

NEW JERSEY COURT OF ERRORS AND APPEALS.

HIRAM E. BUDD AND ISAAC W.

BUDD,

Plaintiffs in Error,

vs.

CAMDEN HORSE RAILROAD COM-

PANY AND THE CAMDEN AND

SUBURBAN RAILWAY COMPANY,

Defendants in Error.

ON ERROR TO

SUPREME COURT.

BRIEF OF E. A. ARMSTRONG, FOR DEFENDANTS IN
ERROR.

The plaintiffs are the owners of the soil of the *locus in quo*, which is all included within the boundaries of the public road or street known as Ferry avenue, in the city of Camden. There is no question at all but what

all of the lands described in the writ and narr. in this cause are in the bounds of the public highway. There is some dispute between the owners of the soil, the plaintiffs in this cause, and the city authorities, whether or not more of the land than plaintiffs concede is in the street. The sixteen and one-half feet for which suit is brought the plaintiffs concede is all in the street. The middle line of the street, which is one of the boundaries (the south) of the land in question, is the boundary line of the city of Camden. The defendants are street railway companies of the State of New Jersey; the Camden Horse Railroad Company being incorporated by special act and the Camden and Suburban Railway Company under the 1893 General Traction act. The latter named company is the lessee of the tracks and franchises of the first named. The first named company has built its street railroad in and along Ferry avenue, which railroad is at a gauge of five feet, and the middle line thereof is parallel with the middle line of Ferry avenue and distant eight and one-half feet north from the middle line of Ferry avenue, and has erected the necessary poles to carry the trolley wires. This brings the north rail of the railroad to within five and one-half feet of the north line of the property described in this suit, which the plaintiffs claim is the north street line.

In the declaration (*Case, page 34*), it does not appear that the land in question is subject to the easement of a street. The plea (*Case, page 34, line 30; pages 35 and 36*), fully sets out, however, that the premises are a public street and lawfully used by the defendants only as a public use for a street railway. Upon this the issue was joined and upon the trial a verdict was directed for

the defendants. Upon the judgment rendered there-upon the writ of error in this cause was sued out.

These plaintiffs are certainly persistent. They filed a bill to restrain the operation of this road, and the Chancellor dismissed the bill (*see 16 Dick., Ch. Rep. 543*), and this decree of dismissal was affirmed by this Court on appeal for the reasons given by Vice Chancellor Grey (*see 18 Dick., Ch. Rep. 804*). They also obtained a rule to show cause for a writ of certiorari, which was heard on proofs, &c., before the Supreme Court and the writ was refused (*54 At. Rep., p. 569*), the Court saying, after having passed on the laches of the plaintiffs: "We think, moreover, that the question whether the use of the highway was a reasonable one, in view of the facts, was for the municipality, and not for the Court."

The plaintiffs' avowed purpose in this suit is to have a jury say whether or not the building and construction and the operation of this railway in this street was a reasonable use thereof. It is not contended on the part of the plaintiff, in fact admitted, that the defendant companies have both legislative and municipal grant and privilege to use and occupy the street in the manner they are now doing. The defendants insisted that the plaintiffs were not entitled to maintain this action and moved for a non-suit (*p. 30, lines 1-10*), on the ground that there was no proof of the exclusive occupancy of the ground by the defendant companies. This was refused, but the direction of the verdict included that reason as well. We are, therefore, privileged to here urge it.

It will not be denied that the right to a public franchise cannot be tried by a suit in ejectment, I appre-

hend. It has been held in many jurisdictions that the owner of the soil had no such right of possession to lands in a street or highway as to entitle him to maintain an action of ejectment under any circumstances. It has been suggested in this State, however, that the landowner might maintain such an action where someone had usurped the street for private purposes and destroyed its use as a street.

In *French vs. Robb*, 38 Vr. 260, on page 263, the Court said it must be held in New Jersey that the landowner could maintain such a suit. This Court in that case, on the same page, saying, however:

"It is established, by express decision, in this State, that the public corporation, which represents the public right to the use of streets, may maintain ejectment against any person, even the owner of the soil, who occupies a street in a manner inconsistent with the public use. *Hoboken Land and Improvement Co. vs. Hoboken*, 7 Vroom, 540. From this it logically follows that the owner of the soil cannot maintain ejectment against such public corporation occupying the street within the limits of the public right."

It is clearly held in this State, then, that for all public purposes the landowner's title is entirely divested as this Court stated it in *Hoboken Land and Improvement Company*, 7 Vroom, 540, on page 541:

"With respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest."

It is not disputed, and, indeed, cannot be in this State, that the use of a street for street railway purposes is a proper use of the public easement and a use by the public, notwithstanding the fact that by license of the public authorities a private corporation is making such use. And this well settled doctrine is now equally well settled in favor of a street railway operated by electricity requiring the erection and maintenance of poles and wires in the highway.

Hinchman v. Paterson Horse R. R. Co., 2 C. E. Gr., 45.

Halsey v. Rapid Transit, 2 Dick. Ch. Rep., 380.

Kennelly v. Jersey City, 28 Vr., 293.

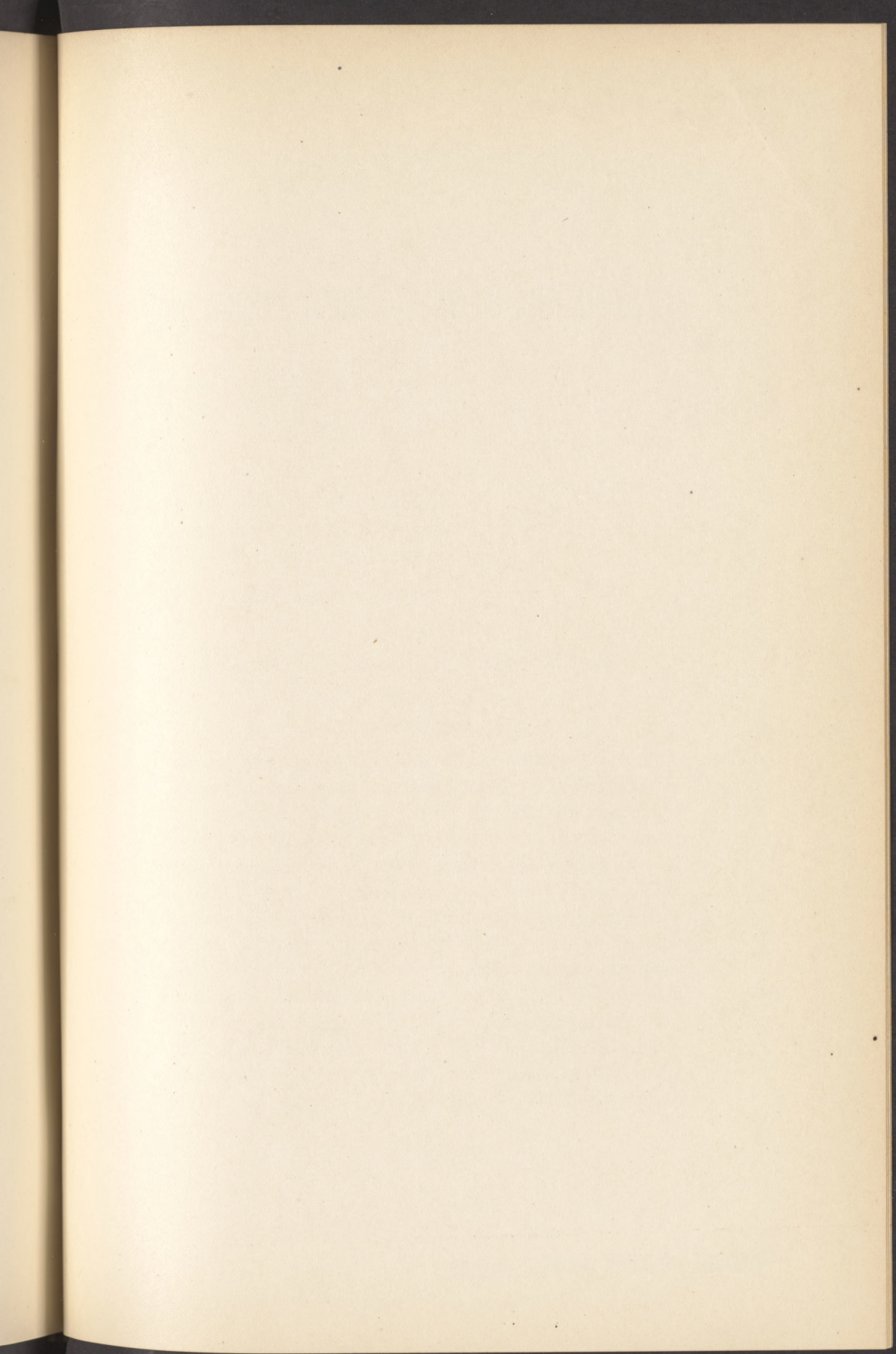
Robeling v. Trenton Passenger Railway Co., 29 Vr., 666.

Moore v. Haddonfield, 32 Vr., 470.

The facts alleged in the defendants' plea are fully proved (*see Case, pages 30 and 31*), from which it appears that the defendant companies had legislative authority to build and operate the railway in question, and got the consent of the city by a proper ordinance (*Case, pages 46-49*). Such being the case, the land in question is being used only for street purposes, the defendants were not guilty and there is no error in the judgment of the Supreme Court, and it should be affirmed.

Camden, N. J., March Term, 1904.

E. A. ARMSTRONG,
Of Counsel with De-
fendants in Error.



NEW JERSEY COURT OF ERRORS AND APPEALS.

HIRAM E. BUDD AND ISAAC W. BUDD,	}	ON ERROR TO THE	
Plaintiffs in Error.		SUPREME COURT.	10
vs.		IN EJECTMENT.	
CAMDEN HORSE RAILROAD COMPANY AND CAMDEN SUBURBAN RAILWAY COMPANY, LESSEE,			
Defendants in Error.	}		

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

For the purpose of this case the following facts may be taken as established and undisputed. The defendants by virtue of an ordinance of the City of Camden, operate, on Ferry Avenue, their trolley lines, and locate their tracks, poles and wires exactly where the ordinance authorized. Ferry Avenue runs East and West. The boundary line of the City of Camden is the centre line of Ferry Avenue. (Laws 1871, page 210). On the North side of Ferry Avenue the plaintiffs own and possess a large and valuable tract of land, all within the city limits, extending in front along Ferry Avenue two thousand and sixty-six feet. The plaintiffs' title goes to the centre of Ferry Avenue, and is co-terminus with the city boundary. Ferry Avenue is thirty-three feet

wide. On the South side of Ferry Avenue lies Haddon Township. The tracks of the defendants extends Easterly on the North side of Ferry Avenue in front of plaintiffs' property from the westernmost point thereof for a distance of fourteen hundred and twenty-seven feet. On the South side of Ferry Avenue, in Haddon Township, the track of the defendants extends the full distance of plaintiffs' frontage. The North rail of the North track is located at the distance of five and one-half feet from the plaintiffs' inner property or building line. The railroad ties extend two and one-half feet beyond the North rail so that the three feet intervene between the North track and the building line.

The defendants' poles for the support of its wires are located within the easement but right up against the inner property or building line. The condition of things seriously interferes with the practical manipulation of plaintiffs' business, which is an extensive manufactory of bricks. It increases risk and danger, causes frequent delays and multiplies the difficulties of ingress and egress. It makes building on the plaintiffs' property along Ferry Avenue impossible for want of a sidewalk and room to swing gates and doors, unless the plaintiffs sacrifice much of the value of their land.

Besides, the location of the North track seriously depreciates the entire value of plaintiffs' land and impedes the sale thereof. Ferry Avenue is one of the principal highways of the City of Camden. Travel on that avenue must increase rapidly. The frequency and speed of trolley cars must increase rapidly. There is no way for the plaintiffs and general public to use Ferry Avenue except by moving on defendants' tracks, or in the twelve feet space between their tracks, or by zigzagging from one track to the other. The defendants practically monopolize the whole of Ferry Avenue. Such an arrangement

necessarily causes, not only great inconvenience and loss to the plaintiffs directly, but indirectly to the use and value of their property.

A bill was filed in the Court of Chancery to enjoin the Railroad Company from maintaining its tracks and poles as above located. The bill was dismissed for want of equity. (Budd et al., vs. Camden Horse R. R. Co., et al. 16 Dick., 543.) An appeal was thereupon taken to this Court. The decree was affirmed (18 Dick., 804). The validity of the ordinance as affecting the plaintiffs in error was passed upon by the Supreme Court on an application for a writ of certiorari. 10

A writ was refused.

(Budd, et al. vs. Camden, et als., 54 Atlantic Rep. page 569.)

ARGUMENT.

EJECTMENT WILL LIE BY THE OWNER OF THE SOIL,
FOR LAND WHICH IS PART OF THE KING'S HIGHWAY.
THE RECOVERY MUST BE SUBJECT TO THE WAY.

This is the doctrine laid down by Lord Mansfield in
the case of *Goodtitle vs. Alker*, 1 Burr. 143.

It has stood unquestioned at Westminster Hall since
1757.

10 This has been the settled law in England, certainly
ever since the time of Edward IV. The only case, which
seemed to the contrary was that of *Sir Bouchier*
Wray, mentioned in the above case, which Lord Mans-
field said was loosely remembered, and so imperfectly re-
ported as to deserve no regard. The old authorities are
cited by *Viner*, *Chimin priv. B.* and particularly 8 Edw.
4. 9. pl. 7., where this was held to be the law by all the
Justices.

20 The case of *Doe vs. Cowley*, 11 E. C. L. 339, is not
in point as it did not appear that the plaintiff had
title to the soil of the street, and further it is the report
of a judgment of non-suit at nisi prius. The early
cases in Connecticut were against *Goodtitle vs. Alker*
but the law in that State is now in harmony with it.
Woodruff v. Neal, 28 Conn. 165.

The doctrine has been doubted in *Cincinnati vs.*
White, 6 Peters, 442. The clear weight of authority is
against *Cincinnati vs. White*, as is every State of the
Union where the question has been mooted *Goodtitle vs.*
Alker, has been followed.

30 *Taylor v. Armstrong*, 24 Ark., 105.
Weyl vs. Sonoma Valley R. 69 Cal., 202.
Savannah vs. Steamboat Co., Charlt. (Ga.), 342.
Louisville R. Co., v. Hess, 92 Ky., 407.
Blake vs. Ham, 53 Me., 430.
Sineberg v. Cunningham, 96 Mich., 378.

Snoddy v. Bolen, 122 Mo., 483.

Carpenter v. Oswego R. Co., 24 N. Y., 655.

Phillips vs. Dunkirk R. Co., 78 Pa. St., 180.

Weisbrad vs. Chicago R. Co., 21 Wis., 602.

Bolling v. Petersburg, 3 Rand. (Va.) 563.

Pomeroy v. Mills, 3 Vt., 279.

Woodruff v. Neal, Supra.

The case in BURROW has been the prevailing law in New Jersey.

Wright vs. Carter, 3 Duch., 76.

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Burnet vs. Crane, 27 Vroom, 288.

To enable the plaintiff to maintain ejectment for any part of the highway to which he has the title subject to the public easement, the defendant must have taken exclusive possession of it, or imposed upon it some burden inconsistent with the public easement. Westlake vs. Koch, 134 N. Y., 61 and cases supra.

THE MUNICIPAL CORPORATION HAD NO POWER TO PASS THE ORDINANCE, UNDER WHICH THE DEFENDANTS JUSTIFY, AND IT IS AN ACT OF USURPATION AND ALL PROCEEDINGS UNDER IT AFFECTING THE PLAINTIFFS ARE VOID, AND ITS VALIDITY CAN BE BROUGHT IN QUESTION COLLATERALLY.

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If the ordinance passed Sept. 9th, 1896, giving the municipal consent to the defendant to build and erect its tracks and poles on Ferry Avenue is lawful because it does not contravene that part of the Constitution of the United States and that of New Jersey, which forbids the taking of private property for public use, we contend that it is still void, because thereby the plaintiffs' sidewalk is taken. This contention is based on the theory that the City Council which passed the ordinance in question was not acting within its jurisdiction. The right grant-

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ed at that point on Ferry Avenue was not within its jurisdiction and control. The ordinance passed by City Council, held December 30th, 1886, regulating the width of sidewalks in the streets of the city, took away from the latter City Council the power to take away the plaintiffs' sidewalk until the former ordinance was revised, amended or repealed. Under the ordinance of December 30th, 1886, the plaintiffs were entitled to a sidewalk in front of their property or at least one-quarter of the width of the street, or a sidewalk eight and one-quarter feet wide. This ordinance was as much binding on the following City Council as would have been a legislature provision regulating the width of sidewalks. The plaintiffs offered in evidence the section of the ordinance of the City of Camden relating to sidewalks, as printed by authority of City Council. Objection was made to this offer. It was admitted. This was proper. "The volume of ordinances and by-laws printed and published by the authority of the City Council shall in like manner be taken and received in evidence of the ordinance and by-laws of said City Council."

Charter of Camden City, Laws of 1871, page 210, sec. 32. The same act of the Legislature (Sec. 29) provides "And no ordinance shall be altered or repealed save by ordinance to that effect." We take it that the purpose of this legislative provision was to prevent City Council from taking away indirectly that which was secured by ordinance, without repealing the former ordinance or amending it. And while it remained in force took away the jurisdiction and control of the following City Council over the subject matter. This condition of affairs gave the plaintiffs the same right to alter the ordinance collaterally as they had by direct attack on certiorari. The trial judge should have said and so found as a matter of law that the ordinance was void, and an im-

proper municipal regulation so far as it affected the plaintiffs. That it was an improper regulation no one can doubt and any court would so say upon a review by certiorari. The plaintiffs were denied a writ.

Camden vs. Mulford, 2 Dutch., 50, is authority for the rule that on an ordinance passed without jurisdiction is attackable collaterally. In that case the collateral attack was not permitted because the governing body was held to have jurisdiction of the subject matter about which the ordinance related.

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In Carron vs. Martin, 2 Dutch., 595, it was held that proceedings of municipal corporations should be kept strictly within the limits assigned to them by the statutes under which they act, and if they do not keep within those limits, their proceedings not only are liable to reversal by certiorari, but are held void and insufficient to support a title professing to be founded on them. The writ was denied, therefore the parties are not concluded. It is not *res judicata*. In Mercer County Traction Co. vs. United N. J. R. R. Co., 54 Atl. Rep., 819, the Court of Chancery permitted a collateral attack on the validity of an ordinance, and this after the Supreme Court and the Court of Errors upon a writ of error had adjudged it to be a valid ordinance. The litigation was between the same parties. The contestant was held not to be estopped in a subsequent new proceeding to contest the validity of the ordinance for reasons not advanced or considered in the prior suit.

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But it is further urged that the court having denied the extraordinary remedy by certiorari, the plaintiffs are left without an appeal, unless they have a writ of ejectment for the reasons herein stated.

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An appeal must lie somewhere. This has always been the policy of the law.

Therefore there being no review by certiorari the court

should permit a collateral attack on this most unreasonable ordinance on the sole ground of its unreasonableness, and even though it be found that the municipal body had jurisdiction to pass the ordinance. If a direct attack is taken away the right to a collateral attack must follow:

THE CONSTRUCTION OF THE TRACKS ON FERRY ROAD, IN SUCH CLOSE PROXIMITY TO THE PLAINTIFFS' BUILDING LINE, AND THE ERECTION OF THE POLES NEXT TO AND
 10 AGAINST THE BUILDING LINE, IS AN APPROPRIATION OF THE LAND IN THE HIGHWAY TO A PURPOSE NOT WITHIN THE LIMITS OF THE EASEMENT AND PUTS AN ADDITIONAL SERVITUDE UPON THE PROPERTY WHICH CANNOT BE IMPOSED WITHOUT COMPENSATION TO THE OWNERS OF THE SOIL.

The use of a street for public purposes other than that of a way for ordinary vehicles, involves one of the most vexed questions of the law of eminent domain. The public purposes in question are those which bear an intimate relation to the thoroughfare use for which a highway
 20 is intended—works of transportation and transmission. A work which though public is presumably derogatory to, or at least not in consonance with the use of a street as a public highway; e. g., a freight station, a market, or a toll house, may never be imposed without compensation.

Barney v. Keokuk, 94 U. S., 324.

State v. Laverack, 5 Vroom, 201.

State v. Mobile, 5 Port., 279.

The question is, when is a location of a work of transportation or transmission upon a street an act of eminent domain—a taking of private property for public use?
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It is generally held that the laying of pipes for the distribution of water and gas in a country road is an invasion of the property of the fee owner in the soil subject only to the public easement of passage, and consequently a taking.

Bloomfield, etc., Gaslight Company v. Calkins, 62 N. Y., 386.

Sterlings Appeal 111, Pa., 35.

But pipes, sewers, drains, etc., may be laid in a city street without compensation, and this without regard to the ownership of the soil.

Barney v. Keokuk, Supra.

Standinger v. Newark, 1 Stew. Eq. 187; S. C., Id. 446.

Commonwealth v. Lowell Gas. Co., 12 Allen 75.

Cane v. Hartford, 28 Conn., 363.

It is held that a highway may be changed into a turn-
pike or a plank road without compensation to the owner
of the fee. The highway remains practically unchanged
and the payment of tolls to a corporation which is bound
to keep the road in repair is not an additional burden on
the adjacent owner since he is relieved from the taxes
formerly assessed for like repair. 10

Walker v. Caywood, 31 N. Y., 51.

Commonwealth vs. Wilkinson 16 Dick., 175.

Wright v. Carter 3 Duch., 76.

Plank Road Co., v. Cane 2 O. St., 419. 20

A horse railroad is simply an enlargement of the common highway use, offering no impediment to travel, and in consequence, not amounting to a new burden on the fee.

Hinchman v. Patterson H. R. R. 2 C. E. Cr., 75.

Met. R. R. v. Atty. Genl. 125 Mass., 515.

Elliott v. Fairhaven R. R. 32 Conn., 579.

A surface railroad operated by electricity is not distinguished from a horse railroad. 30

Briggs v. Horse R. R. 79 Me., 363.

West Jersey R. Co., v. Camden G. & W. R. Co., 7 Dick., 31.

A cable road requiring for its operation a trench through the street must pay compensation to the adjacent owner, though the fee of the street be in the public.

People v. Newton 55 N. Y. Super. 477.

A steam surface railroad cannot be placed upon a public highway without compensation to the owner of the fee. This is based on the ground that a steam railroad is an exclusive use of the highway, and destroys its utility for ordinary vehicles.

Williams v. N. Y. C. R. R. 16 N. Y., 97.

Starr v. Camden & Atl. R. R. 4 Zab. 592, approved in Citizens' Coach Co., vs. Camden H. R. R. Co., 6
10 Stew., 274.

The use of a street for a (steam) railroad is a new burden beyond the public easement—is a continuing tresspass—and ejectment may be maintained to recover the land subject to the public easement as a highway. The legislative grant to construct the railroad is a mere authority, and it must be exercised without violating any private rights, or if any private rights are impaired, the constitutional compensation must be made. The legislative grant is made and is only sustainable upon this
20 ground. It saved the defendants the liability to indictment for a nuisance for laying their rails in the streets of the city and exempts them from all other liabilities as respects the public. It could go no further. It could not take away any private right without providing for making a just compensation.

Wager vs. Troy Union R. R. Co., 25 N. Y., 531.

The use of highways for the plant of telegraph and telephone companies is inconsistent with the easement.

Incorporating acts usually require compensation to be
30 made to the adjacent owner for the setting up of poles. This is the legislative provision in New Jersey.

Where the question arises it has been held that the occupation of the highway is a taking of the property of the adjacent owner.

Board of Trade Tel. Co. vs. Barnett, 107 Ill., 507.

Dusenberry vs. Mut. Tel. Co., 11 Abb. N. C., 440.

Tiffany vs. U. S. Illuminating Co., 51 N. Y. Super. Ct., 280.

Pacific Postal Tel. Co. vs. Irvine, 49 Federal Rep., 113.

2 Dill on Munic. Corp. (4 Ed.) 698.

Finally an elevated railway in a street of a city is a preversion of the use of a street from the purposes originally designed for it and its use cannot be sanctioned without compensation to abutting owners.

Story vs. Ry., 90 N. Y., 124.

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Lehr vs. Ry., 104 N. Y., 268.

Let us see wherein the cause at bar differs from the reported cases which decide that a surface road operated by electricity is consistent with the easement. There is no reported case so far as we can find where the tracks and poles were constructed as in the present case. It is admitted that if the plant had been laid down, under a lawful ordinance, in the ordinary manner, the tracks in the street and the poles just within the curb line, the plaintiffs in error could not be heard to complain.

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In Kennelly vs. Jersey City, 28 Vroom, p. 298, the provisions of the ordinance there under review required the poles to be erected on the sidewalk adjacent to the curb line, and authorized a double track (296) to be placed in the street. In dealing with this case Justice Dixon said, "That easement includes the right to use the street for purposes of passage by the public, and therefore to employ any means directly conducive to that end which do not substantially interfere with the customary use of the street by any portion of the public or with the recognized rights of abutting owners."

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In Roebing vs. Trenton Pass. Ry. Co., 29 Vroom, 676, Justice Depue said, in speaking of the double track railway authorized, "Be that as it may, nothing appears in the case to show that there is anything in the situa-

tion of West State Street, either in the width or surroundings, that makes a double track in the street, with cars operated by the trolley system, in itself injurious or unreasonable, either with respect to the public convenience or to private property. Nor does it appear that the tracks of the company's railroad, next to the property of the prosecutrix, has been placed so near the curb line as unreasonably to interfere with access to her property, or the enjoyment of those privileges which owners
 10 of abutting lands are entitled to enjoy in a public highway in front of their premises." And while much of the discussion in this opinion was not necessary to the determination of the issues there involved, it indicates a strong mind in rebellion against the gradual encroachment on private property by this class of corporations. It may be read with profit in the settlement of this controversy.

In *West Jersey Railroad Company vs. Camden, &c. Railroad Co.*, 7 Dick., 35, the Chancellor, in speaking of
 20 the Electric Road under consideration, contemplated conditions incompatible with the purpose for which the highway was designed.

All of which tends to show that these legal minds were not prepared to admit that every use of a highway by a trolley road was not an additional servitude.

This court should not lay down the broad principle that an electric railroad, no matter how constructed, if built within the lines of the easement, is consistent with the purpose for which the land was appropriated.

30 If this judgment is affirmed that will be its effect. Each new use to which the fee is subjected must be dealt with as it arises. It would be manifestly wrong to say that, because it has been decided that an electric street railway is not an additional servitude, the question here presented cannot be inquired into. Can it be doubted

that pipes, sewers and drains, if authorized to be laid on the surface of the highway, and so placed, would be deemed to be within the limits of the easement, likewise can it be said for a moment that if authorization was given to place lamp-posts or electric light poles against the building line, and they were so erected, that it would be determined that such erection was not a further burden?

The setting up of poles for telegraph and telephone purposes, ordinarily placed just within the curb line, require compensation to the owner of the fee. Trolley poles set up against the building line are a far more serious menace to the abutter. Cable roads, steam railroads, elevated railroads, telegraph and telephone poles as usually placed and erected in the highway are much less injurious to the adjacent owners than are trolley tracks within a few feet of a building line and trolley poles next to an owner's house line. 10

A freight station, a market house or a toll house would many times be preferable to the construction and erection sought to be imposed on the owners of the soil in the case at bar. 20

Where the Courts permit these subordinate privileges in the highway, without compensation to the abutter, it is put upon the ground that they are entirely consistent with its primary use, or merely a new mode of its ordinary use as such, and are no detriment to the land owner. Where these privileges are denied it is put upon the ground that they impede ordinary travel in the highways—as in the case of a steam railroad—thus affecting the general public, or that they are incongruous with the purpose for which the highway was originally created, or that they are injurious to the proprietor of the soil. In dealing with this subject perhaps no general rule covering the subject can be laid down. If, however, the 30

rights of the private owner are always kept in mind, the rights of the public who use the street, as well as the individual will best be conserved.

The tracks and poles herein sought to be removed take away the abutters only valuable property in the street, and destroy or impair the private easement of access. This should modify the controlling interest of the State.

10 In *State vs. Laverack*, supra, the market there set up consisted of a farm wagon which had been directly in front of defendant's premises for several hours, out of which country produce was sold. The Chief Justice said :

20 "It is one of the most important of the privileges of the citizen of this State that their property cannot be taken even when required by the public convenience without just compensation. This a constitutional provision, and, like all such, is to be sedulously guarded and carefully preserved. It is the admitted duty of the Courts of the State to see that this invaluable prerogative is secure against all invasion.

30 "I think the true rule is, that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other use, to the detriment of the land-owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State."

A market carried on out of a wagon at the curb line would be less injurious than trolley poles against a man's window or tracks against his door-step. In *Penna. R. Co., vs. Angel*, 14 *Stew.*, 329, the Court said "That instrument secures to owners, not only the possession of

property, but also those rights which render possession valuable." "In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."

In *Detroit City Ry., v. Mills*, 85 Mich., 659, it was determined that the poles of an electric road must be so placed as not to interfere with the right of ingress and egress to abutting property. 10

THE DEFENDANTS HAVE SO APPROPRIATED AND ARE SO USING THE ROAD IN QUESTION AS TO IMPOSE SPECIAL LOSSES AND SPECIAL BURDENS ON THE PLAINTIFFS, AND THEREBY BRING THEMSELVES UNDER THE CONDEMNATION OF THE PLAINEST PRINCIPLES OF THE LAW.

The narrowness of the street and the arrangement and use of the defendants' tracks, ties and wires, and cars, impair and partially destroy the reasonable use of the street by the plaintiffs in their business. The evidence on this point is without contradiction. While it must be conceded that the evidence does not show an admeasured loss to the plaintiffs at the present time, it does show a loss, and taken with the following suggestions, serves to show the extraordinary burden that the defendants unlawfully impose upon the plaintiffs, which must grow heavier and heavier as time passes. 20

The narrowness of the street, the location of the tracks and the operation of the defendants' cars so far interfere with the free use of the street by the public and the plaintiffs as to impair very seriously the property value of the plaintiffs. The two tracks are so located on either side of the street as to make the street impassable except at great inconvenience. This condition will obviously 30

increase with the growth of the community, which is rapid. It will never lessen.

Between the North track and the plaintiffs' property line there is a space of only five feet and one-half, and between the ends of the ties and the property line, a space of only three feet. The plaintiffs' property is valuable, and within the limits of the City of Camden. They have a right to build to their property line. Besides the ordinances of the City of Camden require the
 10 plaintiffs to lay down a side-walk eight and one-quarter feet wide along the front of their property in case the plaintiffs build, or in case the city so orders it. It is mere idleness to contend that this condition of things is not a serious impairment of the plaintiffs' property rights; it simply renders it impossible for the plaintiffs to lawfully enjoy their property, or to perform the reasonable duties imposed upon them by municipal legislation. The situation is not met by the suggestion that the
 20 plaintiffs have not built, and the city has not required them to lay down their side-walks. They have the right to build which right is taken away from them by the location of the defendants' tracks, ties and poles. They are under an obligation to lay down and maintain their side-walks whenever they build, and whenever the city requires them to do it. The defendants' tracks, ties and poles, put the performance of this duty out of the plaintiffs' power. Upon this ground alone, we insist that this Court must intervene.

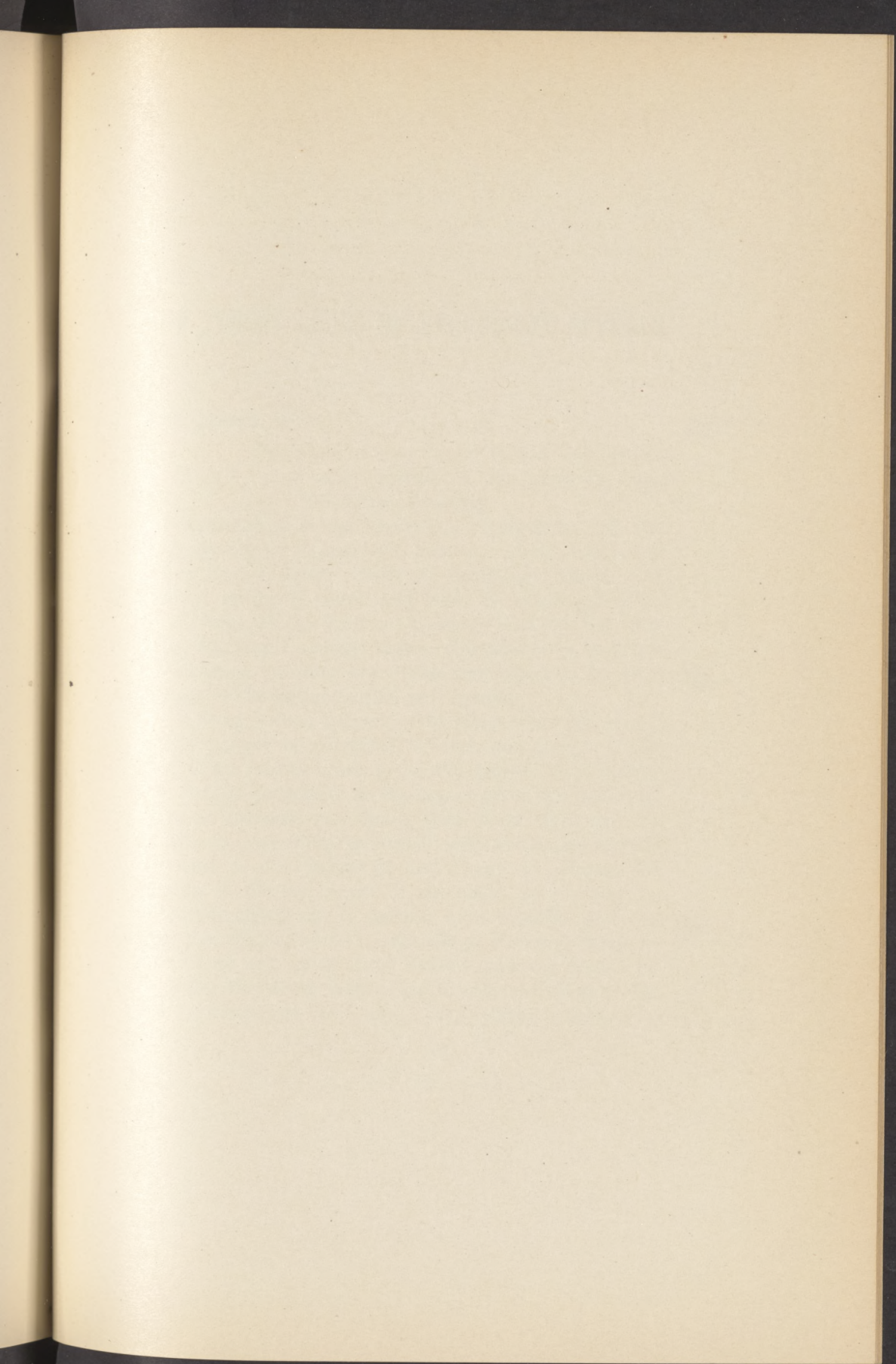
While it is conceded that the defendants have a right
 30 to use this street in common with other citizens, it is emphatically denied that, under the protection of this right, they are so authorized to use it as to destroy in a substantial manner the property values of the plaintiffs. The situation, in the judgment of counsel, is a serious one. It will not do to beg the question. Nor will it do

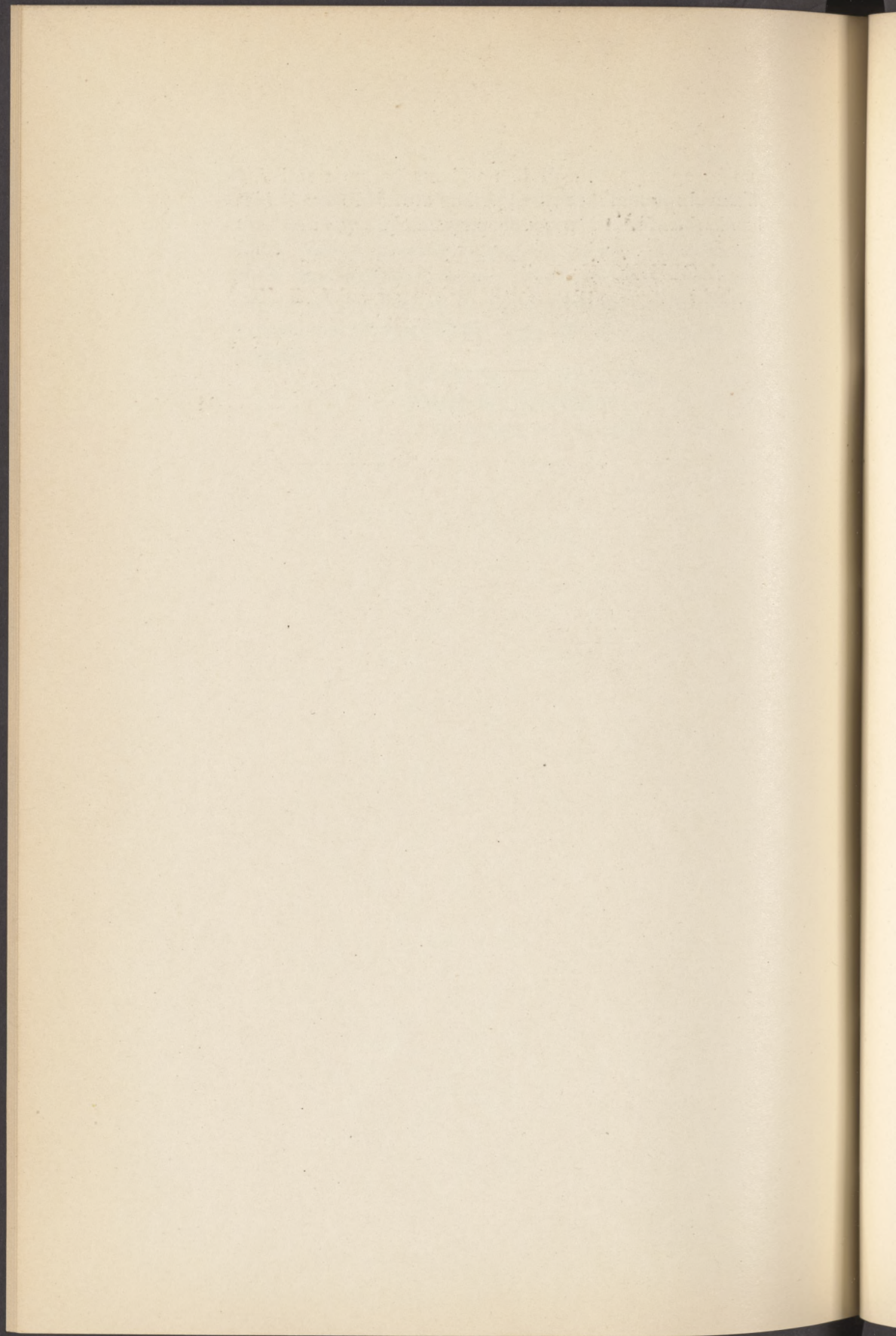
to close our eyes to the special burden placed in this instance upon the plaintiffs by sheltering one's self under the admitted right on the part of the defendants to use the public highway. The fact is, and no fearless mind will refuse to admit it, that, in this case, there is presented such a peculiar use and appropriation of a public street by a corporation as to visit serious damage upon an abutting owner. This, the law says, cannot be done without compensation. To be sure the damage complained of flows indirectly through the public upon the plaintiffs. But, it is none the less damage. When a corporation so uses and appropriates a public highway as to drive purchasers away, so uses it as to make abutting lands undesirable and unmarketable, so uses it as to thus decrease the value which otherwise would normally inhere and belong to adjoining property, it does an injury that the courts must take into account.

In the case at bar the defendants practically monopolize the public road; they make common travel dangerous and seriously inconvenient; they so locate their tracks and poles, and so operate their cars as to drive the defendants' property out of the market, and make it altogether undesirable. Who would purchase lots and build homes on a street where a convenient and free passage is denied, and where danger to life and limb is so far multiplied as to involve constant vigilance? In this case the tracks and cars of the defendants would almost touch the walls of the house built to the property line. They would almost touch, in case a house was built back from the street, the front fence. They would compel the gates to be swung inward. They would make it impossible to have steps in the front of the buildings or yards. They would make it impossible to lay down and maintain sidewalks. They would compel occupants of houses to exercise extraordinary caution in getting in and out of

their homes. If alleys existed between houses, children could not safely go out upon the street thereby, nor could adults, without peeping around the corner. In view of which considerations, we earnestly insist that the ordinance is no justification for the defendants' use of Ferry Avenue, and we respectfully urge that the judgment be reversed.

FRANCIS D. WEAVER,
JOHN W. WESCOTT,
Attorneys for Plaintiffs in Error.





NEW JERSEY COURT OF ERRORS AND APPEALS.

NEW JERSEY, SS:

10

The State of New Jersey to the Chief Justice
[L. s.] and other Justices of our Supreme Court
of Judicature, Greeting:

Forasmuch as in the record and proceedings, and also
in the giving of judgment in a certain plaint, which was
in our said Supreme Court of Judicature, before you,
between Hiram E. Budd and Isaac W. Budd, plaintiffs,
and Camden Horse Railroad Company and Camden Sub-
urban Railway Company, lessee, defendants, in an action
of ejectment, manifest error hath intervened, to the great
damage of the said plaintiffs, as it is said. 20

We being willing that the error, if any there be, should
in due manner be corrected and full and speedy justice
done to the parties aforesaid in this behalf, do command
you, that if judgment be thereupon given and affirmed,
then you distinctly and openly send, under your seal, the
record and proceedings aforesaid, with all things touching
the same, to our Judges of our Court of Errors and
Appeals in the last resort in all causes, at Trenton, on
the twenty-eighth day of January next, together with this
writ, that the record and proceedings aforesaid being in-
spected, we may cause to be further done thereupon, for
correcting that error, what of right, and, according to law,
and the custom of the State of New Jersey, ought to be
done. 30

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the ninth day of January, one thousand nine hundred and four.

F. D. WEAVER, Attorney.	S. D. DICKINSON, Clerk.
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RETURN.

The answer of William S. Gummere, Chief Justice within named. The record and proceedings of the plaint whereof mention is within made, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes within specified, at a day and place within contained, I certify with a certain schedule to this writ annexed, as I am within commanded.

20

WM. S. GUMMERE, [L. s.]
C. J.

30

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY CIRCUIT.

ISAAC W. BUDD, et al,

vs.

} IN EJECTMENT.

CAMDEN HORSE RAILROAD Co., et als.

10

DECEMBER TERM, 1903. No. 24.

Appearances:

For the Plaintiff, F. D. WEAVER, ESQ.

For the Defendant, E. A. ARMSTRONG, ESQ.

20

BEFORE GARRISON, J. AND A JURY.

THE CASE FOR THE PLAINTIFF.

CHARLES S. KING, ESQ., sworn.

By Mr. Weaver:

30

Ques. Mr. King, what is your business?

Ans. I am a lawyer and a surveyor.

Ques. You have followed the business of surveying for
what length of time?

Ans. For the last twenty years.

Ques. Did you make any surveys on the property of
Mr. Budd on Ferry road?

Ans. I have.

Ques. Did you make those surveys on the ground?

Ans. I did.

Ques. As a result of those surveys have you made any map?

Ans. I have.

Ques. Is that the map in front of you?

Ans. It is.

Ques. Now, I ask you when those surveys were made?

10 Ans. The last time I was on the ground for the purpose of making a survey was on the 11th inst.

Ques. Did you at any time locate the centre line of Ferry avenue?

Ans. I have located it two or three times during my experience.

Ques. Now, what is the nature of the construction, in the way of railway or trolley tracks, on Ferry road?

Ans. With reference to the center line, you mean?

Ques. With reference to the center line of Ferry road?

20 Ans. The center line of Ferry avenue is the boundary line of the city of Camden; it is also the boundary line of the lands of Budd & Brother, the plaintiffs in this case. The north trolley track is six feet north of that centre line.

Ques. That is, the south rail of the north track?

Ans. The south rail of the north track, within the limits of the city of Camden.

Ques. Is how many feet from the center line?

Ans. Six feet.

30 Ques. What is the width of the track there?

Ans. Five feet.

By the Court:

Ques. Budd's property lies to the north?

Ans. To the north, yes.

By Mr. Weaver:

Ques. What is the width, do you know, of the ties on the north rail, extending towards the Budd property?

Ans. About two feet to two and a half, as near as I could ascertain.

Ques. What is the width, as you establish it, of Ferry road?

Mr. Armstrong: I do not suppose that is material, as the premises in question here are described to be sixteen and one-half feet; that is all the suit is brought for; whether that is more or less than the width of the street does not signify, inasmuch as it is admitted that the street is at least that wide. 10

(Question withdrawn.)

Ques. Well, according to your survey, what have you established the width of Ferry avenue to be?

Ans. On the north of the center line? 20

Ques. On the north of the center line, yes.

Ans. Sixteen and one-half feet, or one rod.

Ques. Now, within what distance of that property line does the construction of the north rail——

The Court: Which do you mean now by "the property line"?

Mr. Weaver: The Budd property line. 30

The Court: Which do you mean by the "Budd property line"; do you mean the supposed center of the street?

Mr. Weaver: No, I have reference to the side of the street.

The Court: Well, I understand that you are claiming that Budd's property line extends sixteen and a half feet into the street?

Mr. Weaver: Yes.

10 The Court: Well, then, in speaking of the property line, you will have to indicate whether you mean their property line in the center of the street or on the side of the street; otherwise, it will confuse the witness and the Court.

Mr. Weaver: I mean their property line not included within the public easement on Ferry road?

20 Mr. Armstrong: If the Court please, the suit brought here only involves a strip of land sixteen and one-half feet wide, bounded by the middle line of Ferry avenue. Now, if the question is as to that north line of the strip in question, I suppose it is proper; it cannot, I suppose, affect any land outside of that.

The Court: He is not asking now about any land outside of it; he is asking now about the relation of the track with relation to the northernmost of those two lines that are sixteen and one-half feet apart.

Ans. The distance from the north track, the north rail of the north track from the outside line of the street is five and one-half feet.

30 Ques. For what distance on Ferry road from the westernmost line of the Budd property does the trolley track extend easterly along the Budd property—that is, I mean the north track?

Ans. About seventeen hundred feet, to the best of my recollection.

Ques. Have you got a measurement of that on your map, Mr. King?

Ans. I haven't indicated the distance. I have it on the map, which is subject to being scaled. The distance indicated on the map is the double line from the west end of the track to the point where it merges into the other track at the switch, at this point indicated by my finger on the map, being about seventeen hundred feet, as near as I can tell without scaling.

Ques. Now, what do the red marks or the red dots on your map indicate?

Ans. They indicate the position of the poles which hold the trolley wires. 10

Ques. Now, taking the first pole at the westernmost line of the Budd property, will you state to the Court the distance of the pole northwardly from the center line of Ferry road?

Ans. The first pole on the western end of the property, as indicated by the red dot, is sixteen and five-tenths feet, or exactly on the property line, on the outside line of the street.

Ques. The second pole? 20

The Court: Is that the north side of the pole you are speaking of now?

The Witness: The center of the pole, as near as could be ascertained; we measured from the center of the pole.

Ques. The second pole?

Ans. The second pole is located fifteen and three-tenths feet from the middle of the street; the third pole is located fifteen and four-tenths feet from the middle line of the street; the fourth pole is located fifteen and two-tenths feet from the middle line of the street; the fifth pole is located sixteen feet from the middle of the street; the sixth pole is fifteen and eight-tenths feet from the middle of the street; the next one, fourteen and five-tenths feet; the next two poles are inside of the street 30

line entirely and I did not measure those, and the next pole measured by me was sixteen and four-tenths feet from the middle of the street—that is, the tenth pole, measuring eastward from the west end of the map or the track.

Ques. Did you, as a surveyor, lay out the property on the south side of Ferry road opposite the Budd property?

Ans. I did.

Ques. What was the width of the street as you ascertained it at that time?

10

Mr. Armstrong: I object to that.

The Court: Is that within the *locus in quo* laid in your declaration?

Mr. Weaver: No, sir; that only goes to show the width of the street as ascertained by this surveyor.

The Court: The objection has been made that that is not a relevant circumstance in this case.

20

Mr. Weaver: Well, it seems to me to be relevant in this particular: The point is, we wish to show here the width of this street, and the burden is on us to do so. Now, it may or may not be proven by the defense that this street may be wider—

The Court: Well, but what is the relevancy of the width of the street? How does it become relevant?

30

Mr. Weaver: Why, if he undertakes to offer in the defense to show that this street is wider than this—

The Court: How would it be relevant to show it? How would it be relevant to show that on either side?

Mr. Weaver: In this way, as I view the case: If this road is a wider road than we claim it to be, then there would be no action; no action would lie here at all for a trespass, because it would be clearly within the street line, the trolley road would be clearly within the street lines, the sidewalk would not be taken away from them, and these trolley tracks would not be so close to his property line; and, therefore, in order to establish our case—we having taken that burden on us—any part of the evidence which goes to show what the width of the street is as ascertained by surveys of men on the ground is relevant. 10

The Court: Do you contend that the lawfulness or unlawfulness of this taking depends on the width of the street—in other words, that if the street is wide it is lawful, and if it is narrow, it is unlawful?

Mr. Weaver: Yes, sir.

The Court: Before a jury? 20

Mr. Weaver: Well, of course, that may be as the Court may view the law and instruct the jury on that point.

The Court: But I am asking to guide the case, how can a man justify the taking of your property by showing that a public highway is wide or narrow? What has that got to do with you?

Mr. Weaver: As I view it, in this way: If the city has given a right to construct this trolley road, and they have constructed a road within the proper limits of the street lines, and the road is a certain width or of a sufficient width— 30

The Court: If I understand, all that you claim is within the street?

Mr. Weaver: Is within the street.

08 The Court: Now, that is your proposition?

Mr. Weaver: That is our proposition.

The Court: And that carries you to the centre line?

Mr. Weaver: Yes: that carries us to the centre line.

07 The Court: You now want to inquire how much land there is on the other side of the centre line, with which you are, as I understand it, in no wise concerned.

Mr. Weaver: No; but the question is to show by this surveyor, who laid out the land on the southerly side of this property, the width of the street as he found it at the time it was laid out.

01 The Court: The question is, how does that justify anybody in taking your land? Suppose it is a mile wide, or an inch wide, how does that affect the case? I do not see the bearing of it, because there is an objection made that has got to be passed upon on its legal foundation.

Mr. Weaver: It may be anticipating the defense, in a sense, but I think, inasmuch as we propose now, not only by this witness but by the offer of the records of deeds, to show that this road, when it was originally laid out, was a two-rod road or thirty-three feet in width, and that the surveyor, at the time he laid out the property on the southerly side of Ferry road accepted it—

The Court: No matter how you may prove it, how does it touch the case in any way? How does the truth or falsity of any proposition in regard to the width of the road have any bearing upon the case? That is all that is necessary. Now, if it has any bearing at all you can show it.

08

Mr. Weaver: Perhaps I do not understand your Honor, but my theory of this case is this: that because of the narrowness of this road, because Ferry road, as it actually exists, is only thirty-three feet in width, and because the city of Camden, by its ordinance, gave this trolley road the right to build its track within the distance that it did of this plaintiff's property, that it amounts, because of the narrowness of this road, to a taking of their land within the constitutional sense—it amounts to a taking of their property without compensation—and, therefore, anything that goes to show the width of this street is part of the plaintiff's case.

02

The Court: Is it your idea to submit to this trial court the unreasonableness of the ordinance which you say justifies the defendant?

Mr. Weaver: Yes, sir; at the proper time.

The Court: Can that be done?

01

Mr. Weaver: I think so. It has been done.

The Court: Can a Court and petit jury set aside an ordinance?

Mr. Weaver: I think the Court can instruct this jury that the ordinance was unreasonable.

The Court: I thought that was peculiarly the function of the Supreme Court on certiorari. Have you any authorities to show that that matter can be transferred from the Supreme Court to a trial court? If that is the ground of the offer as to the width of the street that will raise that question at once. Has not this ordinance been before the Supreme Court?

10 Mr. Weaver: It has been before the Supreme Court; but the Supreme Court refused a writ; therefore, it is not *res judicata*.

The Court: They simply did not allow the writ?

Mr. Weaver: They simply did not allow the writ.

20 The Court: Well, have you any authority for holding that a Court can leave to a petit jury to say whether an ordinance is unreasonable or not? It is a matter of fact, of course, and if it has got to be decided here it must be decided by the jury.

Mr. Weaver: I don't know that I have any law here——

30 The Court: If you find any authority you may draw my attention to it, but as at present advised, if that is the purpose of proving the width of the street, to show that the city has granted an ordinance which makes an unreasonable occupancy of the street, I shall hold that that matter must be determined by the Court and not by the jury. I am only now speaking as to the purpose for which you want to show the width of the street. Now, I understand that the purpose is to show that the street is so narrow that any ordinance permitting the defendant to build the road as it has built it is so unreasonable that the ordinance is bad.

Mr. Weaver: Suppose that the question of the unreasonableness of the ordinance could not be raised here—certainly we have the other ground of the taking of the plaintiff's land. No ordinance, in my judgment, can justify the taking of the land without compensation. Now, your Honor can pass upon that.

The Court: Has that not already been passed upon?

Mr. Weaver: In what way?

10

The Court: Why, in numerous ways. Has it not been held time and time again that whenever any of the public uses in a street under municipal authority is enjoyed by a trolley road, that that is not an additional servitude, and hence, takes nothing from the landowner? Don't the Fennelley case hold that?

Mr. Weaver: Yes, sir; but we have a unique situation here. This matter has never been reached in our Courts before. The situation before your Honor today is not the ordinary situation of a trolley road building its tracks under a municipal ordinance in the middle of a street within the street lines. Here you have an entirely different situation. Our Courts, as I understand it, have not passed upon this situation. The late Chancellor, in a case—I have forgotten the name of it, but it was decided lately, it arose in Paterson—said that where an injunction was prayed for to prevent a trolley company from putting their poles and their tracks in the street, that while it was true and he would determine that the poles as they then located them, they were within the sidewalk lines and the tracks were within the street, and the change from the ordinary horse-car system to an electric system was not an additional servitude, yet a situation might arise, owing to the increased use of the trolley system, or of a different method of

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construction, whereby the Courts would have to pass upon it. I may not be quoting his words, but, as I understand it, that is his idea. Now, I say we have got here that very situation.

10 The Court: Do you mean to make a distinction here between so much as concerns the laying of the rails and so much as is occupied by the poles? Because I think that which concerns the laying of the rails is thoroughly settled by the Court of Errors and Appeals in the Taxation Case. It is a case where the question was whether the trolley company had any real estate or any interest in land whatsoever in a public highway for which they could be taxed, and the Court of Errors said they had not, that their being there put no additional servitude on the land, and hence they got nothing from the land-owner; that what they got was this—that the public highway, before the trolley company was there, was held by the public authorities in trust for all legitimate public uses, and that when a City Council, 20 by ordinance, said what might be a public use they simply carved out of the trustee's estate a specific public use, but took nothing more from the land-owner than the trustee had already held. That was undoubtedly the opinion of the Court of Errors; and that holds that a trolley company has nothing in a street which it gets from the land-owner at all; that it don't have any relationship of trespasser to the land-owner; that they deal entirely with the trustee that holds the public rights, to wit, the municipal authorities. Now, that is undoubtedly 30 edly so as regards the tracks and ties.

Mr. Weaver: Well, is not your Honor losing sight of the fact that that is an entirely different condition of affairs from that existing here? I can readily see where those cases have been so held in this State; they apply to conditions where, as I have already said, the track is

built "as ordinarily built." Those words were used by the Chancellor in the case I spoke of—that where the track is built as "ordinarily built," it is not an additional servitude. That was his idea of it. But here is a case where the tracks are not "as ordinarily built." This company comes along and builds right up alongside of this plaintiff's property.

The Court: In other words, the public trustee in this case has not so administered his trust as to be fair to his *cesqui que trust*; but that does not alter the Court of Errors' opinion, which was that whatever rights the trustee gives to a trolley company he gives out of a fund which had already been taken from the land-owner by the creation of a public street. That case holds to the very fullest extent that no matter what the public allow a company to do, nothing was taken from the land-owner that was not already taken. 10

Mr. Weaver: But doesn't it do this—doesn't it take his land without compensating him, in a constitutional sense? 20

The Court: Not according to the opinion of the Court of Errors.

Mr. Weaver: Well, that point was not fairly met in that case.

The Court: It was broad enough to cover any conceivable case of the kind.

Mr. Weaver: Taking the case as I view it here, I think we have a situation here very much akin to the situation that arose here on Bridge avenue, in the case of Angell vs Pennsylvania Railroad Company. Down there the railroad company had for years extended use of their right of way, and had turned Bridge avenue at the mouth of their yards into a drill— 30

The Court: The opinion was based upon the ground of the negligence of the company. The Angell case and the Thompson case on Bridge avenue rested, in the Court of Errors, upon the ground that they could not be restrained from any legitimate use, but that when, by negligence, they emitted more smoke than was necessary, or when, by negligence, they allowed coal cars to stand over night in front of people's houses, they could be restrained, but not for their legitimate occupancy of the street. Now, doubtless, if you show that the trolley company hauls loads of offensive material up before your door and lets it stand there you are within the Angell case; but, obviously, in your construction that the kind of use takes more from the land-owner than it took before, you are losing sight, it seems to me, of the fact that when the highway was established that already took from the owner all that could be taken from him. It was taken from him then and vested in a public trustee. Now, how that shall be used for the benefit of the public depends upon the sound discretion of that trustee; and when, in its discretion, by ordinance it says, "You may put a trolley road within five feet of this land," you say that that is not a discreet use of that trustee's power. That may be so. If so, you can go to the Supreme Court on certiorari and have it set aside. But you have parted with nothing that you have not already parted with to your trustee. Your quarrel is with your trustee.

Mr. Weaver: Of course we do not seem to agree on what seems to be—

The Court: You do not seem to agree that when you have the highway put there in front of your property you have then parted with every possible right which the public might see fit to grant in that street?

Mr. Weaver: I don't think we do.

The Court : Well, the Court of Errors differs with you. The law is that when a municipal authority grants to a trolley company a right in a public street it does not affect the land-owner at all, except that he may have the ordinance set aside if it is unreasonable; but he cannot attack the grant of his trustee in any other manner that I can conceive of.

Mr. Weaver : For anything that the trolley company may do in that street? 10

The Court : Legitimately. If you want to claim the illegitimacy of it, go to the Supreme Court and have your trustee's conduct reviewed. But you cannot go before a jury and have them settle as a fact a question between you and your trustee. Now, I asked you whether you made any distinction between the tracks and poles, because I am quite sure no benefit can come from a very extended discussion as to what the Court of Errors has already held in regard to the trolley tracks. Now, if there is any different theory of law to be advanced in regard to the trolley poles, that may be new. 20

Mr. Weaver : So far as the poles go, we have proven here that the poles are all outside of the property line, but they abut—

The Court : Are they within the ordinance?

Mr. Weaver : Yes. 30

The Court : Well, if they are covered by the ordinance, then the same rule applies, that if you are not satisfied with your trustee having disposed of your rights in the street your quarrel lies with it. The objection is sustained.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON,
Justice Supreme Court.

Ques. Mr. King, have you noticed what these poles carry?

Ans. The wires with which the trolley is supplied.

Ques. And also the guy wires?

Ans. The guy wires.

10 Ques. Did you notice the construction of the fence on the Budd property line?

Ans. I did.

Ques. What sort of a fence is it?

Ans. It is now only the remnants of a fence; it has been built many years. It was formerly a picket fence, and there are some few bits of it now remaining, showing its original location.

Ques. Does it indicate, from your view of it, to be of very great age?

20 Ans. Very old.

Ques. How far is it from the center line of Ferry road?

Ans. Sixteen and a half feet, generally.

Cross-examination.

By Mr. Armstrong:

30 Ques. You have indicated on your map, Mr. King, the railway, have you?

Ans. I have; yes, sir.

Ques. Are you acquainted with the ordinance under which the railway is built?

Ans. Yes, sir.

Ques. Is that railway built and constructed in accordance with that ordinance?

Ans. It is.

Ques. It is the ordinance of September 9, 1896, of the city of Camden?

Ans. I don't know the date of the ordinance, but I have read the ordinance referring to the construction of the tracks on Ferry avenue.

Ques. You are acquainted with the ordinance referring to the construction of this very track, passed by the city of Camden?

Ans. Yes, sir.

Ques. And this road is constructed in accordance with those tracks eight and one-half feet north of the center of Ferry avenue, or the city line of Camden?

Ans. Yes, sir.

Ques. You are acquainted with the description of the property involved in this case?

Ans. Yes, sir.

Ques. And that is all within the street limits, is it not?

Ans. All within the street limits.

10

20

Counsel for the plaintiff produces and offers in evidence deed from Anna B. Cooper to Jesse W. Starr, dated January 1, 1869, recorded in the office of the Register of Deeds of Camden county, in Book No. 58 of Deeds, page 511, and acknowledged before James B. Dayton, Master in Chancery.

(Marked Exhibit 1.)

30

Also deed from Jesse W. Starr and wife to Edward N. Cohn, dated October 28, 1882, recorded in the Register's office of Camden county, in Book 106 of Deeds, page 652; acknowledged before Samuel P. Jones, a Master in Chancery.

(Marked Exhibit 2.)

Also deed from Edward N. Conn and wife to John Stone, dated December 8, 1882, recorded in the Register's office of Camden county, in Book 107 of Deeds, page 150; acknowledged before S. D. Bergen, Master in Chancery.

(Marked Exhibit 3.)

10 Also deed from John Stone and wife to Hiram E. Pudd and Isaac W. Budd, dated October 12, 1889, recorded in the Register's office of Camden county, in Book 147 of Deeds, page 132.

(Marked Exhibit 4.)

Also deed from Samuel D. Shreve, Sheriff, to Anna B. Cooper, dated December 28, 1867, recorded in Camden county Register's office, in Book 52 of Deeds, page 463; acknowledged before James B. Dayton, Master in Chancery.

(Marked Exhibit 5.)

20 Mr. Weaver: I also offer this map in evidence, if there is no objection.

The Court: Well, it may be used. It is not evidential at all.

Mr. Weaver: My next offer in evidence is a certified copy under the hand and seal of Frank B. Ridgway, Clerk of Gloucester county, in the matter of the highway; it relates to the laying out of Ferry road.

30 (Marked Exhibit 6.)

Mr. Armstrong: I don't think that is probative.

The Court: Is there any statute which authorizes the proof of highway matters by this sort of proof?

Mr. Weaver: This is a record of Court.

The Court: I am asking now whether there is any statute?

Mr. Weaver: Not that I know of?

The Court: Well, records of Courts, you know, unless aided by statutes, are not necessarily probative. If you want to take the responsibility of offering it, it will be admitted! 10

Mr. Weaver: I will take the responsibility.

Mr. Armstrong: I note an objection for the ground stated; that it is improper, immaterial and not sufficient to prove the facts at issue here.

(Exception noted for the defendant.)

Mr. Weaver: My next offer is a certified copy under the hand and seal of Frank B. Ridgway, of the laying out of the highway in front of the Budd property. 20

(Marked Exhibit 7.)

(Objected to as before; same ruling.)

(Exception noted for the defendant.)

30

ISAAC W. BUDD, sworn.

By Mr. Weaver:

Ques. Mr. Budd, are you the Isaac W. Budd who took title to the twenty-one acres of land on Ferry road from John Stone and wife?

Ans. Yes, sir.

Ques. Are you the owner and possessor of that land at the present time?

Ans. Part owner; it belongs to the firm.

Ques. To you and your brother?

Ans. The firm of Budd & Brother; yes, sir.

Ques. You are familiar with the property?

Ans. Yes, sir.

Ques. Did you know John Stone in his life-time?

10 Ans. Yes, sir.

Ques. Was he in possession of that land?

Mr. Armstrong: Well, that, I suppose, is not the proper way to prove possession.

The Court: Why?

Mr. Armstrong: That will follow from whatever is done, whether he is in possession of that land or not; this witness can't say that he was in possession of land.

20

Ques. Well, was he there on the land?

Ans. Yes, sir.

Ques. How long was he there?

Ans. Several years; I don't know just how long.

Ques. Well, did you see him there?

Ans. Many a time; yes, sir.

Ques. What kind of ownership did he exercise over the land?

30 Ans. Well, when we bought, he proved to be the owner.

The Court: No, but what use did he make of it?

Ques. What did he do there?

Ans. Oh, brick manufacturer.

Ques. How long did he manufacture bricks there?

Ans. Why, several years at the time that he owned it.

Ques. Did he cultivate part of the land?

Ans. Yes, sir.

Ques. And how long did he exercise ownership and make bricks there?

Ans. Why, several years; I don't know just how many.

Ques. Now, you are familiar with this property, are you, Mr. Budd?

Ans. Yes, sir.

Ques. What do you use the property for?

10

Mr. Armstrong: If your Honor please, it seems to me that this is altogether immaterial.

The Court: Do you object to this question?

Mr. Armstrong: I do.

The Court. The objection is sustained.

20

(Whereupon the plaintiffs, by their counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

C. G. GARRISON,
Justice Supreme Court.

Ques. Are you acquainted with the construction of the track on Ferry avenue, in front of your property?

Ans. Yes, sir.

Ques. Do you know how far the north track——

30

The Court: Do you want to vary and modify the testimony of your surveyor?

Mr. Weaver: No, I did not intend to.

The Court: Well, you do not need to corroborate it, surely; if you have got the whole case in, let it rest on that.

Ques. Did you dig clay along the line of your property on Ferry avenue?

(Objected to.)

10 The Court: Do not go into any question of that until you get the question of liability and the question of trespass fairly before the Court.

Mr. Weaver: I want to show this, and I want to get it fairly before the Court, that the construction of these tracks, as they are at present located and constructed——

The Court: And your surveyor has testified to that.

20 Mr. Weaver: Yes, they are so close that these men, in the process of carrying on their business, cannot put their wagons, back them up against the line of their land without being hindered by the passing and re-passing of these trolley cars.

The Court: I do not think that has any bearing myself, but it is you who are making the case, not the Court. Just allow a leading question to be put; put it as a leading question.

30 Ques. Does the building and operation of this trolley road, as located at present on Ferry road, interfere with the carrying on of your business in digging clay along your property line?

(Objected to; objection not sustained.)

(Exception noted for the defendant.)

Ans. It does.

The Court: I overruled the objection and allowed him to answer for the purpose of letting you get your case as you think you ought to have it.

Ques. Now, do you contemplate building along—

The Court: Oh, no; that can't be answered.

10

Ques. Have you occasion, in carrying on your business there, to back up your carts and wagons along your property line on Ferry road?

(Objected to as illegal and immaterial; objection not sustained; exception noted for the defendant.)

Ans. Yes.

Ques. Are you hindered by the operation of their road in carrying on your business there in that respect? 20

(Same objection; same ruling.)

(Exception noted for defendant.)

Ans. Yes, sir.

Ques. How long have you been acquainted with this property, how many years?

Ans. Why, I have known the property for a good many years; four or five years previous to buying it I was well acquainted with it. 30

Ques. Had you travelled along that road there called Ferry road, for any length of time?

Ans. Several years; yes, sir.

Ques. Is the present width of Ferry road the same as it always was, to your recollection?

(Objected to as being entirely immaterial.)

The Court: What do you want to show by this?

Mr. Weaver: We come right back to the proposition again as to the present width of Ferry road.

The Court: The objection will be sustained, then.

- 10 (Whereupon the plaintiffs, by their counsel, pray a bill of exceptions, which is allowed and sealed accordingly.)

C. G. GARRISON,
Justice Supreme Court.

Ques. Is the line fence as now located on your property the same as it always has been?

(Objected to; objection not sustained.)

- 20 Ans. Yes, sir.

Ques. How many years can you remember that fence?

Ans. Why, I suppose twenty-five or thirty years that I can remember the fence being there; been well acquainted with it part of that time.

Ques. Is the remains of the fence there now?

Ans. Yes, sir; a trifle of it.

Ques. Does it indicate age at all; is it an old fence?

Ans. Yes, sir.

- 30 Ques. How old, in your judgment?

Mr. Armstrong: I object; it would not be a matter of judgment; it is a matter of recollection.

Ans. It is a very old fence, as I remember; some bricks there of the old remaining part of the fence.

Cross-examination.

By Mr. Armstrong:

Ques. Mr. Budd, the street railroad has been in operation along there since 1896, hasn't it?

Ans. 1897, I think.

Ques. For several years past?

Ans. 1897, I think it was.

10

By Mr. Weaver:

Ques. Is there any sidewalk along your property line there?

(Objected to.)

The Court: I am going to let Mr. Weaver show this; it is a part of what he conceived to be his case. We are trying this case not according to law, but in order to make law, or allowing Mr. Weaver to do it.

20

Mr. Armstrong: I object to that as improper and immaterial.

The Court: The objection will not be sustained.

Ans. No, sir; there is no sidewalk.

Ques. Is there any room for a sidewalk?

The Court: Now, you have got the measurements; 30 the surveyor has given the measurements, and whether there is room for a sidewalk would depend upon how much room there is.

Mr. Weaver: Judge Armstrong, there is one other matter I want to offer here. I want to offer in evidence

- the 68th section of a compilation of the ordinances of the city of Camden, to be found on page 189 of the charter and ordinances of the city of Camden; it is as follows: "In all other streets of the city of Camden, of the width of thirty feet and upward, the sidewalks shall be one-fourth of the width of the street on each side thereof in the case of each street respectively; and all streets, public lanes and alleys less than thirty feet in width, such proportion thereof as shall be directed by the City Surveyor; or by special ordinance of the City Council, shall be used as above for sidewalks.
- 10

(Objected to as immaterial to this case and not the proper form of proof.)

The Court: I will let Mr. Weaver put it in.

- 20 WILLIAM MITCHELL, sworn.

By Mr. Weaver:

Ques. Where do you live?

Ans. Camden, 311 Kaighn's avenue.

Ques. How long have you lived here?

Ans. About twenty to twenty-five years, I guess.

Ques. Are you acquainted with Ferry road?

Ans. Yes, sir.

Ques. How long have you known it?

- 30 Ans. Oh, from twenty to twenty-five years.

Ques. Are you acquainted with the position of the line fence along the Budd property on Ferry road?

The Court: Do you want to prove something different by this witness than you have by the others?

Mr. Weaver: I want to corroborate it.

The Court: You don't corroborate it; you raise a different question.

Mr. Weaver: That is my case, then, I suppose. Judge Armstrong, you will admit the lease to the Camden & Suburban Railway Company, that is, that the Camden & Suburban Railway Company is the lessee?

Mr. Armstrong: You want more information than that, don't you?

10

The Court: In order to raise the point, why doesn't Mr. Weaver admit on the record what he has already admitted in argument, that is, that the defendant is in this street by virtue of having constructed its road in accordance with the city ordinance set up in the case?

Mr. Armstrong: I have set up in the plea the incorporation of the railroad company.

The Court: I have read the plea.

20

Mr. Weaver: The trouble about that is, in order to get this whole matter before the Court, I would like this ordinance to be introduced by the defendant, and I will make some requests to charge, which your Honor will probably deny. I want to get before the Court the question—

The Court: I know, the only question now is as to the ordinance which you admit was the one which they passed and which you built under; and that will be proved as if it was a very debatable question if there was such a thing as the City of Camden. When it comes to his putting that in his case, I will admit it. Why don't you put it in your case?

30

Mr. Weaver: I don't want to put his ordinance in my case.

The Court: The surveyor testified that he was familiar with this ordinance, and the road was constructed in accordance with it.

Mr. Armstrong: There is no proof of occupancy of this defendant of this property. Of course, the plea admits possession in ejectment, but it only admits possession in the way pleaded; so that it strikes me that the plaintiff himself in his case, to raise that, needs to put this in.

10

The Court: Well, you can move for a non-suit on the ground that this possession has not been proven; I will refuse that motion and grant you an exception. Will you take that course?

Mr. Armstrong: Yes; I will do that. I also desire to move for a non-suit on the ground—

20

The Court: Now, if you want to raise this question, you want to have your ordinance in. You have got to put it in before making your motion for a non-suit, because I shall probably grant your motion on what is already in, and you would not have as complete a case as you otherwise would.

Mr. Armstrong: I have been trying to have him put it in.

Mr. Weaver: I don't want it in my case.

30

Mr. Armstrong: I suppose we might as well finish it at once. I desire to prove—I offer in evidence that the Camden Horse Railroad Company was incorporated by an act of the Legislature of the State of New Jersey, entitled, "An Act to incorporate the Camden Horse Railroad Company, approved March 23, 1866," that this act was supplemented by another act of the Legislature approved

April 2, 1868, and further supplemented by another act of the Legislature passed March 11, 1872. The Camden & Suburban Railway Company was incorporated on the 14th day of April, in the year 1896, under and by virtue of the provisions of an act to authorize the formation of a traction company for the construction and operation of street railways or railroads operated as street railways, and to regulate the same, approved March 14, 1893; that the Camden Horse Railroad Company leased its property and railroad to the Camden & Suburban Railway Company by an indenture of lease dated the 1st of May, 1896, and recorded in the Register of Deeds' Office of Camden County, in Book 218 of Deeds, page 95, whereupon the Camden & Suburban Railway Company entered into and took possession of the property as provided by law, and made a certificate of entry under date of the 9th day of May, 1896, and filed the same in the office of the Secretary of State, as required by law; that the City Council of the City of Camden, on the 9th day of September, 1896, passed an ordinance, entitled, "An ordinance granting consent and permission to the Camden Horse Railroad Company to build, construct and operate a street railway on Van Hook street, Mt. Ephraim avenue, Ferry avenue and Newton avenue, in the city of Camden," which ordinance was duly accepted, and under which the railway on Ferry avenue, testified to in this case, was built and operated.

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20

Mr. Weaver: I object to the ordinance.

The Court: You admit it is in evidence, do you?

30

Mr. Weaver: No; I object to the ordinance going into evidence on this ground, not on the ground that the clerk is not here, but on the ground that it is not a justification of their going there.

The Court: Just let all these things be admitted as instruments of proof.

Mr. Weaver: Well, now, I hand you these requests to charge.

The Court: Just read them, please.

Mr. Weaver: (Reading) That the location of the defendant's railway tracks and poles on Ferry avenue in such close proximity to the plaintiff's property impairs its value, and is in effect a taking of the property for public use.

- 10 That the jury find the defendants guilty of the trespass and assess nominal damages for the reason that the defendants have taken the plaintiff's property without compensation.

That defendants be found guilty for the reason that they have taken the plaintiff's sidewalk.

That the defendants be found guilty because the ordinance under which they attempt to justify is unreasonable, unjust and oppressive, and that it is not a proper municipal regulation.

- 20 That the ordinance in question grants to the defendants an illegal, improper and unreasonable use of the highway on Ferry avenue, in front of plaintiff's property, and is therefore an unlawful municipal regulation of the use of Ferry avenue at the place in question.

That the jury find the defendants guilty and assess damages in favor of plaintiffs at six cents.

The Court: They will be refused.

- 30 (Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is signed and sealed accordingly.)

C. G. GARRISON,
Justice Supreme Court.

Mr. Armstrong: I ask that under the evidence in this case, the jury be directed to find a verdict of not guilty.

The Court: That is my view; a verdict for the defendant is directed.

(Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

C. G. GARRISON,
Justice Supreme Court.

NEW JERSEY SUPREME COURT.

10

HIRAM E. BUDD AND ISAAC W.

BUDD,

vs.

CAMDEN HORSE RAILWAY COM-

PANY AND CAMDEN AND SUB-

URBAN RAILWAY COMPANY,

LESSEE.

IN EJECTMENT.

ON POSTEA.

JUDGMENT FOR DE-

FENDANT.

20

E. A. ARMSTRONG,
Attorney.

30

As yet of the twenty-first day of March, A. D. nineteen hundred and three.

Witness WILLIAM S. GUMMERE, Esquire,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

CAMDEN COUNTY, SS.

Hiram E. Budd and Isaac W. Budd, the plaintiffs in this action, by Francis D. Weaver, their attorney, demand of the Camden Horse Railroad Company and the Camden and Suburban Railway Company, lessee, the defendants therein, the possession of all that certain lot, tract or parcel of land situate in the city and county of Camden and State of New Jersey, and is bounded and described as follows:

- 10 Beginning at a point for a corner in the centre line of Ferry road, being in the line of lands late belonging to Edward N. Cohn, deceased, and extends thence (1) north one degree west, sixteen and one-half feet to a point for a corner; thence (2) north seventy-six degrees and nine minutes east, and parallel with the middle line of said Ferry road, fourteen hundred and twenty-seven feet to a point for a corner; thence (3) south one degree east, sixteen and one-half feet to the centre line of said Ferry road; thence (4) south seventy-six degrees and nine minutes west, and along the middle line of Ferry road, fourteen hundred and twenty-seven feet to the corner and place of beginning, subject to the public easement to and over said lands and premises, and also the sum of two thousand dollars for mesne profits and damages.
- 20

And the plaintiffs say that their right to the possession of the same accrued on the first day of July, one thousand eight hundred and ninety-seven, and that the said defendants wrongfully deprive them of the possession thereof, to their damage two thousand dollars.

- 30 And the said The Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, by E. A. Armstrong, their attorney, appear and defend this action as to a part of the premises by the plaintiffs in their declaration, that is to say:

As to that part and interest therein disclosed by the following facts and description thereof.

The Camden Horse Railroad Company was incorporated by an act of the Legislature of the State of New Jersey, entitled "An act to incorporate the Camden Horse Railroad Company," approved March 23, 1866, (Laws of 1866, page 64,) which act was supplemented by another act of the Legislature, approved April 2, 1868, (Laws of 1868, page 638,) and further supplemented by another act passed March 11, 1872, (Laws of 1872, page 512).

The Camden and Suburban Railway Company was duly incorporated on the fourteenth day of April, in the year eighteen hundred and ninety-six, by a certificate filed that day in the office of the Secretary of State, at Trenton, under an act of the Legislature of the State of New Jersey, entitled "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways and to regulate the same," approved March 14, 1893. 10

That under and by virtue of the above recited acts and other acts of the Legislature of the State of New Jersey, thereunto enabling, the said The Camden Horse Railroad Company made and executed a lease to the Camden and Suburban Railway Company of all its railroad and property that then were or might thereafter be constructed or acquired by it, by an indenture of lease bearing date the first day of May, in the year eighteen hundred and ninety-six, and duly recorded in the Register of Deeds' office of Camden county, in Book No. 218 of Deeds, page 95, &c.; whereupon the defendant, The Camden and Suburban Railway Company, entered into and took possession thereof, and, as required by said acts, made and filed under date of the ninth day of May, in the year eighteen hundred and ninety-six, in the office of the Secretary of State, at Trenton, a certificate of the entry upon the tracks of the Camden Horse Railroad Company under said lease. 20 30

- And that the City Council of the city of Camden, upon due application to it by petition, accompanied by maps and descriptions, and the consent in writing duly acknowledged as are deeds entitled to be recorded, of the owners of more than one-half in amount of lineal feet of property fronting on the streets or parts of streets through which it was desired to construct said railway, and after giving the notice required by law and affording the hearing directed passed on the ninth day of
- 10 September, in the year eighteen hundred and ninety-six, in accordance with the statute in such case made and provided, an ordinance, entitled "An ordinance granting consent and permission to The Camden Horse Railroad Company to build, construct and operate a street railway on Vanhook street, Mount Ephraim avenue, Ferry avenue and Newton avenue, in the city of Camden," and thereunder the said Camden Horse Railroad Company laid down and constructed, in accordance with the location granted in and by said ordinance,
- 20 a single track railway, the middle line thereof being northward eight and one-half feet from the middle line of Ferry avenue from the first course described in the plaintiffs' declaration, eastward and parallel with the middle line of Ferry avenue, or Ferry road, parallel with the fourth course described in said declaration. Said railway track being a street railway of the gauge of five feet operated by means of the overhead trolley system, with trolley line poles erected along the same at the points designated by said City Council upon the map accompanying said ordinance and made a part
- 30 thereof; which said railway said defendants have heretofore used, operated and maintained as and for a street railway and are now using, operating and maintaining the same as and for a street railway under and by virtue of the acts, ordinance and proceedings aforesaid.

As to that part and so much of the premises so defended for they say they are not guilty of the injury

whereof the said Hiram E. Budd and Isaac W. Budd hath complained in their declaration, and of this they put themselves upon the country, and the said Hiram E. Budd and Isaac W. Budd do the like.

Therefore, let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Camden, in and for the county of Camden, on the second Tuesday of December, A. D. nineteen hundred and three, by whom, etc., and the same day is given to the parties aforesaid, there, etc. 10

And now at this day, to wit, the seventeenth day of December, A. D. nineteen hundred and three, before our Supreme Court, at Trenton, come the said parties by their attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the fifteenth day of December, in the year of our Lord one thousand nine hundred and three, before his Honor Charles G. Garrison, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within named Hiram E. Budd and Isaac W. Budd, plaintiffs, as the within named The Camden Horse Railroad Company and the Camden and Suburban Railway Company, defendants, by their respective attorneys within named, and the jurors of the jury being summoned to try said issue also come, who, to try the truth of the matters within contained, being chosen, tried and sworn, on their oaths say, that they find that the said The Camden Horse Railroad Company and the Camden and Suburban Railway Company are not guilty of the trespass and ejectment within laid to their charge in manner and form as the said plaintiffs, Hiram E. Budd and Isaac W. Budd have thereof complained against them. 20 30

Therefore, it is considered that the said Hiram E. Budd and Isaac W. Budd take nothing by their said writ and that the said Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, do go thereof without day, etc.

- And it is further considered by the Court here, that the said Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, do recover against the said Hiram E. Budd and Isaac W. Budd
- 10 the sum of
for their costs and charges by them about their defence in this behalf laid out and expended, by the Court now here adjudged to the said Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, and with their assent, according to the form of the statute in such case made and provided, and that the said Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, have execution thereof, &c.

- 20 Judgment signed this seventeenth day of December, A. D. nineteen hundred and three.

WM. S. GUMMERE,
C. J.

- I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remain of record in my office.
- 30 In testimony whereof, I have set my hand and the seal of said Court, at Trenton, this seventh day of January, A. D. nineteen hundred and four.

WM. RIKER, JR., [SEAL.]
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HIRAM E. BUDD AND ISAAC W.

BUDD,

Plaintiffs in Error,

vs

CAMDEN HORSE RAILROAD COM-

PANY AND CAMDEN & SUBUR-

BAN RAILWAY COMPANY, LES-

SEE,

Defendants in Error.

ON ERROR TO

SUPREME COURT.

IN EJECTMENT.

ASSIGNMENT OF

ERRORS.

10

20

And now at this day the plaintiffs in error assign the following causes of error :

First. Because the trial judge ruled out and rejected competent evidence.

Second. Because the trial judge refused to permit a witness, on the part of the plaintiff in error, to testify as to the width of Ferry avenue as ascertained by him.

Third. Because the trial judge refused to permit a witness, on the part of the plaintiffs in error, to testify for what purpose he used the abutting property. 30

Fourth. Because the trial judge refused to permit a witness, on the part of the plaintiff in error, to testify as to the present and past width of Ferry avenue.

Fifth. Because the trial judge refused to charge the jury as follows: (1) That the tracks and poles as located

10 impair the value of plaintiff's property and is in effect a taking of property for public use; (2) that the defendants in error be found guilty and nominal damages be assessed because plaintiff's property is taken without compensation; (3) that defendants be found guilty because plaintiff's side-walk is taken; (4) that defendants be found guilty because the ordinance is unreasonable, unjust and oppressive, and not a proper municipal regulation; (5) that the ordinance is an unlawful municipal regulation of the use of Ferry avenue; (6) that defendants be found guilty and damages assessed at six cents.

Sixth. Because the trial judge unlawfully directed the jury to find for the defendants.

FRANCIS D. WEAVER,
Att'y of Plaintiffs in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20

HIRAM E. BUDD AND ISAAC W.

BUDD,

Plaintiffs in Error,

vs.

THE CAMDEN HORSE RAILROAD

30

COMPANY AND CAMDEN & SUB-

URBAN RAILWAY COMPANY,

LESSEE,

Defendants in Error.

ON ERROR TO

SUPREME COURT.

JOINDER IN ERROR.

And, hereupon, afterwards, to wit, on the first day of February, A. D. nineteen hundred and four, the said

Camden Horse Railroad Company and Camden and Suburban Railway Company, lessee, by E. Ambler Armstrong, their attorney, come into Court and say that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and they pray here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

E. AMBLER ARMSTRONG,
Attorney for and of Counsel with
Defendants in Error.

10

EXHIBIT 6.

CLERK'S OFFICE OF GLOUCESTER COUNTY.

OCTOBER TERM, 1825.

20

MATTER

OF

HIGHWAY.

More than ten of the freeholders and residents in the county of Gloucester having made application to this Court for the appointment of six surveyors of the highways of said county to lay out a public road of two rods wide, in the township of Newton, in said county, to begin at a stake in the middle of the Chews Landing road, leading from thence to Cooper's ferries; thence north seventy-two and a half degrees east, forty-seven chains to a stake; thence north fifty-nine degrees east, seventeen chains to a stake in the middle of the road leading from Haddonfield to Cooper's ferries and there to end.

30

Thereupon the Court appoint the surveyors of the highways of the townships of Waterford, Newton and Gloucester town to meet at the house of Joseph B. Cooper, in the township of Newton, on Monday, the thirty-first day of October inst., at 10 o'clock in the forenoon of said day, to lay out the said road if they may think proper.

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

10

I, FRANK B. RIDGWAY, Clerk of the county of Gloucester, do hereby certify that the above is a true and correct copy of a certain "Matter of Highway" as the same is on record in my office in "Minutes Common Pleas, 1823," page 315.

In testimony whereof, I have hereunto set my hand and seal of office this 6th day of May,

[SEAL.] A.D. 1898.

FRANK B. RIDGWAY,
Clerk.

20

JOS. B. ROE,
Deputy Clerk.

EXHIBIT 7.

CLERK'S OFFICE OF GLOUCESTER COUNTY.

30 *To the Judges of the Inferior Court of Common Pleas in and for the county of Gloucester:*

These are to certify that we, the subscribers, surveyors of the highways of the townships of Newton and Waterford and the town of Gloucester, having been appointed by the Court of Common Pleas in and for the county aforeasid at the last term, to lay out a public road in the township of Newton, to begin at a stake standing in the

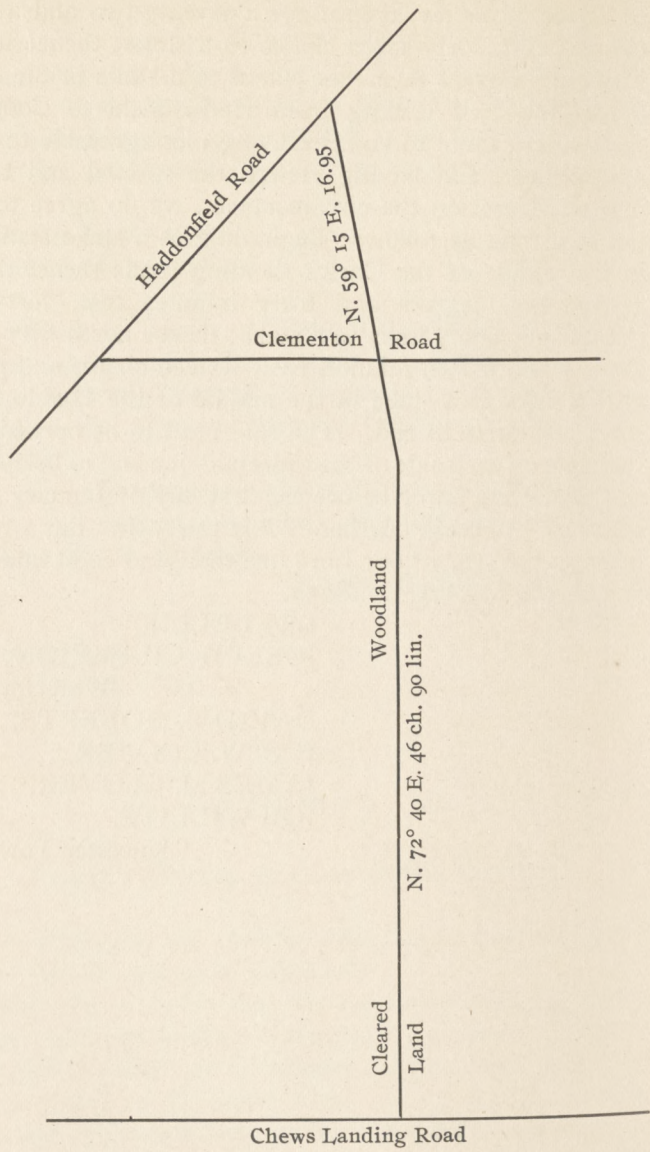
middle of the Chews Landing road, leading from thence to Cooper's ferries; thence north seventy-two and a half degrees east, forty-seven chains to a stake; thence north fifty-nine degrees seventeen chains to a stake in the middle of the road leading from Haddonfield to Cooper's ferries, and there to end. Having met agreeable to said appointment, and having viewed the ground and taken into consideration the circumstances, we do agree to lay out said road as follows: Beginning at a stake standing in the middle of the Chews Landing road; thence north
 10
 seventy-two degrees and forty minutes east, forty-six chains and ninety links to a stake; thence north fifty-nine degrees and fifteen minutes east, sixteen chains and ninety-five links to a stake in the middle of the Haddonfield road, and there to end. The said road to be opened one rod wide on each side of the aforesaid line and to be opened and fit for use on or before the first day of January next ensuing. Witness our hands this thirty-first day of October, in the year of our Lord one thousand eight hundred and twenty-five (A. D. 1825).

LEVI ELLIS,
 JOSEPH CHAMPION,
 Waterford.

DAVID B. ROBERTS,
 JOS. W. COOPER,
 JAMES M. GLOVER,
 JOB WILLITS,
 Gloucester Town.

20

30



Recorded November 19, 1825. Smallwood, Cl'k.

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

I, FRANK B. RIDGWAY, Clerk of the county of Gloucester, do hereby certify that the foregoing is a true and correct copy of a certain "Road matter," as the same is on record in my office, in Book C of Roads, page 57, &c.

In testimony whereof, I have hereunto set my
 hand and seal of office, this 6th day of 10
 [SEAL.] May, A. D. 1898.

FRANK B. RIDGWAY,
 Clerk.

Jos. B. ROE,
 Deputy Clerk.

AN ORDINANCE

Revising the ordinances of the city of Camden. 20

Be it ordained by the City Council of the city of Camden, as follows:

* * * * *

Section 65. That the sidewalks on the northerly side of State street, from Main street to Cooper's creek, shall be fifteen feet in width and the sidewalk on the southerly side thereof shall be twenty feet in width.

Section 66. That the sidewalk on both sides of Cooper street, from Delaware street to the Camden and Atlantic Railroad, shall be thirty feet in width. 30

Section 67. That the sidewalk on both sides of Linden street, between Fifth street and Sixth street, be fifteen feet in width.

Section 68. In all other streets of the city of Camden of the width of thirty feet and upwards the side-

walks shall be one-fourth of the width of the street, on each side thereof, in the case of each street respectively. In all streets, public lanes or alleys less than thirty feet in width such proportion thereof as may be directed by the City Surveyor, or by special ordinance of City Council, shall be used and paved for sidewalks.

Passed at a regular meeting of the City Council held December 30, 1886.

10

 AN ORDINANCE.

An ordinance granting consent and permission to The Camden Horse Railroad Company to build, construct and operate a street railway on Vanhook street, Mount Ephraim avenue, Ferry avenue and Netwon avenue, in the city of Camden.

- Whereas, The Camden Horse Railroad Company made due application, by petitions, to City Council of
 20 the city of Camden for permission to build, construct, operate and maintain a street railway on Vanhook street, Mount Ephraim avenue, Ferry avenue and New-
 30 ton avenue, in the city of Camden, which petitions were in due form of law and accompanied by maps and descriptions of the route of the said railways, showing also the proposed location of rails and tracks and the location of poles; and said Council designated the time and place when and where it would consider said application and petitions and hear all persons interested
 for or against the same; and caused notices thereof to be published and posted according to law, due proof of which publications and postings has been made; and proof also having been made that the consents in writing of owners of more than one-half in amount of lineal feet of property fronting on the streets or part of streets through which it is desired to construct said railways,

which consents have been executed and acknowledged as are deeds entitled to be recorded, have been and now are filed with the City Clerk of the city of Camden, the Clerk of this Council; all of which matters have been duly proved by testimony before this Council, and the hearing having been regularly adjourned until this time; and all persons interested for or against the same having been heard and the matter considered, and the City Council being of the opinion that the prayer of said petitions should be granted; therefore,

Section 1. Be it ordained by the City Council of the city of Camden, that consent and permission is hereby granted to The Camden Horse Railroad Company to build, construct, maintain and operate a single track street railroad in the city of Camden, in, through, upon and along Vanhook street, connecting with the tracks on Broadway, and thence out Vanhook street to Mount Ephraim avenue, and thence south on Mount Ephraim avenue, connecting with the present turn-out near Ferry road on said avenue, curving and connecting with tracks laid and to be laid on Ferry avenue, so as to make a double track street railway on Mount Ephraim avenue from Vanhook street to Ferry avenue; the middle line of the said railway on Vanhook street is to be the middle line of said Vanhook street and the middle line of the new track on Mount Ephraim avenue is to be four and one-half feet eastward from the middle line of said Mount Ephraim avenue. Also a single track railway beginning opposite the east end of the turnout on Ferry avenue, near Eighth street, and connecting therewith and extending eastward out Ferry avenue, the middle line of said track being nine feet northward from the middle line of the present track on Ferry avenue to Mount Ephraim avenue, and thence eastward, still out Ferry avenue, in a line so that the middle line of said railway shall be eight and one-half feet northward from the middle line of said Ferry avenue, which

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is the boundary line of the city of Camden, to Haddon avenue. Also a single track railway on Newton avenue, connecting with the present tracks on Federal street and running thence through Newton avenue, the middle line of said railway being the middle line of said avenue, to connect with the present tracks on said avenue at Haddon avenue, and continuing on said avenue the same course from the terminus of the present tracks at Clinton street, to connect with the present tracks on Fifth street. With all such necessary curves, switches, turnouts and connections as may be needed. All of which said tracks, curves, switches, turnouts and connections are particularly located and designated on the said maps attached to said petitions now on file with this Council in the office of the City Clerk; which maps are hereby made a part of this ordinance. The said railroads are to be built, constructed, operated and maintained in accordance with and subject to the provisions of the genral ordinances of the city of Camden concerning the said The Camden Horse Railroad Company.

Section 2. And be it ordained, that the motive power used on said railroads shall be horse power and electricity; that the trolley line poles erected shall be erected in the same manner as the poles of said company on Broadway, in the city of Camden, and are truly located at the points designated on the maps hereinbefore referred to. The trolley and span wires shall be of the character and construction now provided by ordinances concerning said company.

Section 3. And be it ordained, that the said The Camden Horse Railroad Company, in addition to the obligations imposed upon it by the said genral ordinances of the city of Camden, hereinbefore referred to, shall grade Vanhook street at its own expense, to the satisfaction of the City Council of the city of Camden, before it shall lay its tracks thereon.

Section 4. And be it ordained, that the said The Camden Horse Railroad Company shall pay for the expense of the publication of this ordinance.

Section 5. And be it ordained, that all ordinances and parts of ordinances inconsistent with the provisions of this ordinance be and the same are hereby repealed, and that this ordinance shall take effect immediately.

Passed at an adjourned meeting of City Council, held Wednesday evening, September 9th, 1896.

CHARLES H. ELLIS, JR.,

President of City Council.

Attest :—T. P. VARNEY,

Clerk of City Council.

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