the engines located? *A.* Both on the north side of the track.

Q. And what occurred? *A.* The fire alarm was sounded and Hook and Ladder Company had horses hooked up to the truck and plowed through it, water just about even with their stomachs. The Washington Hose boys had their carriage, had to go two blocks around to get through it because they couldn't go through without getting wet. 10

Q. That was July 30, 1905? *A.* Yes, sir.

Q. Now, since some new pipes have been put in, within a month or so by the company, have you observed the water on the north side of the track, the embankment? *A.* Within ten days I think it is, where they put the pipe in to relieve the water on the north side from going across to the south side, the bank was washed out and washed over the sidewalk, and the receiving basins they put down the foot of the embankment was all filled up with dirt. 20

Q. (By the Court.) They put in new receiving basin here within a month? *A.* Yes, sir.

Q. (By the Court.) And pipe to carry it down?

A. Yes, sir.

Q. (By the Court.) On the north side?

A. Yes, sir. 30

Q. (By the Court.) And you say dirt washed out and filled up this receiving basin? *A.* Yes, sir; I cleaned out the top of it the next morning, the receiving basin.

Q. This is the receiving basin at the foot of the pipe that runs from the north bank? *A.* From the north side; yes, sir.

Q. (By the Court.) The new pipe? *A.* Yes, sir.

Q. (By the Court.) The dirt, I suppose, had filled up the grate; there was a grate over the receiving

basin? *A.* That is just it exactly, and there is a hole left on the north bank yet where it hasn't been replaced.

Q. And that dirt was washed all over the sidewalk and mud into the street, wasn't it? *A.* Yes, sir.

Q. Had you seen previous to that any water or dirt being washed from the south side of the bank of the railroad property into the street? *A.* Yes; I have seen as much as ten or twelve wagon loads at one time
10 washed down there on the south side.

Q. So that in your observation the water has washed both on the north and south into the street carrying mud with it? *A.* Yes, sir.

The Court : Of course we all know a small stream of water running down a side hill of loose dirt will wash the dirt right away; you can't stop it, even a small stream, unless it is paved very thoroughly.

Recess.

20

Alfred L. Ellis, sworn.

Direct Examination, by Mr. Silzer.

Q. Where do you reside? *A.* Metuchen.

Q. Your profession is what? *A.* Physician.

Q. Are you connected with the Board of Health?

A. I am.

30 *Q.* In what capacity? *A.* Secretary and a member of the Board.

Q. As a member of the Board of Health have you had occasion to examine the crossing at Main street in Metuchen? *A.* I have; yes, sir.

Q. When? *A.* Well, a number of times.

Q. During the last summer and fall? *A.* Yes, sir.

Q. And what condition did you find existing at this crossing? *A.* I found accumulations of mud and water and oil, and standing there various lengths of time, sometimes would be there I would say for a

month all the time wet and giving off more or less odor, and at times in summer it would be a sort of deposit showing a bacteria of growth.

Q. And did you call this to the attention of the Pennsylvania Railroad Company by letters addressed to them? *A.* We did.

Q. Do you also have occasion to drive over this road?

A. I do; yes, sir.

Q. And have you ever seen the place filled with water? *A.* Yes, sir.

Q. How frequently? *A.* After almost any large storm.

Q. And large accumulations of mud and dirt in the street? *A.* Yes, sir.

Q. And on the sidewalk? *A.* Yes, sir.

Q. Have you seen where that water came from?

A. Yes, sir.

Q. Where? *A.* The largest part of it comes down either side of the embankments, and also comes down the gutters.

Q. How was the pavement at this point under this crossing? You drive over there? *A.* Oh, it is very uneven, and it is very hard on a horse, or horses and carriages on account of the ruts and holes.

Q. You have seen trolley cars come down the hill?

A. Yes, sir.

Q. Have you ever seen any off at the bottom?

A. Yes, sir.

Q. More than once? *A.* I don't remember more than once; I remember once very distinctly.

Q. You observed the embankment at the north side of the track recently, in the present time?

A. Yes, sir.

Q. Has there been any wash-out there? *A.* Yes, evidently within the last, well, last two weeks sometime.

No cross examination.

Mr. Silzer: If the Court please, we have a number of witnesses just similar to this.

The Court: I don't think there is any reason to doubt what I said before, that the situation shown there amounts to public nuisance at times. The trouble is, what am I to do with it?

Mr. Silzer: I don't want to call any more, on your Honor's suggestion.

The Court: If this thing is disputed you may call
10 your witnesses in rebuttal, if the defence don't object to that mode.

Mr. Strong: No, sir.

The Court: Then the defence consents that if the state of things which have been proven by the witnesses of the complainant are seriously disputed the complainant may put in further evidence.

Mr. Corbin: Yes. We rest now.

The Court: You have a right to ut in certain records.

20 Mr. Corbin: Yes; one or two records referred to already in the testimony.

The Court: Yes.

Mr. Strong: We will put in our defence on the 25th of January.

The Court: You better put in all you can now. I think the complainant is entitled to that.

Mr. Strong: I really have nothing to put in now. My case is not in shape that I can introduce anything that would be of any value.

30 Mr. Corbin: I think we should have my friend's opening.

The Court: Yes; you must state what your line of defence is going to be. That will be fair, because they might ask to have it put off again to make their reply to your defence. You have had the advantage of a display of their case, and that I am very glad you have had; but, on the other hand, they ought to have what amounts to about the same advantage in reply to your case, as far as you can give it to them. Now, open your case.

Mr. Strong: Our defence will be that this whole situation, the depression of the tracks and the drainage system as it exists to-day practically was part of the improvement which consisted mainly in placing the depot where it is now. For that purpose it was essential that there should be this grade crossing, and that arrangements practically as they are should be made, and they were made after a full and public discussion and exhibition of plans, in which there was a mass meeting, I believe, and the whole subject was discussed 10 and talked over, and the arrangements that were made were arrived at as the best practicable; and they were carried out as they were agreed upon. And this drainage system which was put in at that time proved satisfactory for a great number of years, at least until within recent years. All this that has been given here has been confined to within two or three years back, and since the trolley company put this road through the crossing, and that resulted in tearing up what pavement there was there and leaving the street in the uneven 20 condition that it is now. And what other changes were made I cannot now state, but I hope to put in some evidence on that the next time; but the conditions were materially changed.

The Court: You mean to say there was a written agreement by the township or somebody?

Mr. Strong: I didn't know it until to-day. There was a written agreement at the time the change was made.

The Court: You have that, of course? 30

Mr. Strong: The letter refers to it, and I suppose duplicate of that agreement is in possession of the other side.

The Court: They say not.

Mr. Strong: At any rate, we will try and produce that.

The Court: I will suggest to you that you ought to send a copy of it to the other side immediately.

Mr. Corbin: I would like to see it.

Mr. Strong: I will furnish it as soon as we find it.

I would have had it here to-day if I had known it existed.

Now, I say that lay out, that scheme for improvement, what they now complain of, was carried out in exact accordance with what was intended, what was desired by the public at that time. Now, how far that is prohibited in this printed paper I don't know, probably the paper is very brief, but there was, we will prove, a public discussion of it, and all these arrangements
 10 were accepted beforehand and were satisfactory, and for years they were effectual, carried off the water. Now, along comes a trolley company, and they are given free hand the absolute control of this highway to do what they please there, and nobody cares very much, and they go in and rip the pavement up and leave things in a disordered condition which has been described here to-day, and a large part of the accumulation of water, the fact of the water stands there in holes and uneven places is due to the fact that the surface
 20 has been disturbed and has not been replaced, and the danger that there may be to vehicles is due to that same cause.

The Court: That is all remediable without any very great deal of expense.

Mr. Strong: Yes; the main trouble, as the matter addressed itself to my mind after hearing the proof on the part of the complainant, is about the drainage along the tracks of the railroad.

The Court: Not only that but the drainage away
 30 from this settling. Now, I want you to have the benefit of what has run through my mind. I don't know how it will turn out, but wherever there were pipes laid that way, particularly if they were any where near on a level, and unless they have a perfectly even declivity, they are liable to fill up in time with sediment, and if the current is not sufficiently swift to sweep that sediment away, a set of drains of that kind that worked very well for the first, second, fifth, tenth year, will finally become entirely inefficient. And you had better address yourself to a defence on the idea that that may

be a difficulty. And then the question will be, whose duty it is to remedy it. And another question will be—I want to hear you further—have you any right at all to turn any of the surface water of your railroad into that cul de sac?

Mr. Strong: I appreciate the question of law that has been suggested by your Honor; it has not escaped my notice. But at the same time I am glad to know what your Honor is thinking of. But the whole situation is one that presents engineering difficulties of a very serious character to the railroad company. Now, if it be true that this drainage—this drain has become clogged to a certain extent, why, it is a very serious matter to remedy it. That drain is way down, I don't know how many feet below the level of the upper ground there, and to reach that drain and dig it up and clean it is like laying a new drain, all the expense of a new drain, means perhaps ten, fifteen or twenty thousand dollars, way up in the thousands, the money that has been spent there already for drainage only. And then what can be done with this water that comes down the tracks? It is a very serious question whether it can be led in any other way than just as it is led, unless you are going to get way up into thousands of dollars.

The Court: I suspect it is a matter of expense you are fighting about here.

Mr. Strong: Any matter of engineering nowadays you have got to have expense. How much money do the engineers require to do this, and how much ought we to be required to spend,—and what can he do with it, after all? These are engineering problems I want the railroad company to study out, and that is the reason I am not prepared to go into my defence to-day.

The Court: You are not prepared to say what the remedy which the railroad company will find possible or practical will be?

Mr. Strong: No, sir.

The Court: I don't think you ought to be asked to do that. What the counsel wants and what I want now, I suppose, is to know what your theory of the de-

fence is on the law. First, whether you are going to seriously dispute the facts already proven; and, second, whether you are going to contend that there is any duty or no duty on the railroad to do anything, or, if there is any duty to do anything, what is the limit of that duty? I think I have stated it, Mr. Corbin, according to what my notion is. I don't know what yours is. I think you ought to open, though.

Mr. Strong: Very well. I will say then as to the
 10 facts which have been made here by these witnesses, as at present advised I shall not undertake to dispute them seriously, or I don't know that I shall at all. As to the law, I shall insist that the railroad company owes no duty with respect to the care of the surface of the undergrade crossing; that is, we are not obliged to keep this pavement in shape. If we laid it we laid it as a matter of gratuity and neighborly kindness, I may say, to the authorities of Metuchen, without any obligation to maintain it, and especially if they turn this
 20 trolley company loose in there, let them rip up these Belgian blocks, it is for them or the trolley company to put them back again, and I recognize no duty whatever on the part of the railroad company to do anything with respect to the surface of that undergrade crossing.

Now, as to the drainage of that crossing, I shall as at present advised, insist that the company is not under an obligation to do more with respect to it than possibly to avoid turning the water from its own right of
 30 way into it. I think if we remedy that condition of draining into it that we have done all that we need to do about that. And I shall further insist,—perhaps I should have logically put it first,—that this Court has no jurisdiction to make any decree in the premises at all. That the remedy is the very ample one by indictment if we maintain a nuisance there and are responsible for it.

The Court: Suppose one indictment were found. I have had that put to me when I was at the bar, and I must say that I never was satisfied with the answer.

Suppose there is an indictment found and both parties are found guilty. Suppose the grand jury says, "we are not going to determine here which one of these parties are guilty; we are going to hit somebody." It is the public that is interested in this, it is the great public of the State of New Jersey. The corporation of the town of Metuchen is simply a sort of a *loci tenemus* of the State. They are trustees for the public at large, and they are bound, they are indictable if they don't keep the public highways in order. Then you go 10 to the grand jury, and it is no defence for the municipal corporation to say, "why, we made a bargain with the railroad company and they are bound to keep this thing in repair," The public says, "We don't know anything about that, except you are here and are deputed and are loaded with the duty of keeping this road in repair, but if you show us that the railroad company had anything to do with making a nuisance there, why, we will indict the railroad too." You must fight it out between yourselves. The public shall not fall between 20 two stools while you are finding out which one of you is really responsible for this thing. Where is the remedy at last? The common council brings an action at law and establish a right between them and you to keep this thing in repair; indictment after indictment is found. That don't remedy it; it only punishes it for past injury. An action at law won't remedy it,—give damages,—that won't remedy it. Suppose I go on the principle—I don't say I will—that there is a nuisance established as thoroughly as if there had been an indictment and conviction? Suppose I should come to the conclusion that the legal right is against you and in favor of the corporation as plainly as if they had brought an action at law and got a judgment? What is the ultimate remedy of the municipal corporation against the railroad? Now, you attack the jurisdiction of the Court, and very properly. I saw it in your answer; I was not disappointed to find it there, it was not unexpected; and it raises a nice question. But all the while I have been sitting here this has been floating 30

through my mind, and I have been giving you the result just this minute. We come down at last that some court has got the power to settle the boundary line of liability between the municipal corporation and the railroad and to determine somewhere where the duty lies to do this and where the duty lies to do the other thing. Now, that is where I suppose my brother Corbin—I suppose he thought this all out before he advised this bill,—it is probable not in a much clearer
 10 manner than I have attempted to do it in this offhand way. So he says he will jump all over indictments and actions at law and we will come right down now to the pinch and say how is this thing going to be settled.

Mr. Strong: Perhaps I have said enough by way of opening.

The Court: On that question of jurisdiction I would like to know what you are going to say about that. If you are ready to say it now I think the complainant is entitled to it. That is the interesting question
 20 in the case.

Mr. Strong: The position I take there is that this Court will not interfere in matters of public nuisance, because the remedy by indictment, as the cases say, is so ample, and it includes not merely the punishment but the abatement of the nuisance, and the cases in this Court are quite numerous on that subject.

The Court: The universality of that law, that the common law court after an indictment for a physical nuisance will order the nuisance abated,—I will ask
 30 you where that meets and what use that has here? Of what use is that here? The universality of the law fails there.

Mr. Strong: Mr. Corbin called my attention to one other feature of the case that I had not spoken of, and that is the charge of the encroachment on the highway.

The Court: He wants to widen it.

Mr. Strong: I don't think he meant that seriously. He put it in the bill.

Mr. Corbin: I did mean it seriously; it is the most serious part of the bill.

Mr. Strong: Mr. Corbin called my attention to the matter of encroachment, and I want to say in reference to that that we deny we have encroached; we deny this street was ever any wider at that place than it is now, although it was laid out one hundred and fifty odd years ago, yet it never exceeded more than that width, and we shall deny the jurisdiction of this Court, with great respect, at this time to widen it.

Mr. Corbin: I would like to make one suggestion as to further testimony. We may want to keep, if it may be conveniently arranged, a count of passengers in that street. 10

The Court: You want to show the importance of it?

Mr. Corbin: Yes, sir.

The Court: As far as I am concerned at present, I don't think that Mr. Strong would be able to show me that it was not quite an important matter. It is a thoroughfare and is important. I don't believe Mr. Strong means to—

Mr. Corbin: There are two phases about the duty of the railroad as to crossing. One is that a crossing of this character, they may begin by encroaching and then from time to time expand as the public needs require. This is undoubtedly the rule as to highway bridges over the railroad. They can undoubtedly make a highway bridge narrower than the street and then widen it as occasion requires, but Chancellor Magill held they never had any business to put abutments in the street; that was a duty from the very beginning, to clear the street; they had no right to encroach on it; but whichever view you take, if the traffic had gained so they needed more width there. 20 30

The Court: You may offer further evidence on that if you wish.

Mr. Strong: I understood the complainant's case was closed, with the exception of some documentary evidence.

The Court: He is asking for leave now to show, brought out, I suppose, by my rambling talk, that he wants to show the importance of it. That won't hurt

you any. He gives you notice of it now. If you want to go into it you can.

Mr. Strong: My opening was made on the idea that they had closed.

The Court: You denied that you ever had encroached.

Mr. Strong: Yes, sir.

The Court: I think the authorities are dead against you on that. I think if it was laid out four rods wide
10 that right could never be lost.

Mr. Strong: I am only talking about the condition of the evidence. I don't think after my opening they ought to be allowed to supplement their case merely because it has gone over to another day.

The Court: I don't know about that. My idea is never to go to hearing with any evidence that can affect the merits of the case in any way left out, if possible,—if possible to get it.

Mr. Corbin: It is easily supplied. He can supply it
20 himself if he wants.

Mr. Strong: What is that?

Mr. Corbin: Just simply a count of the traffic.

Adjourned until January 25, 1906, at Newark.

Continuation of examination, pursuant to adjournment, on January 25, 1906, at the place and in the presence of the parties as before.

30 *Josiah Tice*, recalled.

Direct Examination, by Mr. Corbin.

Q. Mr. Tice, you referred in your testimony at the last session to a partition map of the Hampden estate and produced a pencil tracing of part of it. Have you since made a full copy of that map of 1799?

A. I have.

Q. Is this the correct copy of it? (Handing witness a map.) A. It is.

Q. What is the little pencil mark on it near the Metuchen church? *A.* The pencil mark crossing the main street near the Metuchen meeting house is put there to show the approximate location of the railroad property as conveyed from John Hampden and the property conveyed by John Hampden to the Presbyterian Church.

Q. That is the railroad property conveyed in 1835 and the church property in 1836? *A.* Yes, sir; of course it is small scale, and traced in lead pencil show- 10 the matter approximately.

Q. (By the Court.) That is the railroad strip, eh, those parallel lines? *A.* Yes, sir.

The Court: If Mr. Strong don't object I will request you to put that in in red lines; pencil lines wear out and bothers my old eyes.

Mr. Strong: What is it?

The Court: Marked there in pencil, the line is approximately of the property conveyed to the railroad across there, and also to the church. I 20 don't see where that church lot comes in.

Mr. Corbin: This triangle. (Indicating.)

The Court: Oh, I see; yes. Any objections, by directions of the Court to have that done?

Mr. Strong: Just to have it in red?

The Court: Yes. Broken red line; I think that is better.

Mr. Strong: Oh, no; no objection.

The Court: There is no objection to the map, 30 I suppose?

Received in evidence, and may be marked Exhibit C 4; and the Court directs the engineer, surveyor, by the consent of all parties, to mark in red ink the railroad strip subsequently conveyed out of this map, and also the part conveyed to the church, the witness having said that it was put on with pencil with approximate accuracy, not absolute accuracy.

A. Yes, sir.

The Court: Do that at your leisure, Mr. Tice.

Mr. Corbin: We produce copy offered at the last session of the deed by John Hampden and wife to the N. J. Railroad and Transportation Company, dated December 7, 1835.

The Court: Not original, but certified copy.

Mr. Corbin: Yes; certified copy.

The Court: Any objection to that? It is admitted.

10 Marked Exhibit C 11.

Mr. Corbin: We desire also to offer the deed by John Hamden and wife to the trustees of the Presbyterian Church of Woodbridge, dated April 5, 1836, and recorded in Middlesex's Clerk's office, book 30, page 345.

The Court: Any objection to it, Mr. Strong?

Mr. Strong: The deed to the church?

The Court: About the same date, or a little later?

20 Mr. Strong: I don't think it has any relevancy.

Mr. Corbin: It is relevant that it shows the length of the same line which is included in the two tracts of the railroad company, and includes the width of the street. By subtracting the distances shown on the railroad two parcels, one each side of the street, from the total distance shown in the church deed, gives us a difference of one chain and three links for the use of the street.

30 Mr. Strong: What is the use of it? It cannot be used for that purpose against us.

The Court: I will admit it, subject to the objection.

Marked Exhibit C 12.

Robert Egan, sworn.

Direct Examination, by Mr. Silzer.

Q. You reside in Metuchen? A. Yes, sir.

Q. At the request of Mayor Van Sicken did you make a count of the number of persons and vehicles who travelled under this crossing that is here in question? A. Yes, sir.

Q. When? A. The 20th of January.

Q. Of this month? A. Yes, sir. 10

Q. From what time to what time did you make this count? A. From six o'clock in the morning until seven o'clock in the evening.

Q. Now during that time how many wagons did you find going through this crossing? A. 394.

Q. And how many persons passed, foot passengers passed over there? A. 1,459.

Q. 1,459? A. Yes, sir.

Q. Did you count the trolley cars?

A. No, sir; I didn't count the trolleys. 20

Q. (By the Court.) Then that counted in that 394, trolley cars? A. No, sir; no trolley cars.

Q. Do you know how often the trolley cars run?

A. Well, every half hour.

The Court: That don't count much.

Q. That is, they cross over there twice every half hour? A. Every half hour.

Q. Go down and back? A. Yes, sir.

Cross Examination, by Mr. Strong. 30

Q. You made the count on one day only?

A. One day only.

The Court: 20th of January; that was last Saturday. I forget what kind of a day it was.

What kind of a day, clear or rainy, or wet, or what?

A. Well, it was hailing and snowing in the morning, but then it cleared up around about noon time.

Q. Did anybody know you were making a count there? A. Not that I know of.

Q. You did not advertise for the whole population to turn out and be counted, did you, anything like that?

A. No, sir; I didn't; there was nobody knowed, and they didn't know what I was there for, that is, outside of the Mayor.

10 Mr. Corbin: I have got a cheap little map of the borough here. I don't think it is worth while to offer it; perhaps we can both refer to it.

The Court: I would like to have it.

Mr. Silzer: We thought it might help your Honor to get a general view of the location.

Mr. Strong: For present purposes I suppose it might do well enough.

Marked Exhibit C 13.

The Court: It is received by consent for what it is worth.

20 Complainant rests.

William M. Jackson, sworn.

Direct Examination, by Mr. Strong.

Q. You are the the supervisor for the Pennsylvania Railroad of the division including this Metuchen crossing, are you? A. I am; yes, sir.

30 Q. Are you familiar with the drainage system in that vicinity? A. Yes, sir.

Q. Have you got a map of it here?

The Court. (Looking at map.) There are a lot of elevations on this map which of course are not placed yet. Those are from the geological survey.

Mr. Corbin: Yes; they are on the geological survey; that is where they get them; they are taken from the State map.

Mr. Strong: I don't think those ought to be received. I don't understand it was offered for that

The Court: No; it was not for that purpose. I make that remark now on purpose. It is easy enough to get one of those sectional maps from Trenton; they have got them now on a very large scale. They have one now.

Mr. Corbin: They haven't got this district. On a scale two thousand feet to the inch.

Q. I show you a blue print and ask you what that represents? A. That is the drainage system that we had there previous to last October. 10

Q. And how is the drainage system shown? Is this it in yellow? A. It is shown by dotted yellow lines; yes, sir.

Q. Describe it briefly. Do you require to refer to the map while giving your testimony?

A. No, sir. (Handing blue print map to the Court.) We show in dotted yellow lines two open ditches under the platform.

Q. (By the Court.) This is not the New York end, is it? (Indicating.) A. Yes, sir; that is the station end. We show open ditches leading under the station platform to a point near the easterly abutment; then the water from the north side of the track is carried under the four tracks through an eight inch pipe into a catch basin, then through a twelve inch pipe under the steps to another catch basin. 20

Q. On the south side of the track?

A. On the south side of the track and on the easterly side of the street; then it is carried across the street through a three foot by eight inch stone box drain to the— 30

Q. (By the Court.) Eight inches deep and three feet deep? A. Yes, sir; to the westerly side of the street into another catch basin; then from this catch basin we have a twenty-four inch terra cotta pipe laid on a grade about four inches to the hundred feet extending along the westerly side, southerly side of the right of the way to Lake street, thence under the track and along the northerly side of the right of way to an open ditch leading along the Lehigh Valley track.

Q. (By the Court.) That runs north from there along the Lehigh Valley into the brook?

A. Into the brook; yes, sir.

Q. (By the Court.) Runs up to the north, four inches to the hundred feet? *A.* About four and a quarter inches.

Q. (By the Court.) Is it on a uniform grade?

A. On a uniform grade; yes, sir.

10 *Q.* Now that you say was the arrangement existing up to last October? *A.* Up to last October; yes, sir.

Q. Now, what change, if any, was made at that time?

The Court: This map is numbered 2231. Is that a series number of the maps for filing?

A. It is the railroad company's file number.

Q. (By the Court.) There isn't any other of that number? *A.* That is the tracing number. Of course the blueprints are sometimes modified a little.

20 Mr. Strong: I was going to offer that so as to have its own mark in the case. I have another of the same number, 2231.

Q. I now show you another blue print of the same tracing which has further yellow marking on it.

The Court: That shows a pipe leading from the north side, dispensing with the pipe under the track from the north side and leading that water down to the north end of the east abutment of the bridge over the wagon road; is that right?

80

A. Yes, sir.

Q. (By the Court.) And carrying it along side of the road and under ground, I suppose?

A. Yes, sir.

Q. (By the Court.) Clear through under the tracks, with two additional catch basins? *A.* Yes, sir.

Q. (By the Court.) To catch water that catches in the sink, I believe we called it the other day, didn't we, the sag?

Mr. Strong: "Sag" was the word that was used.

The Court: I see the size of the pipes are put on here, the one leading down the declivity to the steps on the north side of the railway is marked sixteen inches. That goes with a great declivity, doesn't it, Mr. Engineer?

A. Yes, sir.

Q. (By the Court.) Then we come to a manhole and that connects with a sixteen inch pipe running as before stated along the east side of the wagon way under the railway. Now, is that connected, close connection between the pipe that goes down the proclivity and the one that runs comparatively level from there under the railway tracks? 10

A. Yes, sir; they are connected.

Q. (By the Court.) What are they, iron or tile?

A. Terra cotta pipe.

Q. (By the Court.) What is the declivity in that sixteen inch pipe, if any, where it runs nearly level? 20

A. About six inches drop from one end to the other, that is, six inches in about ninety feet, I think it is; about that.

Q. (By the Court.) How is that manhole fastened? Is it fastened down tight? A. It is a brick manhole built in under.

Q. (By the Court.) Is there anything to prevent the water from rising there and boiling over if it comes down faster down the declivity than a pipe sixteen inches in diameter running nearly on a level will carry it? 30

A. Well, it has an ordinary cast iron cover such as is used for that purpose.

Q. (By the Court.) But it is open where there is a catch basin about the center of the railway line?

A. Yes; the lowest point we can find under the bridge.

Q. (By the Court.) There is one on each side?

A. Yes, sir.

Examined by the Court.

Q. Then on the other side of the wagonway nearly under the street railway is another sixteen inch pipe and another catch basin? *A.* Yes, sir.

Q. Well, now, as an amateur engineer, I will ask you right here a question which suggests itself to my mind. Is there declivity enough in this, what I call horizontal sixteen inch pipes, as distinguished from those that run the steep declivity down the embankment
10 of the railway,—is there declivity enough to carry off that water? *A.* Well, there seems to be; they have a pretty good drop towards the main catch basins on this side.

Q. But it all depends on the declivity whether it will carry the water, doesn't it? *A.* Yes, sir.

Q. Then after you get the twenty-four inch pipe it all depends on that declivity whether it will carry the water or not? *A.* Yes, sir.

Q. And whether or not the dirt and wear and tear
20 of the wagonway that naturally settles down there won't drop in a silt and fill up the bottom of those drains; isn't that it too? *A.* Have a tendency. We have arrangements made to clean them out.

Q. I should like to learn that tendency—

A. I mean the catch basin.

Q. Oh, you clean the catch basins out? *A.* Yes, sir; try to catch all the sand in the catch basins before it reaches the twenty-four inch pipe.

Q. I will ask you this. The question of the capacity
30 of any water bearing pipe to clear itself, its scouring capacity so to speak, depends upon its declivity and smoothness? *A.* Yes, sir.

Q. Unless you have proper scouring capacity the material held in partial suspension will begin to settle right away, won't it, as soon as the velocity ends?

A. As soon as the velocity ends; yes, sir.

Q. And the velocity depends upon the declivity and the smoothness of the surface, don't it?

A. Yes, sir; it does.

Q. Those two things? So I supposed.

The Court: I will say to you right here, Mr. Strong, that my recollection is that my attention was called immediately to that matter when you were here before, a week or two ago, and I was afraid that your twenty-four inch drain pipe did not have declivity enough to give it scouring capacity enough to carry off the sand and fine material that would be carried down into it from the surface. I do not say it is so or not, but that is what is troubling me now. 10

Further Direct Examination, by Mr. Strong.

Q. I will ask the witness whether it is possible to obtain any greater declivity? A. No; it is not; we are down to the swamp on one end, about as low as we can get.

Q. What was the object in making these changes which you say were made last fall? A. Well, to provide a greater number of catch basins to get the water out of that hole under the bridge quicker if possible. 20

Q. And do you know whether the changes have been successful in that respect, or how far successful?

A. I haven't seen any water standing under there; I haven't been there during a rain though.

Q. (By the Court.) Since the change?

A. I think it has; yes, sir.

Q. Think what has? Q. I think it has helped matters as far as the drainage is concerned.

Q. Has there been time enough or sufficient experience with the water to enable you to say whether it has been thoroughly effective? A. I hardly think so. 30

Mr. Strong: I will ask to have this second map marked.

The Court: All right. There are no objections, Mr. Corbin, are there.

Mr. Corbin: Put the mark on it.

The Court: Admitted in evidence.

Marked Exhibit D 2.

Q. Supposing that the changes which were made in October and shown on this second map are insufficient, What can be done to take care of the drainage at that place? *A.* Well, we will have to try and keep the water out of that hole to a certain extent, if we can.

Q. How can that be done? *A.* We would have to build a drain of some kind to intercept a large amount of this water before it gets under the bridge; I don't think we can put any system of drainage under the
10 bridge there which will carry the water away fast enough as it is now.

Q. Any better than existing now? *A.* No. When a greater volume of water comes to one small point it ought to be intercepted—

The Court: Before it gets there?

A. Before it gets to that one place.

Q. (By the Court.) Is it practicable to keep this water that comes down on each side of the railway out of that hole?
20

Mr. Strong: That is the question.

A. Well, we think it is; a certain amount of it; yes, sir.

Q. And how would that be done?

A. Well, we can take it around the roadway.

Q. Have you got any map showing? *A.* Yes, sir.

Q. I show you a third blue print of the same map, 2231, which has on it a series of red lines. Show that
30 to the Court, please. Now, what is that designed to show? *A.* Designed to show a drain leading across the track between the station and the easterly abutment which will intercept all the water that comes out of the cut, and take it northward under the railroad, and then westerly along the northerly side of the railroad into an open ditch by the back of the freight house.

Q. (By the Court.) You will maintain the elevation of the water so as to give it a general declivity all the way from the neighborhood of the station around to the same place where it now delivers? *A.* Yes, sir.

Mr. Strong: It isn't the same place. It delivers down below here now.

A. No; not the same place; there is an existing ditch back of the freight house.

The Court: It amounts to the same thing.

A. It finally reaches the same place.

The Court: Yes.

Q. Of course you have to get under Main street with your drain there? A. Yes, sir. 10

Q. That will allow you still to maintain a sufficient declivity, as the Court says, will it? A. Yes, sir.

Q. (By the Court.) How deep would you have to go in going under Main street? A. Well, would have to keep pretty close to the surface of the paving, but we keep the water on a higher level; we don't let it drop into that hole under the bridge and take it out again.

Q. (By the Court.) What declivity would you have then? 20

Mr. Strong: That is, from that point to the ditch, I suppose?

The Court: Yes.

A. I am not prepared to say about that. Mr. Savage has the levels.

Q. You haven't the accurate levels? A. No.

Q. (By the Court.) I see you have marks here on the side of the street, Main street, a little to the north of the bridge, for something like an opening into it? 30

A. Yes, sir; we put a catch basin there.

Q. (By the Court.) Is that to prevent water from coming down from the north to Main street and getting into it? A. Yes, sir.

Q. (By the Court.) Let me ask a question that is recalled to my memory. It was stated or admitted that there was a declivity on each side along Main street, on each side of the railway toward the sag or

hole in question. Where was the greatest declivity, from the south or north? *A.* South.

Q. (By the Court.) Then the quantity of water furnished from the street wash itself to the north is not so great as that to the south, is that so? It depends on the surface? *A.* It depends on the amount of surface. I don't know whether there is a greater volume of water comes there, but it comes quicker from the south.

10 *Q.* (By the Court.) You expect to intercept, with this new plan on each side of Main street to the north of the bridge a portion of the surface water of the street that would otherwise run into this sag?

A. Yes; and also the water from the cut, also the railroad water.

Q. (By the Court.) I understand, the railway water property? *A.* Yes, sir.

Q. (By the Court.) I mean intercepting the water from the cut is the true object? *A.* Yes, sir.

20 *Q.* (By the Court.) But the other is an incident of some value? *A.* Oh, yes.

Q. Well, what size pipe would you put in there?

A. Well, not less than twenty-four inch.

Q. In your judgment, would that relieve the situation entirely? *A.* I feel sure that it would; yes, sir.

The Court: Certainly; help it very much.

Q. Now, what practical difficulty is there about that? Is there any trouble in draining into that open ditch there? Are you likely to meet any objection from anybody? *A.* We might meet objection from the property holders living along that ditch.

30 *Q.* Is there any place where you can drain it where you are not liable to meet objection from property owners? *A.* No; we have objection already from this man who lives at the end of this present twenty-four inch pipe; he complained that the water shoots out of there in great volume and sometimes overflows his property.

The Court: If you had the pipe and everything perfectly clean I am afraid it would shoot out still greater,—couldn't get that water into the Lehigh Valley track.

A. Why, we discharge now into a ditch that runs parallel to the Lehigh Valley.

Q. On their right of way? A. On their right of way; open ditch.

Q. (By the Court.) This new plan, couldn't you get that onto the Lehigh Valley by a little management? A. We could by making this drain a great deal longer, finally bring it out at that same point we do now. 10

Q. I you couldn't get the use of this open ditch shown on the last map?

The Court: They can condemn the right, I guess, under your charter, can't you?

Mr. Strong: I don't think so.

The Court: The city can. 20

Mr. Strong: I don't know about that.

Mr. Silzer: We are trying to help you, Mr. Strong.

Mr. Strong: You don't seem to be helping us any.

Q. If you cannot use this open drain shown here, then it will be possible to continue some ditch down to the west on the north side of the right of way until you come out at practically the same point where the existing ditch does? A. Yes; it is possible to do that. 30

Q. Is there any other method practicable by which this situation there at the crossing may be remedied?

A. We might possibly take a little of that surface water easterly, but it won't be practical to take very much of it that way.

Q. What difficulties are there in draining toward the east?

A. Well, we would discharge on somebody else's property up there and probably get into difficulties, and

the cut slopes towards Metuchen station, so we would be practically running water up hill; we would have to run our ditch down, while the ground was ascending; we would soon get very deep in the ground.

Q. The natural drainage is towards—

The Court: The actual grade, but not the surface drainage; the natural surface drainage, part of this is the other way?

10 *A.* Yes, sir; the whole trend of the country is westerly right along there.

Q. I am speaking now of the natural surface drainage. Which way does that go?

A. It goes toward Main street.

The Court: But the engineer here stated something like this,—that at the east end of the declivity where the water first begins to gather to come toward the west, the natural drainage is the other way, the cut of the road?

20 *A.* Yes, sir; from the middle of the cut; if the cut wasn't there the water would go easterly.

The Court: That is all he said. There is no dispute about that.

A. We could come to that point and take it easterly again, but there wouldn't be much of it; it wouldn't make much difference.

30 The Court: Undoubtedly, what you have got to do is to take care of the west end, and this layout here, that strikes you as the only practical system, does it?

A. Yes, sir.

The Court: It strikes me as a very practical system. You have got to get clear of it somewhere.

Third map marked Exhibit D 3.

Q. Tell me, does the company propose to carry out this red plan?

The Court: I suppose he don't know that.

Mr. Strong: All right; I will let it go at that.

A. No; I am not here to say as to that.

Cross Examination, by Mr. Corbin.

Q. What is the grade of the track going east from Metuchen station? 10

The Court: The rate of grade?

A. Why, I haven't those figures here. Mr. Savage there has them.

Q. Can't you give the elevations?

The Court: He says he hasn't them. He says another gentleman has them here.

Q. Can you furnish the elevations at the crossing of the track, at the crossing of Main street, and at each point 500 feet westerly therefrom for a mile, conveniently? 20
A. We can, yes; we have another gentleman to testify as to those elevations.

The Court: Got a profile of it, I suppose.

Q. Do you know what is in the street under the surface now? Is there a water main there?

A. There is; yes, sir.

Q. Twelve inch water main? 30
A. Twelve inch water main; and I think there is a gas main.

Q. Gas main laid within the last few months?

A. Yes, sir.

Q. Water main laid some ten or twelve years ago?

A. I don't know how long ago; it is right under the trolley track.

Q. And trolley track laid not long after the water main? 40
A. Not long ago; no, sir.

Q. So within the last ten or twelve years there have come into that crossing the water main, the street railroad and the gas main? 50
A. Yes, sir.

Q. That doesn't help the situation much, does it?

A. No, it does not.

The Court: Have you got any evidence here as to the depth of that, how near the surface they were foolish enough to put that water main?

Q. Do you know where the main is? I think it is four feet deep, isn't it? *A.* No, it isn't; it should be; but it is about eighteen inches under the trolley track.

10 *Q.* (By the Court.) How much?

A. About eighteen inches I think it is.

Q. (By the Court.) You don't know where you are going to put this sluiceway when you come to put it in?

A. We got against that when we put these pipes in last October; we encountered the water main; it was right in our way.

Q. How did you get around it?

A. We had to siphon under it.

20 *Q.* Do you know where the gas main is, which side of the street? *A.* It is east of the trolley track, pretty near the center of the street, I think, a little east of the center of the street.

Q. Suppose the level of the highway and of the railroad over it were raised five feet; you would have that much more pressure in your outlet, would you not?

The Court: That I thought of, Mr. Corbin; I know that if they will change the grade of the railroad all along there and raise it up.

30 Mr. Corbin: That would give you necessary pressure no doubt to make that twenty-four inch main serve.

The Court: The present twenty-four inch main?

Mr. Corbin: Yes.

A. Well, it would increase the flow slightly, but I don't think it would.

Q. It would be a matter of calculation as to five foot more head? *A.* It would be; yes, sir.

Q. Or four feet more head. Then it would relieve

that seven foot grade very materially, would it not, if you had the street raised five feet at the foot of that cut?

The Court: Relieve what grade—grade of the street?

Mr. Corbin: The grade to the south in the street a distance of three hundred feet.

A. In the old highway; you see we gain that by this high level sewer.

Q. You don't relieve the grade of the highway? **10**

A. No.

Q. There is a very steep grade there? A. Yes, sir.

Q. Do you know of any other grades anything like as steep as that anywhere around Metuchen, of any highway at all?

Mr. Strong: I object.

The Court: I know plenty of them.

Mr. Corbin: Around Metuchen?

A. I am not familiar with that feature of it. **20**

The Court: Seven per cent. is a heavy grade, but there are a great many of them ten per cent. and thought to be comfortable at that; but the trouble with that is that they wash so in winter, the rains and snows melting; you can build the road, but it don't stay built. And undoubtedly the condition of that grade there for 300 feet increases the amount of dirt that washes down into that hole. The greater the declivity the more the water washes; it will cut right out the best macadamized road ever built, just on a declivity of that kind, the water will cut and take it right out. **30**

Q. How long since you have seen this crossing?

A. Why, day before yesterday.

Q. At the place where the pipe was laid recently across the highway did you find a depression in the street?

The Court: When the track was originally laid?

Mr. Silzer: On the south side of the track

where you laid the pipe across from the east to the west?

A. Across Main street?

Mr. Silzer: Yes.

Q. Isn't there a deep rut left there as a result of the putting in of that pipe?

The Court: You mean the road left in a bad order? Oh, I can't bother with that, you know, can I?

Mr. Silzer: Mr. Strong contends it is not their duty to keep that highway in repair, but certainly it would be to the extent of making improvements.

The Court: What can I do with the injunctive power of this Court with that? I do not see, Mr. Corbin, what I have got to do with a little bad repair that it was left in. I never knew anybody yet, except under very severe personal supervision, never could get a contractor to lay a pipe down in the street, with the strongest contract you had in the world, to put it back as good as it was before. I don't think I have anything to do with that, Mr. Corbin, as I can see.

Joseph P. Savage, sworn.

Direct Examination, by Mr. Strong.

Q. Are you employed by the Pennsylvania Railroad Company? *A.* Yes, sir.

Q. In what capacity? *A.* As a draughtsman in maintenance way department.

Q. Are you a civil engineer? *A.* Yes, sir.

Q. Accustomed to make surveys, levels, and so on?

A. Yes, sir.

Q. Have you recently made any surveys of the drainage system in connection with this Main street crossing at Metuchen? *A.* Yes, sir, on January 23d.

Q. What levels have you taken?

A. I have taken levels of the ditch and top rail 1,800

feet east of Metuchen station to Main street, and also difference in elevations between the scheme proposed in red on one of our prints and the outlet which we could have for that pipe.

Q. Now, what would be the difference in the elevation between that pipe at Main street and the outlet at the open ditch shown on the print?

A. Well, the difference in elevation between the top of the road at Main street where we would have our catch basin and the surface water in the open ditch is about six foot five inches. 10

The Court: Let me get the point that you are talking about now. You have got a six foot fall in that distance?

A. Yes, sir.

Q. And the distance is what? *A.* 400 feet.

The Court: That is eighteen inches to the hundred.

Q. You mean from the top of the street? 20

A. Yes, sir; we haven't taken into consideration the thickness of the pipe and the thickness below the surface of the street.

The Court: You have to take off at least four feet for that.

A. Have to take off four feet.

Q. When you get to the ditch how does the water run?

The Court: Can't you get more depth there?

A. We can submerge our pipe six inches or more there. 30

The Court: I don't see but what you are getting pretty near to your railroad here too, to your own track here. You run right down here on your own right of way, don't you?

A. Yes, sir.

Q. (By the Court.) Why can't you go on, on your own right of way, go right on down on these blue prints? These blue prints show the line of your right of way, don't they? *A.* Yes, sir.

Examined by the Court.

Q. For instance, here is the freight station and track running from it (indicating); here is the delivery, way out. Now, as I understand, this new proposed surface water tile drain runs along on your right of way until it comes to this ditch? *A.* Yes, sir.

Q. And then it can continue right on your right of way until it comes to the lowest point there is down here, can't it? *A.* Yes, sir.

10 Q. Will come right to your other delivery?

A. Yes, sir.

Q. Now, I will ask you this. What is the difference in the elevation at the crossing of the new proposed drain, crossing of Main street with the new proposed drain and the drain in the bottom of the sink or slump in the street immediately under your tracks?

Mr. Strong: You are speaking of the surface of the ground, I suppose?

20 The Court: Well, whichever he says.

Q. Have you got it, the difference between the point where your track—your new pipe crosses Main street, and the catch basins now in Main street under the bridge? *A.* The difference is seven feet.

Q. Then you gain seven feet? *A.* Yes, sir.

Q. By this plan? *A.* Yes, sir.

Q. You can distribute that over the whole distance from there down to where your other outlet is?

A. Yes, sir.

30 Q. And that whole distance is how much? I have forgotten. *A.* Fourteen feet.

Q. That is six inches to the hundred feet gain?

A. Six inches to the hundred feet; yes, sir.

Q. Gain, besides the four inches you have. You have four inches to the hundred feet now fall, according to the engineer's evidence this morning, from the slump or sag in Main street under the railway tracks down to the debouch of the drain near your right of way south of Metuchen station?

Mr. Silzer: West of Metuchen station.

Q. West. It is the same thing. By your new plan you will add seven feet to that, which will be in the neighborhood of six inches more to the hundred feet, give you ten inch fall instead of four, in round figures, approximately? A. Well, this at the present time is not a four inch fall. We take the elevations given on this plan.

Q. Your engineer says there is. If it isn't four inch I am sorry for it. 10

Mr. Strong: What is the fall?

A. Well, we have it right on the plan; we have seven feet fall in fourteen hundred feet.

Q. How far is that from six inches?

A. That is six inch fall instead of four.

Q. Your engineer gave it as four inches this morning.

Mr. Strong: No, I think not. There was an approximate statement the other day, not an accurate one. 20

The Court: He stated on the stand this morning, if I had my ears, that it was four inches. Didn't you, my friend?

Mr. Jackson: That is my recollection of it.

The Court: And I think six inches is little enough.

Mr. Strong: Six inches is better than four.

The Court: Six inches is better than four, and sixteen or eighteen is better than either, and it is all the difference between failure and success. 30

Further Direct Examination, by Mr. Strong.

Q. Would it be more effectual and better arrangement to carry this new proposed ditch shown here in red, to carry it all the way down to the present point of delivery of the old ditch? Would that be more effective?

A. I think not. This present arrangement in red does not take care of all the water under Main street;

it only takes care of what is on the north side of the tracks and on the east right of way. Now, if we brought that clear down to here, both pipes, this would take all the water from the north side and put it down here in the field, and this field on a heavy rain fills up.

Q. It does now? *A.* It does now; consequently it would form a back pressure in this other pipe.

Q. In other words, you would be delivering more water at this point below here than it could take care
10 of? *A.* Than it could take care of.

The Court: You would be delivering just so much less at the other place, and that argument don't quite convince me. I have had a good deal to do with this kind of thing. If it backs it up now it won't back it up any more.

A. No.

Q. In your judgment, would this plan proposed in
20 red on blue print D 3 effectually relieve the flow of water into Main street?
The Court: You are speaking about the difficulty of getting the right of way of this fellow over whose land you run. You will deliver the same water at the same point you do now, but instead of having one pipe of twenty-four inches, at a declivity of only four or six inches to the hundred, you will have two, and one of them will be at a much greater declivity.

Q. In your judgment, would this plan proposed in red on blue print D 3 effectually relieve the flow of water into Main street?

30

The Court: Under the bridge, the flow of water under the bridge?

A. I don't think it would.

Q. Why not? *A.* Because there is so much water draining in under the bridge at Main street that I don't think if you put—what size pipe you put there you could take it away fast enough; that is, it goes in so quick on a heavy rain.

Q. (By the Court). You mean from the road itself?

A. From the road itself.

Q. From the street or the railroad, which?

A. From the street on both sides.

Q. Would this plan proposed in red on D 3, would it relieve the water that comes down—would it take all the water that comes down along the railroad at present? A. Yes, sir.

The Court: You need not ask or answer the question. It is manifest to me, and I think don't require any conceded engineering knowledge to know that the system you have got now will take care of half the water, or two-thirds, or one-quarter, much better than it will a greater quantity. I am not sure it would not take care of it at all. I don't know how much mud or dirty water comes down from the railroad, but I do know, on general principles, that there must be a great deal of mud and dirty water come down from the stone road from the south down that seven feet to the hundred declivity; it must be so, and it has got to go somewhere, and unless there is rapidity of flow enough to keep it from settling, because it is only the velocity of the stream, what is called the scouring power, that takes up coarse material and carries it in a state of half suspense; the moment you check the velocity down it begins to settle right away, and that bottom of that twenty-four inch main has got dirt settled in it all along; I have no more doubt of it than I have that I am alive.

Cross Examination, by Mr. Corbin.

Q. What is the elevation, top of the railroad at this crossing on Main street? A. Well, I have comparative elevations.

The Court: That is what he wants. Whereabouts is there an up grade to the west?

Mr. Corbin: If he will give me the elevations we can figure them ourselves. I think we can get at it more accurately this way.

Q. Can you give me that elevation? Take your own data, or take any data? *A.* 89.9.

Q. (By Mr. Silzer.) Where is that at?

A. At the top rail of the bridge.

Q. What is your data there? Is that sea level?

A. No, sir; I established my own data.

Q. It is a little above sea level? *A.* Yes, sir.

Q. Now, what is the elevation of the rail five hundred feet east—or give me some point near there and tell me what it is? *A.* Well, in eighteen hundred feet—

Q. Never mind eighteen hundred feet. Five hundred feet. Can you give me that?

The Court: What is the elevation eighteen hundred?

A. We get down to elevation 100.

Q. You get up, you mean?

A. Get up to elevation 100.

20

The Court: Eleven feet, or nearly that, in eighteen hundred.

Q. That is a regular up grade, is it? *A.* Yes, sir.

Q. Now, when does the grade change again? How much further east would you reach the summit there, at what point? *A.* We reach the summit eighteen hundred feet east of the bridge.

Q. That is the summit? *A.* Yes, sir.

Q. Then the grade begins to fall toward the east, does it? *A.* I didn't run any further than eighteen hundred feet.

The Court: It is down grade from that place to Rahway. Everybody that rides on the railroad knows that.

Q. Is it?

The Court: Yes, it is down grade from there; I know.

Q. That eighteen hundred feet is near Robinvale station? *A.* Yes, sir.

30

Q. Little to the west of it? *A.* Yes, sir.

Q. And that point eighteen hundred feet east of the crossing, is a point which is a short distance west of Robinvale station.

The Court: All right.

Q. Now then, what is the grade going east from that eighteen hundred feet point? *A.* I don't know.

Q. You don't know that? *A.* No.

Q. You don't know those elevations? *A.* No, sir. 10

Q. (By the Court.) Now, go west from the station, Metuchen station. How is the grade?

Q. Is there any one here who can give those elevations on the railroad? *A.* No, sir.

Q. (By the Court.) Don't you know what the grade is west of the station? *A.* It is a continuous grade; but I only ran my levels as far as the west side of the bridge.

Q. (By the Court.) Do you say it is down grade all the way west of Metuchen? *A.* I don't know how far west; it is down grade across the street. 20

Q. Do you know what is the bottom of that grade going west? *A.* No, sir.

Q. Is it at the Lehigh bridge? *A.* I don't know.

Q. You don't know? *A.* No.

Q. Is there any one here that can give the levels, the elevations on the Pennsylvania? Haven't you got them all? You have got them all in your offices, haven't you? *A.* We have records in the office.

Q. Nobody here that can give them, eh? 30

A. No, sir.

Q. Do you know what the depth of the culvert—Do you know of the culvert which is about two or three hundred feet east of Robinvale station?

A. I know there is one there; I don't know how deep it is.

Q. Do you know what the depth of it is below the track? *A.* No, sir.

Q. Now, you say you took some—you had some levels west of this crossing—or didn't you have any?

A. No, sir.

Q. No elevations west of the crossing?

A. Except the elevation for the open ditch.

Q. (By the Court.) Was that taken on the railroad?

A. No, that is on the outside of the railroad.

The Court: I should like very much to know the grade of the railway each way.

Q. Starting from the crossing in the highway and going north, do you know how far it is along the street
10 before you reach the drainage summit? Do you know how far that cut draws from the north in the highway?

A. I don't know exactly; no, sir.

The Court: That was given by your people. Mr. Tice gave that the other day here, I think.

Q. Very short distance, isn't it? A. Very short distance; not over a hundred and fifty feet.

Q. On the south side it is very much further?

A. Yes, sir.

20

The Court: This plan won't relieve much water, road water, out of the cut, out of the sag.

Mr. Strong: I was under the impression when I was here last, impression derived from a letter which was put in on the other side, written by Mr. Abercrombie, that there was some formal agreement as to the construction of this undergrade crossing.

The Court: Between the old township of Raritan and the city.

30 Mr. Strong: Yes; and I have not been able to find any original paper. I have found this, which seems to be a copy of something. It is signed by Messrs. Tappan and Stell as surveyors of the highways. I haven't the original and don't know where it is.

The Court: Been a search made?

Mr. Strong: Been a search made in the offices, and this has only come to my hands to-day, I will say, and this is what there is of it.

Mr. Corbin: Relate to Woodbridge avenue?

Mr. Strong: It simply provides for the change of

grade, and states the width of the excavation, and the head room.

Mr. Corbin: It ought to be in the clerk's office.

Mr. Strong: No, it isn't in the clerk's office. This is all I have of it if you want it (handing paper to Mr. Corbin). I think it was admitted on the part of the complainant at the last hearing that this change in grade, whatever was done there was done in connection with the improvement of moving the station there at that time, and with general public consent. 10

The Court: I don't recollect what was admitted.

Mr. Strong: I think it appears so.

The Court: Subject to what Mr. Corbin may argue on the subject, I should say it seems it must have been made by general acquiescence. The evidence is written up. If you find anything of that kind and want to remind me of it now you may do so.

Mr. Corbin: It is not a thing that would help my friend much, but I don't think it is competent. We ought to have some official action. I should think that 20 would be a matter of county record, wouldn't it?

Mr. Silzer: If anything was ever done.

The Court: Is this bridge an ordinary iron truss bridge?

Mr. Silzer: Yes.

Mr. Tice: Girder bridge.

The Court: It is not an arch bridge?

Mr. Tice: No.

Mr. Strong: Do you admit that this whole situation, that is, the depression of grade and the arrange- 30 ments for drainage were made at the time they were made as part of the general scheme by which the depot was to be placed there, and by general acquiescence?

The Court: Have you found what you wanted?

Mr. Strong: What I was thinking of is in the testimony, page 53, Mr. Tice being on the stand and being cross examined. Mr. Tice did not seem to know, but Mr. Corbin says he admitted it.

Now, the only other thing that I desire to be put in is objected to on the part of the complainant, and I

have not here the necessary testimony to prove a search for the original. I say this purports to be a copy, and I submitted it to the gentlemen on the other side.

Mr. Silzer: We found no original; we looked yesterday in the clerk's office.

Mr. Strong: They have made that search and say it is not found in the clerk's office.

The Court: What is the paper?

Mr. Strong: The paper is an application by Mr. Brooks, engineer of maintenance of way of the railroad company, proposing this depression, and that is recited in a document signed or purported to be signed by Tappan and Stell, surveyors of the highways of Raritan Township, consenting to the depression of grade. That seems to have been required by an act, statute, approved April 16, 1868. I want to put that in. As I say, I am not prepared to make strict search for the original. All I can say is that this is furnished from the offices of the company, and I am informed at the same time they cannot find the original; but at the same time I have got to make strict proof that that is lost.

The Court: What have you got to say to it?

Mr. Corbin: There seems to be several objections to it. In the first place, I haven't examined the act of 1868, but I should suppose there is no authority on the part of the surveyors of the highways to raise the grade. But, beyond that, we have got no proof that there ever was an original.

The Court: Are those men alive who signed it?

Mr. Corbin: Tappan is.

Mr. Silzer: John C. Stell is alive.

Mr. Strong: They have a right to strict proof of this, and I haven't the evidence to make it.

The Court: I don't suppose the complainant will object to giving you an opportunity to supply the proof. Will you, Mr. Corbin?

Mr. Corbin: No; we don't like to delay the cause.

John Robinson, recalled.

Direct Examination, by Mr. Strong.

Q. You were formerly town clerk of the township of Raritan? *A.* Yes, sir.

Q. And was J. L. Morse chairman in the year 1889 of the township committee? *A.* I don't know as my memory serves me exactly as to that.

Q. He was chairman of the township committee for a number of years, wasn't he? *A.* I don't know about 10 a number of years; he might have been one or two.

Q. What do you know? Just tell us then what you know about that? *A.* About him being chairman?

Q. About Mr. Morse being chairman of the township committee. *A.* He was chairman once; yes.

Q. Do you know when, approximately? *A.* It was a good many years ago; I can't remember the year.

Q. (By the Court.) Were you clerk in the year 1868? *A.* 1868? No, sir.

Q. You were in 1889? *A.* Yes, sir. 20

Q. Do you recollect? Just read that paper.

A. No, sir; I don't remember it.

Q. Do you recollect sending a communication of that character? *A.* I don't remember it.

Q. Were there any minutes kept by you as town clerk at that time? *A.* Yes, sir.

Q. In what form? *A.* Well, regular book form; there was a book of minutes.

Q. There was a book of minutes, was there?

A. Yes, sir. 30

Q. Did that contain the resolutions of the township committee and the proceedings? *A.* Yes, sir.

Q. What did you do with that book when you ceased to be town clerk? *A.* Passed it over.

Q. To whom? *A.* To my successor.

Q. Who was he? *A.* I think Mr. Frank J. Metzrath.

Q. When did you do that—hand the book over to him? *A.* Probably 1894; I won't say positive.

Q. What happened then? You ceased to be town clerk? *A.* Yes, sir.

Q. Was that the time that the borough was formed?
A. No, sir.

Q. Before that? A. That was before; yes, sir.

Q. Have you seen that book since? A. No, sir.

Q. You haven't made any search for that book for any proceedings or resolutions by the township committee with respect to this undergrade crossing of Main street? A. No, sir.

10 Q. Do you remember that there were some resolutions on that subject passed by the township committee? A. No, sir; I do not.

Q. Don't remember that at all, eh? Who is the present town clerk? Metzrath yet? A. No, sir; there was a new one elected this last fall; Mr. Donomore was the clerk previous.

Q. Who is now—who was elected last fall?

Mr. Silzer: A man named Dixon.

A. A man named Dixon; yes, sir.

20 Q. He isn't here in court, is he?

A. I don't know the gentleman myself.

Mr. Strong: I think we ought to have an opportunity of supplying the records of the township committee as well as the reports of the surveyors of the highways. I don't suppose the surveyors of the highway had any record; but I mean this consent of theirs that appears here; the original of it is or ought to be in the possession of the company.

30 Mr. Corbin: We have the township minutes here. Page 149, minutes of 1889.

Thomas L. Dixon, sworn.

Direct Examination, by Mr. Strong.

Q. Are you the present town clerk of the township of Raritan? A. Yes, sir.

Q. Elected when? A. November last.

Q. And have you in your possession the book of minutes of the township committee delivered to you by your predecessor? A. Yes, sir.

Q. Covering the year 1889? A. Yes, sir.

Q. And 1888 also? A. Yes, sir.

Q. Will you hand us the book and refer us to it?

Mr. Silzer: Page 149, Mr. Dixon.

Mr. Corbin: I object to the offer of the minutes on the ground that the township committee had no authority either to vacate any part of the street or to regulate the width of the roadbed or the sidewalks. 10

The Court: I shall admit it, subject to the objection.

Q. Have you looked through this book for the action of the township committee in reference to the change in grade of Main street? A. No, sir.

Q. You haven't made that examination? A. No, sir; I have made no examination of those old books; 20 I have only had them in my possession about three weeks.

Mr. Strong: The only minute that I find here is on page 149. Is there any other, gentlemen, that you know of?

Mr. Corbin: I don't know of anything else that relates to this matter.

Mr. Strong: And that shows substantially what your Honor saw there in the shape of a copy. 30

The Court: The entry is this, on page 149:

"Metuchen, New Jersey, May 18, 1889. The town committee met at the clerk's office for the purpose of notifying the Pennsylvania Railroad Company to change width of sidewalks and extend width of roadway south of the track on Main street. Resolved, That the Pennsylvania Railroad Company be authorized to make the sidewalk six feet wide instead of ten, and add to the roadway eight feet taken from the sidewalks, making the roadway twenty-five feet wide in-

stead of seventeen." Copy of resolution sent to E. F. Brooks.

"Metuchen, N. J., May 18, 1889. Mr. E. F. Brooks, Engineer Maintenance of Way Pennsylvania Railroad Company. Dear Sir: In accordance with the resolution passed this day by the township committee of Raritan Township, you are authorized by them to make the sidewalk six feet wide instead of ten, throwing the other eight feet into the roadway, and we will
10 release you of all responsibility that will arise hereafter. Joseph L. Hahn, chairman; L. H. Tappan. John Robinson, town clerk. Approved by the committee June 1st, 1889. John Robinson, town clerk."

That is a copy of everything here except the consent of the surveyors of highways.

Mr. Strong: Yes, sir; that wasn't in our book; that was another body. This book is offered.

The Court: It is received, subject to the objection of Mr. Corbin.

20 Mr. Strong: I don't suppose the book needs to be marked, the original book?

The Court: Oh, no.

Mr. Strong: An act relative to the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company and the New Jersey Railroad and Transportation Company, approved April 15, 1868, being chapter 446 of the Pamphlet Laws of 1868, and found on page 1037, is offered in evidence.

The Court: It is received.

30 Mr. Strong: What have you to say about that paper? Do you want me to make formal proof and strict search?

Mr. Corbin: I don't think we ought to admit it.

Mr. Strong: Then I will have to ask your Honor to give me a chance to make strict search for it.

The Court: I will do that. You have got to prove, in the first place, where according to the regular business of the company it ought to be filed; then you have got to search those files; but they have all that kind of

documentary evidence distributed and located some place.

Mr. Strong: That is all we have to offer. With that exception we are through.

The Court: I shall give you an opportunity to make that proof. Have you anything in rebuttal?

Mr. Corbin: No, I think, nothing.

The Court: Paper alleged to be a copy of a consent by the surveyors of the highway of Raritan Township to the change of grade of this road, and being the paper which was shown Mr. Robinson on the stand, not admitted in evidence, but marked Exhibit D 5. 10

Adjourned to Tuesday, February 27, 1906.

20

30

New Jersey Supreme Court.

THE MAYOR AND COUNCIL OF THE
BOROUGH OF METUCHEN

v.

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL.

10 FINAL HEARING ON BILL, ANSWER AND PROOFS.

Submitted June 7th, 1906. Decided July 18th, 1906.

Mr. Charles L. Corbin and Mr. George
S. Silzer, for the Complainant.

Mr. Alan H. Strong, for the Defendants.

PITNEY, V. C.

20 This suit is brought by the Borough of Metuchen against the Pennsylvania Railroad Company, as lessee, and the United Railroad Companies of New Jersey, as lessor, of a section of the great through railroad route between New York and Philadelphia.

Its object is to compel the defendants to correct and remedy alleged defects in a crossing of the railway over Main street in the borough.

The complainant invokes this action by this Court under the 29th section of the revision of 1903 of the act concerning railroads, session laws of 1903, page 660.

30 That section, then first enacted, provides that "When any company shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks as required by law, it shall be lawful for the governing body of the township or municipality wherein such crossings are located . . . to proceed by a suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings, and the Court shall pre-

scribe the crossing to be constructed or the repairs to be made."

The 26th, 27th and 28th sections contain provisions regulating the crossings in both country and urban districts.

The defendants are operating their road under the original charter of the New Jersey Railroad and Transportation Company, P. L. 1832, page 104, which, by section 20, requires that 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." 10

The standing of the municipality in this Court in cases of this sort was thoroughly established in the case of *The Inhabitants of Greenwich v. The Easton and Amboy Railroad Company*, 9 C. E. Gr. 217, affirmed on appeal in 10 C. E. Gr. 565, which has been followed in many instances.

However, most if not all of those cases were instances of preventive remedy in which the Court was asked to prevent the creation of an obstruction or *purpresture* upon a public highway. 20

The power of the Court to compel by mandatory proceedings the railroad corporation to do its duty in this respect rests, so far as I am aware, wholly upon the statute of 1903.

The particular defects which the bill seeks to remedy are threefold.

First, that the bridge by which the railway tracks now cross the street encroach upon the street by its abutments and reduce its lawful width of sixty-six feet to about forty-four feet. At the same time those abutments, which are over eighty feet in length, are not parallel to the side lines of the street, but are laid at right angles to the course of the railway, which cuts the centre line of the street at a slightly acute angle, and that the narrowing and distortion of the street seriously impedes public travel. 30

In the second place, that the railroad company, in order to accommodate its grade line to that of the road-

way, depressed the roadway several feet, making a cul de sac immediately under the bridge with a rising grade in the street in each direction therefrom, the result of which was and is that the surface water falling on the street collects immediately under the bridge and there forms pools of water immediately after a rain.

In addition to the water that thus reaches this cul de sac a large contribution comes from the railway tracks to the east of the bridge, there being a rising grade from the bridge in that direction for a distance of eighteen hundred feet.

A few hundred feet to the east of the bridge there is a natural divide in the surface of the earth, the water on the westerly side draining towards the bridge and thence to the Raritan River above tide water at Bound Brook, and on the easterly side toward the Rahway River.

The exigencies of the railroad company have extended this natural divide a considerable distance to the east so far as its track is concerned, so that a considerably greater area of surface of the railway tracks than is natural is drained toward the railroad bridge, and dropped by a steep declivity of ten or twelve feet into the cul de sac under the bridge, there uniting with the surface water coming from the street on each side of the railway.

At the time of the building of this bridge, which was in 1889, the railroad company attempted to provide for this surface water by a tile drain two feet in diameter leading from the cul de sac lengthwise under its tracks and emerging fourteen hundred feet away on the north side of their track, from which the water found its way into a rivulet emptying into the Raritan River at Bound Brook.

This drain or conduit seems to have served its purpose reasonably well up to within a few years, but has now become entirely insufficient.

I do not recollect that any expert opinion was offered in explanation of this recent inefficiency, but I think it

can be easily explained from common knowledge. The surface water which reached this cul de sac, both that from the highway and that from the railroad tracks, carried with it a great deal of earth, which, on the occasion of each heavy rain, settled in this cul de sac and covered the roadway and sidewalks and had, of course, to be carted out. But a considerable portion of it found its way in the shape of very muddy water into the tile drain, which had a declivity of only four and one-quarter inches in one hundred feet. 10

This gradient of four and one-quarter inches to the hundred feet was given by one of the engineers of the defendant, and would indicate a fall of about five feet in the whole length of fourteen hundred feet. Another engineer of the defendant stated the difference of elevation of the roadway under the bridge and the outlet of the drain to be seven feet, making a fall of six inches to the one hundred feet, and showing an apparent discrepancy of the two engineers of about two feet.

As a jurymen I should say that this declivity was 20 not sufficient to produce a rapidity of flow sufficient to produce the scouring capacity sufficient in its turn to carry all the sediment out of the tile or drain. The result is, probably, that the original carrying capacity of the drain has been seriously reduced by the subsidence and lodgment of heavy particles of earth and sand along its course.

However, be that as it may, the result of the present situation is that in times of heavy rains the roadway under the railroad is rendered nearly or quite impassable. 30

The third complaint of the municipality is that the railroad company is bound by the terms of its charter to keep that part of the street immediately under the bridge in repair, relieving the municipality of its duty in that behalf.

The railroad company admits its liability in law as to the first two items of the charges of the complainant, but denies it as to the third.

Without at this moment stopping to determine the

question of construction of the clause in the old charter thus raised, I will proceed to consider the other defenses set up by the defendant which go to the whole of the complainant's case.

And first it contends that the section of the act upon which the complainant relies is unconstitutional; or in other words that the legislature had no power to confer on this Court the right and power to give to a municipality compulsory remedy by way of compelling
 10 specific performance by a railroad company of its duties in this behalf, as contra-distinguished from its power to give it a preventive remedy, such as was given in *The Inhabitants of the Township of Greenwich v. The Easton and Amboy Railroad Company*, supra.

With regard to this defense, I think it has already been disposed of by the Court of Errors and Appeals. In the case of *Palmyra v. The Pennsylvania Railroad Company*, 17 Dick. 601, the question was elaborately
 20 discussed by Vice Chancellor Grey, commencing at page 610, and his opinion upholding the power was adopted by the Court of Errors and Appeals in affirming his decree. 18 Dick 799.

The same doctrine was reaffirmed in the *Perth Amboy case*. *Eckert v. Perth Amboy and Woodbridge Railroad Company*, 20 Dick. 777.

The Court was, in both these cases, dealing with a proceeding under the 36th section of the revision of the general railroad law, P. L. 1903, page 664, which
 30 provides for compulsory proceedings to establish gates or bars across the railway. But I am unable to distinguish between the authority given by that section (36) and that given by section 29, under which these proceedings are had. The principle established by Vice Chancellor Grey's reasoning and adopted by the Court of Errors and Appeals includes the present case. And it seems to me *a fortiori*; for section 29 merely provides for the compelling of the specific performance of a duty resting upon the railway by virtue of its original contract with the State, while Section 36, as it

seems to me, goes farther and compels the railroad, without regard to their original contract, to adopt and establish means to provide simply against the danger of injury arising from the inadvertance of persons crossing the railroad by a highway at a grade crossing.

I have spoken of the charter of the New Jersey Railroad and Transportation Company as a contract between it and the State. It certainly is a contract on behalf of the State in the sense that it cannot be altered or the franchise withdrawn unless the power to do so is reserved in the charter, and I think it may be properly said that the acceptance of it by the railroad company amounts to a contractual obligation on its part to perform the duties imposed upon it thereby. Thus it seems to me that the jurisdiction given to this Court by section 29 *supra* is cognate to the familiar jurisdiction of this Court to compel the specific performance of contracts.

The next defense set up by the defendant is that the present arrangement of the crossing was adopted by and with the consent and acquiescence of the then municipal authorities, the Township Committee of the Township of Raritan (the Borough of Metuchen had not been organized at that time), and by the consent of the Surveyors of the Highway of that township.

The legislative authority invoked by the defendants for this is found in the session laws of 1868, page 1037, being "An Act relative to the Delaware and Raritan Canal Company, The Camden and Amboy Railroad and Transportation Company, and The New Jersey Railroad and Transportation Company."

The first section authorizes the companies to shorten and straighten any part of their railroad lines and to cause the same to pass above or below any public highway or street crossing the same, and if necessary to change the location *or grade* of such highway or street so as to make the crossing more convenient
 "provided that the location or grade of no street or highway shall be changed without the concurrence of the common council of any city or borough, or a ma-

majority of the surveyors of the highways of any township in which such change may be made."

It will be seen that the then governing body, namely, the township committee of the township, is not mentioned, and no authority is given even by implication to that committee to give any dispensation whatever to the railroad company. The whole jurisdiction in that respect herein question is vested in the two surveyors of the highways of the township. The defendants, at
 10 the hearing, attempted to prove that they had such a document executed by the then two surveyors of the highways of the Township of Raritan which permitted this change to be made precisely in the way it was made. At the hearing what purported to be a copy of such a document was produced purporting to be signed by two men, Messrs. Tappen and Stell, both still living, but the original was not produced nor was any proof given of its actual existence. At the close of the evidence leave was given to counsel for the de-
 20 fendants to supply the proof of the existence of the original document, but no such proof was ever produced, and counsel for the defendants afterwards stated to me personally that they had been unable to produce it, and no reliance was placed upon it in the written argument of that counsel.

But it is to be observed that the proviso above quoted contains no authority on the part of the surveyors of the highway to vacate, either in whole or in part, or to reduce the width of any street or road.

30 Whatever municipal authority was shown to exist for the present arrangement is found in an entry on the minutes of the Township Committee of Raritan Township, as follows:

"Metuchen, New Jersey, May 18th, 1889.

"The town committee met at the clerk's office for the purpose of notifying the Pennsylvania Railroad Company to change width of sidewalks and extend width of roadway *south of the track on Main street*. Resolved, that the Pennsylvania Railroad Company be authorized to make the sidewalk six feet wide instead

of ten and to add to the roadway eight feet taken from the sidewalks, making the roadway twenty-five feet wide instead of seventeen."

"Metuchen, N. J., May 18th, 1889.

"Mr. E. F. Brooks, Engineer, Maintenance of Way,
"Pennsylvania Railroad Company.

"Dear Sir:

"In accordance with the resolution passed this day by the Township Committee of Raritan Township you are authorized by them to make the sidewalk six feet wide instead of ten, throwing the other eight feet into the roadway, and we will release you from all responsibility that will arise hereafter. 10

"JOSEPH L. HAHN, Chairman.

"L. H. TAPPEN.

"JOHN ROBINSON, Town Clerk.

"Approved by the Committee, June 1st, 1889. John Robinson, Town Clerk."

This entry shows plainly on its face that it referred wholly to the width of the road to the south of and outside of the bridge in question. 20

In order to accommodate the grade of the highway to the grade of the railroad the defendant made a deep cut in the highway on the south side of the bridge, with sloping banks, thereby narrowing the usable width of the road which previously, according to the evidence, had been opened and used on both sides of the railway substantially to its lawful width of sixty-six feet. And to the roadway in these cuts the resolution refers.

But granting that the resolution recognizes the narrowing of the street under the railway; and granting, what is alleged by the defendant but not proven, that such narrowing was done with the acquiescence and tacit consent, not only of the Township Committee but of the inhabitants of the vicinity, there yet remains two complete answers to the defense so far as defendants rely thereon. 30

First, that the Township Committee had no authority in law to vacate any part of the public highway or to

authorize any occupation thereof or obstruction to be placed thereon by the railroad. (*City of Hoboken v. Hoboken Land and Improvement Company*, 7 Vr. 540.) And the case is clearly not within the doctrine of the case of *Easton and McMahon v. New York and Long Branch Railroad Company*, 9 C. E. Gr. 49.

In the second place it is quite clear that the bridge and its width and location and the change in the grade of the street were wholly the device and plan of the
 10 defendants, who are responsible therefor, and however ample it may have been to accommodate the travel as it existed at the date of its construction, the evidence satisfies me that it is not sufficient for that purpose at the present time, and hence the case is brought within the rule which was established by the Supreme Court in *Central Railroad of New Jersey v. The State*, 3 Vr. 220. There the Chief Justice, speaking for the Supreme Court, was dealing with the clause in the charter of the Central Railroad of New Jersey, correspond-
 20 ing with and substantially similar to that which imposes the duty on the defendant railroad to maintain passages over or under its railroad, above cited. He uses this language:

“This provision, it will be perceived, imposes a duty on the company in favor of the public. It is to be taken most strongly against the corporation, but it is to receive a reasonable construction. It is a continuing duty to which the company is made subject, which, in its performance, must be measured by circumstances.
 30 Thus, a bridge or a passage way, which at one time would be adequate to the public accommodation, might at a subsequent period, from an increase of business or population, be totally inadequate, and consequently a provision which at one juncture would be a discharge of the duty, would at another, amount to its infraction. Suppose a public street in a town to have been originally laid by the company over the surface of their track, and that by reason of the growth of their business, at that locality, their trains should pass in such quick succession as to render such street almost im-

passable; under these circumstances, could it be pretended that the company could discharge themselves from the obligation which the section in question imposes, except by passing the street thus obstructed under their road, so as to restore it to public use. The duty prescribed is, to keep at all times, and under all circumstances, the public highways, at the point where they cross the railroad, in a condition fit for safe and convenient use."

That principle has been restated in so many instances 10
by the judges of this State as to have become thoroughly embedded in our laws. See the opinion of Chancellor McGill in *Township of Raritan v. Port Reading Railroad Company*, 4 Dick. 14, and *Read v. Camden*, 24 Vr. 322 and 326, and later on in *Palmyra v. Pennsylvania Railroad Company*, *supra*, and the additional cases there cited.

If, then, the passage way under the railroad provided by the defendant in 1889 has become insufficient, it is their duty, under the language of their charter, to cause 20
the passage way to be enlarged.

It was not contended that the clause in question found in defendant's charter or any other clause or legislative grant authorized the defendants to put the abutments or supports to their bridge within the lines of the street, except that they have the right to plant posts for support to their structure on the edge of the sidewalks, giving an increased width to the outside of the sidewalks from their own right of way. This right is given by a proviso in section 27 of the revision of the act 30
concerning railroads, P. L. 1903, pages 659-660.

I find therefore that the defendants have no excuse either at law or in equity, as to the first two charges against them, namely, the placing of the abutments to their bridge within the lines of the street, and the failure to properly drain the cul de sac which they have formed therein.

But, say the defendants, this Court ought not to exercise jurisdiction, because there is an ample remedy at law, either by mandamus, ejectment or indictment.

The remedy by mandamus was so thoroughly dealt with by Vice Chancellor Grey in his opinion in the Palmyra case, *supra*, commencing at the bottom of page 615 (17 Dick.) that I will only refer to it. The learned Vice Chancellor was indeed dealing there with the constitutional question, but what he says applies with equal force to the present situation and shows the inadequacy of such a proceeding. It lacks the pliability and adaptability to special circumstances which the

10 remedy in this Court affords. It is true that there is a remedy at law by mandamus to compel a railroad company, or a canal company, to build a bridge across such railroad or canal. It was so decided in this State by the Supreme Court in the Trenton Water Power Company case, Spen. 659, and Mr. High, in his work on Extraordinary Legal Remedies, at section 319-320 dilates upon the subject, and comes to the same conclusion. But I have found no authority which goes to the length that the remedy by mandamus is efficient

20 to adjudge a structure already existing as inefficient or to be a public nuisance and to order its removal and the substitution therefor of a proper structure, or to define what a proper structure should be.

Moreover, it seems to me that the statute, above cited, giving this Court jurisdiction, gives the remedy in this Court a sort of preference over other known remedies, and declares in advance that this Court shall and may assume and exercise jurisdiction without stopping to carefully examine and strike a balance

30 between the adequacy of the remedy at law whether by mandamus, ejectment or indictment, and that in this Court. It may be admitted that each of those remedies are open to the complainant.

The remedy by ejectment was recently maintained by Justice Pitney sitting in the Passaic Circuit Court.

But the question arises, what would the complainant do with a judgment in its favor giving it possession of the ground within the limits of the highway occupied by the abutments of the defendant's bridge, and how would that judgment be used to widen the road

except by destroying the bridge and interrupting travel over a great public highway.

Then with regard to the remedy by indictment. The same criticism arises. Suppose the indictment found and conviction under it and an order to abate the nuisance. What would the sheriff do?

But after all, to speak with perfect frankness, the sentiment of the bench and bar as to the adequacy of indictment in cases like the present has changed and advanced within late years. As early as the case of the Hoboken Land and Improvement Company v. Hoboken (1873), 7 Vr. 540, Justice Depue, speaking for the Court of Errors and Appeals, says: "Where the public easement is such that possession, exclusive of any interference by the owner of the fee, is essential for its improvement, regulation and enjoyment, the only appropriate action to obtain the possession is ejection. To deny this form of relief and remit the public to a remedy by an indictment for a nuisance would result in subjecting public rights to the varying moods of grand juries." 10 20

The learned judge was there dealing with the choice between ejection and indictment, that is, between a civil remedy and a criminal remedy, and his reasoning applies here, and is supported by the Trenton Water Power case, *supra*.

And Vice Chancellor Emery in *Grey v. The Greenville and Hudson Railroad Company*, 14 Dick. 372, at the bottom of page 387 says: "The uncertainty of protecting public rights in highways by indictments against nuisances was one reason for the establishment of the doctrine that these public rights should also be protected by ejection and by injunction pursued by the municipal bodies vested with the control of the highways." And he then quotes the language of Justice Depue which I have just quoted. 30

In support of his position in this behalf counsel for defendants cites a long line of cases culminating in that of *The Inhabitants of the Township of Raritan v.*

Port Reading Railroad Company, 4 Dick. 11 (1891), decided by Chancellor McGill.

That case is also relied upon by the complainant in support of its position on the lack of right of the railroad company to narrow the highway, and is precisely in point on that subject.

But while deciding as he did that the duty of the railroad company was to place the supports of its bridge entirely outside the line of the highway (in that case fifty feet wide) he declined to grant an injunction on the ground that its proposed structure which was to be supported by abutments only twenty-five feet wide, was entirely ample for all present and immediately prospective travel over the highway, and he remarked that under the doctrine of the Central Railroad case above cited, 3 Vr. 220, it would be the duty of the railroad company to widen the passage way whenever the public travel required it, and after asserting the power of the township to maintain its suit for preventive remedy in this Court he refused to grant the injunction on the ground "that the travel over the highway is merely nominal, and that the roadway in use consisted of a single wagon track, and that the highway on each side of the wagon track where the abutments are being erected is under brush and weeds, so that for all practical purposes the twenty-five foot space between the abutments will be ample for the public accommodations at present and perhaps for years to come." He then remarked that the remedy by indictment was sufficient to abate the nuisance and restore to the public the use of the entire highway. The latter remark was entirely unnecessary for his decision, and it is entirely clear that it was based upon the facts in the case, which showed that no practical inconvenience would arise to the public from the contemplated encroachment. And it is equally clear that had the circumstances justified it he would have granted the injunction.

I am therefore of the opinion that the complainant is entitled to relief as to the first two charges above

mentioned, namely, the location of the abutments of the bridge within the limits of the road and the insufficient drainage of the cul de sac which defendant has created in the grade of the highway.

I stop here to say that the railway company at the hearing presented a plan which it had devised to remedy this collection of water by entirely diverting all the surface water which comes down to the bridge from the long strip of railway to the east thereof. It may be that if it succeeds in such diversion the present long drain will be sufficient to carry away the water which accumulates there from the surface of the highway. 10

I come now to the third duty which the complainant asserts rests upon the defendants and which they have not performed, and that is the maintaining in good order the highway under the bridge.

The language of the obligation is this: "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." 20

I am unable to follow the very ingenious argument of the counsel for the complainant in support of his construction of that clause of the act. I think that the words "construct and keep in repair," applies wholly to the word "bridges." It may be said that the railroad will in self-protection, so to speak, keep a bridge like this, which conveys the railroad over the highway, in good repair. But that consideration does not apply to the case where the bridge is erected to carry the highway over the railroad. The words "keep and repair" 30 were intended to apply to the latter class of bridges, and do not, in my judgment, apply to the word "passages" under the railroad. This I think is the reasonable construction. The object of the legislature was to prevent the railroad company from imposing upon the public any increased burden by reason of the railway crossing. Hence where there is a crossing at grade it is the duty of the railroad to keep in repair with proper planking, etc., so much of the highway as is immediately affected by the presence of its ties and

rails. In the present case the burden of the public is not increased by the crossing except so far as the road is rendered more liable to fall into disrepair by the change in its grade and the accumulation of water in the cul de sac. But in these cases it must be borne in mind that the general traveling public over the railroad are to be considered, and that it has always been considered to be proper in adopting plans of crossings to avoid crossings at grade, and to that end that the
10 wagonway should be somewhat depressed where necessary. But I do not see upon what principle under the statute the depression in this case can be held to impose on the railroad company the expense of keeping that part of the road in repair.

No evidence was adduced at the hearing nor any suggestions made at the argument as to what remedy the Court should adopt with regard to the narrowing of the highway both immediately under the bridge and on each side thereof, and I have not given the subject
20 consideration. With regard to the drainage of the cul de sac I am inclined to think the defendant's plans presented at the hearing should be subjected to the actual test. But upon these matters I express no definite opinion. They are proper subjects for consideration and further evidence on the subject will be provided for by the decree which I shall advise upon notice to the solicitors.

In Chancery of New Jersey.

Between

THE MAYOR AND COUNCIL OF
THE BOROUGH OF METUCHEN,
Complainant,

and

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL.

Defendants.

On Bill, &c.
Decree.

10

This cause coming on to be heard in the presence of George S. Silzer and Charles L. Corbin, counsel for complainant, and Alan H. Strong, counsel for defendants, and evidence having been taken and counsel heard,

It is, on this sixteenth day of October, nineteen hundred and six, on motion of George S. Silzer, counsel for complainant, ordered, adjudged and decreed, that 20
the defendants shall, within ninety days from this date, remove their abutments and embankment from Main street, in the Borough of Metuchen, within their right of way, leaving the street sixty-six (66) feet in width, with a clear roadway of forty (40) feet, and sidewalks on each side of thirteen (13) feet, with leave to place bridge supports on the curb line upon contributing an equivalent width to the sidewalk, as authorized by the General Railroad Law; and that the said defendants shall so construct their drainage system that they shall 30
not discharge water from their right of way into the highway in such quantities as to accumulate and make pools in the roadway, or to flow over the surface of the sidewalk or roadway; and that an injunction shall issue, enjoining the discharge of water from the right of way of the defendant into the road crossing in such quantities as to back up and make pools in the roadway, and from permitting such water to be discharged over the surface of the sidewalk. The application of the complainant that the defendants shall be required

to pave and keep in repair, and suitable for travel, the surface of the street, within the lines of their right of way, is denied.

Either party may apply to the Court for further direction or relief as may be found necessary in the execution of this decree.

W. J. MAGIE, C.

Respectfully advised.

H. C. PITNEY, V. C.

10

20

30

In Chancery of New Jersey.

Between

THE MAYOR AND COUNCIL OF
THE BOROUGH OF METUCHEN,
Complainant,

and

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL.

Defendants.

On Bill, &c.
Notice of
Appeal.

10

[Filed October 24, 1906.]

The defendant, The Pennsylvania Railroad Company, hereby appeals from so much of the decree made in this Court in the above entitled cause bearing date the sixteenth day of October, nineteen hundred and six, as requires that the defendants shall, within ninety days from said date, remove their abutments and embankment from Main street in the Borough of Metuchen, within their right of way, leaving the street sixty-six feet in width, with a clear roadway of forty feet, and sidewalks on each side of thirteen feet, with leave to place bridge supports on the curb line upon contributing an equivalent width to the sidewalk, as authorized by the General Railroad Law; and from so much thereof as further requires that the said defendants shall so construct their drainage system that they shall not discharge water from their right of way into the highway in such quantities as to accumulate and make pools in the roadway, or to flow over the surface of the sidewalk or roadway; and that an injunction shall issue, enjoining the discharge of water from the right of way of the defendants into the road crossing in such quantities as to back up and make pools in the roadway, and from permitting such water to be dis-

20

30

charged over the surface of the sidewalk, to the Court of Errors and Appeals in the last resort in all causes.

Dated October 24, 1906.

ALAN H. STRONG,
Solicitor for The Penna. R. R. Co.

I conceive that there is good cause for appeal from the above stated decree.

ALAN H. STRONG,
Of Counsel with Appellant.

10

Service acknowledged October 25, 1906.

GEORGE S. SILZER,
Solicitor for Complainant.

20

30

New Jersey Court of Errors and Appeals.

Between

THE MAYOR AND COUNCIL OF
THE BOROUGH OF METUCHEN,
Complainant,

and

THE PENNSYLVANIA RAILROAD
COMPANY, ET AL.
Defendants.

On Bill, &c.
Petition of
Appeal.

10

[Filed November 17, 1906.]

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

The petition of The Pennsylvania Railroad Com- 20
pany, the appellant in the above entitled cause, respect-
fully shows that your petitioner finds itself aggrieved
by a certain final decree made in the Court of Chan-
cery by the Honorable William J. Magie, Chancellor of
the State of New Jersey, bearing date the sixteenth
day of October, in the year nineteen hundred and six,
in a cause wherein the Mayor and Council of the Bor-
ough of Metuchen was complainant and your petitioner
and others were defendants, in this respect: that the
said decree requires that the defendants shall within 30
ninety days from the said date thereof, remove their
abutments and embankment from Main street in the
Borough of Metuchen within their right of way, leav-
ing the street sixty-six feet in width, with a clear road-
way of forty feet, and sidewalks on each side of thir-
teen feet, with leave to place bridge supports on the
curb line upon contributing an equivalent width to the
sidewalk, as authorized by the General Railroad Law;
and in this respect, that the said decree further requires
that the said defendant shall so construct their drainage
system that they shall not discharge water from their

right of way into the highway in such quantities as to accumulate and make pools in the roadway, or to flow over the surface of the sidewalk or roadway; and in this respect, that the said decree directs that an injunction shall issue enjoining the discharge of water from the right of way of the defendants into the road crossing in such quantities as to back up and make pools in the roadway, and from permitting such water to be discharged over the surface of the sidewalk.

- 10 And your petitioner respectfully appeals from the said portions of the said decree upon the ground that the same are erroneous, for that the said Court of Chancery had no jurisdiction to render such decree, and for that the evidence in said cause was not sufficient to sustain such decree, and for that the said decree is contrary to equity, and for that the said bill of the said complainant should have been dismissed.

- Your petitioner therefore prays that the said decree of the said Chancellor may in the particulars aforesaid,
 20 be 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.

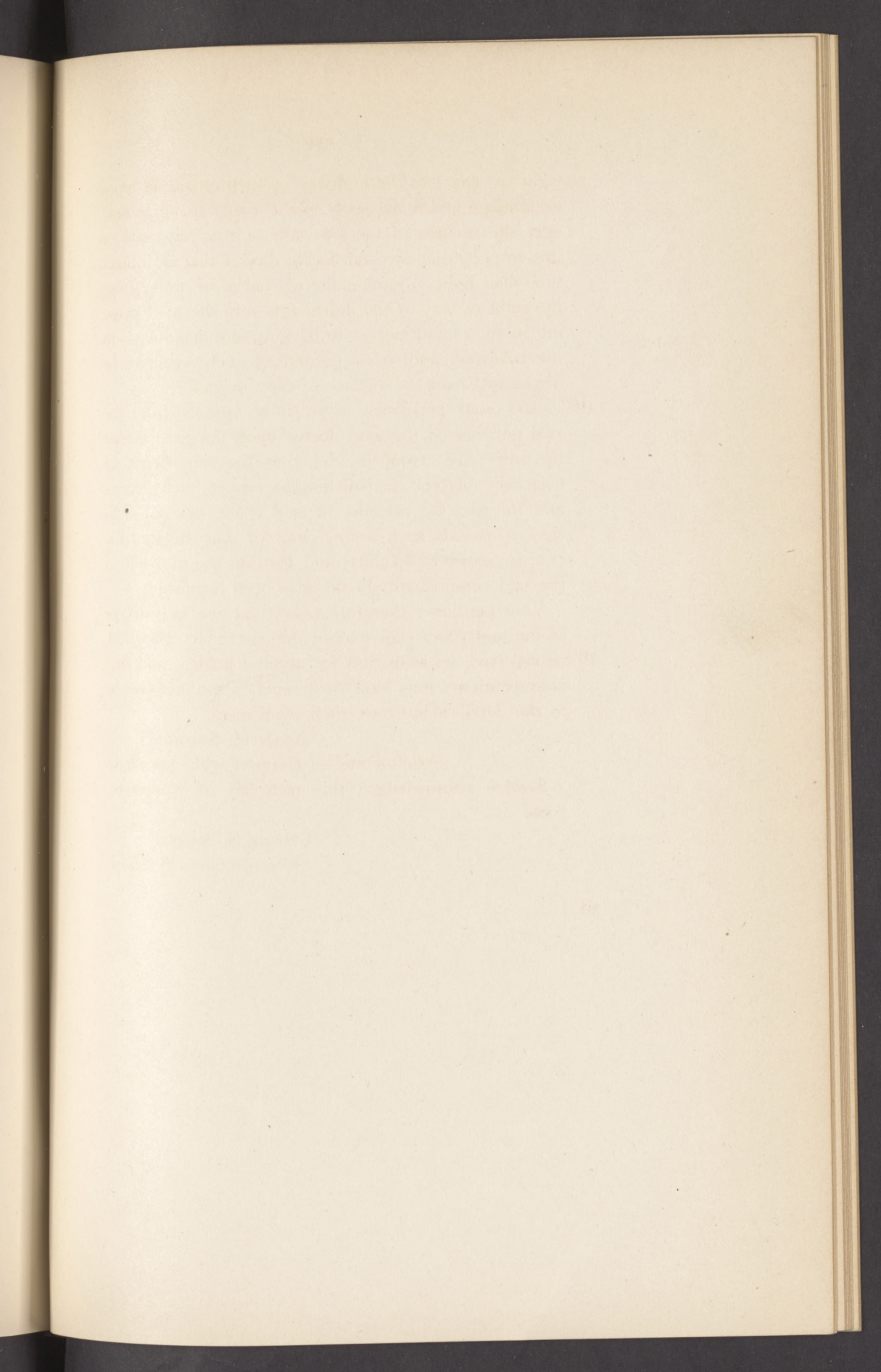
ALAN H. STRONG,

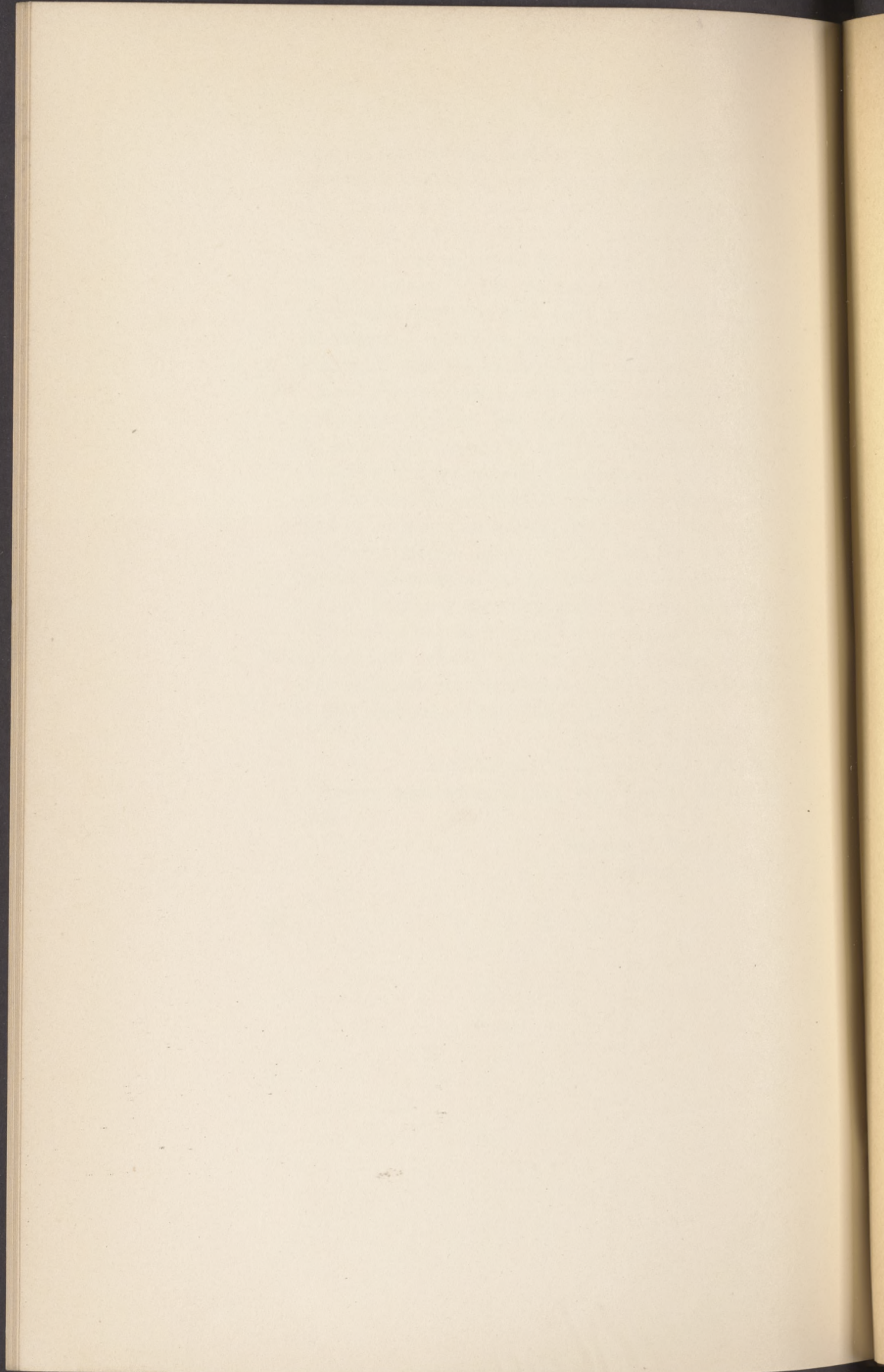
Solicitor and of Counsel with Appellant.

Service acknowledged this 16th day of November, 1906.

GEORGE S. SILZER,

Complainant's Solicitor.





NEW JERSEY COURT OF ERRORS AND APPEALS

IN SENATE, March Term, 1907.

THE STATE OF NEW JERSEY,

County of _____

vs.

ON WRIT OF HABEAS CORPUS.

Appeal from the _____

