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Notice and Grounds of Appeal.

Filed September 12, 1928.

New Jersey Supreme Court.

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THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Company, and THE MORRIS AND ESSEX RAILROAD COMPANY, Prosecutors-Appellants, vs. THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, Defendants-Respondents.	On Certiorari.

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To: WILLIAM A. CALHOUN, Esq., Attorney of Defendants-Respondents,

SIR:

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YOU WILL PLEASE TO TAKE NOTICE that The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company, Prosecutors in the above entitled cause, hereby appeal from the judgment of the New Jersey Supreme Court entered in said matter on the 9th day of August, 1928, to the New Jersey Court of Errors and Appeals, and that said prosecutors-appellants

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herewith set forth their reasons for and grounds of appeal in said matter, to-wit:

1. Because the New Jersey Supreme Court rendered judgment in favor of the City of Orange, a Municipal Corporation, and the Board of Commissioners of the City of Orange, defendants, and against The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company.

2. Because the New Jersey Supreme Court gave judgment in favor of the City of Orange, a Municipal Corporation, and the Board of Commissioners of the City of Orange, defendants, and against The Delaware, Lackawanna and Western Railroad Company, lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company, prosecutors, in dismissing the writ of certiorari allowed The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company.

Dated, September 7th, 1928.

Yours truly,

FREDERIC B. SCOTT
Attorney of Prosecutors-Respondents.

Writ of Certiorari.

NEW JERSEY, ss.

THE STATE OF NEW JERSEY to THE CITY OF ORANGE, [SEAL] a municipal corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, 10

GREETING:

WE BEING WILLING, for certain reasons appearing by the affidavit of E. T. Lukens, filed in this cause, to be certified of certain assessments made against the properties of The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company, for paving and curbing of certain streets and public places, and assessed 20 against The Morris and Essex Railroad Company and against The Delaware, Lackawanna and Western Railroad Company, as follows:—

FOR PAVING AND CURBING:

Assessed Against	Lot	Block	Assessment
The Morris and Essex Railroad Company.....	3	109	$363.12
The Morris and Essex Railroad Company.....	6	112	166.27
The Morris and Essex Railroad Company.....	6	109	484.93
The Morris and Essex Railroad Company.....	12	111	1,539.31
The Morris and Essex Railroad Company.....	Highland Av. Depot		1,425.71
The Delaware, Lackawanna and Western Railroad Company	44	132	248.67

and confirmed on the 19th day of August, 1926; 40

WE COMMAND YOU, that the said assessments and all proceedings relating thereto and connected therewith so made by The Board of Commissioners of The City of Orange, together with all matters touching and concerning the same, as fully and entirely as before you may remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the 3rd Tuesday of January, next, you certify and send, together with this writ, that there may be done what of right and according to the laws of this State should be done. In the meantime all proceedings on your part are hereby ordered to be stayed.

WITNESS, Honorable William S. Gummere, Chief Justice of our Supreme Court at Trenton, this 12th day of November, 1927.

EDWARD J. KELLEHER
Clerk.

FREDERIC B. SCOTT, Attorney.

NEW JERSEY SUPREME COURT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of THE MORRIS AND ESSEX RAILROAD COMPANY and THE MORRIS AND ESSEX RAILROAD COMPANY
Prosecutors

vs.

THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE
Defendants

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WRIT OF CERTIORARI.

Issued Nov. 12th, 1927.

Returnable December 2d, 1927.

FREDERIC B. SCOTT
Attorney for Prosecutors
27 Edgemont Av., Summit, N. J.

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This Writ is allowed.
Let it be sealed this 12th day of November, 1927.

WM. S. GUMMERE
C. J.

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Order.

Filed Nov. 14, 1927.

NEW JERSEY SUPREME COURT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of THE MORRIS AND ESSEX RAILROAD COMPANY and THE MORRIS AND ESSEX RAILROAD COMPANY Prosecutors vs. THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE Defendants	On Certiorari. Order.

A Writ of Certiorari having been duly allowed by this Court on this 12th day of November, 1927, and application having been made to this Court for an order granting leave of the parties hereto to take testimony in support of said writ of certiorari,

It is on this 12th day of November, 1927,

ORDERED that the parties hereto have leave of this Court to take testimony in the above entitled cause before a Supreme Court Commissioner on 3 days' notice to each other.

WILLIAM S. GUMMERE
C. J.

Return.

Filed December 2, 1927.

To the Honorable Justices of the Supreme Court of Judicature of New Jersey:

I, Cornelia A. Barnard, Deputy City Clerk of The City of Orange, in the County of Essex, in obedience to the command of the writ hereto annexed, directed to said The City of Orange and The Board of Commissioners of The City of Orange, do hereby certify and send to you, the said Justices, the said paving and curbing assessments against The Morris and Essex Railroad Company, and The Delaware, Lackawanna and Western Railroad Company for the construction of a sheet asphalt pavement laid on a concrete base, and installing necessary drainage connection and curbing made by The Commissioners of Assessment of the said City and confirmed by The Board of Commissioners of The City of Orange on the 10th day of August, 1926, and an ordinance entitled, "An ordinance to provide that The City of Orange unite with the County of Essex in undertaking the work of improving Scotland Road from Central Avenue to the South Orange Line, by paving the same from curb to curb with a sheet asphalt pavement laid on a concrete base, and installing necessary drainage connection, and authorizing the execution of a contract with the County of Essex for said purpose" passed September 21, 1920, and again June 23, 1924; a report of the Commissioners of Assessment of The City of Orange dated July 20, 1926, and the confirmation of said The Board of Commissioners of The City of Orange confirming the said report, map and assessment of the Commissioners of

Assessment in the matter of the paving and curbing of Scotland Road from Central Avenue to the South Orange line, all as appears by the schedule hereunto written.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the said The City of Orange this 1st
10 day of December, Nineteen hundred and twenty-seven.

CORNELIA A. BARNARD
Deputy City Clerk.

Schedule annexed to Return.

20 ASSESSMENT REPORT

TO THE BOARD OF ASSESSMENTS of the CITY OF ORANGE, N. J. An ordinance (of which the following is a copy) was passed by the Board of Commissioners of said City on the 21st day of September, A. D., 1920, and June 23, 1924.

"An ordinance to provide that the City of Orange
30 unite with the County of Essex in undertaking the work of improving Scotland Road from Central Avenue to the South Orange Line by paving the same from curb to curb with a sheet asphalt pavement laid on a concrete base, and installing the necessary drainage connections, and authorizing the execution of a contract with the County of Essex for that purpose.

Whereas the City of Orange and the County of
40 Essex are desirous of uniting and undertaking the

work of improving Scotland Road from its intersection with Central Avenue to the South Orange Line pursuant to the statutes in such case made and provided, and

Whereas a proposed agreement has been prepared between the City of Orange and the County of Essex setting forth the work to be undertaken, the plans and specifications therefore, and the proportion of the cost thereof to be borne by each, and other provisions deemed necessary to be inserted therein, copies of which proposed agreement, plans and specifications are filed in the office of the City Engineer;

Therefore, the Board of Commissioners of the City of Orange, do ordain:

1. That the City of Orange unite with the County of Essex in the laying of an asphalt pavement on a concrete base extending from curb to curb in said Road from its intersection with the southerly line of Central Avenue to the South Orange Line, together with the installation of the necessary drainage system for said Road.

2. That the share of the cost of the City of Orange to be paid in accordance with the said proposed amendment, except for drainage shall be assessed upon the property abutting on the line of the improvement to the extent of the benefits actually received as provided by law.

3. Within thirty days after the passage of this ordinance, the owners of any and all lands on the line of said improvement which are not already connected with sewer, gas and water mains on said Scotland Road are ordered and directed to make the necessary connections with sewer, gas and water

mains. All such connections shall be made in the proportion of one such connection to each twenty-five foot front of land on the line of said improvement; provided, that the Director of Streets and Public Improvements may, in his discretion make such connections or allow them to be made in the proportion of one to each fifty foot front of said land.

4. In case the owner or owners of any land for which connections are hereby ordered to be made shall not comply with the order or direction contained in this ordinance, the Director of Streets and Public Improvements shall cause said connections to be made by the City Engineer and said City shall pay the expenses and costs thereof, which expenses and costs shall be assessed in accordance with law upon any lands in said City of Orange benefitted.

5. The Mayor and Clerk are hereby authorized on behalf of the City to execute said proposed agreement with the County of Essex."

On the 9th day of March, A. D. 1926 resolutions (of which the following are copies) were also passed by the said Board of Commissioners:

"Resolved, that the Board of Commissioners of the City of Orange doth hereby ascertain and determine that the whole amount of costs and expenses for the paving, curbing, sewer water and gas mains in Scotland Road from the South Orange Line to Main Street including the cost of advertising, survey, map, etc. shall be one hundred and twenty thousand and seven hundred and ninety-four dollars and seventy-seven cents ($120,794.77)."

"Resolved, that the Board of Commissioners, sit-

ting as a Board of Assessments, shall meet on Tuesday, 30th day of March, A. D. 1926 at 4:30 P. M., in the Assembly Chamber, for the purpose of assessing damages and benefits, or the expense, as the case may be, for the paving, curbing, sewer, water and gas mains, in Scotland Road from the South Orange Line to Main Street and that the City Clerk give the necessary notice by publication." 10

I, J. Alexander Neill, City Clerk, do hereby certify to the Board of Commissioners, sitting as a Board of Assessments, that the foregoing are true copies of the Ordinance and Resolutions passed by the Board of Commissioners in relation to the paving, curbing, sewer water and gas mains in Scotland Road from the South Orange Line to Main Street, and that I have given public notice of the time and place of meeting of said Board of Commissioners, 20 sitting as a Board of Assessments, by publishing an advertisement in the newspaper now published in said City, for at least two weeks previous to said meeting.

J. Alexander Neill, City Clerk

Dated: Orange, N. J. March 12, 1926

Assessment of Expense.

To the Board of Commissioners of the City of 30 Orange:

Whereas, the said Board of Commissioners did, on the 21st day of September, A. D. 1920 and June 23, 1924 pass a certain ordinance entitled "An Ordinance to (as printed on first sheet of this report)."

And Whereas, as soon as might be after the completion of the said improvement mentioned in the said ordinance, the expense thereof, including sur- 40

veying, and a moderate allowance (the same being estimated by the said Board of Commissioners) for the cost of making the assessment hereinafter reported and certified, was duly ascertained and determined, by the said Board of Commissioners to be the sum of one hundred twenty thousand, seven hundred ninety-four dollars and seventy-seven cents; which amount was duly entered, by resolution, on the record of their proceedings:

Whereas, the said Board of Commissioners did, by their certain resolution passed on the 9th day of March, A. D. 1926 appointing the time and place for the Board of Assessments of said City to meet and assess the expense of making the certain improvement mentioned in said ordinance; of which appointment, the City Clerk did give public notice, for at least two weeks, in the newspaper published in said City of Orange.

And Whereas, copies of the said ordinance and said resolution, attached by the said City Clerk, have been duly handed by him to George Roach one of the members of the said Board of Assesments, which copies are hereto attached, and are to be considered and taken as part hereof;

Now, we, the undersigned

F. J. Murray

R. Fitzmaurice W. Kearney

G. Roach G. Perry

being all of the said Board of Assessments, do hereby certify and report to the said Board of Commissioners, that pursuant to the said appointment, Messrs. Murray, Fitzmaurice, Kearney, Roach, Perry being all of the said Board, met at the Assembly Chamber, in the said City on Tuesday the 30th day of March, A. D. 1926 at the hour 4:30 o'clock in the afternoon, (by the time and place mentioned

in said resolution and notice), and, being so met, did adjourn to meet again, at the same place on Tuesday the 6th day of April at the hour of 4:30 o'clock in the afternoon, and did then and there make public proclamation of said adjournment; and that, at the time and place last aforesaid, Messrs. Murray, Fitzmaurice, Kearney, Roach, Perry being all of said Board, met in pursuance of said adjournment, and being so met, did adjourn to meet again, at the same place on Tuesday, the 20th day of April at the hour of 4:30 o'clock in the afternoon, and did then and there make public proclamation of said adjournment; and that at the time and place last aforesaid, Messrs. Murray, Fitzmaurice, Kearney, Roach, Perry being all of the said Board, met in pursuance of said adjournment, and being so met, did proceed to assess the expense of making the said improvement mentioned and referred to in said ordinance and resolution, fairly, and equitably, upon the owner or owners of any land and real estate on the line of said Scotland Road which in the opinion of said Board, or any three members thereof, will be peculiarly benefited by said improvement; and in such proportions as they consider said lands and real estate to be so benefited, and to the extent of said benefits, and did assess the excess of such benefits on the City at large; and did give all parties interested in, or affected by, the said improvement, ample opportunity at each of the above mentioned meetings, to be heard upon the subject of the assessment; and did view the premises; and did assess the said expense with due regard to the rights and interests of all persons concerned, and as well upon the owner or owners whose name or names is or are known, as upon such whose name or names the said Board, upon careful and diligent

inquiry, have not been able to ascertain, and who are therefore designated as "owners unknown", and upon the several parcels of the said lands and real estate owned by them respectively, at the sums affixed to their several respective names and designations, in a certain schedule, hereinafter following—which schedule contains a brief description of the several parcels of said lands and real estate; specifying the locality thereof, with reference to streets, numbers and cross-streets, as far as same can be conveniently stated.

SCHEDULE OF BENEFITS

Scotland Road Paving (South Orange Line to the southside of Hillside Avenue)

Bl	Lot	Owner	Description	Ftge.	Pav.	Curb.	Total
					4.73659	1.854N .968R	
			EAST SIDE				
109	3	M & E RR Co.	702.28′ s fr. Main St, ftge. 86′ depth—	86.00′	203.68	159.44N	363.12
109	6	"	628.7′ s fr. Main St, ftge. 73.58, depth—	73.58′	348.52	136.41N	484.93
112	6	Hudson Realty Co.	159.67′ n fr. Mechanic St ftge. 58′ depth—	25.23′	119.50	46.77N	166.27
(WEST SIDE)							
132	44	D.L.&W.RR.Co.	NW corner of Freeman St ftge. 70′ depth 30.2	52.5	248.67		248.67
132		M & E RR Co.	Highland Ave Depot, ftge. 301.′	301.′	1425.75		1425.71
111		"	NW corner Globe St, ftge. 233′ depth—	233′	1103.62	435.69N	1539.31

(Map attached)

AND we do also certify and report, that we do return, herewith, a map, attested by the signatures of the undersigned, and bearing even date herewith; which map shows not only the said lands and real estate taken for, or damaged by, the said improvement, and for which we have so assessed damages, but also any lands and real estate which, in our opinion, are benefited by said improvement, or upon or by reason of which we have so made any assessment for the benefits of said improvement. 10

AND we do also certify and report, that no member of the said Board who has acted in this matter, is or has been personally interested in either of the said assessments. Witness our hands, on this twentieth day of April, A. D. 1926.

FRANK MURRAY
RICHARD J. FITZMAURICE 20
WILLIAM J. KEARNEY
GEORGE ROACH
GEORGE PERRY

Endorsement

ASSESSMENT REPORT

for

PAVING—CURBING—ETC. 30

SCOTLAND ROAD

Presented to the Board Of Commisioners July 20, 1926 and ordered considered August 10, 1926
Rectified and confirmed by the Board of Commissioners, August 10, 1926.

J. ALEXANDER NEILL, City Clerk

Accepted without interest until October 9, 1926.
Entered Book 9, pages 159-199 40

Reasons.

Filed December 9, 1927.

NEW JERSEY SUPREME COURT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Company, and THE MORRIS AND ESSEX RAILROAD COMPANY Prosecutors vs THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE Defendants	On Certiorari.

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The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company, prosecutors in the above entitled proceeding, herewith set out their reasons why the assessments sought to be reviewed by the writ of certiorari allowed in the above entitled cause, should not be set aside, vacated and for nothing holden, to be as follows:

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I. Because said assessments were and are illegel and invalid for the reason that the City of Orange under and by virtue of a certain contract entered into by it with The Delaware, Lackawanna and Western Railroad Company and The Morris and Essex Railroad Company, dated March 28, 1916, expressly exempted and freed the prosecutors, and each of them, from all expense by assessment or

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otherwise, for all work of street paving, repaving, curbing, guttering, etc. as more particularly set out and forth in the contract so referred to.

II. Because under a certain contract entered into by and between the prosecutors and the defendant The City of Orange, dated March 28, 1916, the said defendant The City of Orange contracted and agreed to do the work of the paving and curbing for which it subsequently unlawfully and illegally assessed the prosecutors, without expense by assessment or otherwise to the prosecutors.

III. Because the said assessments were and are in other and divers respects, illegal and unlawful.

Dated, December 8th, 1927.

FREDERIC B. SCOTT
Attorney of Prosecutors.

Stipulation and Testimony.

NEW JERSEY SUPREME COURT.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Lessee of THE MORRIS & ESSEX RAILROAD COMPANY and THE MORRIS & ESSEX RAILROAD COMPANY,
Prosecutors,

vs.

THE CITY OF ORANGE, a municipal corporation, and the BOARD OF COMMISSIONERS OF THE CITY OF ORANGE,
Defendants.

On Certiorari.

TRANSCRIPT of testimony taken in the above entitled cause before Nicholas W. Bindseil, a Supreme Court Commissioner of New Jersey, at his office, 929 Federal Trust Building, Newark, New Jersey, on Friday, December 30, 1927, at 2 P. M., pursuant to order of the court and on notice.

APPEARANCES:—

MR. FREDERIC B. SCOTT for prosecutors.
MR. WILLIAM A. CALHOUN for defendants.

It is stipulated and agreed by and between the attorneys for the respective parties, that the testimony may be taken stenographically by the Commissioner and afterwards reduced to typewriting, the signing of the same being waived.

It is stipulated between the attorneys of the respective parties that the following matters, things and facts may be admitted without offer of formal proof:

1. That attached to this stipulation is a true copy of the contract between the City of Orange and the Delaware, Lackawanna & Western Railroad Company, Lessee of the Morris & Essex Railroad Company, dated March 28, 1916. 10

(Marked Exhibit P-1.)

2. That the date when the work under the contract in question, Exhibit P-1, was begun, was about July 1, 1916, and the date when said work was completed was about January 1, 1919.

3. That an ordinance was passed by the City of Orange on September 14, 1920, for the improvement of Scotland Street, now known as Scotland Road, by the laying of a new pavement. The contract for a period of this work was awarded on September 1, 1921 and the work accepted on November 7, 1921. 20

4. The balance of said work from Central Avenue extending in a southerly direction to the South Orange line was done during the latter half of the year 1924. 30

Mr. Scott: I will agree to the following, subject to objection as to its materiality.

5. Lincoln Avenue, a street in the City of Orange, upon which the Railroad Company is also the owner of lands, was repaved subsequent to the completion of the railroad track elevation, and the company paid paving assessments upon the same. 40

KENNETH F. CRANE, a witness called on behalf of prosecutors, being duly sworn according to law, on his oath testified as follows:

DIRECT-EXAMINATION BY MR. SCOTT:

Q. Mr. Crane, you are the City Engineer of Orange? A. I am.

10 Q. And have been for how long? A. Officially since 1923, January 1.

Q. And prior to that time what was your capacity? A. I served temporarily as City Engineer during a short period, and as assistant engineer for quite some years previous to that. Prior to the making of what is known as the Elevation Contract, of March 8, 1916, I was assistant engineer at that time.

Q. You are familiar with that contract and the 20 work done under it? A. In a general way, yes.

Q. You are also familiar with the assessments for paving and curbing, which are involved in this particular proceeding? A. On Scotland Road, yes, sir.

Q. I show you a blue print and ask you, after looking it over, whether that print correctly represents in a general way the territory covered by what is known as the Scotland Road improvement and 30 the assessments involved in this particular case? A. Yes, it does; that generally covers it.

Mr. Scott: I offer that blue-print in evidence.

(Marked Exhibit P-2.)

Q. Looking at this Exhibit P-2, Mr. Crane, will you indicate in red with a cross where lot 3, block 40 109, is located? A. I have marked it with a cross.

Q. And lot 6, block 109, will you mark that? A. That is directly north of lot 3, presumably here (indicating); I will mark it by a cross with a circle around it.

Q. Will you indicate lot 6 in block 112? A. I will make a cross with a square around this one.

Q. And lot 12, on block 111? A. I will mark that with a circle. 10

Q. And lot 44, block 132? A. That is the corner lot which I will mark with a cross and a circle around it.

Q. Is the Highland Avenue depot property correctly shown on the print in question, Exhibit P-2? A. As near as I can determine, by the picture shown here.

Q. And that runs from Stetson to Freeman Street? A. Exclusive of lot 44, and the triangular 20 strip from the north wall to Stetson Street is what we have called the depot property. I will mark that with a D., for Depot.

Q. Mr. Crane, will you tell us with respect to the assessments in question, what the assessment of $306.12 against lot 3, block 109, was for, and whether for curbing or paving? A. The assessment is for paving and curbing.

Q. And what was the frontage there? A. The frontage as used for the assessment was 86 feet. 30

Q. And at what basis was the curbing? A. The curbing was on the base of $1.854 for new curb; this was entirely paved with new curb.

Q. How about the paving? A. The paving was for the same frontage, at the rate of $4.7365 per foot.

Q. Will you take lot 6, block 109, and give us the same data? A. That has a frontage, according to our records, of 73.58 feet. The paving was $348.52; 40

the curbing $136.41, entirely new curb; total $484.93.

Q. Will you look at block 111, lot 12, and tell us whether that was for paving and curbing, and give us the data on that? A. That is the parcel on the northwest corner of Glebe Street?

Q. Yes. A. There is 233 feet frontage on Scotland Road there. The assessment for paving is $1,103.62, curbing $435.69, all new curbing, total $1,539.31.

Q. These figures for new curbing and new paving that you have mentioned before, are applied to all these assessments involved here? A. To all the assessments involved. I might also add, that where there is any re-set curb, the rate is at 96.8 cents per front foot. That is the only other item that may come in.

Q. Will you kindly look at lot 6, block 112, and give us the data on that? A. That has a frontage of 25.23 feet, paving $119.50, curbing $46.77, all new curbing, total $166.27.

Q. Will you look at lot 44, block 132, is that for paving and curbing both? A. 52.5 feet has been used for the frontage there; that is for paving only, $248.67.

Q. Will you let us know with respect to the assessment of $1,425.71 against the Highland Avenue Depot property, and tell us what the frontage was there, and what the assessment was for? A. The frontage used for the Highland Avenue Depot was the distance from lot 44 to the projection opposite the wall on the northerly side.

Q. How many feet? A. Approximately 301 feet.

Q. Was that for new paving? A. That was for new paving only.

Q. And that assessment was $1,425.71? A. Yes.

Q. While you are still at it, will you look again and tell us with respect to whom the assessment $166.27, block 112, lot 6, was made? A. The Hudson Realty Company seems to be the name indicated in the report of the Assessment Commissioners.

Q. Can you indicate on Exhibit P-2 just where lot 29, block 146, is located? A. There are no figures indicated on there. I refer to the report of the Assessment Commissioners. 10

Q. Can you indicate it on Exhibit P-2? A. I indicated it right here by a circle and cross.

Q. To whom is that assessment made? A. There doesn't seem to be any lot 29 in the assessment report, unless it is covered by two lots 30 indicated in the assessment report.

Q. Will you look at the sixth page of that schedule, at the bottom of the page? A. Of the typewritten report of the assessment commissioners? 20

Q. Of the schedule, which is attached to the report. A. Hudson Realty Company is listed here as the owner.

Q. And can you indicate on this Exhibit P-2 where that lot is? A. Chestnut street is not shown on Exhibit P-2.

Q. From your knowledge can you tell us where that is located? A. It is the northwest corner of McChesney Street and Scotland Road, by the description in my report. 30

Q. If you will look at the last page of what I have got here as a memorandum "West Side Details Continued—Item of Exemption." Will you see if any reference is made to an exemption of block 146, lot 29, assessed to the Hudson Realty Company? A. There is block 146, lot 29, Hudson Realty Company, exemption $225.23.

Q. Can you tell us, if you know, why there was an 40

exemption made in that particular instance? A. As I recall the conditions as we went over it, that was part of the main stem of the railroad.

CROSS-EXAMINATION BY MR. CALHOUN:

Q. Will you look at the assessment report and state to whom lot 3, block 109 was assessed? A. Assessed to the M. & E. Railroad Company.

Q. Meaning Morris & Essex Railroad Company? A. Yes.

Q. And will you look at lot 6, block 112, and state to whom it is assessed? A. Hudson Realty Company.

Q. Will you look at lot 6, block 109, and state to whom it is assessed? A. Block 109, lot 6, Morris & Essex Railroad Company.

Q. And lot 12, block 111, who was that assessed to? A. The northwest corner of Glebe Street, to the Morris and Essex Railroad Company.

Q. And the property described on the assessment report as the Highland Avenue Depot, to whom was that assessed? A. Morris & Essex Railroad Company; it is the Highland Avenue Depot.

Mr. Scott: This is the $1,425.71 assessment?
Witness: Yes.

Q. Will you look at lot 44, block 132, and state to whom that is assessed? A. It is assessed to the D. L. & W. Railroad Company.

Q. You stated in your direct-examination that lot 29, in block 146, was exempted on account of there being no benefit. A. It is part of the main stem.

Q. What was the depth of that lot from the street, approximately? A. The original depth of that property previous to the acquisition by the railroad was 39.04 feet from Scotland Road, taper-

ing to nothing at Nassau Street. The railroad main stem now is a wall and changing to an embankment, very close to McChesney street, as I recall.

Q. At the time the assessment was made, the wall was completed, presumably? A. Yes, sir.

Q. And what depth did it leave after the completion of the wall, on this property, approximately? A. As near as I can guess offhand, there may be ten to twelve feet, McChesney Street tapering down to the wall at nothing on Scotland Road, near Nassau Street. 10

Q. So that this particular piece would form a triangle with a base of ten or twelve feet, and running to the apex, where it would be nothing? A. Yes.

Q. So that independent of the ownership, there would have been no benefit, would there, to this property? A. Presumably not; that is what we assume. 20

Q. And was that the real reason for not assessing this triangular gore? A. It was not assessed, because there was no benefit to the frontage involved there, the majority of it being embankment.

Q. The plot being so narrow? A. Yes.

REDIRECT-EXAMINATION BY MR. SCOTT:

Q. When on your direct-examination you referred to the exemption of this property, lot 29, block 146, not being assessed on account of being part of the main stem, what did you mean? A. What we usually cover in the main stem, as I understand it, is the main tracks used by the railroad and any embankment or wall. 30

Q. And what railroad was that that you had reference to? A. It is generally known as the Lackawanna Railroad through the City.

Q. The D. L. & W. Railroad? A. Yes. 40

JOHN T. DRAKE, a witness called on behalf of prosecutors, being duly sworn according to law, on his oath testified as follows:

DIRECT-EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, you are connected with the D. L. & W. Railroad Company in what capacity? A. Assistant engineer.

Q. That is in the civil engineering department? A. Yes.

Q. You are familiar with the various properties of the Railroad Company? A. Yes, sir.

Q. Will you kindly look at this Exhibit P-2, and direct your attention to what is known as lot 6, block 112? A. Yes.

Q. Have you with you the original deed for that property? A. I have the deed conveying it from the Hudson Realty Company to the Morris & Essex Railroad Company.

Q. And that property was conveyed by the Hudson Realty Company to the Morris & Essex Railroad Company when? A. May 3, 1920.

Q. And recorded when? A. December 18, 1920.

CROSS-EXAMINATION BY MR. CALHOUN:

Q. Mr. Drake, the deed from the Hudson Realty Company, of which you previously testified, conveying property on Scotland Street, in the City of Orange, was made to whom? A. To the Morris & Essex Railroad Company.

Q. And to the best of your knowledge, the Morris & Essex Railroad Company is still the owner of the properties described in this deed? A. Yes.

Q. And these properties include what is known as lot 6, block 112? A. Yes.

JOHN S. FRIERY, a witness called on behalf of prosecutors, being duly sworn according to law, on his oath testified as follows:

DIRECT-EXAMINATION BY MR. SCOTT:

Q. You are connected with the D. L. & W. Railroad Company in what capacity? A. Engineering department.

Q. And have been for how long? A. Twenty years.

Q. And you are familiar with what is known as the Orange Elevation Improvements? A. Yes, sir.

Q. And in what capacity did you serve the railroad at that time? A. Chief of the surveying party.

Q. I show you Exhibit P-2 and ask you if that correctly represents the track lay-out of the D. L. & W. Railroad Company after the improvements in question were made? A. Yes, sir.

Q. And can you indicate with this pencil in red just where the old tracks ran? A. Approximately.

Q. Please do so. A. I have indicated it on the map by a red line from Lincoln Avenue, at the Orange Station to Freeman Street at the Highland Avenue Station.

Q. At the east, or left-hand side, of this Exhibit P-2, I notice a large number of tracks; will you tell us what those tracks are; that is, whether they were main stem tracks or freight yard tracks? A. They are freight yard tracks and express tracks.

Q. And also include the main running tracks? A. Yes.

Q. And as I note, this line which you say was the old line of the railroad company before the improvements, I note it runs down parallel to Scotland street, on what is described on that map as the old right of way? A. Right.

Q. And that was the old right of way of what? A. Of the Morris & Essex Railroad Company.

Q. Prior to these improvements made under the contract, Exhibit P-1, were you familiar with what kind of a street Scotland Street, or Scotland Road, was? A. As I remember, Scotland Street at the railroad, it was a dirt road at that time.

Q. That was prior to your taking charge? A. That was about the time the construction started.

CROSS-EXAMINATION BY MR. CALHOUN:

Q. And at the time the railroad elevation improvement was completed, Scotland Street was still a dirt road? A. It was still a dirt road.

Mr. Scott: One question I omitted.

Can you indicate where the Scotland Road viaduct is on this map, Exhibit P-2?

Witness: I have indicated it. There is one abutment, and this would be the other abutment there (indicating).

Stipulation.

6. It is stipulated and agreed that the correct assessment for lot 6, block 109, is $484.93, and not $488.93, as shown in the writ of certiorari.

7. It is stipulated and agreed that a notice of appeal involving the same assessments involved in the present suit was taken by the Railroad Company to the Essex County Common Pleas on September 13, 1926. Said matter has not been prosecuted or determined, and the case has not been discontinued.

Exhibit P-1.

AGREEMENT, made the 28th day of March, 1916, between the City of Orange, a municipal corporation in Essex County, New Jersey, party of the first part, hereinafter called the City, and the Delaware, Lackawanna and Western Railroad Company, lessee of the Morris and Essex Railroad, party of the second part, hereinafter called the Railroad Company. 10

WHEREAS the railroad of the Railroad Company extends through the City of Orange, crossing all intersecting streets at grade, and

WHEREAS for the purpose of securing greater safety to persons and property and to facilitate the construction and maintenance of other than grade crossings of said railroad and streets, the parties desire said railroad to be relocated and elevated above the grade of said intersecting streets, and other improvements to be made in said railroad and appurtenances, and 20

WHEREAS the act approved March 20th, 1901, and the act approved April 14th, 1903 and the amendments thereof and supplements thereto, have authorized such contracts as shall be made in pursuance thereof, and 30

WHEREAS the Board of Commissioners of the City of Orange, has, by ordinance approved March 14th, 1916, authorized the making of this contract:

NOW THEREFORE, THIS AGREEMENT WITNESSETH: That the parties hereto, in consideration of the 40

premises, have agreed and do hereby agree with each other as follows:

I.

GENERAL DESCRIPTION AND PLANS.

The tracks and passenger stations of the Railroad Company shall be relocated and reconstructed and the streets intersected by the railroad shall be changed, in accordance with the plans and profiles hereto annexed and hereby made a part hereof and identified by the signature of G. J. Ray, Chief Engineer of the Railroad Company, and Daniel F. Minahan, Mayor of the City, viz:

(*a*) General location map showing new line and tracks, profiles of streets and new stations at Orange and Highland Avenue and streets and topography adjacent to railroad in two sections, viz:

SEC. 1. From the East Orange-Orange line to Glebe street, dated January 1st, 1916.

SEC. 2. From Glebe street to Orange-South Orange line, dated January 1st, 1916.

(*b*) Profile of the grade of the main tracks as relocated and elevated, dated January 1st, 1916.

(*c*) Should there be any omission in the written portions of this agreement, in describing or specifying the work to be done, the maps or profiles shall govern.

II.

CROSSINGS.

The Railroad will be elevated so as to cross all of the streets intersecting same (excepting Scotland Street, which is to be carried over the railroad and

excepting Prince, Commerce and Bell Streets which are to be vacated) upon reinforced concrete bridges (excepting Cone street, which is to be crossed by a steel bridge encased in concrete), resting upon concrete abutments erected along the side lines of the streets, and with concrete columns or piers upon the curb lines and in the center of the streets where necessary, as shown on the plans, it being understood that the maximum length of single spans of said concrete bridges is twenty-four (24) feet. The vertical clearance, width of openings, and necessary changes in the grade of streets being shown upon the attached plans and profiles. The clearances beneath the railroad bridges at all said crossings shall be not less than 12½ feet and at Cone Street and Central Avenue the vertical clearances will not be less than 13½ feet.

(*b*) Scotland street will be carried over the main and yard tracks upon a steel and concrete viaduct, with earth filled approaches, at a maximum elevation of not to exceed approximately eighteen feet above the present grade, and with approaches thereto not exceeding 6 per cent.

III.

Other Street Changes.

(*a*) The City shall vacate Prince street and Commerce street between the railroad right of way lines, and for the purpose of maintaining a thoroughfare of Hill street, Hill street shall be extended at its present width easterly to Oakwood Avenue.

(*b*) Bell street shall be vacated from the easterly line of Glebe street to the northerly side of the railroad.

IV.

Other Improvements.

(*a*) The Railroad Company will erect new passenger stations on the south side of the tracks, with suitable grounds and approaches, between Essex Avenue and Lincoln Avenue, and between Freeman street and Stetson street, with Shelter houses on the north side of the tracks, connected with the main stations by suitable subways.

(*b*) Wherever the Railroad Company has or shall acquire sufficient right of way for the purpose, the retaining walls of the Company's embankment, shown upon the attached plans, may be reduced, omitted or relocated, as conditions will permit.

(*c*) At Lincoln Avenue and other streets, the grade whereof is to be depressed, in consequence whereof the sewers and drains must be relocated or reconstructed or new sewers or drains constructed, the City shall proceed to construct, reconstruct or relocate the necessary sewers or drains before the Railroad Company is required to change the grade of said streets.

(*d*) All of the work specified to be performed by either party shall be commenced and completed by it at such times and in such manner as to not interfere with or delay the work to be performed by the other party or to cause any unnecessary expense to the Railroad Company or the City in the performance of its work.

(*e*) If, during the progress of the work, it shall be found desirable or necessary to make any changes in this agreement or in the plans of the work such changes shall be particularly described in writing

or by a revised plan, and when approved by the Railroad Company and by resolutions of the City Commissioners, this agreement and the plans shall be deemed amended accordingly.

V.

Temporary Conditions.

(*a*) As it will not be practicable to maintain traffic on all parts of the present roadbed during the construction of the work, permission is hereby granted by the City to the Railroad Company to construct and maintain for such time as shall be necessary, temporary main tracks in, along and across the streets intersecting and adjacent to the railroad and at the grade thereof or otherwise, as may be necessary for the prosecution of the work.

(*b*) During the grading of streets and erection of bridges, certain of the streets will necessarily be obstructed or temporarily closed, and the permission of the City is hereby given to the Railroad Company to temporarily obstruct or close such streets as shall be found necessary for the proper prosecution of the work. So far as the work will reasonably permit, alternate streets will be kept open for traffic. Provided, however, that if the City of Orange is compelled by law to pay damages to any owner or occupancy of abutting property, by reason of the temporary closing or obstructing of streets as herein mentioned, such damages shall be counted as part of the property damages hereinafter mentioned, the payment of which the parties hereto have agreed to share.

(*c*) The Railroad Company is also given permission to relocate and temporarily maintain its

telegraph, electric light, signal and other lines, if necessary, in and along the convenient streets near the Railroad until such time as they can be replaced on the Company's right of way.

(*d*) Wherever the Company shall place temporary tracks, poles and structures in, across or along the streets or public places of the city, said tracks, poles and structures shall be removed by the company as soon as the progress of the work will permit and the Company will restore all such places so occupied to their former condition as soon as possible.

(*e*) Inasmuch as it will not be possible to complete the bridge over Oakwood avenue at the elevation shown upon the attached plans until such time as the Railroad Company shall have agreed with the City of East Orange for the extension of its elevated grade line into such city, it is agreed that the Railroad Company shall construct a temporary grade line, extending easterly from the proposed new grade at Hickory street to the present grade of the tracks near Harrison street in the City of East Orange, and that said grade shall be raised and the bridge at Oakwood avenue completed in accordance with the plans hereto annexed as soon as the Railroad Company shall have completed arrangements to extend the proposed elevated grade line into the City of East Orange, and while said temporary grade line is maintained the Railroad Company shall provide a suitable passage for vehicular and pedestrian traffic along Oakwood avenue and beneath the said temporary grade line with a clearance for vehicles of not less than 11 feet.

Exhibit P-1.

VI.

Expense and Damages.

(*a*) All of the work of construction and reconstruction of the Railroad Company's tracks and structures and street bridges and the supports thereof, including the Scotland street viaduct, and the grading and regrading of streets, shown on attached profiles, excepting the grading and paving of Hill street extension, shall be performed by the Railroad Company at its own expense.

(*b*) The City shall exercise its right and powers in this behalf in requiring and causing the owners and operators of all wire lines and overhead structures, street railways and gas and water pipes, telephone and other conduits, and other subsurface structures in the streets affected by the work, to move, remove or reconstruct the same, as may be necessary, at such times and in such manner as to facilitate the work contemplated by this agreement.

(*c*) The City shall, in connection with and as a part of this improvement, and without expense to the Railroad Company by assessment or otherwise, do all work of street paving, repaving, curbing, guttering, laying and relaying of sidewalks and crosswalks, constructing, moving or reconstructing municipal sewers and drains, catch basins, municipal pipes, lamps, electric light lines, poles, conduits and other municipal structures in, across and along the streets and public places affected by the work under this contract, excepting the sidewalks on the northerly side of Scotland street, between Stetson street and Freeman street, adjacent to the station grounds.

(*d*) The City shall in the first instance pay all sums of maney which may be lawfully awarded to or recovered by the owners or occupants of lands or buildings as damages on account of the alteration of the grades or vacation of parts of streets as required by this agreement, and the Railroad Company will pay to the City sixty per cent. of all such amounts paid by the City, provided that no settlement of such damages shall be made by the City without the consent of the Railroad Company and that the Railroad Company may appear by its attorneys in all proceedings instituted to recover, determine or award such damages; and provided further that if the total amount of such damages paid by the City shall exceed the sum of $50,000.00 the Railroad Company will pay to the City, in addition to the sixty per cent. thereof, the total amount of all such damages in excess of $50,000.00.

(*e*) Wherever the Railroad Company, with the consent of the City, can and may find it desirable to effect settlements and obtain release of any such damages, or to reduce or mitigate any such damages by altering or restoring the lands and premises of or providing temporary facilities for any person who would otherwise be entitled to an award of damages, the Railroad Company shall be credited in the account of such damages, with the expense incurred by it in doing such work; and the amount thereof shall be divided and borne in the proportions above specified; provided, that the amount of such expense shall be approved by the governing body of the City of Orange. The City and the Railroad Company hereby waive any and all claims for such damages to any lands or property owned or controlled by them.

(*f*) The City shall by proper proceedings acquire the necessary land and do all necessary work for the extension of Hill street aforesaid, and the Railroad Company will pay to the City on account thereof the sum of $4,500.00, payable when the land is acquired by the city.

(*g*) The Railroad Company shall at its own expense maintain its stations and other structures, and the supports and spans of all bridges, and the City shall, without expense to the Railroad Company, maintain the pavements and other wearing surfaces of all highway bridges, streets and sidewalks, and all facilities constructed by or for the City and general public.

(*h*) The Railroad Company is hereby given consent, permission and authority, at its own expense, and under the supervision of the City Engineer, to construct and connect all necessary sewers, drains and water pipes to and from its lands and structures with the City's sewers, drains and water pipes in adjacent or convenient streets, such work, however, to be done in accordance with the ordinances of the City relating thereto, excepting that the Railroad Company shall not be required to pay any permit or license fees therefor.

(*i*) The Railroad Company shall not be required to do any work or provide any materials, or assume any expense, whatever, in connection with any matter or thing except as specifically stated herein or shown upon the annexed plans.

(*j*) When the work provided for in this contract is completed the Railroad Company will convey, by bargain and sale deed, to the City of Orange,

the lands now occupied by the Railroad Company, between the southerly side of Glebe Street and the northerly side of Stetson Street.

VII.

10 ORDINANCES AND RESOLUTIONS.

In order to avoid unnecessary delay and expense, the City shall, as soon as possible, pass and adopt all ordinances and resolutions, and take all other official action which may be required or desirable to alter the grades, vacate or otherwise change parts of streets, as herein provided, and to satisfy all lawful claims for damages and otherwise to effectuate and facilitate the progress and completion of 20 the work covered by this agreement.

The City shall, in the first instance, take all official action which may be necessary or desirable to effectuate the changes described in Central avenue, and any other street herein mentioned, which may be under the care, custody or control of the Board of Chosen Freeholders of Essex County, and shall also, as far as possible, obtain the approval and concurrence of said board of and 30 in such changes as far as the same is necessary or desirable.

VIII.

MISCELLANEOUS.

(*a*) The Railroad Company's rights and privileges and the lawful use and operation of its properties and franchises shall not be limited or modified 40 other than as specfically set forth herein.

(*b*) The work herein described shall be commenced within 60 days from the date hereof and shall be prosecuted vigorously to completion.

(*c*) It is further stipulated and agreed that each and every one of the acts and things to be done and performed by each of the parties hereto is an essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this agreement is a necessary and proper part of the work of improvement herein provided for, and in case either party to this contract shall refuse, neglect or omit to do any act, or take any proceedings herein required to be done or taken by such parties, or which shall be necessary to be done in order to accomplish the objects contemplated by this agreement, proper action may be taken in the proper court by the other party or parties hereto to compel specific performance of any such acts or proceedings, or to restrain any violation of the terms hereof, in addition to the right to enforce any legal claims for damages on account of such refusal, neglect or omission.

In witness whereof the party of the first part has by an ordinance of its Board of Commissioners, caused this agreement to be executed on its behalf by the signatures of the Mayor of the City of Orange and the corporate seal of said City of Orange to be hereunto affixed, attested by the clerk of said City, and the party of the second part has caused this agreement to be signed by its President and its corporate seal to be hereunto affixed, attested

by its secretary, the day and year first above written.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

By W. H. TRUESDALE.
President.

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Attest:
R. B. SCOFIELD.
(SEAL) Asst. Secretary.

Authorized by Board of Managers
of the D. L. & W. R. R. Co.,
March 30th, 1916.
R. B. SCOFIELD,
Asst. Secretary.

20

Form Approved
W. S. JENNEY,
General Counsel.

THE CITY OF ORANGE IN THE COUNTY OF ESSEX.

By DANIEL F. MINAHAN,
Mayor.

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Attest:
JOHN J. BYRNE.
Clerk (SEAL)

40

Certificate.

I HEREBY CERTIFY that the foregoing testimony was taken pursuant to Notice, before me as Supreme Court Commissioner of New Jersey, at my office, 929 Federal Trust Building, Newark, New Jersey, on Friday, December 30, 1927, at 2 P. M., in the presence of Mr. Frederic B. Scott, for prosecutors, and Mr. William A. Calhoun, for defendants; that it was stipulated and agreed by and between the attorneys for the respective parties, that the testimony should be taken stenographically by me and afterwards reduced to typewriting, the signing of the same being waived; and it was further stipulated that certain matters, things and facts as therein stated should be admitted without offer of formal proof. I further certify that the foregoing is a true and correct transcript of my shorthand notes of the testimony and proceedings before me.

NICHOLAS W. BINDSEIL
Supreme Court Commissioner of
New Jersey.

Opinion of Supreme Court.

Filed August 7, 1928.

No. 299 January Term, 1928.

NEW JERSEY SUPREME COURT.

10 THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Co., and THE MORRIS AND ESSEX RAILROAD COMPANY,
Prosecutor,

vs.

THE CITY OF ORANGE, *et al.*,
20 Defendants.

ON CERTIORARI REVIEWING ASSESSMENTS.

ARGUED JANUARY TERM, 1928. DECIDED MAY TERM, 1928.

FREDERIC B. SCOTT,
For Prosecutor,

30 WILLIAM A. CALHOUN,
For Defendants.

ARGUED BEFORE PARKER, MINTURN and CAMPBELL, *JJ.*:

PER CURIAM:

This writ reviews certain assessments levied for street improvements, in the City of Orange. Four
40 of the assessments were levied against the Morris

and Essex Railroad Company; one against the Delaware, Lackawanna and Western Railroad Company, and one, by mistake, against the Hudson Realty Company. It is conceded that the latter assessment should have been against the Morris and Essex Railroad Company.

In 1916 the City of Orange, entered into a contract with the Delaware, Lackawanna and Western Railroad Company, described therein as lessee of the Morris and Essex Railroad Company, for the elevation of its railroad tracks throughout the City. It was necessary, as part of this work, to change the grade of a number of streets in order to provide for proper clearances under bridges to be erected by the Railroad Company; the contract also contained the following provision:

> "The City shall, in connection with and as a part of this improvement, and without expense to the Railroad Company by assessment or otherwise, do all work of street paving, repaving, curbing, guttering, laying and relaying of sidewalks and crosswalks, constructing, moving or reconstructing municipal sewers and drains, catch basins, municipal pipes, lamps, electric light lines, poles, conduits and other municipal structures in, across and along the streets and public places affected by the work under this contract excepting etc. etc.".

The track elevation was completed by the Railroad Company under the contract about January 1, 1919, at which time Scotland Road was an unimproved dirt road. In September 1920, steps were taken by the City for the paving and curbing of Scotland Road. The assessments in question were confirmed by the Board of Commissioners of the

City on August 10, 1926. On November 12, 1927, this writ of certiorari was allowed.

Prosecutors claim exemption from the assessments by reason of the provision of the contract herein referred to. But it is manifest that this provision of the contract, properly construed, merely exempts the Railroad Company from liability for damage to City property or improvements existing at the time of the execution of the contract along, across or in streets and public places affected by the elevation work, and does not include subsequent improvements, not necessitated by reason of the track elevation.

The defendant raises the question (1) of laches, (2) of the election by the prosecutor of a remedy in the appeal to the Common Pleas, and (3) questions the right of the Morris and Essex Railroad Company to the benefit of the contract.

Our examination of the contract, which presents the basis for the claim of the prosecutor is as already stated, that it bears no relation to and was not intended to apply to the improvement in question.

The writ will therefore be dismissed, with costs.

Rule of Affirmance.

Entered August 9th, 1928.

NEW JERSEY SUPREME COURT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Company, and THE MORRIS AND ESSEX RAILROAD COMPANY, Prosecutors, vs. THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, Defendants.	On Certiorari.

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The Court having inspected the proceedings of the Board of Assessment returned with the Certiorari in this cause and heard the argument of Counsel, and having duly considered the same, do Order that the assessment levied by the said Board of Assessment against the properties of the Prosecutor be in all things affirmed, and the Writ dismissed with costs.

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On Motion of

WILLIAM A. CALHOUN,
Attorney of Defendants.

X3480

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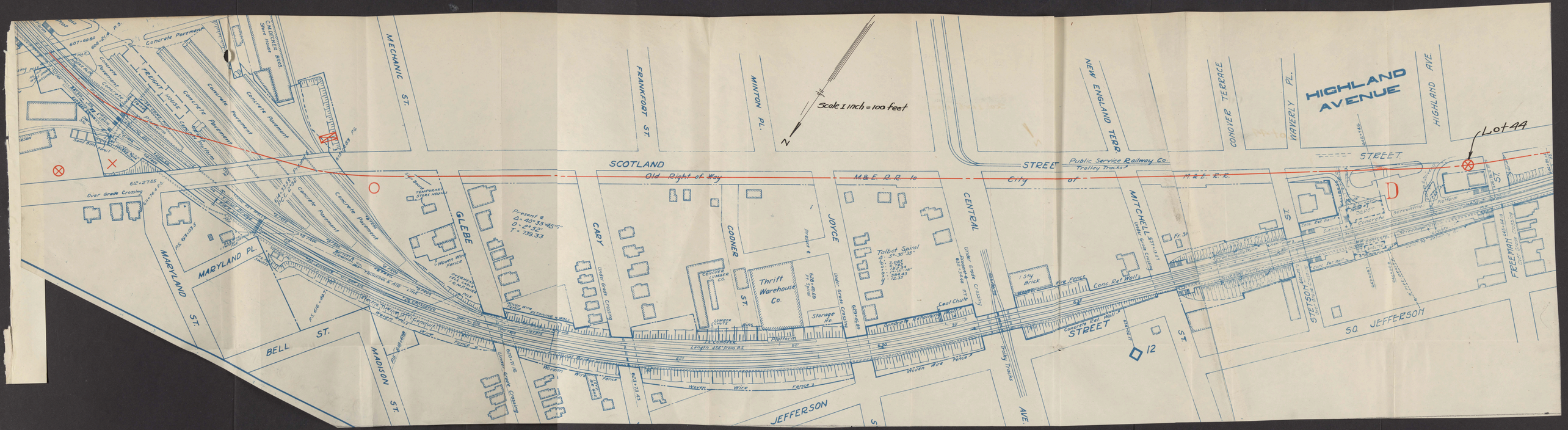
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MECHANIC ST.
FRANKFORT ST.
MINTON PL.
NEW ENGLAND TERR
CONVER TERRACE
WAVERLY PL.
HIGHLAND AVENUE
HIGHLAND AVE
Lot 44
SCOTLAND STREET
Old Right of Way
M & E. R.R. to City of
Public Service Railway Co. Trolley Tracks
M & E. R.R.
STREET
Concrete Pavement
Freight House
Over Grade Crossing
MARYLAND PL.
MARYLAND ST.
BELL ST.
MADISON ST.
GLEBE
CARY
COONER ST.
JOYCE
CENTRAL
MITCHELL ST.
STETSON ST.
FREEMAN
SQ. JEFFERSON
JEFFERSON
AVE
Present ∡ D = 20°33'45"
D = 2°52'
T = 739.33
Thrift Warehouse Co.
Storage Yd.
Talbot Spiral
Coal Chute
Sty Brick
Conc. Ret. Walls
Woven Wire Fence
Trolley Tracks
Under Grade Crossing
Temporary Store House
Platform
Lengths 458' from P.S.
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New Jersey Court of Errors and Appeals.

THE DELAWARE, LACKAWANA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Company, and THE MORRIS AND ESSEX RAILROAD COMPANY, Prosecutors-Appellants, vs. THE CITY OF ORANGE, a Municipal Corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, Defendants-Respondents.	On Appeal Dismissing Writ of Certiorari of Assessments for Improvements.

BRIEF OF APPELLANTS.

Statement of Case.

This is an appeal from the judgment of the Supreme Court entered on August 9, 1928 (p. 45), dismissing a Writ of Certiorari obtained to review certain assessments levied for street improvements in the City of Orange. Four of the assessments were levied against the Morris and Essex Railroad Company, one against the Delaware, Lackawanna & Western Railroad

Company, and one, by mistake, against the Hudson Realty Company, it being conceded that the latter assessment should have been against The Morris and Essex Railroad Company.

Prior to March, 1926, the railroad of the Prosecutors ran through the City of Orange at grade, crossing among other highways in that municipality, a street known as Scotland Road. On March 28th, 1916, the Prosecutors contracted with the Municipality of Orange, by virtue of Chapter 63 P. L. 1901, page 116, and Chapter 257, P. L. 1903, page 661, and the amendments and supplements of said Acts, to elevate their Railroad so as to cross all of the streets of the Municipality of Orange intersecting the same, except Scotland Street, *i. e.,* Scotland Road, which road was to be carried over the Railroad on a viaduct, and certain other streets which were to be vacated (p. 31, l. 20, *et seq.*), it being necessary as part of this work to change the grade of a number of streets in order to provide for proper clearances under bridges to be erected by the Railroad Company.

Among the provisions of the contract it was provided, under "Expense and Damages" (p. 35, l. 25, *et seq.*), that :

> "(*c*) The City shall, in connection with and as a part of this improvement, and without expense to the Railroad Company by assessment or otherwise, do all work of street paving, repaving, curbing, guttering, laying and relaying of sidewalks and crosswalks, constructing, moving or reconstructing muni-

cipal sewers and drains, catch basins, municipal pipes, lamps, electric light lines, poles, conduits and other municipal structures in, across and along the streets and public places affected by the work under this contract, excepting the sidewalks on the northerly side of Scotland Street, between Stetson street and Freeman street, adjacent to the station grounds."

"(*g*) The Railroad Company shall at its own expense maintain its stations and other structures, and the supports and spans of all bridges, and the City shall, without expense to the Railroad Company, maintain the pavements and other wearing surfaces of all highway bridges, streets and sidewalks, and all facilities constructed by or for the City and general public" (p. 37, line 10, *et seq.*).

The Prosecutors began the work of elevation under its contract with the Municipality about July 1st, 1916, and said work was completed about January 1st, 1919 (p. 19, line 15).

On September 21st, 1920, and June 23rd, 1924, The City of Orange passed ordinances providing for the uniting with the County of Essex in undertaking the work of improving Scotland Road from Central Avenue to the South Orange Line by paving the same from curb to curb with a sheet asphalt pavement laid on a concrete base, and installing the necessary drainage connections (p. 8, line 20, *et seq.*), and on March 9th, 1926, resolutions were passed by the Municipality for the purpose of ascertaining and determining the whole

amount of costs and expenses for said paving and curbing (p. 10, line 6, *et seq.*).

In pursuance of said ordinances and resolutions, The Board of Assessments of The City of Orange on April 20th, 1926, filed their assessment report (p. 15, line 14, *et seq.*), which was confirmed on August 10th, 1926 (p. 15, line 33), and accepted (p. 15, line 39).

Among the properties assessed for benefits for said improvements, were six parcels of land owned by the prosecutors (set out fully at p. 14 of the Defendant's Return), four (4) being assessed against the prosecutor, The Morris and Essex Railroad Company, and one (1) against the Delaware, Lackawanna and Western Railroad Company, and one (1) against the Hudson Realty Company—which last mentioned piece of property the evidence taken under the order allowed by this Court, was shown to have been owned by The Morris and Essex Railroad Company since December 18th, 1920, when the deed for said property of The Hudson Realty Company conveying it to The Morris and Essex Railroad Company, was recorded (p. 26, line 14 *et seq.*), a period of about six years before the assessment involved against the prosecutor, The Morris and Essex Railroad Company, was confirmed (p. 15, line 35).

Before the Railroad Elevation Improvements were made under the contract, Scotland Road was a dirt road (p. 28, line 3, *et seq.*), and it was still a dirt road when the elevation work was completed (p. 28, line 15, *et seq.*).

An examination of the blueprint, Exhibit P-2,

inserted at the end of the State of Case, which correctly represents in a general way the territory covered by what is known as the Scotland Road Improvement and the assessments involved in this particular case (p. 27, line 17, *et seq.*) shows by a continuous red line the right of way and the tracks of the prosecutors prior to the "Elevation Improvements", at that time running parallel and contiguous to Scotland Road, the road subsequently improved by The City of Orange.

All of the assessments made against the prosecutors which are indicated by various markings on the blueprint Exhibit P-2 (p. 46), from left to right being designated as follows; a circle with a cross therein, a cross, a square with a cross therein, a circle, a circle with a cross therein and the numeral Lot 44, and the marking D for Depot, were properties located within the lines of the Railroad Elevation Improvements, and adjoining and were contiguous to Scotland Road, and were all within the zone or area affected by said Improvements.

The assessments involved in this matter were either for paving and curbing, or paving or curbing (pp. 20 to 25).

The Supreme Court in its opinion dealt with but one question: that, the main question involved in this appeal as to whether the contract exempted the Railroad Company from the assessments in question. In their opinion they disposed of this point as follows:

> "Our examination of the contract, which presents the basis for the claim of the prose-

cutors, is as already stated that it bears no relation to and was not intended to apply to the improvement in question" (p. 44, line 21, *et seq.*).

Grounds of Appeal.

The grounds of appeal asserted and intended to be argued are as follows:

I. Because the New Jersey Supreme Court rendered judgment in favor of the City of Orange.

II. Because the New Jersey Supreme Court gave judgment in favor of the City of Orange, a Municipal Corporation, and the Board of Commissioners of the City of Orange, defendants, and against The Delaware, Lackawanna and Western Railroad Company, lessee of The Morris and Essex Railroad Company, and the Morris and Essex Railroad Company, prosecutors, in dismissing the writ of certiorari allowed The Delaware, Lackawanna and Western Railroad Company, Lessee of The Morris and Essex Railroad Company, and The Morris and Essex Railroad Company (P-1 and 2).

ARGUMENT:

POINT I.

The Elevation Contract between the Railroads and the Municipality exempted the Prosecutors from the assessments involved.

The Supreme Court, giving its reasons for the dismissal of the certiorari that the contract in question "bears no relation to and was not intended to apply to the improvement in question" (p. 44, line 3 *et seq.*), gave the following reasons for coming to that conclusion:

> "Prosecutors claim exemption from the assessments by reason of the provision of the contract herein referred to. But it is manifest that this provision of the contract, properly construed, merely exempts the Railroad Company from liability for damage to City property or improvements existing at the time of the execution of the contract along, across or in streets and public places affected by the elevation work, and does not include subsequent improvements, not necessitated by reason of the track elevation."

An examination of the record, however, leads the Appellants to respectfully suggest and urge that the reason given by the Supreme Court for the dismissal of the Appellant's certiorari was both fallacious and unsound, in view of the record in the instant case, because it is apparent that the

work done, and for which assessments were levied, although not contemporaneous with the completion of the work under a contract to be done by the Railroad Company, was included in the improvements and *necessitated by reason of the track elevation.* For from the undisputed facts in the case, it appears that all the contested assessments were within the area contemplated by the elevation contract (see blueprint, Exhibit P-2, p. 46); that Scotland Road, prior to the Railroad improvement and after the Railroad had finished the particular elevation work, which was contemplated by the contract, was an unimproved dirt road; that within a comparatively short time after the completion of the elevation work by the prosecutors, the City started proceedings for the paving and other improvements of Scotland Road in the particular area contemplated by the contract and immediately affected by the elevation contract from assessments against the prosecutors.

An analysis of the assessments, as shown in the Return to the Writ (p. 14), under Schedule of Benefits, was made by the City Engineer, and his testimony, which is very brief (pp. 20 to 25 inclusive), and that of the Appellant's Engineer, Friery (pp. 27-28), shows that all of the improvement work was new or additional work; *i. e.,* new paving, new curbing, new guttering.

Should the reason given by the Supreme Court properly apply, all that the Municipality, under such a contract as is involved in this case, would

need to do, to shirk in a measure part of their responsibilities and obligations, would be to delay the improvements contemplated by them as growing out of the work to such a later day as to create an impression, when the matter is placed before a court, that such improvements, perforce, because of the lateness in time in which they were made, were subsequent improvements not necessitated by reason of a track elevation contract.

While it may be true that the Railroad Appellant would be without remedy to force the Municipality to proceed instanter to the making of such improvements as were within the purview and terms of the elevation contract, nevertheless the Municipality's delay in making such improvements and subsequent assessments affords no reason to characterize them as "Subsequent improvements not necessitated by the track elevation."

An examination of Exhibit P-2 (p. 46) shows by a red line the old right of way of the Railroad Company, which at that time was a grade, paralleling to a large degree Scotland Street, or road, and the elaborate improvements of the Railroad Company under the contract also shown by the exhibit in question, makes so manifest the fact that the improvements in question, for which the assessments were levied, were so closely connected with the improvement contemplated by the elevation contract that it becomes manifestly apparent that the conclusions of the Supreme Court were erroneous.

Section C of Article VI of the contract expressly provides that the City shall pave, repave, curb, etc., streets and public places affected by the work under this contract, in connection with and as part of this improvement, *i. e.,* railroad elevation; and while it is unnecessary for the Appellants to now urge that this section exempted the prosecutors perpetually from subsequent assessment for the improvement of any of the streets within the limits of the City and the area contemplated by the elevation contract, it is urged with all our force that, the first improvement (*i. e.,* paving of the dirt road, of Scotland Street, and the new or original curbing along the same) was such work as was distinctly contemplated by the contract.

An examination of the Acts under which the City was authorized to contract with the Railroad Company for the elimination of its grade crossings, shows that it had other powers granted it than those particularly relating to the opening, vacating, altering the lines and changing grades of their streets, because the original Act of 1901 (p. 116) provides that the Municipalities are,

> "Authorized and empowered to enter into such contracts with any of the Railroad Companies, whose roads now or hereafter may enter or lie within their respective towns or cities, as shall secure greatest safety to persons and property therein * * * as in the judgment of such Municipalities respectively may be best adopted to secure the safety of lives and property."

There appears no necessity for this court to decide whether the contract in question was broad enough to authorize the Municipality to agree to exempt the Railroad Company from all assessments within its limits *in perpetuity,* because that question is not here presented, the particular assessments being assessments for original and new work. Neither would there appear to be any necessity for passing upon the question as to whether the acts of the Municipality, in making the contract, were *ultra vires* in view of what your Court has already said in the case of *Morris and Essex R. R. Co. vs. Newark* (76 N. J. L. 555, at 557, *et seq.*); for the Respondent does not question the authority of the Municipality to enter into the contract in question.

POINT II.

The Prosecutors are not estopped in pursuing their proper remedy.

It would appear that the defendants might urge on their behalf that the prosecutors are either estopped or have waived their right to question the assessments involved because, the defendants desired it to appear in the record of this case that: "Lincoln Avenue, a street in the City of Orange, upon which the Railroad Company is also the owner of lands, was repaved subsequent to the completion of the railroad track elevation, and the company paid paving assessments upon the same"

(p. 19, line 33, *et seq.*). Where said Lincoln Avenue is with respect to the Scotland Road improvement neither appears from an inspection of the blueprint Exhibit P-2 nor any of the evidence in the case, and the particular circumstances in connection with the repaving of that street and the paying of the assessments thereon, is in no way before the Court, but even conceding that the same rule of exemption from assessment as contended for in the assessments now before the Court, was applicable to the Lincoln Avenue repavements, the mere paying of a particular assessment on a particular piece of property of the prosecutors, cannot in our opinion have any bearing on the validity or invalidity of the assessments now before the Court.

Neither are the prosecutors estopped because they first pursued a fancied remedy.

The defendants on the hearing under the Rule to Take Testimony desired that it should also appear in the record and it was so stipulated (p. 26, line 34, *et seq.*): "that a notice of appeal involving the same assessments involved in the present suit was taken by the Railroad Company to the Essex County Common Pleas on September 13, 1926. Said matter has not been prosecuted or determined, and the case has not been discontinued." The weakness in urging such action created an estoppel or an election of remedies, will appear manifest on a mere examination of the statutes governing such matters.

It was true that under the Municipalities

act as amended by P. L. 1918, g 42, page 486, that an appeal from assessments for local improvements was permitted to the Court of Common Pleas of the County wherein such municipality is located but such appeal was eliminated by the repeal of that section of the Municipalities act by P. L. 2924, g 5, page 506, which act went into immediate effect on March 12, 1924, a period of over three years before the assessments involved in this matter were confirmed, and approximately four years before the writ in the instant case was allowed. No such procedure as the appeal stipulated about being of any validity at the time of the giving of the notice, and the proceedings being strictly statutory with respect to such appeals, the notice of September 13, 1926, of the prosecutors' appeal to the Essex County Common Pleas, had no more validity than if it had been to the Court of Piepoudre, if said Court were still in existence.

It is thus apparent that there was no election by the prosecutors-appellants of a remedy on the appeal to the Common Pleas Court, because the fatuous choice of a fancied remedy that did not exist and the futile pursuit of it, even until a Court should have adjudged that it had no existence, is no defense to an action to enforce an actual remedy inconsistent with the one first invoked. (*Bierce vs. Hutchins,* 205 U. S. 340, at 347; *Harrill vs. Davis,* 168 Fed. 187; 9 R. C. L. 962, sec. 9.)

POINT III.

The Prosecutors are not in laches.

The defendant may contend that the prosecutors are in laches because it appears that the assessments involved were confirmed by the Board of Commissioners of The City of Orange on August 10th, 1926 (p. 15, line 36), and that the prosecutors' writ of certiorari was allowed them on November 12th, 1927, but your Court, we believe, has answered such a contention if advanced by the prosecutors, in the recent case of *Delaware River, &c. Co. v. Twp. Com. of Haddon,* 5 Misc. Reports, No. 10, page 212, where it said:

> "But the respondents contend that if that be so the assessments should not be set aside and that the prosecutor is not entitled to have this writ of certiorari because it is in laches under both Certiorari act (1 Comp. Stat., p. 407, g 15) and the Municipalities act (2 Supp. Comp. Stat. (1911-1924), p. 2209, gg 136, 2057), in that a period of nearly eight months elapsed from the date the assessments were levied and the date of the allowance of the writ. The Certiorari act, *supra,* limits the allowance of the writ to sixty days after such assessments are confirmed, and the Municipalities act, *supra,* fixes such limitation at thirty days.
>
> "This would be so if the ground urged for setting the assessments aside was some

irregularity in the proceedings, or for an undue or excessive amount of assessment or mistake in the manner of making them, but these limitations do not apply and laches cannot be successfully urged, where, as here, the lands were not subject to assessment. *Benedictine Sisters v. Elizabeth,* 50 N. J. L. 347; *Meredith v. Perth Amboy,* 63 *Id.* 520; *Winants v. Jersey City,* 42 *Id.* 349."

CONCLUSION.

It is urged that for the foregoing reasons the judgment of the Supreme Court be reversed to the end that the assessments involved in this matter be set aside *in toto.*

Respectfully submitted,

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New Jersey Court of Errors and Appeals

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of The Morris and Essex Railroad Company, and THE MORRIS AND ESSEX RAILROAD COMPANY, *Prosecutors-Appellants,* *vs.* THE CITY OF ORANGE, a municipal corporation, and THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, *Defendants-Respondents.*	*On Certiorari.* *Appeal from Supreme Court.*

BRIEF FOR RESPONDENTS.

This appeal brings up for review a judgment of the Supreme Court dismissing a writ of certiorari obtained to review assessments for street improvements upon Scotland Road, formerly Scotland street, in the City of Orange.

In the year 1916, the City entered into a contract with the Delaware, Lackawanna and Western Railroad described therein as lessee of the Morris and Essex Railroad, for the elevation of its railroad throughout the City. Prior to that time the railroad ran through the City at grade. This necessitated among other matters the changing of the grade of a number of streets in order that the proper clearance might be obtained under the bridges to be erected by the Railroad Company; and an apportionment of the expense and damages occasioned by these changes was

provided for in Article 6 of the contract (see Exhibit P. 1); so much of the contract as is pertinent to this inquiry is contained in Sections "C" and "G" of this article, which sections read as follows:

> "C." "The City shall, in connection with and as a part of this improvement, and without expense to the Railroad Company by assessment or otherwise, do all work of street paving, repaving, curbing, guttering, laying and relaying of sidewalks and crosswalks, constructing, moving or reconstructing municipal sewers and drains, catch basins, municipal pipes, lamps, electric light lines, poles, conduits and other municipal structures in, across and along the streets and public places affected by the work under this contract, excepting the sidewalks on the northerly side of Scotland street, between Stetson street and Freeman street, adjacent to the station grounds."
>
> "G." "The Railroad Company shall at its own expense maintain its stations and other structures, and the supports and spans of all bridges, and the City shall, without expense to the Railroad Company, maintain the pavements and other wearing surfaces of all highway bridges, streets and sidewalks and all facilities constructed by or for the City and general public."

The Railroad Company completed the elevation of its tracks pursuant to this contract about January 1, 1919. Scotland Road at this date was an unimproved dirt road (Case, p. 28, l. 16). In September, 1920, steps were taken by the City for its improvement by paving the same and a portion of the work was subsequently completed and accepted on November 7, 1921; the remainder

of the work was finished during the latter half of the year 1924 (Case, p. 19).

Prosecutors question the legality of six assessments for this improvement confirmed by the Board of Commissioners on August 10, 1926. Five of these assessments are levied against the Morris and Essex Railroad Company, the remaining one being against the Delaware, Lackawanna and Western Railroad Company.

It appears that one of these five assessments was originally erroneously levied against the Hudson Realty Company. It is admitted, however, that it should have been levied against the Morris and Essex Railroad Company (Case, p. 26).

On September 13, 1926, prosecutors appealed from all of these assessments to the Essex County Common Pleas Court. This appeal has not been discontinued (Case, p. 28).

On November 12, 1927, the writ of certiorari was allowed.

Prosecutors claim exemption from all of these assessments by virtue of the provisions of the elevation contract previously referred to.

POINT ONE.

Prosecutors elected to appeal to Court of Common Pleas.

Prosecutors by appealing to the Court of Common Pleas prior to applying for the writ in this case, made an election of the remedy they intended to pursue, and it is respectfully submitted, should be compelled to abide by the result of that appeal. It is true that this appeal has not as yet been prosecuted to a decision, but, on the

other hand, it has not been dismissed, and was presumably taken by them with full knowledge of their rights and of the facts.

Whether or not they got into the wrong court is beside the point. The fact remains that they are in, and have taken no steps to get out, although this appeal has been pending for over a year.

It is conceivable that the Legislature might pass an act again legalizing such appeals, and that such act could be drawn in such a manner as to make the same retroactive, or that the act repealing appeals to the Common Pleas might itself be declared by the courts to be invalid, in which case this defendant would be placed in the anomalous position of having to defend two suits, in two different courts, for the same cause of action.

POINT TWO.

Prosecutors are in laches.

The assessments in question were confirmed on August 10, 1926, and the writ issued on November 12, 1927, prosecutors having waited fifteen months before obtaining the same.

Chapter 195, P. L. 1921, 2 Supp. Comp. Stats., p. 2209, limits the period for allowing a writ of certiorari to review an assessment to thirty days; this cuts in half the time formerly allowed by the Certiorari Act, of sixty days. It is apparent that the legislative policy is that prosecutors in cases of this kind should be vigilant.

It is true that the Supreme Court in *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, held that a statutory limitation upon the allowance of a prerogative writ cannot be enforced for the protection

of an assessment which the Legislature could not constitutionally authorize; which ruling it followed in the recent case of *Delaware River, etc. Co.* v. *Haddon Township,* 5 Misc. Reports 212, 135 Atl. 801; still, it is submitted that it was not the intention of the Court to abrogate the common law rule that in the absence of statute or rule timely application for the writ must be made; the question as to whether or not the application is seasonable being addressed to the discretion of the Court.

In the case at bar, prosecutors questioned the legality of these assessments in September, 1926, when they took their appeal to the Court of Common Pleas, and then quietly rested on their oars for over a year. If disgruntled property owners are to be allowed to question assessments years after they are levied, it makes it practically impossible for municipalities to ascertain the correct amount of funds owing to them.

In *American Dock and Improvement Co.* v. *Trustees of Public Schools,* 35 N. J. Eq. 181, at p. 258, Justice Depue in delivering the opinion of the Court of Errors and Appeals said that courts interfere with great reluctance with the collection of public revenues.

It is submitted that even if prosecutors' claim is not barred by statute, it is so stale that it should not be reviewed by this Court, particularly in view of the fact that no excuse has been presented for their delay in applying for the writ.

POINT THREE.

The Morris and Essex Railroad Company is not entitled to relief.

An examination of the contract (Exhibit P. 1) under which prosecutors claim exemption shows that it was made solely by the Delaware, Lackawanna and Western Railroad Company, who are described therein as being the lessee of the Morris and Essex Railroad Company. As the latter company was not a party to the contract, and the lease has not been placed in evidence, it is difficult to understand on what theory this company is entitled to exemption. All of the assessments that are questioned, with the exception of one on property of Delaware, Lackawanna and Western Railroad Company, are on properties of Morris and Essex Railroad Company.

POINT FOUR.

The contract does not exempt prosecutors from assessments now questioned.

It should be borne in mind that the assessments now questioned have no connection whatsoever with work done in connection with the railroad elevation, but were levied for the subsequent improvement of a street upon which prosecutors own lands.

The first ordinance providing for these improvements was passed in September, 1920, and the elevation of the railroad was completed about January 1, 1919, some twenty months prior to its passage.

Section "C" of Article 6 of the contract expressly provides that the City shall pave, repave, curb, etc., streets and public places affected by the work under this contract, in connection with

and as a part of this improvement, *i. e.*, railroad elevation.

To hold that the language of this section exempted prosecutors perpetually from any subsequent assessment for the improvement of any street within the limits of the City, upon which they happened to own lands, as now contended by them, would do violence to the English language.

Section "G" provides that the City maintain the pavements and other wearing surfaces of streets, etc., and would appear to have no special bearing on the present assessments, all of which are levied for either new paving or new curbing, and not for the upkeep of the same.

The word "maintain" is defined in Webster's New International Dictionary (2): "To hold or keep in any particular state or condition, especially in a state of efficiency or validity, to support, sustain or uphold, to keep up, not to suffer to fall or decline."

An examination of the acts under which the City was authorized to contract with the Railroad Company for the elimination of its grade crossings shows that its power as to streets is limited to their opening, vacating, altering lines or changing their grades, with a further provision that it may do all such acts as may be necessary and proper to effectually carry out such contracts. P. L. 1901, p. 116; P. L. 1903, p. 661, Comp. Stat., pp. 4234-4266.

It is respectfully submitted that the language of these acts while broad is not broad enough to authorize a municipality to agree to exempt a Railroad Company from all assessments within its limits in perpetuity, and particularly from assessments which have no connection with the

work covered by the contracts, as in the present case; and that if the City had in its contract agreed to make the exemptions requested in this case, such action on its part would be *ultra vires.*

It is submitted that the true construction of clause "C" is that the City, at its own expense, make the necessary street changes required in the streets affected by the work under the contract, and that its language does not include the paving of streets at any time subsequent to the completion of the contract without expense to the Railroad.

In fact this construction has already been adopted by prosecutors when they paid assessments for repaving Lincoln avenue, which repaving was done subsequent to the track elevation (Case, p. 19). This avenue parallels Scotland street and is one block east of it, being shown on the upper left-hand corner of Exhibit "P." 2. It is not named on the exhibit but may be identified as the street on which the freight house and grass plot are shown as fronting.

The case of *Morris and Essex Railroad Company* v. *Newark,* 76 N. J. L. 555, cited by prosecutors is not in point; that case turned on the sole question of validity of a contract, whereas in the case at bar defendants do not question their authority to enter into the contract, but say that the proper construction of its terms does not require an exemption from assessments of prosecutors' properties, where improvements were made subsequent to its completion and which improvements have absolutely no connection with the work done under said contract; and that the Legislature under the acts above cited did not give them authority to exempt in perpetuity the various properties owned by appel-

lants, from assessments for subsequent improvements to streets.

The Supreme Court in deciding the case at bar construed paragraph "C" of Article 6 of the contract between the Railroad Company and the City, and held that this provision merely exempted the Railroad Company from liability for damage to City property or improvements existing at the time of the execution of the contract, along, across or in streets and public places affected by the elevation work, and that it did not include subsequent improvements not necessitated by reason of the track elevation. The decision having been based on this broad ground, it was not necessary, and the Court did not go into the other questions raised by the defendant in its brief.

It is manifest that whether Scotland street remained a dirt road with or without curbing could have no possible bearing on the contract, and that its subsequent improvement had no connection with the track elevation as contended by appellants.

Appellants contend that the decision of the Supreme Court was erroneous because the work done on this street, although not contemporaneous with the completion of the work under the Railroad Company's contract, was included in the improvements and necessitated by reason of the track elevation. The improvement of this street was solely due to the rapidly increasing traffic caused by automobiles and the insistent demand of their owners for modern pavements, which has necessitated the laying or improving of some twenty miles of paving within the limits of the City subsequent to the completion of the elevation contract by the Railroad.

They also make the rather nebulous contention that the contested assessments were within the area contemplated by the elevation contract and that the Railroad Company should be exempted from assessments because the improvement work consisted of new paving, curbing and guttering.

The completion of this contract eliminated over twenty grade crossings in the City, the blue print attached to the State of the Case showing only a portion of the company's right-of-way within the municipality, and it might well be said that every street in the City which intersects the railroad was within the area contemplated by the elevation.

The mere fact that Scotland street roughly parallels both the old and present right-of-way of the Railroad Company for approximately a mile places it in no different category than the other streets in the vicinity of the railroad, and it is difficult to draw any distinction between what appellants call a first improvement and a second or third or any subsequent improvement of a street.

It is respectfully submitted that the construction placed by the Supreme Court upon the contract now under examination is correct and should be affirmed.

October Term, 1928.

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