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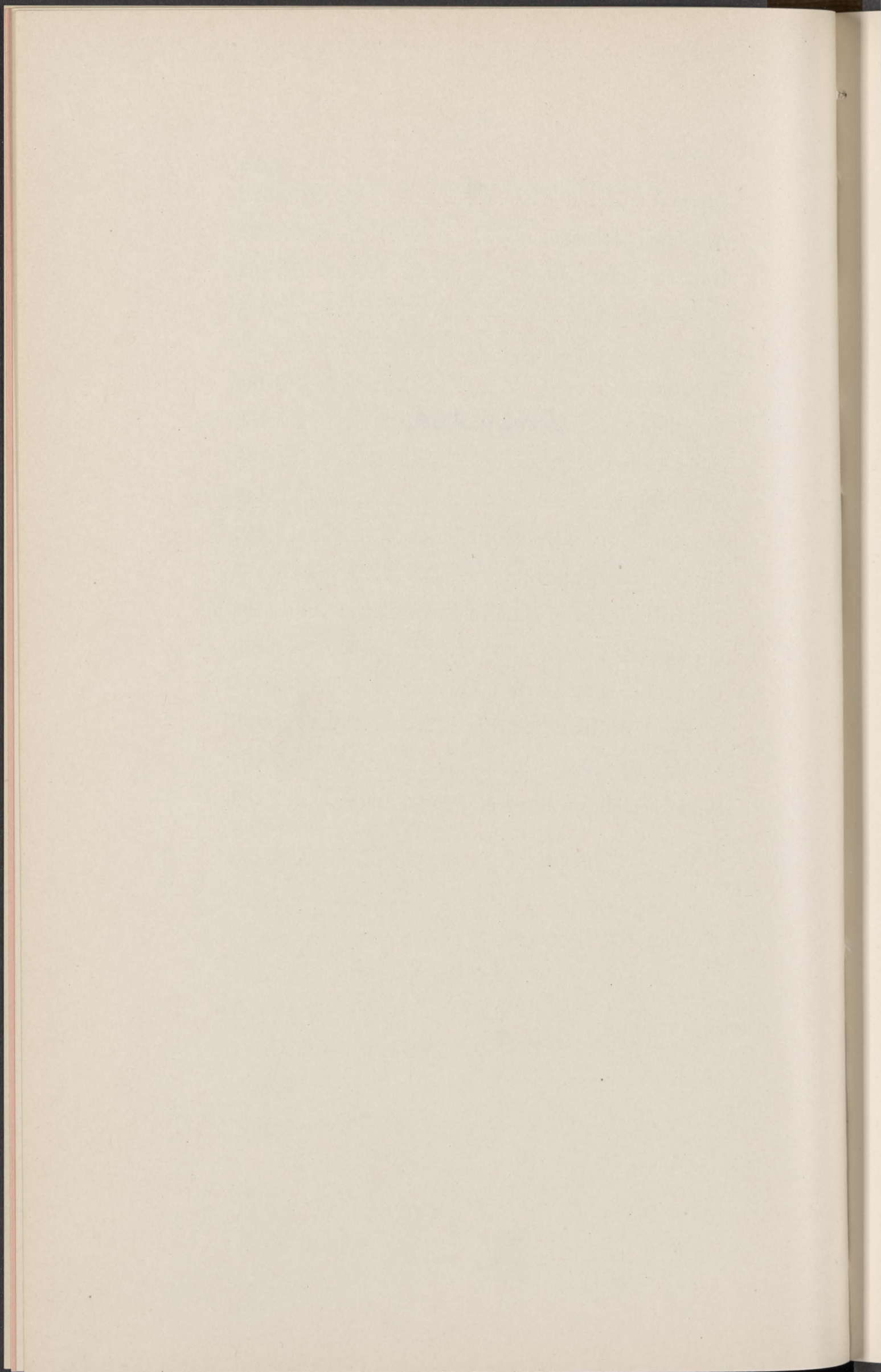
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Notice of Appeal.

Filed August 25, 1930.

In Chancery of New Jersey.

Between	}	On Bill, etc., for Injunction.	
THE ROCKAWAY ROLLING MILL, a Corporation, Complainant,			10
<i>and</i>	}		
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COM- PANY AND THE MORRIS AND ES- SEX RAILROAD COMPANY, Defendants.			20

The Delaware, Lackawanna and Western Rail-
road Company and The Morris and Essex Rail-
road Company, defendants in the above named
Notice of Appeal, hereby appeal from the final
decree filed in the above entitled cause on July 3,
1930, and dated July 3, 1930, and from every part
thereof, made on the advice of the Honorable
John J. Fallon, Vice Chancellor, to the Court of
Errors and Appeals in the last resort in all
causes. 30

Dated July 31st, 1930.

FREDERIC B. SCOTT,
Solicitor for and of Counsel
with Defendants.

I conceive there is good cause for appeal in the
above stated case.

FREDERIC B. SCOTT. 40

Petition of Appeal.

Filed August 26, 1930.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between	}	On Appeal from Court of Chancery.
	THE ROCKAWAY ROLLING MILL, a corporation, Complainant,		
	<i>and</i>		
	THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COM- PANY, a corporation, and THE MORRIS AND ESSEX RAILROAD		
20	COMPANY, a corporation, Defendants.		

*To the Honorable Court of Errors and Appeals in
the Last Resort in All Causes:*

The petition of The Delaware, Lackawanna and Western Railroad Company and the Morris and Essex Railroad Company, the appellants in the above-entitled cause, respectfully shows:

30 Petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date July 3, 1930, in a certain cause in said Court of Chancery wherein The Rockaway Rolling Mill was complainant and The Delaware, Lackawanna and Western Railroad Company and The Morris and Essex Railroad Company were defendants, in

40 these respects, to wit:

Petition of Appeal.

That said final decree adjudges and orders that a permanent mandatory injunction issue out of said Court compelling the defendants, or either of them, to immediately restore or provide and keep in repair a suitable wagon-way or crossing over said railroad for complainant, its successors and assigns and that the defendants, their respective officers, directors, agents, servants and employees be enjoined and restrained by said permanent mandatory injunction from removing, destroying, obstructing or in any way interfering with said wagon-way or crossing when so restored or provided as aforesaid, and further ordering, adjudging and decreeing that the said defendants pay to the complainant or its counsel a counsel fee of \$3,500, which was thereby allowed as a reasonable counsel fee for the service of the counsel for the complainant in said cause.

And your petitioner appeals from said final decree of the Chancellor, which decree is as aforesaid, upon the following grounds and for the following reasons, to wit:

1. Because there was no hearing in said cause according to the rules and practice of the Court of Chancery upon which said final decree in said matter was alleged to have been made and determined.

2. Because there was no hearing as provided by the rules and practice of the Court of Chancery on the petition of the complainant verified June 2, 1930, and the order to show cause obtained thereon dated June 3, 1930, that said cause be brought to a hearing for further directions in accordance with the interlocutory decree of the Court of Chancery, and that complainant be allowed a reasonable counsel fee, resulting in the entry of the final decree in the above cause.

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Petition of Appeal.

3. Because said final decree is erroneous and illegal in that it determines and decrees matters and things not alleged or set up by the complainant's bill of complaint filed in said cause.

10 4. Because said final decree is erroneous and illegal in that it is without justification either in law or in fact.

5. Because said final decree is erroneous and illegal in the allowance to the complainant or its counsel a counsel fee in a cause in which no trust fund was involved.

20 6. Because said final decree is erroneous and illegal in the allowance to the complainant or its counsel of a counsel fee, because the statutes by virtue of which it is purported said Court of Chancery had authority to allow said counsel fee are violative of both the Fifth Amendment to the Constitution of the United States and Subdivision 4 of Section 7 of Article 4 of the Constitution of the State of New Jersey.

30 7. Because said final decree is erroneous and illegal in that the counsel fee allowed the complainant or its counsel is excessive and grossly disproportionate to the labor involved in said matter and bears no fair relation to the services of the complainant's counsel actually rendered in said cause.

Petitioners therefore pray that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that the petitioners may have such other relief in the premises as this Court shall deem proper.

FREDERIC B. SCOTT,
Solicitor for and of Counsel
with Appellants.

Bill of Complaint.

Filed Feb. 16, 1927.

IN CHANCERY OF NEW JERSEY.

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

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The complainant, The Rockaway Rolling Mill, a corporation of the State of New Jersey, doing business in the Borough of Rockaway, in the County of Morris and State of New Jersey, respectfully shows that:

1. On and prior to September 22nd, 1846, complainant's predecessor in title, Jabez L. Estile, was the owner in fee simple by deed of conveyance to him, dated March 29, 1820, and recorded in the Office of the Clerk of the County of Morris in Book K-2 of Deeds for said County, pages 32 &c., of the following described lands and premises:

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BEGINNING in the middle of Rockaway River at a corner of Barnabas King's land and from thence running (1) along said King's line South seventy-nine degrees West eight chains forty-four links to stake and stones, thence (2) South fifteen degrees West nine chains thirty links to a stone heap, thence (3) South thirteen and one-half degrees West eight chains to a stone heap, thence (4) South fifty-six and one-half degrees West six chains sixty-three links to a small white oak, thence (5) South twenty-seven degrees East two chains to the middle of Rockaway River, thence (6) up said river about South twelve

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Bill of Complaint.

degrees West eleven chains eighty links or thereabouts, thence (7) North eighty-six degrees West nine chains Fifty-three links to a stake in Noah Estile's line, thence (8) South seven degrees West one chain eighty links to two small May cherry trees, thence (9) South forty-nine degrees West four chains ten links to a white oak tree a corner of Noah Estile's land and a corner of Ezra Abbot's land, thence (10) South fifty-seven degrees East nine chains thirty links to a small white ash tree on a small island near the East side of Rockaway River, a corner of Frederick Boem's lot, thence (11) North eighty-three degrees East twelve chains five links to a mall white oak, thence (12) North thirty-one and one-half degrees East eight chains forty-four links to the corner of John Clark's land, thence (13) North sixty-seven degrees West nine chains twenty-nine links, thence (14) North twenty-nine degrees East ten chains eighty-four links to a black oak tree on the East bank of Rockaway River, thence (15) North sixty degrees West to the middle of said river, thence down the middle of said river the several courses thereof to the place of Beginning. Containing thirty-one acres more or less.

2. The Morris & Essex Railroad Company, one of the defendants herein, is a railroad corporation and was incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Morris & Essex Rail-

Bill of Complaint.

road Company'', passed January 29th, 1835; and the Delaware, Lackawanna & Western Railroad Compny, the other defendant, is a railroad corporation organized under the laws of the State of Pennsylvania.

3. By Section 7 of the Act of incorporation of the defendant, the Morris & Essex Railroad Company, it was empowered to acquire lands by assessment for railroad purposes, where it could not agree with the owner as to the price thereof. 10

4. On or about September 22nd, 1846, defendant, the Morris & Essex Railroad Company, by virtue of said Section 7 of its Act of incorporation, took proceedings to acquire by assessment the right, liberty and privilege of entering upon a certain strip or tract of land of said Jabez L. Estile, described as follows: 20

BEGINNING at Selee Tompkin's East line and pursuing a line of stakes North thirty-five degrees forty-five minutes East eleven chains to Joseph Jackson's West line embracing one and one-half rods on each side of said line of stakes, and containing three-fourths of an acre and twelve perches of land. 30

and to take possession of, hold, have, use and occupy the same for railroad purposes, as in said Act provided, and in and by said proceedings commissoners were apponted to assess the price or value of the lands of said Jabez L. Estile so taken, and his damages, and by their instrument in writing dated September 22nd,

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Bill of Complaint.

1846, recorded in the Office of the Clerk of the County of Morris in Book L-4 of Deeds for said County, on pages 530 &c., said commissioners assessed the price or value of said strip or tract of land of said Jabez L. Estile so taken, as well as his damages occasioned by the occupancy of his lands by the defendant, the Morris & Essex Railroad Company, all of which more fully appears by said instrument, a copy of which is hereto annexed and made a part hereof marked Schedule "A".

5. Thereafter and on or about February 25th, 1847, said Jabez L. Estile conveyed to the defendant, the Morris & Essex Railroad Company, by deed dated February 25th, 1847, and recorded in the Office of the Clerk of the County of Morris in Book M-4 of Deeds for said County, on Pages 49 &c., the same right, liberty and privilege of entering upon said strip or tract of land above described, and to possess, hold, use, occupy and erect thereon embankments, bridges and all other works necessary to lay rails, as the defendant, the Morris & Essex Railroad Company, had acquired in the proceedings aforesaid, under its Act of incorporation and the acts supplemental thereto, which define what rights the company shall acquire by assessment; a copy of which deed is hereto annexed and made a part hereof, marked Schedule "B".

6. The said strip or tract of land so acquired by the defendant, the Morris & Essex Railroad Company, intersected said lands of said Jabez L. Estile, described in the first paragraph hereof, and upon said strip or tract of land it erected

Bill of Complaint.

a railroad which is operated by defendant, the Delaware, Lackawanna & Western Railroad Company.

7. By an act of the Legislature of the State of New Jersey, entitled "An Act to validate and confirm a certain lease and contract by which the Morris & Essex Railroad Company leases their road to the Delaware, Lackawanna & Western Railroad Company", approved February 9th, 1869, the defendant, the Delaware, Lackawanna & Western Railroad Company, exercises all rights, powers and privileges of the defendant the Morris & Essex Railroad Company, and is obligated to do and perform all acts and things which the defendant, the Morris & Essex Railroad Company, as owners of said property was and is required and bound to do.

8. By Section 9 of said Act of incorporation of the defendant, the Morris & Essex Railroad Company, it is provided that where its railroad shall intersect any farm or lands of any individual, it shall provide and keep in repair suitable wagon-ways over or under its railroad so that said individual may pass from one part to the other of his lands so intersected by said railroad; and the same duty is imposed on every railroad company by Section 26 of an "Act Concerning Railroads" (P. L. 1903, P. 659).

9. By mesne conveyances the following described tracts of land, which are a part of said lands formerly owned by said Jabez L. Estile, described in Paragraph 1 hereof, were conveyed to complainant, The Rockaway Rolling Mill, on

Bill of Complaint.

or about June 2nd, 1926, by deed of that date which is recorded in the Office of the Clerk of the County of Morris in Book B-30 of Deeds for said County, on Pages 30 &c.

10 FIRST TRACT: Beginning at a stone monu-
 ment in the Westerly line of the right-of-way
 of the Morris & Essex Railroad Company and
 running thence (1) along land of Morris &
 Essex Railroad Company South eighty-eight
 degrees thirty-nine minutes ten seconds West
 four hundred feet to an iron monument,
 thence in the same course fourteen feet to
 East bank Rockaway River thence (2) North
 forty-one degrees fifty-four minutes fifteen
 20 seconds East five hundred fifteen and four
 hundredths feet and running along the East-
 erly side of said Rockaway River to a point in
 said Easterly side line, thence (3) still along
 said side line North nineteen degrees fifty-six
 minutes twenty seconds East one hundred
 eight and fifty hundredths feet to a point in
 the same, thence (4) still along said side line
 North three degrees fifty-seven minutes forty
 seconds East one hundred thirty and thirty-
 one hundredths feet to a point in said side
 30 line, thence (5) still along said side line North
 ten degrees fifty-seven minutes East eighty-
 three and twenty-two hundredths feet to a
 point in the same said point being also in
 the Southerly side line of the right-of-way of
 the Dover and Rockaway Railroad Company
 now leased by the Central Railroad Company
 of New Jersey, thence (6) North sixty-three
 degrees thirty-one minutes twenty seconds
 40 East along said side line of said railroad one

Bill of Complaint.

hundred forty-eight feet to a point in the same, thence (7) South sixty-three degrees three minutes fifty seconds East three hundred seventy-five and fifty-three hundredths feet to a stone monument in the Westerly side line of the right-of-way of the Morris & Essex Railroad aforesaid, thence (8) South thirty-eight degrees thirteen minutes West seven hundred forty-two and twenty-five hundredths feet along said side line to the point or place of Beginning. 10

SECOND TRACT: Beginning at a stone monument the most southerly corner of this second tract and running thence (1) South eighty-eight degrees thirty-nine minutes ten seconds West two hundred ninety and thirty-seven hundredths feet to a point in the Easterly side line of the Morris & Essex Railroad Company, thence (2) along said side line of said Railroad Company North thirty-eight degrees thirteen minutes East seven hundred and eighty-eight hundredths feet to a point in the same, thence (3) South sixty-three degrees three minutes fifty seconds East one hundred ninety-nine and sixty-five hundredths feet to a stone monument, thence (4) South thirty-five degrees nineteen minutes twenty seconds West five hundred fifty-five and seventy hundredths feet to the point or place of Beginning. 20 30

and said conveyance was made subject to such rights, if any, which the Morris & Essex Railroad Company, and its lessee may have in the above described tracts of land. 40

Bill of Complaint.

10. At and prior to the time of said conveyance to complainant there was located on the First Tract of land described in Paragraph 9 hereof, several large factory buildings of great value, constituting a manufacturing plant which complainant is repairing and putting in shape for extensive manufacturing purposes and operations; and, until February 1st, 1927, access to said manufacturing plant was by a wagon-road over the Second Tract of land described in said Paragraph 9, to defendants' railroad and thence across said railroad by means of a wagon-way or crossing.

20 11. The said two tracts of land described in said Paragraph 9 hereof have always at the same time been in the same common ownership since the acquisition by the defendant, the Morris & Essex Railroad Company, of the strip or tract of land described in said Paragraph 4 hereof; and by the devolution to the complainant of the title to the two tracts of land described in said Paragraph 9 hereof, it became seized and possessed of a right to a suitable wagon-way or crossing over defendants' railroad, which defendants or either of them must provide and keep in repair.

30 12. On February 1st, 1927, defendant, the Delaware, Lackawanna & Western Railroad Company, by its agents and servants, removed the wagon-way or crossing which the complainant theretofore had used as a wagon-way to cross defendants' railroad from the lands of complainant on the one side upon which its factory is located to its lands on the other side, and

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Bill of Complaint.

erected and constructed on each side of said railroad a fence across said wagon-way, thereby depriving complainant of its only access to its manufacturing plant.

13. Defendants, by their acts or omission to act, have failed and neglected to provide and keep in repair a suitable wagon-way or crossing over said railroad so that complainant might pass from its lands on one side of defendants' railroad to complainant's lands on the other side thereof, as required by law. 10

14. By reason of the foregoing, complainant is now deprived, by the failure and neglect and wrongful acts of the defendants, of a suitable wagon-way over defendants' railroad as a means of convenient access from and to such portions of its lands as are intersected and separated by said railroad, and thereby an irreparable injury or damage is inflicted upon complainant. 20

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

1. That the Morris & Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company, the defendants in this suit, may answer this bill of complaint and each statement therein made. 30

2. That defendants and each of them may be required by the order and decree of this court to provide and keep in repair a suitable wagon-way and crossing over the defendants' railroad so that complainant may pass over the same, as and in such manner as the nature of complainant's business and the proper use of its said 40

Bill of Complaint.

lands may reasonably require; and that a mandatory injunction issue out of this court compelling defendants to immediately restore or provide and keep in repair a suitable wagon-way or crossing over said railroad for complainant; and
 10 that the defendants, their officers, contractors, agents, servants and employees, be enjoined and restrained by an injunction issued out of this court, from removing, destroying, obstructing or in any way interfering with said wagon-way or crossing, when so restored or provided as aforesaid, and that the complainant may have such other and further relief as the nature of the case may require and as may be agreeable to equity.

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

KING & VOGT,
Solicitors for Complainant.

EDWARD P. STOUT,
Of Counsel.

30 STATE OF NEW JERSEY, }
County of Morris, } ss.:

EDWARD EHLERS, of full age, being duly sworn, on his oath, deposes and says:

I am the President of Rockaway Rolling Mill, a corporation of New Jersey, the complainant herein, and am personally familiar with the affairs of the company.

40

Affidavit of Edward Ehlers.

1. On and prior to September 22nd, 1846, complainant's predecessor in title, Jabez L. Estile, was the owner in fee simple, of the property described in Paragraph 1 of the complaint hereof, which property was acquired by him, by deed dated March 29th, 1820, recorded in the Morris County Clerk's office, in Book K-2 of Deeds, pages 32 &c., as therein set forth. 10

2. The defendant, Morris & Essex Railroad Company, is a corporation of the State of New Jersey, and the defendant, Delaware, Lackawanna & Western Railroad Company, is a corporation of the State of Pennsylvania.

3. By Section 7 of the act of incorporation of the defendant, Morris & Essex Railroad Company, it was empowered to acquire land by assessment, for railroad purposes, where it could not agree with the owner as to the price thereof. 20

4. On or about September 22nd, 1846, defendant, Morris & Essex Railroad Company, by virtue of said Section 7, took proceedings to acquire by assessment, the right, liberty and privilege of entering upon a certain strip of land of the said Jabez L. Estile, described in Paragraph 4 of the complaint, and to take possession of, hold, have, use and occupy the same for railroad purposes, and in and by said proceedings, Commissioners were appointed to assess the price or value of the land of said Estile so taken, and his damages, and by their instrument in writing, dated September 22nd, 1846, recorded in the Office of the Clerk of the County of Morris, in Book L-4 of Deeds, pages 530 &c., said Commissioners merely assessed the price or value of said strip of land of said Jabez 30 40

Affidavit of Edward Ehlers.

L. Estile, so taken, as well as his damage occasioned by the occupancy of his land by the defendant, Morris & Essex Railroad Company, all as fully set forth in Paragraph 4 of said complaint.

5. On February 25th, 1847, Jabez L. Estile conveyed to the defendant, Morris & Essex Railroad
10 Company, by deed of that date, recorded in the Morris County Clerk's Office, in Book M-4 of Deeds, pages 49, &c., the same right, liberty and privilege of entering upon said strip of land described in Paragraph 4 of the complaint, and to possess, hold, use, occupy and erect thereon, embankments, bridges and all other works necessary to lay rails, which the said defendant, Morris & Essex Railroad Company, had acquired in the proceedings aforesaid, under its act of incorporation and the acts supplemental thereto, which defined
20 what rights the company could acquire by assessment, as fully set forth in Paragraph 5 of the complaint.

6. The said strip or tract of land so acquired by the defendant, Morris & Essex Railroad Company, intersected said land of said Jabez L. Estile, described in the first paragraph of the complaint, and upon said strip or tract of land it erected a
30 railroad, which is operated by the defendant, Delaware, Lackawanna & Western Railroad Company.

7. By an act of the legislature of the State of New Jersey, approved February 9th, 1869, the defendant, Delaware, Lackawanna & Western Railroad Company, exercises all rights, powers and privileges of the defendant, Morris & Essex Railroad Company, and is obligated to do and perform all acts and things, which the defendant,
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Affidavit of Edward Ehlers.

Morris & Essex Railroad Company, as owners of said property, was and is required and bound to do.

8. Section 9 of the act of incorporation of the defendant, Morris & Essex Railroad Company, provides that where this railroad shall intersect any farm or lands of any individual, it shall provide and keep in repair, suitable wagon-ways over or under its railroad, so that said individual may pass from one part to the other of his lands so intersected by said railroad, and the same duty is imposed on other railroad companies by Section 26 of "An Act Concerning Railroads," P. L. 1903, Page 659. 10

9. By mesne conveyance, the tracts of land described in Paragraph 9 of the complaint, which are a part of the land formerly owned by said Jabez L. Estile, described in Paragraph 1 of the complaint, were conveyed to complainant, Rockaway Rolling Mill, on or about June 2nd, 1926, by deed of that date, which conveyance was subject to such rights, if any, which the Morris & Essex Railroad Company and its lessees may have in said property, as fully set forth in Paragraph 9 of the complaint. 20

10. At and prior to the time of said conveyance to complainant, there was erected on the first tract described in Paragraph 9 of the complaint, several large factory buildings of great value, constituting a manufacturing plant, which complainant is repairing and putting in shape for extensive manufacturing purposes and operations, and until February 1st, 1927, access to said manufacturing plant was by a wagon road over the second tract of the land described in Paragraph 9 of the 30 40

Affidavit of Edward Ehlers.

complaint, to defendants' railroad and thence across said railroad by means of a wagon-way or crossing.

10 11. Said two tracts of land described in Paragraph 9 of the complaint have always at the same time been in the same common ownership, since the acquisition by the defendant, the Morris & Essex Railroad Company, of the strip of land described in Paragraph 4 of the complaint; and by the devolution to the complainant, of the title to the said two tracts of land described in Paragraph 9 of the complaint, it became seized and possessed of a right to a suitable wagon-way or crossing over defendants' railroad, which defendants or either of them must provide and keep in
20 repair.

12. On February 1st, 1927, defendant, Delaware, Lackawanna & Western Railroad Company, by its agents and servants, removed the wagon-way or crossing which complainant theretofore had used as a wagon-way to cross defendants' railroad from the lands of complainant on the one side, upon which its factory is located, to its land on the other side, and erected and constructed on
30 each side of said railroad, a fence across said wagon-way, thereby depriving complainant of its only access to its manufacturing plant.

13. Defendants, by their acts or omission to act, have failed and neglected to provide and keep in repair, a suitable wagon-way or crossing over said railroad, so that complainant might pass from its lands on one side of defendants' railroad to complainant's land on the other side thereof, as required by law.
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Commissioners' Award to M. & E. R. R. Co.

14. By reason of the foregoing, complainant is now deprived by the failure and neglect and wrongful acts of the defendants of a suitable wagon-way over defendants' railroad as a means of convenient access from and to such portions of its land as are intersected and separated by said railroad, and thereby an irreparable injury or damage is inflicted upon complainant. 10

EDWARD EHLERS.

Subscribed and sworn to before me }
 this 25th day of March, 1927. }

MARY L. JAMIESON
 Notary Public of N. J.
 (Seal)

20

Commissioners Award to M. & E. R. R. Co.

BENJAMIN P. LUM,
 WILLIAM PATTERSON,
 GEORGE S. CORWIN,
 Commissioners,
 to
 THE MORRIS & ESSEX
 RAILROAD.

Dated September 22, 1846.
 Rec'd. October 17, 1846.
 Rec'd. Book L-4, Page 530. 30

We, Benjamin P. Lum, William Patterson and George S. Corwin, commissioners duly appointed by Jephtha B. Munn Esq., one of the Judges of the Inferior Court of Common Pleas in and for the County of Morris, on the application of the Morris & Essex Railroad Company 40

Commissioners' Award to M. & E. R. R. Co.

to assess to Jabez L. Estile, the price or value of the land now in the occupancy of the Morris & Essex Railroad Company, and owned by the said Jabez L. Estile under the act entitled An Act to incorporate the Morris & Essex Railroad Company and the supplements thereto, which land is situated in the Township of Rockaway, in said county of Morris, as in and by the record of our appointment as commissioners by the said Jephtha B. Munn, Esq., before him will more fully appear. Having taken upon ourselves the duties of the aforesaid appointment, and having first severally in due form, taken an oath before the said Jephtha B. Munn, Esq., judge as aforesaid, faithfully to execute the duties of such appointment as commissioners as aforesaid, and it having been duly proved on the oath and examination of Thomas I. Osgan, a witness, that the said Jabez L. Estile had ten days previous notice in writing of this meeting, and that the said company had like notice, and that they were notified to meet at the house of Jacob Hurd, in Dover, in the Township of Randolph in said County of Morris, on Monday the 7th day of September A. D. 1846, at the hour of nine o'clock A. M. on said day. We proceeded to examine the land and real estate occupied by the Morris & Essex Railroad Company for the site of their branch railroad, and having met and viewed the premises and having caused a survey thereof to be made, we ascertained the following to be a true description of the land or real estate owned by the said Jabez L. Estell and taken by the Morris & Essex Railroad Company for the site of their branch railroad to Dover. Beginning at Selee Tompkin's East line and pursuing a line

Commissioners' Award to M. & E. R. R. Co.

of stakes North thirty-five degrees forty-five minutes East eleven chains to Joseph Jackson's West line embracing one and one-half rods on each side of said line of stakes, and containing three-fourths of an acre and twelve perches of land (see map) viz:

for land	\$15	
general damage	10	\$25.

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It is also awarded that the said railroad company shall make a ditchfence or cattle guard on the line between the said Jabez L. Estell's land and the land of Joseph Jackson, and we the subscribers, having viewed the lands of the said Jabez L. Estell as well as the premises above described occupied as aforesaid by the said Morris & Essex Railroad Company as the site of their branch road, and having heard the parties, as well the said Jabez L. Estell as the said company, their allegations, proofs and evidence and having fully examined and duly considered the proofs adduced before us, do hereby award, order, adjudge, appraise and assess the price or value of the above described lands of the said Jabez L. Estell so as aforesaid taken by the said Morris & Essex Railroad Company at the sum of Twenty-five Dollars, which said sum of Twenty-five Dollars we do hereby award and order the said Morris & Essex Railroad Company to pay unto the said Jabez L. Estell for the price or value of his said land so as aforesaid taken by said company and as full satisfaction for the same, including in said assessment to said Jabez L. Estell all the costs and expenses he is or may be put to in running, mak-

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Commissioners' Award to M. & E. R. R. Co.

10 ing and maintaining the fencing on the aforesaid line of the said railroad; and all other damages of every kind which he has or may sustain by reason of the occupation of his aforesaid land, premises and real estate by the said Morris & Essex Railroad Company, which we as commissioners as aforesaid are authorized to assess under and by virtue of the aforesaid act. The said sum of Twenty-five Dollars so as aforesaid by us awarded to the said Jabez L. Estell, being in full satisfaction to the said Jabez L. Estell as well for the value of his land so as aforesaid taken as for the damages occasioned by the occupancy of his land by the said railroad company.

20 In Witness whereof, we the said Benjamin P. Lum, William Patterson and George S. Corwin, Commissioners as aforesaid, have hereunto set our hands and seals this 22nd day of September A. D. 1846.

BENJAMIN P. LUM (L. S.)
 W. PATTERSON (L. S.)
 GEO. S. CORWIN (L. S.)

30 Map attached.

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Estile Deed to M. & E. R. R. Co.

JABEZ L. ESTILE

to

THE MORRIS & ESSEX
RAILROAD COMPANY.

Dated February 25, 1847
Ack'd. February 25, 1847
Rec'd. October 6, 1847
Book M-4, Page 49

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To all to whom these presents may come, Jabez L. Estile, of the Township of Rockaway, in the County of Morris and State of New Jersey, sends greetings:

Whereas, the Morris & Essex Railroad Company in pursuance of the provisions of an act of the Legislature of the State of New Jersey entitled an act to incorporate the Morris & Essex Railroad Company, and the various supplements thereto, have surveyed a route for a railroad from Morristown to Dover called the Dover Branch of the Morris & Essex Railroad, which route has been laid over the following described tract of the said Jabez L. Estile, situated in the Township of Rockaway, in the County of Morris and State of New Jersey, beginning in the Northeasterly line of lands owned by Seely Tompkins where the survey of railroad crosses the same and running thence in a Northeasterly direction as the stakes are set for said survey to the line of lands in possession of Joseph Jackson embracing such width as may be necessary for the construc-

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Estile Deed to M. & E. R. R. Co.

tion and maintenance of railroad not exceeding two rods in width on each side of the line of stakes set for the middle of said road through said Jabez L. Estile's land. This deed is upon the condition that said railroad company shall at the time of making said road, construct and build good and sufficient cattle-guards where the said road enters upon and leaves said Estile's land not exceeding two such cattle guards in number and shall keep such cattle guards in good form. The said Estile to fence said road at his own expense. Now be it known that the said Jabez L. Estile in consideration of the sum of One Hundred Dollars to him in hand well and truly paid by the said The Morris & Essex Railroad Company, the receipt whereof is hereby acknowledged hath and by these presents doth grant, bargain, sell, convey and confirm unto the said The Morris & Essex Railroad Company and to their successors forever, the right, liberty and privilege of entering upon the tract of land above described, by its officers, agents, engineers, superintendents, contractors, workmen and other persons in their employ, and to take possession of, hold, use, occupy and excavate the same, and to erect embankments, bridges and all other works necessary to lay roads, and do all other things which shall be suitable or necessary for the completion or repair of said road or roads. To have and to hold the said tract of land and premises unto the said Morris & Essex Railroad Company, and to its successors and assigns forever, for the purpose above mentioned, and for all other purposes mentioned in the Act of incorporation and the several supplements thereto.

Estile Deed to M. E. R. R. Co.

IN WITNESS WHEREOF, the said Jabez L. Estile hath hereunto set his hand and seal the 25th day of February in the year of our Lord One Thousand Eight Hundred and Forty-seven.

JABEZ L. ESTILE (L. S.)

Signed, sealed and delivered
in the presence of
SAMUEL B. HALSEY

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Acknowledged on February 25, 1847, before Samuel B. Halsey, one of the Judges of the Court of Common Pleas for the County of Morris.

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COMPLAINANT'S AFFIDAVITS.

Affidavit of Richard Bonno.

IN CHANCERY OF NEW JERSEY.

10	Between	}	On Bill, &c. On Order to Show Cause.
	THE ROCKAWAY ROLLING MILL, a corporation, Complainant,		
	<i>and</i>		
20	THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.		

STATE OF NEW JERSEY, }
County of Morris, } ss.:

RICHARD BONNO, of full age, being duly sworn on his oath, deposes and says:

30 I am General Manager of Rockaway Rolling Mill, a corporation of New Jersey, and have been personally engaged in preparing the plant of complainant, purchased from the Receiver of the International High Speed Steel Company, for operation, and have charge of conveying of material to and from its plant.

40 The only means of access by vehicles to and from this plant, which is located between the right-of-way of the Morris & Essex Railroad. under lease to the Delaware, Lackawanna & Western Railroad, the Central Railroad of New Jersey and

Complainant's Affidavit of Richard Bonno.

the Rockaway River, is by a grade crossing over the right-of-way of the defendant company. That crossing has to my personal knowledge been at the same location since 1916, and was used by the former owners of the plant, its agents, servants and employees, and any one having any reason to go to or from its plant by vehicle. 10

On February 1st, 1927, the defendant caused its servants or agents to rip up, remove and take away the planks forming said crossing, and to erect on each side of defendant's tracks a fence or barrier across the road leading to the company's plant. This fence or barrier is about twenty feet long, four feet high and so constructed as to absolutely prevent access to or from the company's plant by any vehicle. Access to and from the company's plant by pedestrians can only be gained by walking down the right-of-way of the defendant and around the fence. 20

The unlawful action of the defendant has resulted in irreparable damage to the complainant, and continues to result in irreparable damage and loss to the complainant. It is absolutely essential and necessary that material be taken to and from said plant by trucks or vehicles, and access to the company's plant by fire apparatus, in case of a fire, is absolutely prevented. 30

RICHARD BONNO.

Subscribed and sworn to before me }
this 5th day of April, 1927. }

HATTIE S. LOREE
Notary Public of N. J.

(Seal)

Complainant's Affidavit of Absalom Crampton.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

ABSALOM CRAMPTON, of full age, being duly sworn on his oath, deposes and says:

10 I live in Denville Township about a quarter of a mile from the plant formerly owned by International High Speed Steel Co., now owned by The Rockaway Rolling Mill.

I am fifty-two years old and can remember the property on which that plant stands and surrounding property for forty-five years. My grandfather, Charles Crampton, owned it at one time, then my father owned it and then I and my brother and sister owned it.

20 For the forty-five years I have known the property there has been a crossing over the tracks of the Lackawanna Railroad at exactly the same place where the crossing was until the first part of February, 1927, when the planks were taken up and fence placed across what was the road. The railroad was formerly the Morris & Essex and I have driven over the crossing many times when a youngster. It was not planked when I first remember the crossing but the road was in the same place as now and between the tracks was
 30 filled with dirt or gravel to make the crossing. The crossing led from one part of my grandfather's property to the other, and was the only means of access to the field lying between the railroad and the Rockaway River.

I still pass the place frequently and know that the crossing has been in its exact location and used by the owners of the adjoining property for the entire forty-five years.

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Complainant's Affidavit of Absalom Crampton.

The crossing in question is the only means of access to that field or property now and the land on both sides of the track at that point has always been owned by the same person at the same time.

All the buildings of the plant are across the track from the road leading in to them and it is necessary to cross the track at that crossing in order to get to them. 10

All the time my grandfather, father or myself and brother and sister owned the property, there was never any controversy between the railroad company and any of us as to this crossing, and the railroad kept the crossing in repair and maintained it and furnished the ties to make a bridge over the ditch on each side of the railroad crossing in order to get to it and across it. 20

ABSALOM CRAMPTON.

Sworn and subscribed to before me }
this 5th day of April, 1927. }

HATTIE S. LOREE
Notary Public of N. J.

(Seal)

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Complainant's Affidavit of George E. Crampton.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

GEORGE E. CRAMPTON, of full age, being duly sworn on his oath, deposes and says:

10 My grandfather, Charles Crampton, owned the property formerly owned by the International High Speed Steel Co. on both sides of the railroad. My father owned it later and myself, brother and sister owned it after that.

I can remember for at least fifty years that there was a crossing over the railroad tracks from the property on one side to the property on the other side, at the same place where the crossing has just been closed and a fence put up.

20 When I was a boy and the property was owned by my grandfather I rode over that crossing many times. The crossing was always in the same location and connected the property owned by my grandfather on both sides of the railroad. I know that timber was carted over there and whenever it was necessary, we notified the railroad and they sent their section gang to the crossing, put in new planks, fixed the crossing for the heavy trucking and even widened and bridged the ditch near the crossing so the crossing could be used.

30 During all the time I have known the crossing it was in exactly the same location over the tracks of the railroad. The railroad has always maintained the crossing, kept it in repair and kept it open during the time it was owned by my family and there was never any question or dispute as to the crossing. Whenever notified, they came and repaired the crossing, even putting in extra wooden flanges to keep the wagon wheels from

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Complainant's Affidavit of George W. Stickle.

catching in the tracks when we were going to cart hay or timber over the crossing.

This crossing is and was the only way of getting over to the field between the tracks and the Rockaway River. The entire plant of the Rockaway Rolling Mill is located in that field.

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I am a contractor and a builder and live at Rockaway, N. J.

During the entire fifty years that I have known of the crossing it has never been closed, blocked or obstructed or crossing prohibited until the first part of February, 1927, when the fence was put up at the crossing, by the railroad.

GEORGE E. CRAMPTON.

Subscribed and sworn to before me }
this 5th day of April, 1927. }

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HATTIE E. LOREE
Notary Public of N. J.

(Seal)

Complainant's Affidavit of George W. Stickle.

STATE OF NEW JERSEY, }
County of Morris, } ss. :

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GEORGE W. STICKLE, of full age, being duly sworn on his oath, deposes and says:

I live at Rockaway, N. J., and have lived there for 72 years.

I am familiar with the property now owned by Rockaway Rolling Mill, formerly owned by International High Speed Steel Company in the Borough of Rockaway, formerly Township of Denville, and once owned the property.

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Complainant's Affidavit of George W. Stickle.

10 I know where the road crossing goes over the railroad tracks of the Lackawanna (formerly the Morris and Essex Division) and have known of the crossing for at least 30 years. The railroad at that place divided the property then owned by the Cramptons. I bought timber from them and the timber was brought out over that railroad crossing. Since I have known the property the crossing has been there and in about the same location as it now is. To my knowledge the crossing was never obstructed or its use prohibited until the present fence was put there by the railroad the first part of this year.

20 The property at the place in question divided by the railroad at this place has been owned by the same person at the same time since the Cramptons owned it.

GEORGE W. STICKLE.

Subscribed and sworn to before me }
this 6th day of April, 1927. }

EDWIN J. MATTHEWS
Notary Public of N. J.

(Seal)

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Complainant's Affidavit of Leslie Todd.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

LESLIE TODD, of full age, being duly sworn on his oath, deposes and says:

I live at Denville, N. J. When I was a boy my grandfather Joseph Zeek owned property adjoining the property then owned by the Cramptons, now owned by the Rockaway Rolling Mill. I often visited my grandfather and with others went swimming in the Rockaway River going down the road through the Crampton property over the crossing where the road crossed the railroad and on over the road through the field upon which the plant of the Rockaway Rolling Mill (formerly International High Speed Steel Co.) is now erected. 10

I can remember that crossing for at least 35 years and know that the wagon road crossed the track and was used by the owners of the property or others having any reason to go beyond the tracks for that length of time. The crossing was at the place where it was until fenced off by the Railroad Company on February 1st, 1927. 20

I know George and Absalom Crampton when they were boys and often went over the railroad crossing with them and it was the only road or path to get down through the field or woods to the river from the Franklin Road, a public road. 30

LESLIE TODD.

Subscribed and sworn to before me }
 this 5th day of April, 1927. }

HATTIE S. LOREE
 Notary Public of N. J.

(Seal)

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Complainant's Affidavit of Michael S. Malone.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

MICHAEL S. MALONE, of full age, being duly sworn on his oath, deposes and says:

10 I live in the Borough of Rockaway. I worked for the International High Speed Steel Co. from October, 1915 to May, 1926. I was purchasing agent for the company, at its plant, involved in this suit, for a great part of that time.

At the time I went to work for the company, the railroad crossing was over the tracks of the defendants at the same place as it was until the First of February of this year, and the road leading to it and from it was in the same place. It was the only way of getting to the plant by vehicles and was used the entire time of operation.

20 The railroad company made all the repairs to the crossing, furnished all the material and labor for making those repairs and from time to time with the exception of one time a Mr. Hill of the railroad company came to me and said the crossing was in bad shape and wanted some planking to fix it right away. I gave him some planking from the Steel Company's stock and he used it to repair the crossing. All the work was done by the railroad company's men. The planking I gave Mr. Hill was spruce 8 inches wide. He said it was not suitable for the purpose but would replace it with oak plank at the first opportunity. After that he and his men took up the spruce planking and put down other planking in its place.

MICHAEL S. MALONE.

Sworn and subscribed this 5th }
 day of April, 1927. }

HATTIE S. LOREE

Notary Public of N. J.

40 (Seal)

Answer.

Filed April 4, 1927.

IN CHANCERY OF NEW JERSEY.

Between	10
THE ROCKAWAY ROLLING MILL, a corporation, Complainant,	
<i>and</i>	
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.	20

The Delaware, Lackawanna and Western Railroad Company, and the Morris and Essex Railroad Company, answering the complainant's bill of complaint, says:

I. It has no knowledge or information sufficient to form a belief so as to answer as to whether Jabez L. Estile was the complainant's predecessor in title to the property referred to in the first paragraph of the complainant's complaint, but admits the allegations contained in said paragraph, that the records in the office of the Clerk of the County of Morris, as set forth and described in said first paragraph, do show that the said Jabez L. Estile was the owner in fee simple of the land referred to in said paragraph, obtaining the same by the deed of conveyance referred to in said paragraph.

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Answer.

II. It admits the allegations contained in the second paragraph.

III. It admits the allegations contained in the third paragraph.

10 IV. It admits the allegations contained in the fourth paragraph.

V. It admits the allegations contained in the fifth paragraph that "Thereafter and on or about February 25, 1847, said Jabez L. Estile conveyed to the defendant, the Morris and Essex Railroad Company by deed dated February 25, 1847, and recorded in the office of the Clerk of the County of Morris in Book M-4 of deeds of said county on pages 49, and so forth," the land and premises
20 described in the deed referred to in the said fifth paragraph, a copy of which is annexed and made to form a part of the complainant's bill of complaint and marked Schedule B.

VI. It admits the allegations contained in the sixth paragraph that "the said strip or tract of land so acquired by the defendant, The Morris and Essex Railroad Company," by the deed referred to in the fifth paragraph of the complainant's bill of complaint, and made a part of the
30 complainant's bill of complaint and marked Schedule B, "intersected said lands of said Jabez L. Estile described in the first paragraph hereof, and upon said strip or tract of land it erected a railroad which is operated by the Delaware, Lackawanna and Western Railroad Company."

VII. It admits the allegations contained in the seventh paragraph.

40 VIII. It admits the allegations contained in the eighth paragraph.

Answer.

IX. It has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the ninth paragraph.

X. It admits the allegations contained in the tenth paragraph that "there was located on the first tract of land described in paragraph nine hereof, several large factory buildings" "constituting a manufacturing plant," and "until February 1, 1897, access to said manufacturing plant was by wagon road over the second tract of land in said paragraph nine to defendant's railroad and thence across said railroad by means of a wagon way or crossing." 10

These defendants say that the crossing referred to in the tenth paragraph of the complainant's complaint was installed by the International High Speed Steel Company as a result of an application made by said Steel Company and an agreement entered into with said International High Speed Steel Company on May 3, 1915, wherein and whereby the defendant, The Delaware, Lackawanna and Western Railroad Company licensed and permitted the construction, maintenance and operation of said crossing across its track at grade, and that said crossing was allowed and permitted to be and remained across the track of the Delaware, Lackawanna and Western Railroad Company, until it was taken up by it on February 1, 1927. 20 30

XI. The defendants have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the eleventh paragraph that "the said two tracts of land described in said paragraph nine, have always at the same time been in some common ownership 40

Answer.

10 since the acquisition by the defendant, The Morris and Essex Railroad Company of the strip or tract of land described in said paragraph four hereof," and with respect to the balance and remainder of the allegations in said paragraph, it denies the same.

20 XII. It admits the allegations contained in the twelfth paragraph that "on February 1, 1927, the defendant, The Delaware, Lackawanna and Western Railroad Company, by its agents and servants, removed the wagon-way or crossing," "and erected and constructed on each side of said railroad a fence across said wagon-way," but denies the balance and remainder of the allegations contained in said paragraph.

20 XIII. It denies the allegations contained in the thirteenth paragraph.

XIV. It denies the allegations contained in the fourteenth paragraph.

30 XV. And these defendants, further answering the allegations contained in the complainant's complaint, say that from the time of the acquisition of the land and premises by the defendant, The Morris and Essex Railroad Company, set forth, described and referred to in the complainant's bill of complaint as having been acquired by the Morris and Essex Railroad Company, by the deed of Jabez L. Estile, to The Morris and Essex Railroad Company on or about February 25, 1847, a copy of which deed is annexed to and made a part of the complainant's bill of complaint, and marked Schedule B, up until the present time there never has been any crossing or
40 road-way over its track or right-of-way connect-

Answer.

ing the properties separated by its right-of-way and track, nor has any owner of the lands and property separated by its right-of-way and track ever requested a crossing or wagon-way, with the exception of the crossing requested by the International High Speed Steel Company, and licensed and permitted by The Delaware, Lackawanna and Western Railroad Company to the International High Speed Steel Company, under and by virtue of the licensed agreement between the International High Speed Steel Company and The Delaware, Lackawanna and Western Railroad Company, which agreement was dated May 3, 1915, and which crossing was constructed by the International High Speed Steel Company on June 7, 1915, and maintained by it until said concern went into bankruptcy, and which crossing The Delaware, Lackawanna and Western Railroad Company subsequently took up and removed on February 1, 1927, after the complainant refused to enter into a licensed agreement similar to the one executed by the International High Speed Steel Company with the defendant, The Delaware, Lackawanna and Western Railroad Company.

WHEREFORE these defendants pray that the complainant's bill of complaint be dismissed as against them with their taxed costs.

FREDERIC B. SCOTT,
Solicitor for and of Counsel
of Defendants.

DEFENDANTS' AFFIDAVITS.

Affidavit of George J. Ray.

STATE OF NEW JERSEY, }
 County of Hudson, } ss. :

10 GEORGE J. RAY, of full age, being duly sworn, on his oath says :

I reside at East Orange, New Jersey.

I am the Chief Engineer of The Delaware, Lackawanna and Western Railroad Company, lessor of The Morris and Essex Railroad Company, and have been since the year 1908.

20 On April 26th, 1915, representatives of the International High Speed Steel Company called at my office with reference to our granting it permission to make a crossing of our tracks at grade on the Rockaway Branch, for teaming purposes, into the plant which it was erecting along said branch.

30 As a result of said application and subsequent negotiations, an agreement was entered into with the said International High Speed Steel Company on May 3rd, 1915, which I executed on behalf of The Delaware, Lackawanna and Western Railroad Company, a true copy of which agreement is hereto attached to this my affidavit and marked Schedule "A."

I further state that the grade crossing contemplated by said agreement was constructed and laid by the employees of the International High Speed Steel Company on or about June 7th, 1915, and that it was maintained by the said International High Speed Steel Company until the time it ceased to do business and went into the hands of a receiver.

Defendants' Affidavit of George J. Ray.

On the 6th day of September, 1922, a very serious accident happened at said crossing, due to the carelessness of certain employees of the said International High Speed Steel Company, and it was not until the three cases brought by the injured parties or their representatives had been tried three times that an original judgment on a verdict of Twenty-six Thousand Dollars (\$26,000) was wiped out. 10

I further state that the insolvency of the International High Speed Steel Company during the time said verdicts and judgments thereon were in force caused The Delaware, Lackawanna and Western Railroad Company considerable anxiety because the indemnification by the said International High Speed Steel Company of the Railroad Company, as provided in and by said agreement—Schedule A—was rendered practically worthless. 20

As a result of said accident, it was determined by The Delaware, Lackawanna and Western Railroad Company to take up said crossing and terminate said license agreement and to that end, said crossing was taken up on February 1st, 1927.

I further state that on June 9th, 1926, the complainant, The Rockaway Rolling Mill, advised The Delaware, Lackawanna and Western Railroad Company that it had recently purchased the plant formerly of the International High Speed Steel Company located between Rockaway and Dover, New Jersey, and, as there was a very dangerous crossing entering said plant, it was suggested that The Delaware, Lackawanna and Western Railroad Company put up a warning signal for said crossing, to which communication, on June 21st, 1926, I replied, advising the said The Rockaway Rolling Mill that the crossing in question was a 30 40

Defendants' Affidavit of George J. Ray.

personal privilege or a license granted by The Delaware, Lackawanna and Western Railroad Company under an agreement with the International High Speed Steel Company and, inasmuch as it had gone out of business, it was the intention of the Railroad Company forthwith to take up said crossing unless the said The Rockaway Rolling Mill felt disposed to immediately make application to the Railroad Company for a similar license and permit to maintain said crossing, which license permit the Railroad Company would give consideration to, but that one of the terms of said license permit would be that the Rockaway Rolling Mill would be obliged to secure the Railroad Company's indemnification for any accident happening at the said crossing, the indemnification running both from the Rockaway Rolling Mill personally and with a bond of a well known surety company, in an amount not less than Fifty Thousand Dollars (\$50,000.00), to which communication the said The Rockaway Rolling Mill replied, by requesting a copy of said agreement with the International High Speed Steel Company, covering said crossing, which copy was furnished to said The Rockaway Rolling Mill on July 3rd, 1926.

As a result of the conditions imposed in the communication to The Rockaway Rolling Mill, for permission to secure said crossing, the said The Rockaway Rolling Mill abandoned its activities to have said crossing either protected or maintained until the institution of the suit in which I am now making this affidavit.

I further state that in my opinion, the construction and maintenance of a grade crossing at the place where the International High Speed Steel Company formerly maintained a grade

Defendants' Affidavit of George J. Ray.

crossing under the agreement hereinbefore referred to as "Schedule A," unless the Railroad Company is adequately protected, is both unwise and unsafe and highly dangerous and, in view of the fact that, so long as I have known the situation to be, covering a period of over nineteen years, there was no crossing, private, farm or otherwise, at the exact location, or near the exact location, of the crossing constructed by the International High Speed Steel Company, as aforesaid, maintained or permitted by the Railroad Company, that no such crossing should be ordered or permitted at said place. 10

GEORGE J. RAY.

Subscribed and sworn to before me }
this 2nd day of April, 1927. } 20

HAZEL LEMON

Notary Public of New Jersey

(Seal)

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Schedule A.

(Lease dated May 3, 1915, between The Delaware, Lackawanna and Western Railroad Company and International High Speed Steel Company.)

10 THIS AGREEMENT, made this 3rd day of May, 1915, by and between THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation of the State of Pennsylvania, Lessee of The Morris and Essex Railroad Company, a corporation of the State of New Jersey, party of the first part, hereinafter called "Railroad Company," and the INTERNATIONAL HIGH SPEED STEEL COMPANY, a corporation of the State of New York, party of the second part, hereinafter called the "Steel Company,"

20 WHEREAS, the Steel Company is the owner of certain lands in the Township of Rockaway, Morris County, State of New Jersey, lying of either side of the railroad of the Railroad Company, and has applied to the Railroad Company for a license and permit to construct, maintain and operate a certain road across the track of the Railroad Company at the grade thereof for the purpose of affording convenient access from the lands of the Steel Company on the Southerly side of said track to its lands on the Northerly side thereof, being
30 Plot No. 2 as shown upon the blueprint plan which is hereto annexed and made a part of this agreement, and

WHEREAS, the Railroad Company has agreed to license and permit the construction, maintenance and operation of said road across its track at the grade thereof in the location shown upon said plan:

40 NOW, THIS AGREEMENT WITNESSETH: That in consideration of the premises and of the covenants,

*Schedule A, Attached to Defendants' Affidavit of
George J. Ray.*

terms, conditions and restrictions hereinafter contained, to be severally kept, performed and observed by the Steel Company, the Railroad Company hereby licenses and permits the Steel Company to lay, construct, maintain and use the said road across its track at grade, at the location and in the manner shown upon said map, subject, however to the following covenants, terms, conditions and restrictions, to wit:

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First: The said crossing shall be constructed and maintained by the Steel Company at its sole expense and in a manner satisfactory to the Chief Engineer of the Railroad Company.

Second: The Steel Company hereby agrees that it will indemnify and save harmless the Railroad Company from and against any and all liability, loss, damages and expense and costs which the Railroad Company may incur, sustain, suffer or be subjected to by reason of the construction and existence of said grade crossing upon the property of the Railroad Company, or by reason of its becoming out of repair or unsafe for travel thereon. The Steel Company also agrees that it will indemnify and save harmless the Railroad Company from and against any and all liability, loss, damages, expenses and costs which the Railroad Company may incur, sustain, suffer or be subjected to by reason of the injury to person or property of any person or persons, firms or corporations using the same, whether due to or growing out of, directly or indirectly, the negligence of the Railroad Company, its agents, servants or employees, or otherwise.

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*Schedule A, Attached to Defendants' Affidavit of
George J. Ray.*

10 Third: The Railroad Company shall have the right at any time, upon sixty days' notice to the Steel Company, to terminate this agreement and to summarily revoke the license and permit herein given, in which event the Steel Company shall promptly remove all of its property from the premises of the Railroad Company at its own expense.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed, the day and year first above written.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY.

20 By G. J. Ray,
Chief Engineer.

INTERNATIONAL HIGH SPEED STEEL
COMPANY,

By Wm. Garrow Fisher,
President.

(Seal)

Attest:

30 Ralph Gillette,
Secretary.

DEFENDANTS' AFFIDAVITS.

Affidavit of John Sexton.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

JOHN SEXTON, of full age, being duly sworn, on his oath, says: 10

I am employed by the Delaware, Lackawanna and Western Railroad Company, lessor of The Morris and Essex Railroad Company, as its Roadmaster and have been so employed for the last twenty-six years.

As a part of my duties, I am obliged to know the various railroad crossings, both public and private, in the territory to which I am assigned; said territory covering the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company which runs from Denville, New Jersey, to East Dover, New Jersey. 20

I am familiar with and know the location of the plant of the International High Speed Steel Company, a corporation of New Jersey, which was formerly located on the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company, and which plant, I am informed, was purchased by The Rockaway Rolling Mill some time in the month of June, 1926. 30

During the twenty-six years which I have been Roadmaster of The Delaware, Lackawanna and Western Railroad Company, I have had occasion, in the course of my duties, to pass the plant of the International High Speed Steel Company at least once a week, and I am familiar with the location where said International High Speed Steel Company's plant was located. 40

Defendants' Affidavit of John Sexton.

I recollect that the International High Speed Steel Company applied to The Delaware, Lackawanna and Western Railroad Company some time in May or June, 1915 for a license or permit to construct, maintain and operate a crossing at grade across the tracks of The Delaware, Lackawanna and Western Railroad Company, for the purpose of affording access from the lands of the International High Speed Steel Company on the southerly side of the Railroad Company's tracks, to its lands on the northerly side thereof, and that subsequently, the said International High Speed Steel Company did construct said crossing and maintain it at its sole expense until said International High Speed Steel Company went out of business.

I further state that during all the years that I have been roadmaster of the Delaware, Lackawanna and Western Railroad Company and familiar with the location of the crossing over the track of the railroad into the plant of the International High Speed Steel Company, as hereinbefore stated, that that was the only crossing and means of ingress to or egress from said plant or the properties on both sides of the railroad track in existence.

I further state that, prior to the construction of said crossing by the International High Speed Steel Company, there never was any crossing, at grade, or otherwise, going over the tracks and right-of-way of The Delaware, Lackawanna and Western Railroad Company in exactly the same or near said location and that there was no crossing prior to the construction by the International High Speed Steel Company hereinbefore referred to used by the owners of the properties on each

Defendants' Affidavit of John Sexton.

side of The Delaware, Lackawanna and Western Railroad Company's single track.

I further state that all orders during the last twenty-six years to do any work on the tracks of the Delaware, Lackawanna and Western Railroad Company, such as bridging its right-of-way and piping the ditches along its right-of-way, were passed upon by myself and that the bridge of the ditch on the easterly side of the right-of-way of The Delaware, Lackawanna and Western Railroad Company and the iron pipe on the westerly side of the Railroad Company's right-of-way, where crossed by the road constructed and maintained by the International High Speed Steel Company, were not put in or the material furnished by The Delaware, Lackawanna and Western Railroad Company, but that both said work and the materials were done and furnished by the International High Speed Steel Company under the agreement between it and The Delaware, Lackawanna and Western Railroad Company, hereinbefore referred to.

I further state that the Delaware, Lackawanna and Western Railroad Company never maintained the crossing into the International High Speed Steel Company's plant, nor renewed the planks in it, but that said crossing was maintained solely by the said International High Speed Steel Company and that it renewed the planks in said crossing when it was required.

I admit that on February 1st, 1927, all of the planks in said crossing leading into the place where the International High Speed Steel Company had constructed a crossing under the license agreement hereinbefore referred to, were removed by The Delaware, Lackawanna and Western Rail-

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Defendants' Affidavit of Thomas Wallace.

10 road Company, and I further state that there was erected and constructed on the property of The Delaware, Lackawanna and Western Railroad Company two fences, one on each side of its tracks, so that ingress to or egress from and over the crossing formerly constructed and maintained by the International High Speed Steel Company was made impossible.

I further state that the crossing so blocked and hereinbefore referred to has, ever since its existence, been a source of danger to trains operating over its Rockaway Branch, and its passengers being carried thereon.

JOHN SEXTON.

20 Subscribed and sworn to before me }
this 2nd day of April, 1927. }

HAZEL LEMON
Notary Public of New Jersey
(Seal)

Defendants' Affidavit of Thomas Wallace.

STATE OF NEW JERSEY, }
County of Morris, } ss. :

30 THOMAS WALLACE, of full age, being duly sworn, on his oath, says:

I am employed by The Delaware, Lackawanna and Western Railroad Company as its Assistant Roadmaster and work under one John Sexton, its Roadmaster, having charge of the territory which includes the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company running from Denville, New Jersey, to East Dover,
40 New Jersey.

Defendants' Affidavit of Thomas Wallace.

I further state that I have been Assistant Roadmaster of The Delaware, Lackawanna and Western Railroad Company since January, 1911, and during that time, have acquired a familiarity with the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company, having traveled over it either on foot or on track motor at least once a week during my time of service as said Assistant Roadmaster. 10

I know where the former plant of the International High Speed Steel Company was located on the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company and recollect that in about the month of June, 1915, the International High Speed Steel Company installed a crossing over the tracks of The Delaware, Lackawanna and Western Railroad Company for the purpose of securing ingress to and egress from their plant. 20

I further state that prior to the erection of the plant of the International High Speed Steel Company, there was no crossing at grade across the tracks of the Delaware, Lackawanna and Western Railroad Company at exactly, or nearly exactly, the same place where the crossing was constructed and maintained by the International High Speed Steel Company, and that during the time I have been Assistant Roadmaster, there never was any crossing at grade at any other point over the tracks of The Delaware, Lackawanna and Western Railroad Company, connecting up the lands owned by persons either side of the Railroad Company's right-of-way adjacent or contiguous to the place where the International High Speed Steel Company subsequently erected its plant. 30

I know of my own personal knowledge that The 40

Defendants' Affidavit of Thomas Wallace.

10 Delaware, Lackawanna and Western Railroad Company never maintained the crossing leading into the plant of the International High Speed Steel Company hereinbefore referred to, or repaired said crossing by putting new plankings in said crossing, but that the said crossing was maintained and repaired by the International High Speed Steel Company, the material for said repairs being furnished by said International High Speed Steel Company.

20 I further state that the bridging of the ditch on the easterly side of the right-of-way of The Delaware, Lackawanna and Western Railroad Company and the iron pipe on the westerly side of the right-of-way of the Railroad Company where the ditch was crossed by the road constructed and maintained by the International High Speed Steel Company, referred to in the affidavit of Edward Ehlers in this cause, were bridged and piped by the International High Speed Steel Company, the material for the same being furnished by the International High Speed Steel Company.

THOMAS WALLACE.

30 Subscribed and sworn to before me }
 this 2nd day of February, 1927. }

HAZEL LEMON
 Notary Public of New Jersey.
 (L. S.)

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Defendants' Affidavit of William Hill.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

WILLIAM HILL, of full age, being duly sworn, on his oath, says:

I am fifty-eight years old and live at Rockaway, New Jersey, about half a mile from where the plant of the International High Speed Steel Company was constructed in the year 1915, adjoining the right-of-way of the Morris and Essex Railroad Company, on its Rockaway Branch, which extends from Denville, New Jersey, to East Dover, New Jersey. 10

Since December 16th, 1911, I have been employed by the Delaware, Lackawanna and Western Railroad Company, as its Section Foreman, having charge of its Rockaway Branch, which branch has a single track, extending as hereinbefore described and passing the place where the International High Speed Steel Company's plant was erected and continued in operation until it went into the hands of a receiver and closed down. 20

As section foreman, I have charge of the right-of-way of the Rockaway Branch of the Railroad and my duties always have been to see that its track was in proper condition and that its right-of-way was properly kept to prevent fires from starting thereon, and by reason of my duties I have been continuously on said Rockaway Branch since I was first employed by the Delaware, Lackawanna and Western Railroad Company up to the present time, and, in that way, I have gained my familiarity with the location of the property formerly of the International High Speed Steel Company, which was fenced by said concern. 30 40

Defendants' Affidavit of William Hill.

I remember on June 7th, 1915, the employees of the International High Speed Steel Company placing and constructing a crossing over the tracks of the Rockaway Branch of the Delaware, Lackawanna and Western Railroad Company, for the purpose of affording access into said
10 plant, and I remember the employees of the International High Speed Steel Company putting a pipe along the right-of-way of the Railroad Company, near the crossing so constructed by the International High Speed Steel Company for the purpose of taking care of the drainage at that point.

The employees of the International High Speed Steel Company also constructed and made
20 the approaches to said crossing over the railroad track so constructed as hereinbefore recited.

From the time said crossing was constructed by the employees of the International High Speed Steel Company on June 7th, 1915, up until February 1st, 1927, when said crossing was taken up by me under instructions from my superiors, said crossing was never repaired by me nor any of the forces under me and in my charge, and the only thing I had to do with said
30 crossing was to see that it was in such shape as to permit the safe running of trains over it.

When I took up the planking at said crossing on February 1st, 1927, I also put up a fence so as to block the use of said crossing and this fence is located entirely within the right-of-way of The Delaware, Lackawanna and Western Railroad Company.

From December 16th, 1911, when I first became
40 Section Foreman of the Delaware, Lackawanna and Western Railroad Company of its Rockaway

Defendants' Affidavit of William Hill.

Branch, up until June 7th, 1915, I was continuously passing over said Rockaway Branch at the place where the International High Speed Steel Company subsequently erected its plant, and during that time, there was never any crossing of any kind whatsoever at exactly the same location where the International High Speed Steel Company's crossing hereinbefore referred to was constructed, or at any point crossing the tracks of The Delaware, Lackawanna and Western Railroad Company over its right-of-way connecting what subsequently were the properties of the International High Speed Steel Company on each side of the tracks and right-of-way of said Railroad Company, and during said time, nobody ever used to cross said tracks for any purpose whatsoever to my knowledge.

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WILLIAM HILL.

Subscribed and sworn to before me }
 this 2nd day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(L. S.)

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Defendants' Affidavit of William Shuman.

STATE OF NEW JERSEY, }
 County of Morris, } ss.:

WILLIAM SHUMAN, of full age, being duly sworn, on his oath, says:

10 I am sixty-one years old and I reside at Franklin Road, Rockaway, New Jersey, about half a mile east of the place where the plant of the International High Speed Steel Company was at one time located on the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company.

20 For twenty years I have been employed by The Delaware, Lackawanna and Western Railroad Company as a carpenter and frequently, during said time, have passed, on foot, the place where the International High Speed Steel Company's plant was subsequently erected, and I remember when the crossing of the International High Speed Steel Company's plant was put in over the tracks of The Delaware, Lackawanna and Western Railroad Company, for the purpose of furnishing access to said International High Speed Steel Company's plant.

30 Prior to the time of the installation of said crossing, I was familiar with the right-of-way of said The Delaware, Lackawanna and Western Railroad Company as it passed the point where the International High Speed Steel Company subsequently installed a crossing, and during the time prior to the installation of said crossing, I am positive that there was no crossing of any kind whatsoever over the tracks of The Delaware, Lackawanna and Western Railroad Company on its Rockaway Branch, connecting properties on both

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Defendants' Affidavit of William Shuman.

sides of the tracks of the Delaware, Lackawanna and Western Railroad Company in the neighborhood or vicinity of the place where the International High Speed Steel Company subsequently erected and constructed its crossing, or at any other point in the neighborhood or vicinity of the plant of the International High Speed Steel Company. 10

WILLIAM SHUMAN.

Subscribed and sworn to before me }
 this 2nd day of April, 1927. }

HAZEL LEMON
 Notary Public of New Jersey.

(Seal) 20

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**DEFENDANTS' SUPPLEMENTAL
AFFIDAVITS.**

Affidavit of Jeremiah D. Cooper.

IN CHANCERY OF NEW JERSEY.

10	Between THE ROCKAWAY ROLLING MILL, a corporation, Complainant, <i>and</i> THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, and THE MORRIS AND ESSEX 20 RAILROAD COMPANY, Defendants.	}	On Bill, etc. On Order to Show Cause.
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STATE OF NEW JERSEY, }
 County of Hudson, } ss. :

JEREMIAH D. COOPER, of full age, being duly sworn, on his oath, says:

I reside at Denville, New Jersey.
 30 I am eighty-five years old.

From the year 1873, to the year 1911, I was employed by The Delaware, Lackawanna and Western Railroad Company, being one of its Section Foremen, for over a period of thirty-six years.

During the time I was the Section Foreman of The Delaware, Lackawanna and Western Railroad Company, part of my territory included the Rockaway Branch of said Railroad, running from
 40 East Dover, New Jersey, to Rockaway, New Jer-

*Defendants' Supplemental Affidavit of
Jeremiah D. Cooper.*

sey, passing the place where the International High Speed Steel Company subsequently erected its plant.

I remember distinctly the locality where the International High Speed Steel Company's plant was subsequently located, it being my duty during the years that I was Section Foreman to pass said place almost daily for at least thirty-six years. 10

I know where the grade crossing over the tracks of The Delaware, Lackawanna and Western Railroad Company, running into the plant of the International High Speed Steel Company, was located, and I know of the condition of that place for at least forty years before said crossing was installed. 20

As a result of my almost continuous presence in the vicinity of where said crossing was subsequently constructed, I know that there was no crossing over the track of the Delaware, Lackawanna and Western Railroad Company, connecting the properties on either side of the Railroad Company's tracks, of any kind whatsoever, prior to the construction by the International High Speed Steel Company of the crossing hereinbefore referred to. 30

Once while I was Section Foreman the owner of the property between the railroad track and the Rockaway River sold some timber on that land and so that he could conveniently cart it out he applied to the Supervisor of the Railroad Company to put some planks about the rails of the track. I put the planks there and after the wood was carted out I took the planks up, and from that time up until I quit my job as Section Foreman 40

Defendant's Supplemental Affidavit of John H. Hall.

in 1911, there never was any other crossing there. This crossing I have referred to was taken up by me about twenty years ago.

JEREMIAH D. COOPER.

10 Subscribed and sworn to before me }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(L. S.)

Defendants' Supplemental Affidavit of John H. Hall.

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STATE OF NEW JERSEY, }
County of Hudson, } ss.:

JOHN H. HALL, of full age, being duly sworn, on his oath, says:

I am seventy-nine years old and reside at Denville, New Jersey.

30 I am familiar with the crossing leading over the tracks of the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company into the plant formerly of the International High Speed Steel Company, although I do not recollect the exact time that the said International High Speed Steel Company put down said crossing over the Railroad Company's tracks.

40 For a number of years I worked for the Delaware, Lackawanna and Western Railroad Company, first as a Section hand and later as a section foreman.

Defendants' Supplemental Affidavit of John H. Hall.

From the year 1866 to 1870, I worked as a section hand under one Charles White, a Section Foreman of The Delaware, Lackawanna and Western Railroad Company on the Rockaway Branch of said Railroad Company and during said time, I daily traversed said branch, passing and working around the vicinity where the International High Speed Steel Company's plant was subsequently located and the crossing installed by it and, during said time, I know that there was no crossing of any kind whatsoever, either private or public, farm crossing, or otherwise, in exactly, or in nearly exactly, the same location as the crossing subsequently installed by the International High Speed Steel Company.

I further state that during the time I worked under Section Foreman Charles White, there was no crossing of any kind whatsoever over the tracks of The Delaware, Lackawanna and Western Railroad Company, connecting the land on both sides of the said railroad in the neighborhood or vicinity of where the plant of the International High Speed Steel Company was subsequently erected.

JOHN HALL.

Subscribed and sworn to before me }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(Seal)

Defendants' Supplemental of Edwin L. Barzler.

STATE OF NEW JERSEY, }
 County of Hudson, } ss. :

EDWIN L. BARZLER, of full age, being duly sworn, on his oath, says:

- 10 I live at Clark Summit, Pennsylvania.
 I am sixty-nine years of age, and, for more than forty years, have been a locomotive engineer running locomotives for The Delaware, Lackawanna and Western Railroad Company over its various branches, including the Rockaway Branch, running from Denville, New Jersey, to East Dover, New Jersey, having passed over said branch during said time at least three times a week.
- 20 I am familiar with the location of what was formerly the plant of the International High Speed Steel Company, located on the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company, and I recollect when said plant was erected.
- I further state that I recollect when a crossing was constructed over the tracks of The Delaware, Lackawanna and Western Railroad Company, leading into the plant of the International High Speed Steel Company.
- 30 I further state that I recollect the condition of the exact location of the crossing over the Railroad Company's tracks leading into the International High Speed Steel Company's plant, prior to the installation of said crossing, and further state that there was no crossing at grade leading across the tracks of The Delaware, Lackawanna and Western Railroad Company at exactly the same location as the crossing leading into the plant of the International High Speed Steel Com-
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*Defendants' Supplemental Affidavit of Fred
Myers.*

pany hereinbefore referred to, or at any other
place connecting the lands contiguous or adjacent
to the lands subsequently occupied by the Inter-
national High Speed Steel Company, prior to the
construction of the crossing leading into the plant
as hereinbefore stated by myself. 10

EDWIN L. BARZLER.

Subscribed and sworn to before me }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(Seal)

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**Defendants' Supplemental Affidavit of Fred
Myers.**

STATE OF NEW JERSEY, }
County of Hudson, } ss. :

FRED MYERS, of full age, being duly sworn, on
his oath, says:

I live at Rockaway, New Jersey, and am forty-
nine years old. 30

When I was seventeen years old, I started to
work as a section hand for the Delaware, Lacka-
wanna & Western Railroad Company and for over
two years, I worked for said Company in that
capacity.

The territory or place over which I worked dur-
ing that time was on the Rockaway Branch of The
Delaware, Lackawanna and Western Railroad
Company running from Denville, New Jersey, to
East Dover, New Jersey, said branch passing the 40

*Defendants' Supplemental Affidavit of Fred
Myers.*

land upon which the International High Speed Steel Company subsequently erected its plant, said plant being on the northerly side of the Railroad Company's track and right-of-way and bounded on the other side by the Rockaway River.

10 I recollect very well the character of the land as it appeared during the time I worked as a section hand for the Delaware, Lackawanna and Western Railroad Company and upon which land the plant of the International High Speed Steel Company was subsequently erected.

At the time that I was such section hand, the land in question was low laying ground and both in the spring and in the winter, it was frequently covered by the waters from the Rockaway River.

20 At the time I was such section hand, there was no wagon road, or way, or crossing connecting the lands which subsequently were acquired by the International High Speed Steel Company on both sides of the Railroad Company's track and right-of-way; nor was there any evidence on the ground that there ever had been a crossing, wagon road or any other character of crossing connecting the lands in question and passing over the Railroad Company's tracks or right-of-way.

FRED MYERS.

Subscribed and sworn to before me }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(Seal)

Defendants' Supplemental Affidavit of Andrew Best.

STATE OF NEW JERSEY, }
 County of Hudson, } ss. :

ANDREW BEST, of full age, being duly sworn, on his oath, says:

I live at Stanhope, New Jersey. 10

I am fifty-nine years of age, and, for more than twenty-two years, have been a locomotive engineer running locomotives for The Delaware, Lackawanna and Western Railroad Company over its various branches, including the Rockaway Branch, running from Denville, New Jersey, to East Dover, New Jersey, having passed over said branch during said time at least six times a week.

I am familiar with the location of what was formerly the plant of the International High Speed Steel Company, located on the Rockaway Branch of The Delaware, Lackawanna and Western Railroad Company, and I recollect when said plant was erected. 20

I further state that I recollect when a crossing was constructed over the tracks of The Delaware, Lackawanna and Western Railroad Company, leading into the plant of the International High Speed Steel Company. 30

I further state that I recollect the condition of the exact location of the crossing over the Railroad Company's tracks leading into the International High Speed Steel Company's plant, prior to the installation of said crossing, and further state that there was no crossing at grade leading across the tracks of the Delaware, Lackawanna and Western Railroad Company at exactly the same location as the crossing leading into the plant of the International High Speed Steel Company 40

*Defendants' Supplemental Affidavit of John
Draney.*

hereinbefore referred to, or at any other place connecting the lands contiguous or adjacent to the lands subsequently occupied by the International High Speed Steel Company, prior to the construction of the crossing leading into the plant as hereinbefore stated by myself.

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ANDREW BEST.

Subscribed and sworn to before me, }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(L. S.)

20 **Defendants' Supplemental Affidavit of John
Draney.**

STATE OF NEW JERSEY, }
County of Hudson, } SS.:

JOHN DRANEY, of full age, being duly sworn, on his oath, says:

I live at Jersey City, New Jersey.

30 I am sixty-five years of age, and, for more than thirty-five years, have been a locomotive engineer running locomotives for The Delaware, Lackawanna and Western Railroad Company over its various branches, including the Rockaway Branch, running from Denville, New Jersey, to East Dover, New Jersey, having passed over said branch during said time at least three times a week.

40 I am familiar with the location of what was formerly the plant of the International High Speed Steel Company, located on the Rockaway

*Defendants' Supplemental Affidavit of John
Draney.*

Branch of The Delaware, Lackawanna and Western Railroad Company, and I recollect when said plant was erected.

I further state that I recollect when a crossing was constructed over the tracks of the Delaware, Lackawanna and Western Railroad Company, leading into the plant of the International High Speed Steel Company. 10

I further state that I recollect the condition of the exact location of the crossing over the Railroad Company's tracks leading into the International High Speed Steel Company's plant, prior to the installation of said crossing, and further state that there was no crossing at grade leading across the tracks of the Delaware, Lackawanna and Western Railroad Company at exactly the same location as the crossing leading into the plant of the International High Speed Steel Company hereinbefore referred to, or at any other place connecting the lands contiguous or adjacent to the lands subsequently occupied by the International High Speed Steel Company, prior to the construction of the crossing leading into the plant as hereinbefore stated by myself. 20

JOHN DRANEY. 30

Subscribed and sworn to before me }
this 5th day of April, 1927. }

HAZEL LEMON

Notary Public of New Jersey.

(L. S.)

**Defendants' Supplemental Affidavit of Warren
Surnburger.**

STATE OF NEW YORK, }
County of New York, }^{ss.:}

WARREN SURNBURGER, of full age, being duly sworn, on his oath, says:

10 I live at Dover, New Jersey, and have lived there for forty years.

I became associated with the International High Speed Steel Company at about the time its buildings were being constructed adjacent to the railroad tracks of the Delaware, Lackawanna and Western Railroad Company on its Rockaway Branch between Rockaway, New Jersey, and East Dover, New Jersey, and remained with said Company until the fall of the year 1916, and from
20 May, 1915, until I left, my position there was that of Superintendent.

I further state that after the buildings of said International High Speed Steel Company's plant were built, it was necessary to fill in the ground of said buildings and the yard of said plant, the land being low lying property. As a result of such necessity, I decided to utilize the sand in a sand pit on the other or southerly side of the railroad tracks for the purpose of fill for the floors
30 or ground of said buildings and the yard. This sand pit on the southerly side of the Railroad Company's track was about three hundred (300') feet from the railroad track, and the property or land between said sand pit and the railroad track was of such a swampy nature that it was impossible to walk from the sand pit up to the railroad track.

I further state that, as a result of my desire to
40 do the filling in the building and yards of the In-

Defendants' Supplemental Affidavit of Warren Surnburger.

ternational High Speed Steel Company's plant, I decided to make a crossing over the Railroad Company's track and, when I started to do so, I was stopped by Mr. John Sexton, the Roadmaster of The Delaware, Lackawanna and Western Railroad Company, who advised me that I had no authority whatsoever to make any crossing over the Railroad Company's track. 10

As a result of being stopped and on account of my desire to use the sand in the sand pit in question, the International High Speed Steel Company subsequently entered into an agreement with the Delaware, Lackawanna and Western Railroad Company for the purpose of permitting a crossing to be laid across its tracks, so that access could be obtained to said plant on the other side of its tracks from the sand pit. 20

I was subsequently notified that I might go ahead with the construction of a crossing over the Railroad Company's tracks and about June 3, 1915, I advised the Railroad Company that I had procured the necessary planking, spikes and material to construct the crossing and was ready to lay the same, and subsequently, on June 7, 1915, said crossing was put down by the employees of the International High Speed Steel Company under my supervision and in the presence of William Hill, the Section Foreman of the Railroad Company. 30

There was a road leading from the sand pit on the southerly side of the Railroad Company's tracks to the Franklin Road, which was also on the southerly side of the Railroad Company's tracks, leading to Rockaway and Franklin, but this road, at the time I constructed the crossing 40

Defendants' Supplemental Affidavit of Warren Surnburger.

10 in question for the International High Speed Steel Company hereinbefore referred to, did not extend beyond said sand pit on the southerly side of the Railroad Company's tracks, and there was no evidence that said road had ever been carried over the Railroad Company's tracks.

I further state that during the time that I was connected with the International High Speed Steel Company, the Railroad Company never did anything to the crossing in question so constructed by me, but that I had the employees of the International High Speed Steel Company maintain the same in every way and detail.

WARREN SURNBURGER.

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Subscribed and sworn to before me }
this 7th day of April, 1927. }

JOSEPH FIELL.

A Foreign Commissioner of Deeds
for the State of New Jersey in New
York. Commission expires June
3, 1928.

(Seal)

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Conclusions.

IN CHANCERY OF NEW JERSEY.

Between

THE ROCKAWAY ROLLING MILL
CORPORATION,
Complainant,

and

DELAWARE, LACKAWANNA & WEST-
ERN R. R. COMPANY, and MOR-
RIS & ESSEX R. R. COMPANY,
Defendants.

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

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Application for a preliminary mandatory injunction, Heard on bill, answer and affidavits.

For the Complainant, Messrs. KING & VOGT,
Solicitors (Mr. EDW. P. STOUT, of Counsel).

For the Defendants, Mr. FREDERIC B. SCOTT.

FALLON, V. C.:

The bill is filed to compel the defendants to provide, or restore for the benefit and use of complainant, a suitable wagon-way or crossing over defendants' railroad where it intersects complainant's lands. The matter is now before the court on the return of an order requiring the defendants to show cause why a preliminary mandatory injunction should not issue to compel the defendants to restore a wagon-way or crossing which is said to have been provided by the

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Conclusions.

Morris and Essex Railroad Company many years ago, and the use of which was exercised by the intersecting landowners up to February 1, 1927, when complainant was deprived of the use of such wagon-way or crossing by a fence erected by the defendants on each side of their railroad
10 which prevents passage across the railroad.

Briefly stated, the bill alleges that on and prior to September 22, 1846, one Jabez L. Estell owned certain farmlands in the Township of Rockaway, Morris County, N. J.; that on or about said date Morris & Essex Railroad Company, under the authority of its charter (P. L. 1835, p. 29), by appropriate proceedings condemned a right-of-way for a railroad across a
20 portion of said lands, and thereafter erected a railroad thereon; that the lands thus acquired by said Company are described in a report of commissioners bearing date September 22nd, 1846; that by deed dated February 25, 1847 Jabez L. *Estile* conveyed to said Company a certain strip or parcel of land therein described for a right-of-way for its railroad, said deed purporting to grant to the grantee substantially the same right, liberty and privilege of entering upon and making use of the land therein mentioned as was
30 acquired by said grantee by the award in condemnation proceedings in and to the lands acquired thereby; (there is a variance in the description of the parcel of land acquired through the condemnation proceeding and that acquired by the deed, and the deed is—"upon the condition that said railroad company shall, at the time of making the said road, construct and build good and sufficient cattle-guards where the said road enters upon and leaves said *Estile's* land, not ex-
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Conclusions.

ceeding two such cattle-guards in number, and shall keep such cattle-guards in good form. The said *Estile* to fence said road at his own expense"); that said Company leased, under legislative sanction, all its rights, powers and privileges to Delaware, Lackawanna & Western Railroad Company, and the latter Company assumed all the obligations of the former company in the operation of the railroad, which, as laid out, intersected the lands of Estell; that the portion of the Estell lands now owned by complainant, title to which was acquired by deed dated June 2, 1926, has always been in the same common ownership; that under Section 9 of the charter of Morris & Essex Railroad Company, and under Section 26 of the General Railroad Law (*P. L. 1903, p. 659*), a duty is imposed upon the defendants, where their railroad intersects any farm or lands of any individual, to provide and keep in repair suitable wagon-ways over and under said road, so that he may pass the same; that at the time complainant acquired the lands in question, so intersected by defendants' railroad, there was a wagon-way over said railroad from the lands on one side thereof to the lands on the other side, and such wagon-way was the only means of access to a large manufacturing plant situated on the portion of complainant's lands which lie between the defendants' railroad and the Rockaway River; that on February 1, 1927, defendants removed said wagon-way and erected a fence on each side of the railroad, thereby depriving complainant of its only access to its said manufacturing plant, which is of great value; that on and prior to February 1, 1927, complainant was engaged in making repairs and

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Conclusions.

alterations to its said plant for extensive manufacturing purposes, and operations; that by reason of the acts complained of the complainant is deprived of the use of the wagon-way aforesaid, and of its manufacturing plants, and suffers irreparable damage.

- 10 Defendants, by their answer, admit most of the allegations of the bill, but say that the wagon-way over their railroad, which existed at the time of the acquisition of the aforesaid lands by complainant, was such as constructed and maintained by The International High Speed Steel Company, complainant's immediate predecessor in title, under a license agreement, dated May 3, 1915, between said Steel Company and Delaware, Lackawanna & Western Railroad Company, which latter company, under the terms of said agreement, was not obliged to provide and keep said wagon-way or crossing in repair and reserved the right to revoke such license upon sixty days notice to the licensee, in which event the licensee was to promptly remove such wagon-way or crossing; that on February 1, 1927, in accordance with such agreement, the licensor removed said wagon-way or crossing, after the complainant refused to enter into an agreement similar to the one executed by said Steel Company with Delaware, Lackawanna & Western Railroad Company. Defendants assert there never has been any crossing or roadway over its track or right-of-way connecting the properties separated by its right-of-way and track, nor has any owner of lands and property separated by its right-of-way and track ever requested a crossing or wagon-way, with the exception of that requested by the International High Speed Steel
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Conclusions.

Company and licensed as aforesaid, and by virtue of said license agreement a crossing was constructed by said Steel Company on June 7th, 1915, and maintained by it until it went into bankruptcy, and defendant Delaware, Lackawanna & Western Railroad Company took up and removed said wagon-way or crossing on February 1, 1927, after the complainant refused to enter into an agreement similar to the one executed by the Steel Company with said defendant. The date when said licensee went into bankruptcy is not stated. 10

Complainant, by its affidavits, which outweigh in my opinion, the affidavits submitted on behalf of the defendants, show that there had been a wagon-way or crossing at the place in question for upwards of fifty years which had been used by complainant's predecessors in title for the carting of hay, timber, etc., and by complainant as a means of access to its manufacturing establishment, and that such wagon-way or crossing was kept in repair by the defendants. 20

Defendants, by their affidavits (the affiants being principally employees of the defendants), disclaim the existence of any wagon-way or crossing at the place in question other than the one constructed in the year 1915, under the license agreement aforesaid. 30

Of the affidavits submitted on behalf of the complainant, those of Absalom Crampton and George E. Crampton refer to conditions existing for a period of upwards of forty-five years. They say that the land on either side of defendants' railroad, at and about the location of the wagon-way or crossing in question, was owned, at various times during the aforesaid period, by their grand- 40

Conclusions.

father, their father, themselves and their sister, and that the wagon-way or crossing alleged by complainant existed during all of that time, and there was never any controversy between the defendants and any of such owners as to such wagon-way or crossing, and that said wagon-way or crossing had never been closed, blocked or obstructed until February 1, 1927, when a fence was erected by the defendants. The statements of said affiants are supported by the affidavits of numerous others, including one Leslie Todd, who says that his grandfather, Joseph Zeek, owned property adjoining the Crampton property which is now owned by complainant, and that he, as a boy, often accompanied said Cramptons over the crossing where the road crosses the defendants' railroad; that he remembers such crossing for at least thirty-five years, and knows that the wagon-road across the defendants tracks was used by the owners of the property now owned by complainant, and by others having reason to go beyond the tracks for that length of time. Said affiant also says that the wagon-way or crossing in question was located where claimed by the complainant until fenced off by the defendants on February 1, 1927.

30 The defendants contend that if it be assumed that the complainant, by virtue of the provisions of Section 9 of the charter of Morris & Essex Railroad Company be regarded as entitled to a wagon-way over their tracks, the aforesaid deed by Jabez L. Estile to Morris & Essex Railroad Company exonerates them from complying with such statutory obligation, and that said deed subjects them only to the conditions contained there-
40 in, to wit, the construction and maintenance of

Conclusions.

cattle-guards where the railroad enters upon and leaves the lands formerly of *Estile*.

It is manifest, from the bill, answer and affidavits, that the easement claimed by the complainant is disputed by defendants. In view thereof, the respective rights of the parties should be determined at law. I am of the opinion, however, that until the rights of the respective parties may be so determined, a preliminary mandatory injunction should issue to compel the restoration of the wagon-way or crossing which I find from the proofs submitted existed, and the use of which was enjoyed by complainant, prior to February 1, 1927, at which time defendants erected a fence which deprives complainant thereof, which wagon-way or crossing appears to be necessary for the operation of complainant's business establishment, and the deprivation of which ostensibly subjects the complainant to irreparable injury. Though it is well settled that primary jurisdiction over controverted legal titles to land is to be found in the courts of law, and when substantial doubts arise touching a complainant's legal title, whether the doubt arises on the face of the bill before answer filed or at final hearing, a court of equity should not assume to adjudicate that title, nevertheless, it is equally well settled that this court may, by injunction, protect a private legal right in land from invasion or obstruction, *Coombs v. Atlantic City R. R. Co.*, 96 N. J. Eq. 709, 711; and while in *Imperial Realty Co. v. West Jersey & Seashore R. R. Co.*, 79 N. J. Eq. 168, the Court of Errors and Appeals held that where complainant asserts that it has an easement over defendant's land, and seeks to restrain the defendant from interfering with its use, and defendant disputes its right, equity will not inter-

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Conclusions.

fere by injunction until such right is established at law (citing *Todd v. Staats*, 60 N. J. Eq. 507; *Borough of South Amboy v. Pennsylvania R. R. Co.*, 77 N. J. Eq. 242; *Mason v. Ross*, 77 N. J. Eq. 527), yet in *McCran v. Public Service Railway Co.*, 95 N. J. Eq. 22, the Chancellor says in granting temporary injunctions to protect easements, as in other cases, the court does not take jurisdiction for the purpose of settling the rights of the parties permanently, but simply to preserve such rights until the legal question upon which they are based is established; and that a preliminary mandatory injunction will issue to compel the restoration of a *status quo ante* in aid of a suit at law where irreparable damage would result from its being withheld; and in *Fulton v. Greacon*, 36 N. J. Eq. 216, it is said, "There are cases in which it is the duty of a court of equity to interpose for the protection of the property in dispute, pending the determination of litigation concerning the legal title. In such cases the Court does not take jurisdiction for the purpose of settling the rights of the parties, but simply to preserve the property until the legal title to it is established"; and quotes with approval *Shrewsbury & Chester R. R. Co. v. Shrewsbury & Birmingham R. R. Co.*, 1 Sim. (N. S.) 410, wherein the Court says, "Where the alternative is interference or probable destruction of the property, there, of course, the court will be ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant." I do not apprehend, from the proofs before me, that any injury will be done to defendants by the issue of an injunction to re-

Conclusions.

store the *status quo ante* February 1, 1927, but I consider that the complainant will be irreparably injured by its refusal.

In *High on Injunctions*, 4 Ed. Sec. 3, the author says, "Where the legal right is not sufficiently clear to enable a court of equity to form an opinion, it will generally be governed in deciding an application for preliminary injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. And where, upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to the complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted"; and, in the same section, the author says, "Indeed, the consideration of relative convenience and inconvenience to the parties is one of the principal guides which govern courts of equity in the matter of granting or withholding relief by interlocutory injunction." Section 2 of the same authority asserts a like principle is applicable to the grant of mandatory injunctions. 10 20

Defendants do not, by their answer or otherwise, challenge the jurisdiction of this court. They appear to be content to deny the complainant's right to the easement in question. The proper practice of the court, under such circumstances, appears to be to retain the bill until the complainant has had a reasonable opportunity to establish its title, to the easement, at law. *Mason v. Ross, supra*. If defendants challenged the jurisdiction of the court, the present practice would actuate the court in sending the parties to the law court for the determination of the question of title 30 40

Conclusions.

to the easement in question, meanwhile retaining the bill (*P. L., 1915, p. 184, Sec. 8*); *Sayre v. Fisher, etc.*, 128 Atl. 862.

10 The deed relied upon by the defendants as an exoneration of the obligation imposed by Section 9 of the charter of Morris & Essex Railroad Company to provide suitable wagon-ways for the use of a party whose lands intersect the railroad, does not contain an express waiver of the grantor's statutory right to a wagon-way. Defendants contend that the condition in said deed requiring the grantee to provide and maintain cattle-guards impliedly limits its obligation accordingly. In 33 Cyc. 304, 305, it is said (citing cases in note 88) that statutory requirements (similar to that imposed by Section 9 of the charter of Morris & Essex Railroad Company) apply whether the railroad acquires its right-of-way by purchase or condemnation. The charter (Section 9) of Morris & Essex Railroad Company providing that it shall be the duty of said company, where its railroad intersects any farm or lands of any individual, to provide and keep in repair suitable wagon-ways over and under said road, so that he may pass the same, imposes a *continuing* duty; and even though at the time the railroad was constructed no wagon-way was deemed necessary, or provided for the benefit of the landowner, but such be now necessary, it is the duty of the defendants to provide it. 33 Cyc. 306, bottom; *Palmyra v. Pennsylvania R. R. Co.*, 62 N. J. Eq. 601, at 609; *aff'd* 63 N. J. Eq. 799; *Central R. R. Co. v. State*, 32 N. J. L. 224.

40 The Estile deed (if description of property, condition as to requirement for construction and maintenance of cattle-guards, and circumstances under which the deed was obtained, be disregarded-

Conclusions.

ed) contains wording as to rights and privileges granted thereunder, similar in many respects (though not identical) with the 6th section of the charter of the Morris & Essex Railroad Company, and a deed made by Thomas Green to said company, which latter deed was considered in the case of *Green v. Morris & Essex R. R. Co.*, 12 N. J. Eq. 165, aff'd 15 N. J. Eq. 469, wherein it is said that the provisions of the ninth section of the charter of the Morris & Essex Railroad Company are wholly independent of those of the seventh section (which relates to condemnation proceedings), and make it obligatory upon the company to construct and keep in repair passages over or under the railroad, where it crosses public or private roads and where it intersects lands of individuals. Chancellor Williamson, in the course of his opinion (p. 171) says: "In my judgment, the deed in question" (a deed to effectuate the award of arbitrators) "does not operate as a release of any rights complainant may have under the ninth section of defendant's charter"; and on page 173, "I do not see how, with any propriety, a construction can be put upon this deed that would release the company from the duties imposed by the ninth section." When the aforesaid Green case was before the Court of Errors and Appeals, Mr. Justice Brown, in delivering the opinion in affirmance, said, (p. 475): "It may, notwithstanding the case of *Brearley v. Delaware & Raritan Canal Co.*, Spenc. R. 236, be questioned whether, upon a fair construction of this deed, it does release the company from the charter obligation to construct roadways. This point is not directly before the court." The *dictum* of Chancellor Williamson in

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Conclusions.

the *Green case, supra*, does not appear to have been criticized or overruled excepting in so far as it may be said to have been overruled in the case of *Perry v. Pennsylvania R. R. Co.*, 55 N. J. Law 178. In *Pipe Line Co. v. D. L. & W. R.R. Co.*, 62 N. J. Law 254, the Court of Errors and Appeals, in referring to such part of the opinion of Chancellor Williamson in *Green v. Morris & Essex R. R. Co.*, *supra*, which related to the deed purporting to release the company from its obligation to provide wagon-ways over its railroad for the benefit of intersecting landowners, says (p. 273): "If the remarks of the Chancellor are to be taken as a judicial determination that a conveyance by deed will not effect charter obligations which would subsist where premises were taken by condemnation, such a construction was contrary to the decision of the Supreme Court in *Brearley v. Delaware & Raritan Canal Co.*, Spenc. 236, and was overruled in *Perry v. Pennsylvania Railroad Co.*, 26 Vroom 178."

In *Perry v. Pennsylvania Railroad Co.*, *supra*, the Supreme Court says: "In *Brealey v. Delaware & Raritan Canal Co.*, Spenc. 236, it was decided by this Court that the section in question" (referring to Section 16 of the charter of the Canal Company, which provides that "when its canal or feeder shall intersect the farm or land of any individual it shall be the duty of the company to provide and keep in repair a suitable bridge or bridges over the canal or feeder, so that the owner or owners and others may pass the same") "did not apply where the company had acquired the land for the construction of its canal by a deed from the owner. The principle on which this decision was founded is that the

Conclusions.

company, by its charter, was empowered to take lands by condemnation only in case where such lands could not be obtained by agreement with the owner, and that the sixteenth section of its charter applied only when the lands acquired were obtained by condemnation; and that where the company acquired title by agreement with the owner, the liability of the company in relation thereto depends, as was said by Mr. Justice Whitehead, not upon the provisions of the charter but upon the contract between the parties." Mr. Justice Depue, in distinguishing the decisions of the *Green Case* and the *Brearley Case*, *supra*, at p. 186, says: "The difference between the language of the deed involved in the case of 2 Beas." (Green Case on appeal) "and the language of the usual conveyances of land makes that decision" (*Green Case*) "in every aspect irrelevant to conveyances such as that which was the foundation of the decision in the *Brearley* case."

I am of the opinion that the deed obtained by Morris & Essex R.R. Co. from *Estile*, and the legal effect thereof, is distinguishable from the *Brearley* and *Green* deeds aforesaid.

In *Bailey v. Schnitzius*, 46 N. J. Eq. 198, which appears to be an accepted authority, it is said that a preliminary mandatory injunction will be ordered only in cases of extreme necessity; and in *Rogers Locomotive Works v. Erie R. R. Co.*, 20 N. J. Eq. 379, and *Wakeman v. N. Y., L. E. & W. R. R. Co.*, 35 N. J. Eq. 496, it is said preliminary mandatory injunctions will be ordered only in cases of obstruction to easements, or rights of like nature. The case *sub judice* is within the class of cases aforesaid.

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Conclusions.

I will advise an order that the bill in this cause be retained, with liberty to the complainant to promptly institute a suit at law against the defendants for a determination of the right of easement claimed by it, and that a preliminary mandatory injunction issue requiring the defendants to immediately restore or provide and keep in repair pending such suit a suitable wagon-way or crossing over defendants' railroad, substantially as same existed on and prior to February 1st, 1927, reserving all further directions until after the determination of such suit. But in case the complainant shall not promptly institute such suit at law, and diligently prosecute same to finality, the defendants may apply to this court for a dissolution of the injunction aforesaid and dismissal of the bill of complaint.

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*Order That Bill be Retained and Preliminary
Mandatory Injunction Issue.*

10 defendants for a determination of the right of easement claimed by it, and that a preliminary mandatory injunction issue requiring the defendants to immediately restore or provide and keep in repair pending such suit a suitable wagon-way or crossing over defendants' railroad, substantially as same existed on and prior to February 1st, 1927, reserving all further directions until after the determination of such suit. But in case the complainant shall not promptly institute such suit at law, and diligently prosecute same to finality, the defendants may apply to this court for a dissolution of the injunction aforesaid and dismissal of the bill of complaint.

20 And it appearing that a copy of the bill of complaint and affidavit thereto annexed, and the order to show cause made in this matter, on the 29th day of March, 1927, have been duly served in the manner therein prescribed,

It is on this 31st day of May, 1927, ORDERED that the bill in this cause be retained with liberty to the complainant on or before the 15th day of June, 1927, institute a suit at law against the defendants for a determination of the right of easement claimed by it.

30 AND IT IS FURTHER ORDERED, that a preliminary mandatory injunction issue, requiring the defendants to immediately restore or provide and keep in repair, pending such suit, a suitable wagon-way or crossing over defendants' railroad substantially as same existed on and prior to February 1st, 1927.

40 AND IT IS FURTHER ORDERED, that all further directions be reserved until after the determination of such suit.

*Order That Bill be Retained and Preliminary
Mandatory Injunction Issue.*

AND IT IS FURTHER ORDERED, that in case the complainant shall not on or before this 15th day of June, 1927, promptly institute such suit at law and diligently prosecute the same to finality, the defendants may apply to this court for a dissolution of the injunction aforesaid and dismissal of the bill of complaint.

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AND IT IS FURTHER ORDERED, that the defendants, the Delaware, Lackawanna & Western Railroad Company, a corporation, and the Morris & Essex Railroad Company, a corporation, pay to the complainant, The Rockaway Rolling Mill, a corporation, a counsel fee of Five hundred dollars, which is hereby allowed to said complainant, within fifteen days after the service upon them of true but uncertified copies of this order and of said taxed costs; and that in default of such payment, execution issue therefore, according to the practice of this court, against the goods and chattels, lands, tenements, hereditaments and real estate of said defendants.

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E. W. WALKER,
Chancellor.

Respectfully advised,
JOHN J. FALLON,
V. C.

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Petition for Instructions and Hearing.

Filed July 3, 1930.

IN CHANCERY OF NEW JERSEY.

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THE ROCKAWAY ROLLING MILL,
a corporation,
Complainant,

vs.

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DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, and
MORRIS & ESSEX RAILROAD COM-
PANY,
Defendants.

On Bill, &c.

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

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The petition of The Rockaway Rolling Mill, a corporation of the State of New Jersey, doing business in the Borough of Rockaway in the County of Morris and State of New Jersey, respectfully shows that:

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1. Petitioner is the complainant in the above-entitled cause, and on March 29th, 1927, filed its bill of complaint and affidavits in this cause to compel the defendants herein to restore or provide and keep in repair for the benefit of complainant a suitable wagon-way or crossing over defendants' railroad in the Borough of Rockaway, Morris County, New Jersey, where it intersected complainant's lands. In and by said bill it is alleged

Petition for Instructions and Hearing.

that on and prior to February 1st, 1927, there existed such a wagon-way or crossing which the defendants were under a legal duty to provide and maintain, and that on that date defendants erected a fence on each side of their railroad at said crossing thereby depriving complainant of the use thereof. Upon the filing of said bill, this court made an order requiring the defendants to show cause why a preliminary mandatory injunction should not issue to compel the defendants to restore said crossing. Such proceedings were had in this cause and on May 31st, 1927, an interlocutory decree or order was made herein, directing:

- (a) that the bill in this cause be retained with liberty to the complainant, on or before the 15th day of June, 1927, to institute a suit at law against the defendants for a determination of the right of easement claimed by it;
- (b) that a preliminary mandatory injunction issue, requiring the defendants to immediately restore or provide and keep in repair, pending such suit, a suitable wagon-way or crossing over defendants' railroad, substantially as same existed on and prior to February 1st, 1927; and
- (c) that all further directions be reserved until after the determination of such suit.

Pursuant to said order a writ of injunction was issued and tested on June 1st, 1927, and duly served upon the defendants who thereafter restored said crossing,—all of which more fully appears by the record and proceedings in this cause.

Petition for Instructions and Hearing.

2. On June 2nd, 1927, defendants filed notice of appeal from said interlocutory decree or order to the New Jersey Court of Errors and Appeals. On June 3rd, 1927, defendants filed their petition of appeal in said court. On June 14th, 1927, defendants, pursuant to notice duly given to complainant, applied to the Chancellor by verified petition or an order to vacate said writ of injunction, which was denied. On July 27th, 1927, complainant filed its answer to defendants' petition of appeal. Said appeal was brought on for argument at the May Term, 1928, of said court and, by an opinion filed in that court on October 15th, 1928, said interlocutory decree or order of the Court of Chancery was affirmed, and a rule on affirmance and remittitur was duly entered in that court,—all of which more fully appears by the record in these courts in this cause.

3. On June 10th, 1927, within the time limited by said interlocutory decree or order of the Court of Chancery, complainant instituted a suit in the New Jersey Supreme Court, Morris County, against the defendants for a determination of the right of easement claimed by it as appears by the summons and complaint filed in said suit on June 14th, 1927. Defendants in that suit filed their answer July 20th, 1927. Plaintiff in that suit filed its reply on August 4th, 1927. The case was tried before Circuit Court Judge Rulif V. Lawrence, and a jury, on April 5th, 1928. As appears by the postea filed in that suit on April 10th, 1928, the jury found as a matter of fact that a suitable wagon-way or crossing over defendants' railroad for the benefit of plaintiff and its predecessors in title existed for 20 years or more prior to 1915,

Petition for Instructions and Hearing.

and found a verdict in favor of plaintiff, The Rockaway Rolling Mill, against the defendants, Delaware, Lackawanna & Western Railroad Company and Morris and Essex Railroad Company, with 6c. damages. On April 10th, 1928, judgment was entered in the New Jersey Supreme Court on said postea. On April 5th, 1928, Judge Lawrence, on application of defendants, ordered that defendants have leave to file an amended answer which said order was on April 10th, 1928, duly entered in the New Jersey Supreme Court, and, on that date, defendants filed their amended answer. On April 9, 1928, on application of defendants, Judge Lawrence made a rule to show cause why said verdict in said action should not be set aside and for nothing holden and a new trial granted, which rule was entered April 10th, 1928, in the New Jersey Supreme Court. On April 23rd, 1928, plaintiff in the suit, with the consent of defendants, filed an amended reply. On April 26th, 1928, a stipulation was filed in the New Jersey Supreme Court extending the defendants' time to file their reasons on said rule to show cause. On September 13th, 1928, another stipulation was filed extending defendants' time to file their reasons on said rule to show cause. On April 12th, 1929, Judge Lawrence directed an amended complaint to be filed as of April 5th, 1928, the date of the trial, and said amended complaint was filed on April 12th, 1929. On June 18th, 1929, stipulation was entered in said suit substituting Edward P. Stout, Esq., as attorneys for plaintiff in the place and stead of King & Vogt, Esqs. On May 13th, 1929, a stipulation was entered between the respective parties to said suit, extending defendants' time to file and serve their reasons on said

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Petition for Instructions and Hearing.

rule to show cause to July 1st, 1929, which stipulation was filed June 26th, 1929. On June 26th, 1929, defendants filed their reasons on said rule to show cause. On July 31, 1929, defendants filed notice of argument for Tuesday, the 1st day of October, 1929, in the New Jersey Supreme Court, which notice had been duly served upon the plaintiff. On September 23rd, 1929, defendants filed a notice of argument for the 1st Tuesday of October, 1929, in the New Jersey Supreme Court, which notice had been duly served upon plaintiff. The cause came on for argument at the October Term, 1929, of the New Jersey Supreme Court, and on March 7th, 1930, that court filed its opinion directing that the rule to show cause be discharged, and such a rule was duly entered. On April 1st, 1930, final judgment was entered in the New Jersey Supreme Court in that suit, as of April 10th, 1928. On April 2nd, 1930, verified bill for printing Brief for Plaintiff in said cause was filed. On May 1st, 1930, an order was entered in the New Jersey Supreme Court, vacating so much of said rule discharging defendants' rule to show cause as ordered costs to be taxed;—all of which more fully appears by the record of the proceedings in the New Jersey Supreme Court in that suit.

The suit in the New Jersey Supreme Court, Morris County, as mentioned and described in Paragraph 3 hereof, having determined and settled that the complainant is entitled to the right of easement claimed by it in its bill of complaint herein, petitioner thereof prays:

(1) that this cause may be brought to a hearing for further directions in accordance with said interlocutory decree or order of this court, and

Petition for Instructions and Hearing.

for the relief prayed for by complainant in its bill of complaint;

(2) that counsel for complainant herein be allowed a reasonable counsel fee in this cause:

- (a) for his services in this court in the main proceedings, and in the proceedings brought by the defendants before the Chancellor to vacate the writ of injunction; 10
- (b) for his services in the New Jersey Court of Errors and Appeals in the proceedings brought by the defendants in that court, on appeal from the interlocutory decree or order of the Court of Chancery; 20
- (c) for his services in the New Jersey Supreme Court (Morris County) in the suit brought in that court by complainant in accordance with the direction of said interlocutory decree or order of this court;
- (d) for his services in the New Jersey Supreme Court on defendants' rule to show cause why the verdict in the suit at law should not be set aside and a new trial granted; 30
- (e) for his services in this court for further directions in accordance with said interlocutory decree or order.

EDWARD P. STOUT,
Solicitor for Petitioner.

Petition for Instructions and Hearing.

STATE OF NEW JERSEY, }
 County of Hudson, } ss.:

EDWARD P. STOUT, being duly sworn according to law, upon his oath, deposes and says:

10 I am the Solicitor for the Petitioner in the foregoing Petition named and have actual charge of the above-entitled suit, and the matters and things set forth in said Petition are true to the best of my knowledge, information and belief.

EDWARD P. STOUT.

Subscribed and sworn to before me,
 this 2nd day day of June, 1930, at
 Jersey City, N. J.

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HELEN E. RECTOR,
 Notary Public of New Jersey.

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Order to Show Cause.

ern Railroad Company, and the Morris & Essex Railroad Company, the defendants herein, show cause before the Chancellor on the 9th day of June, 1930, at the hour of 10 o'clock in the forenoon, Daylight Saving Time, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Jersey City, why a hearing should not be had for further direction in accordance with the interlocutory decree or order of this Court dated May 31st, 1927; and why the complainant herein should not be granted the relief prayed for in its bill of complaint; and why counsel for complainant should not be allowed a reasonable counsel fee for his services in this cause; and

20 It is FURTHER ORDERED that a true but uncertified copy of this Order be served upon said defendants, Delaware, Lackawanna and Western Railroad Company, and Morris and Essex Railroad Company, within two days from the date of this Order.

E. R. WALKER,
C.

Respectfully advised:

30 JOHN J. FALLON,
V. C.

Answer to Petition.

Filed July 11, 1930.

IN CHANCERY OF NEW JERSEY.

Between	}	10
THE ROCKAWAY ROLLING MILL, a corporation, Complainant,		
<i>and</i>	}	On Bill, &c.
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, and		
MORRIS & ESSEX RAILROAD COM- PANY, Defendants.		
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The Delaware, Lackawanna and Western Railroad Company and Morris and Essex Railroad Company, the defendants in the above entitled proceedings, answering the allegations contained in the complainant's petition filed in the above cause upon which an order to show cause was made on the third day of June, 1930, returnable before the Chancellor on the 9th day of June, 1930, at 10 o'clock in the forenoon of that day at the Chancery Chambers in Jersey City, say that:

1. They admit the allegations contained in the first paragraph of said petition.

2. They admit the allegations contained in the second paragraph of said petition.

3. They admit the allegations contained in the third paragraph of said petition that "On June

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Answer to Petition.

10 10, 1927, within the time limited by said interlocutory decree or order of the Court of Chancery, the complainant instituted suit in the New Jersey Supreme Court, Morris County, against the defendants for a determination of the right of easement claimed by it, as appears by the summons and complaint filed in said suit on June 14, 1927. Defendants in the suit filed their answer July 30, 1927. Plaintiff in that suit filed its reply on August 4, 1927.”

20 But these defendants deny that the case tried before Honorable Circuit Court Judge Rulif V. Lawrence and a jury, April 5, 1926, by reason of the amendment by the complainant of its complaint filed in the above entitled action and referred to in the third paragraph of said petition, was the action at law that the complainant was authorized to bring by the interlocutory decree or order of the Court of Chancery, referred to in the complainant's petition deny that it was the same suit with the same issues as permitted by the order of the Court of Chancery, hereinbefore referred to.

30 With the exception and qualification hereinabove set forth in the preceeding paragraph these defendants admit the allegations contained in the third paragraph of said petition, but with the following qualifications of the allegations contained in the last paragraph on page 4, paragraph 3 of said petition which says that:

40 “The suit in the New Jersey Supreme Court, Morris County, as mentioned and described in paragraph 3 hereof, having determined and settled that the complainant is entitled to the right of easement claimed by it in its bill of complaint herein.”

Answer to Petition.

These defendants make no objection that the above entitled matter as provided by the rule to show cause granted in the above cause on June 3, 1930, be brought to a hearing, but deny that the complainant is entitled to have a summary disposition of the matters and things herein involved, and further deny that the counsel for the complainant herein is entitled to any other or further counsel fee in said cause, for that the counsel for the complainant has been adequately paid for his services in the main proceedings in this case pursuant to an order of this court in the premises heretofore made, and for the further reasons that the complainant is adequately able to pay its counsel for the conduct of so much of the litigation in said matter as he actually participated in, and that said counsel for the complainant is not entitled to be allowed by this Court for services rendered in the New Jersey Supreme Court Morris County action, both because none were actually rendered in said cause at the Circuit and said cause was not the cause which the order of this honorable Court permitted to the complainant to bring against these defendants, and that for like reasons the counsel for the complainant is not entitled to be allowed a counsel fee by this court for his services in the New Jersey Supreme Court on the defendant's rule to show cause why the verdict in the said Morris Circuit issue of the New Jersey Supreme Court should be set aside and a new trial granted.

Accordingly, it is respectfully submitted that on a due and proper hearing of said cause pursuant to the rule to show cause hereinbefore referred to that no other or further order be entered by this Court in the premises either with respect

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Answer to Petition.

to the interlocutory decree or order of this court heretofore entered or the matter of counsel fee for the complainant's counsel.

FREDERIC B. SCOTT,
Solicitor for Defendant.

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STATE OF NEW JERSEY, }
County of Essex } ss.:

FREDERIC B. SCOTT,, being duly sworn according to law upon his oath, deposes and says:

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I am the solicitor for the defendants in the foregoing petition and answer named and have had actual charge of the above entitled suit and that the matters and things set forth in said petition are true to the best of my opinion, knowledge, information, and belief.

FREDERIC B. SCOTT.

Sworn and subscribed to before me
this 11th day of June, 1930, at
Newark, New Jersey.

JAMES S. SLAVIN,
Notary Public of New Jersey.

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(Seal)

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Final Decree.

Filed July 11, 1930.

IN CHANCERY OF NEW JERSEY.

THE ROCKAWAY ROLLING MILL, a corporation, Complainant, <i>vs.</i>	On Bill, &c. On Petition, &c.,	10
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, a cor- poration, and MORRIS & ESSEX RAILROAD COMPANY, a cor- poration, Defendants.	On Order to Show Cause, &c.	20

This cause coming on to be heard, in the presence of EDWARD P. STOUT, Solicitor of The Rockaway Rolling Mill, the complainant herein, and FREDERIC B. SCOTT, Solicitor for the Delaware, Lackawanna and Western Railroad Company, a corporation, and Morris and Essex Railroad Company, a corporation, the defendants herein, on the return of the order to show cause herein for further directions in accordance with the interlocutory decree or order of this court dated May 31st, 1927, and why the complainant should not be granted the relief prayed for in its bill of complaint filed herein, and why counsel for complainant should not be allowed a counsel fee for his services in this court; and

It appearing to the court by the interlocutory decree or order aforesaid that this court ordered,

Final Decree.

10 among other things, that the bill in this cause be retained with liberty to the complainant, on or before June 15th, 1927, to institute a suit at law against the defendants for a determination of the right of easement claimed by it, and that a preliminary mandatory injunction issue requiring the defendants to immediately restore or provide and keep in repair pending such a suit a suitable wagon-way or crossing over defendants' railroad where it intersects complainant's lands, substantially the same as it existed on and prior to February 1st, 1927, and that all further directions be reserved until after the determination of such suit; and

20 It further appearing to the court in and by complainant's petition filed herein on June 3rd, 1930, pursuant to the practice of this court, (a) that complainant instituted such a suit at law within the time limited by said interlocutory decree or order; (b) that the defendants restored the wagon-way or crossing in question as required by said preliminary injunction; (c) that the proceedings in said action at law and the judgment recovered therein established and determined the right of easement claimed by complainant; and
30 (d) that complainant prayed that this cause be brought to a hearing for further directions in accordance with said interlocutory decree or order, and for the relief prayed for by complainant in its bill of complaint, and for a reasonable counsel fee for the services of counsel for complainant in this cause; and

40 It further appearing to the court that on the filing of said petition this court made an order to show cause, returnable June 9th, 1930, why such hearing should not be had, and why counsel for

Final Decree.

complainant should not be allowed a reasonable counsel fee as aforesaid; and

It further appearing to the court on the return of said order to show cause, that said petition and order to show cause had been duly served on said defendants; and the court, in the presence of the solicitors of the respective parties, fixed the 11th day of June, 1930, as the time for the further hearing of this cause; and, at said time and the place designated for said hearing, the defendants herein filed an answer to said petition, denying that complainant has established the right of easement claimed by it, and that complainant's counsel is entitled to a counsel fee; and complainant having offered in evidence, without objection of said defendants, a certified copy of the proceedings and judgment in said action at law against the defendants establishing and determining the right of easement claimed by it as aforesaid; and the court having considered complainant's bill and affidavits, annexed thereto, and defendants' answer and answering affidavits, the interlocutory decree or order, the petition, order to show cause, and defendants' answer thereto as aforesaid, and the proceedings and the judgment recovered in said action at law, and having heard the argument of the respective counsel thereon; and the court being satisfied that the judgment aforesaid has and did establish and determine the right of easement claimed by complainant, and that complainant is therefore entitled to the relief prayed for in its bill of complaint, and that counsel for complainant should be allowed a reasonable counsel fee for his services in this cause;

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Final Decree.

It is, thereupon, on this 3rd day of July, 1930, by his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the judgment aforesaid established and determined the right of easement claimed by complainant, and that complainant is entitled to the relief prayed for in its bill of complaint; that the defendants, Delaware, Lackawanna and Western Railroad Company, a corporation, and Morris and Essex Railroad Company, a corporation, and each of them, be and they are hereby required to provide and keep in repair a suitable wagon-way or crossing over the defendants' railroad where it intersects complainant's lands in the Borough of Rockaway in the County of Morris and State of New Jersey, so that complainant may pass over the same as and in such manner as the nature of complainant's business and the proper use of its said lands may reasonably require; that a permanent mandatory injunction issue out of this court compelling defendants or either of them to immediately restore or provide and keep in repair a suitable wagon-way or crossing over said railroad for complainant, its successors and assigns; that the defendants, their respective officers, directors, agents, servants and employees, be enjoined and restrained by said permanent mandatory injunction from removing, destroying, obstructing, or in any way interfering with said wagon-way or crossing when so restored or provided as aforesaid; and

It is FURTHER ORDERED, ADJUDGED and DECREED that said defendants, Delaware, Lackawanna and Western Railroad Company, a corporation, and Morris and Essex Railroad Company, a corpora-

Final Decree.

tion, pay to complainant or its Counsel, EDWARD P. STOUT, complainant's taxed costs on final hearing of this suit, to be taxed, including a counsel fee of \$3500.00 which is hereby allowed as a reasonable counsel fee for the services of counsel for complainant in this cause; and that, in default of such payment, within twenty days after the service upon said defendants of a certified copy of both this Decree and the Taxed Bill of the Costs aforesaid, execution issue therefor according to the practice of this court against the goods and chattels, the lands, tenements and hereditaments and real estate of said defendants, Delaware, Lackawanna and Western Railroad Company, a corporation, and Morris and Essex Railroad Company, a corporation. 10
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E. R. WALKER,
C.

Respectfully advised:

* JNO. J. FALLON,
V. C.

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CERTIFIED COPY OF PROCEEDINGS.**Summons.**

THE STATE OF NEW JERSEY,

10 (L. S.) TO DELAWARE, LACKAWANNA & WESTERN RAIL-
ROAD COMPANY, a Corporation, and
MORRIS & ESSEX RAILROAD COMPANY, a
Corporation:

YOU ARE SUMMONED to answer the annexed com-
plaint of The Rockaway Rolling Mill, a Corpora-
tion, in an action at law in the Supreme Court.

20 AND TAKE NOTICE, that unless you file your an-
swer to said complaint with the Clerk of the Su-
preme Court at Trenton, within twenty days after
service upon you of this writ and the annexed
complaint, the plaintiff may proceed in the suit
and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Esq., Chief
Justice of the Supreme Court, at Trenton, this
10th day of June, A. D. One Thousand Nine Hun-
dred and Twenty-seven.

EDWARD J. KELLEHER,
Clerk.

30 KING & VOGT,
Attorneys.

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Complaint.

and from thence running (1) along said King's line South seventy-nine degrees West eight chains forty-four links to stake and stones, thence (2) South fifteen degrees West nine chains thirty links to a stone heap, thence (3) South thirteen and one-half degrees West Eight chains to a stone heap, thence (4) South fifty-six and one-half degrees West six chains sixty-three links to a small white oak, thence (5) South twenty-seven degrees East two chains to the middle of Rockaway River, thence (6) up said river about South Twelve degrees West eleven chains eighty links or thereabouts, thence (7) North eighty-six degrees West nine chains fifty-three links to a stake in Noah Estile's line, thence (8) South seven degrees West one chain eighty links to two small may cherry trees, thence (9) South forty-nine degrees West four chains ten links to a white oak tree a corner of Noah Estile's land and a corner of Ezra Abbot's land, thence (10) South fifty-seven degrees East nine chains thirty links to a small white ash tree on a small island near the East side of Rockaway River, a corner of Frederick Beem's lot, thence (11) North eighty-three degrees East twelve chains five links to a small white oak, thence (12) North thirty-one and one-half degrees East eight chains forty-four links to the corner of John Clark's land, thence (13) North sixty-seven degrees West nine chains twenty-nine links, thence (14) North twenty-nine degrees East ten chains eighty-four links to a black oak tree on the East bank of Rockaway

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Complaint.

River, thence (15) North sixty degrees West to the middle of said river, thence down the middle of said river the several courses thereof to the place of Beginning.

Containing thirty-one acres more or less.

2. The Morris & Essex Railroad Company, one of the defendants herein, is a railroad corporation and was incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Morris & Essex Railroad Company," passed January 29th, 1835; and the Delaware, Lackawanna & Western Railroad Company, the other defendant, is a railroad corporation organized under the laws of the State of Pennsylvania.

3. By Section 7 of the Act of incorporation of the defendant, the Morris & Essex Railroad Company, it was empowered to acquire lands by assessment for railroad purposes, where it could not agree with the owner as to the price thereof.

4. On or about September 22nd, 1846, defendant, the Morris & Essex Railroad Company, by virtue of said Section 7 of its Act of incorporation, took proceedings to acquire by assessment the right, liberty and privilege of entering upon a certain strip or tract of land of said Jabez L. Estile, in the Borough of Rockaway aforesaid, described as follows:

BEGINNING at Selee Tompkin's East line and pursuing a line of stakes North thirty-five degrees forty-five minutes East eleven chains to Joseph Jackson's West line embracing one and one-half rods on each side of said

Complaint.

line of stakes, and containing three-fourths of an acre and twelve perches of land.

10 and to take possession of, hold, have, use and occupy the same for railroad purposes, as in said Act provided, and in and by said proceedings commissioners were appointed to assess the price or value of the lands of said Jabez L. Estile so taken, and his damages, and by their instrument in writing dated September 22nd, 1846, recorded in the Office of the Clerk of the County of Morris in Book L-4 of Deeds for said County, on Pages 530 &c., said commissioners assessed the price or value of said strip or tract of land of said Jabez L. Estile so taken, as well as his damages occasioned by the occupancy of his lands by the defendant, the Morris & Essex Railroad Company, all of which more fully appears by said instrument, a copy of which is hereto annexed and made a part hereof, marked Schedule "A".

20 5. Thereafter and on or about February 25th, 1847, said Jabez L. Estile conveyed to the defendant, the Morris & Essex Railroad Company, by deed dated February 25th, 1847, and recorded in the Office of the Clerk of the County of Morris in Book M-4 of Deeds for said County, on Pages 49 &c., the same right, liberty and privilege of entering upon said strip or tract of land above described, and to possess, hold, use, occupy and erect thereon embankments, bridges and all other works necessary to lay rails, as the defendant, the Morris & Essex Railroad Company, had acquired in the proceedings aforesaid, under its Act of incorporation and the acts supplemental thereto, which define what rights the company shall ac-

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Complaint.

quire by assessment; a copy of which deed is hereto annexed and made a part hereof, marked Schedule "B."

6. The said strip or tract of land so acquired by the defendant, the Morris & Essex Railroad Company, intersected said lands of said Jabez L. Estile, described in the 1st paragraph hereof, and upon said strip or tract of land it erected a railroad which is operated by defendant, the Delaware, Lackawanna & Western Railroad Company. 10

7. By an Act of the Legislature of the State of New Jersey, entitled "An Act to validate and confirm a certain lease and contract by which the Morris & Essex Railroad Company leases their road to the Delaware, Lackawanna & Western Railroad Company," approved February 9th, 1869, the defendant, the Delaware, Lackawanna & Western Railroad Company, exercises all rights, powers and privileges of the defendant, the Morris & Essex Railroad Company, and is obligated to do and perform all acts and things which the defendant, the Morris & Essex Railroad Company, as owners of said property was and is required and bound to do. 20

8. By Section 9 of said Act of incorporation of the defendant, the Morris & Essex Railroad Company, it is provided that where its railroad shall intersect any farm or lands of any individual, it shall provide and keep in repair suitable wagonways over or under its railroad so that said individual may pass from one part to the other of his lands so intersected by said railroad; and the same duty is imposed on every railroad company by Section 26 of an Act of the Legislature of New 30
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Complaint.

Jersey, entitled "An Act Concerning Railroads" (P. L. 1903, P. 659).

9. By mesne conveyances the following described tracts of land in the Borough of Rockaway aforesaid, which are a part of said lands formerly owned by said Jabez L. Estile, described in Paragraph 1 hereof, were conveyed to plaintiff, The Rockaway Rolling Mill, on or about June 2nd, 1926, by deed of that date which is recorded in the Office of the Clerk of the County of Morris in Book B-30 of Deeds for said County, on Pages 30 &c.

FIRST TRACT: BEGINNING at a stone monument in the Westerly line of the right-of-way of the Morris & Essex Railroad Company and running thence (1) along land of Morris & Essex Railroad Company South eighty-eight degrees thirty-nine minutes ten seconds West four hundred feet to an iron monument, thence in the same course fourteen feet to East bank Rockaway River thence (2) North forty-one degrees fifty-four minutes fifteen seconds East five hundred fifteen and four hundredths feet and running along the Easterly side of said Rockaway River to a point in said Easterly side line, thence (3) still along said side line North nineteen degrees fifty-six minutes twenty seconds East one hundred eight and fifty hundredths feet to a point in the same, thence (4) still along said side line North three degrees fifty-seven minutes forty seconds East one hundred thirty and thirty-one hundredths feet to a point in said side line, thence (5) still along

Complaint.

said side line North ten degrees fifty-seven minutes East eighty-three and twenty-two hundredths feet to a point in the same said point being also in the Southerly side line of the right-of-way of the Dover and Rockaway Railroad Company now leased by the Central Railroad Company of New Jersey, thence 10
 (6) North sixty-three degrees thirty-one minutes twenty seconds East along said side line of said railroad one hundred forty-eight feet to a point in the same, thence (7) South sixty-three degrees three minutes fifty seconds East three hundred seventy-five and fifty-three hundredths feet to a stone monument in the Westerly side line of the right-of-way of the Morris & Essex Railroad afore- 20
 said, thence (8) South thirty-eight degrees thirteen minutes west seven hundred forty-two and twenty-five hundredths feet along said side line to the point or place of Beginning.

SECOND TRACT: BEGINNING at a stone monument the most Southerly corner of this second tract and running thence (1) South eighty-eight degrees thirty-nine minutes ten seconds West two hundred ninety and thirty-seven hundredths feet to a point in the Easterly side line of the Morris & Essex Railroad Company, thence (2) along said side line of said Railroad Company North thirty-eight degrees thirteen minutes East seven hundred and eighty-eight hundredths feet to a point in the same, thence (3) South sixty-three degrees three minutes fifty seconds East one hundred ninety-nine and sixty-five hun- 30
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Complaint.

dredths feet to a stone monument, thence (4) South thirty-five degrees nineteen minutes twenty seconds West five hundred fifty-five and seventy hundredths feet to the point or place of Beginning.

10 and said conveyance was made subject to such rights, if any, which the Morris & Essex Railroad Company and its lessee may have in the above described tracts of land.

20 10. At and prior to the time of said conveyance to plaintiff, there was located on the First Tract of land described in Paragraph 9 hereof, several large factory buildings of great value, constituting a manufacturing plant which plaintiff was and is repairing and putting in shape for extensive manufacturing purposes and operations; and, until February 1st, 1927, access to said manufacturing plant was by a wagon-road over the Second Tract of land described in said Paragraph 9, to defendants' railroad and thence across said railroad by means of a wagon-way or crossing at grade, constructed of planks, of the width of about 15 feet, directly opposite the entrance gates to plaintiff's plant, being 718 feet Easterly from the intersection of defendants' right of way with the most Westerly part of the fence on plaintiff's property and being 329 feet Westerly from the intersection of defendants' right of way with the most Easterly part of the fence on plaintiff's property.

40 11. The said two tracts of land described in said Paragraph 9 hereof have always at the same time been in the same common ownership since the acquisition by the defendant, the Morris & Essex

Complaint.

Railroad Company, of the strip or tract of land described in said Paragraph 4 hereof; and by the devolution to the plaintiff of the title to the two tracts of land described in said Paragraph 9 hereof, it became seized and possessed of a right to a suitable wagon-way or crossing over defendants' railroad, which defendants or either of them must provide and keep in repair. 10

12. On February 1st, 1927, defendant, the Delaware, Lackawanna & Western Railroad Company, by its agents and servants, removed the wagon-way or crossing which the plaintiff theretofore had used as a wagon-way to cross defendants' railroad from the lands of plaintiff on the one side upon which its factory is located to its lands on the other side, and erected and constructed on each side of said railroad a fence across said wagon-way, thereby depriving plaintiff of its only access to its manufacturing plant. 20

13. Defendants, by their acts or omission to act, have failed and neglected to provide and keep in repair a suitable wagon-way or crossing over said railroad so that plaintiff might pass from its lands on one side of defendants' railroad to plaintiff's lands on the other side thereof, as required by law. 30

14. By reason of the foregoing, plaintiff is now deprived and has ever since February 1, 1927, been deprived of the failure and neglect and wrongful acts of the defendants, of a suitable wagon-way over defendants' railroad as a means of convenient access from and to such portions of its lands as are intersected and separated by said 40

Answer.

lands as are intersected and separated by said railroad.

Plaintiff demands \$2,950. damages.

KING & VOGT,
Attorneys of Plaintiff.

- 10 NOTE: Herewith is omitted printing of Order that bill be retained, same being printed at pages 85-7 *ante*.

Answer.

NEW JERSEY SUPREME COURT.

20 THE ROCKAWAY ROLLING MILL,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

Action at Law

- 30 The Delaware, Lackawanna and Western Railroad Company and The Morris and Essex Railroad Company, defendants in the above entitled action, answering the allegations contained in the plaintiff's complaint, say:

40 That they object to the plaintiff's complaint in a point of law, in that the above entitled suit of the plaintiff against them is not for the matters and things permitted the plaintiff to be litigated against the defendants by the order of the Court

Answer.

of Chancery of New Jersey in the case of The Rockaway Rolling Mill, a corporation, complainant, and Delaware, Lackawanna & Western Railroad Company, a corporation, and Morris & Essex Railroad Company, a corporation, defendants, and dated May 31st, 1927, a true copy of which order is hereto attached and marked Schedule A. 10

I. They have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the first paragraph of the plaintiff's complaint.

II. They admit the allegations contained in the second paragraph.

III. They admit the allegations contained in the third paragraph. 20

IV. They admit the allegations contained in the fourth paragraph.

V. They admit the allegations contained in the fifth paragraph that "thereafter and on or about February 25th, 1847, said Jabez L. Estile conveyed to the defendant, The Morris and Essex Railroad Company, by deed dated February 25th, 1847, and recorded in the Office of the Clerk of the County of Morris in Book M-4 of Deeds for said County, pages 49, &c.," certain lands and properties specifically set forth in said deed, but deny the balance and remainder of the allegations of said paragraph. 30

VI. They admit that upon the tract of land conveyed to The Morris and Essex Railroad Company and specifically referred to in the fifth paragraph of the plaintiff's complaint, The Morris 40

Answer.

and Essex Railroad Company erected a railroad which is operated by the defendant, The Delaware, Lackawanna and Western Railroad Company, but they deny the balance and remainder of the allegations in said paragraph.

10 VII. They admit the allegations contained in the seventh paragraph.

VIII. They admit the allegations contained in the eighth paragraph.

IX. They have no knowledge or information sufficient to form a belief so as to answer the allegations in the ninth paragraph.

20 X. They admit that from June 7th, 1915, to February 1st, 1927, "there was a crossing at grade across its railroad tracks from the land on one side of its railroad to the land on the other side of its railroad, said crossing being constructed of planks of the width of about fifteen (15) feet, and being located directly opposite the entrance to the gates of what the plaintiff now claims is its plant, but they have no knowledge or information sufficient to form a belief so as to answer the balance and remainder of the allegations contained

30 in the plaintiff's complaint.

XI. They deny the allegations contained in the eleventh paragraph.

XII. They admit that on February 1st, 1927, the defendant, The Delaware, Lackawanna and Western Railroad Company, by its agents and servants, removed the * * * crossing which the plaintiff theretofore had used as a wagon-way to cross defendants' railroad from the lands on

40 the one side, upon which plaintiff's factory is lo-

Answer.

cated, to lands on the other side, and erected and constructed on each side of said railroad a fence across said crossing, but deny the balance and remainder of the allegations in said paragraph.

XIII. They deny the allegations contained in the thirteenth paragraph. 10

XIV. They deny the allegations contained in the fourteenth paragraph.

AND FOR A SPECIAL SECOND, SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the plaintiff at no time, pursuant to the 9th Section of the charter of the defendant, The Morris and Essex Railroad Company, gave notice to said defendants, or either of them, to provide and keep in good repair suitable wagon-ways over or under their railroad. 20

AND FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the said defendant, The Morris and Essex Railroad Company, in acquiring the tract of land from Jabez L. Estile, by deed dated February 25, 1847, and referred to in the fifth paragraph of the plaintiff's complaint, but not here admitted by the defendants to be the same but identical land referred to in the fourth paragraph of the plaintiff's complaint, was relieved and released from the charter obligations of the said The Morris and Essex Railroad Company and Section 26 of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Railroads," (P. L. 1903, p. 659), referred to in the eighth paragraph of the plaintiff's complaint. 30 40

Answer.

AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the plaintiff and its predecessor in title never had any right in and to said wagon-way or crossing referred to in the plaintiff's complaint, for the reason that said wagon-way or crossing was permitted by the defendant, The Delaware, Lackawanna and Western Railroad Company, to be installed and maintained by the International High Speed Steel Company under a revocable license agreement, which license agreement or permission The Delaware, Lackawanna and Western Railroad Company duly revoked, and said crossing was taken up and made inaccessible for use by the defendant, The Delaware, Lackawanna and Western Railroad Company, on February 1st, 1927.

WHEREFORE, these defendants pray that the above entitled action may be dismissed as against them with their taxed costs.

FREDERIC B. SCOTT,
Attorney of Defendants.

NOTE: Herewith is omitted printing of Order that bill be retained, same being printed at pages 85-7 *ante*.

Reply.

NEW JERSEY SUPREME COURT,

MORRIS COUNTY.

 THE ROCKAWAY ROLLING MILL,
 Plaintiff,
vs.
 THE DELAWARE, LACKAWANNA AND
 WESTERN RAILROAD COMPANY
 and THE MORRIS AND ESSEX
 RAILROAD COMPANY,
 Defendants.

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Action at Law.

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The plaintiff, by way of reply to the answer of the defendants, says that:

1. The first alleged objection to the plaintiff's complaint herein, is not good in point of law and is pleaded contrary to the rules and practice of this Court.

2. Plaintiff will object that the special second separate and distinct defense discloses no defense for the following reasons:

30

(a) Because this action is brought pursuant to the order of the Court of Chancery of New Jersey, dated May 31st, 1927, referred to in defendants' answer, which order directed plaintiff to bring action in a court of law against defendants to establish its rights to a suitable wagon-way or crossing over defendants' railroad.

(b) Because it was not necessary for plaintiff, under Section 9 of the Charter of defendant, Mor-

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Reply.

ris and Essex Railroad Company, to give notice to the defendants in order to have or maintain an action against them, or either of them, to provide and keep in repair suitable wagon-ways over or under defendants' railroad.

10 3. Plaintiff denies the third separate and distinct defense, and also objects in point of law that this supposed defense is no defense because said deed therein mentioned only conveyed to the defendants the same right and privilege, and neither more nor less than they had acquired by assessment, as alleged in the fourth paragraph of the complaint.

20 4. Plaintiff denies the fourth separate and distinct defense, and also objects in point of law that the supposed defense is no defense:

(a) Because the alleged license agreement is without consideration and void.

(b) Because the defendants could not relieve themselves, or either of them, from their statutory obligation to provide and keep in repair a suitable wagon-way or crossing by such an alleged license agreement.

30 (c) Because plaintiff had neither actual nor constructive notice of said alleged license agreement at or before the time of acquiring title to the instant lands intersected by defendants' railroad.

KING & VOGT,
Attorneys for Plaintiff.

Postea.NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

THE ROCKAWAY ROLLING MILL, a
Corporation,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

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Action at Law

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This case was tried before HON. RULIF V. LAWRENCE, Circuit Court Judge, and a jury on April 5th, 1928.

The Court having considered the issues raised by the first count, to be matters of law, reserved its opinion thereon, and now being of the opinion that decision thereon is unnecessary, inasmuch as

The jury rendered a verdict on the second count as follows:

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We find as a matter of fact that a suitable wagon-way or crossing over defendants' railroad for the benefit of plaintiff and its predecessors in title, existed for twenty years or more prior to 1915, and find a verdict in favor of the plaintiff, The Rockaway Rolling Mill against the defendants, with Six Cents damages.

RULIF V. LAWRENCE,
Judge. 40

On Postea and Rule to Show Cause.

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">WESTERN RAILROAD COMPANY THE DELAWARE, LACKAWANNA AND and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.</p>	} Action at Law
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20 KING & VOGT, Attorneys.

Judgment entered this first day of April A. D. nineteen hundred and thirty as of April 10, 1928 in favor of plaintiff and against the defendants for the som of six cents damages without costs.

Damages \$.06.

No Costs.

WM. S. GUMMERE,
C. J.

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On Postea and Rule to Show Cause.
NEW JERSEY SUPREME COURT

<p style="text-align: center;">THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">Action at Law.</p>
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The rule to show case heretofore entered in this cause having been discharged by the Court,—It is ordered that Judgment final be and hereby is entered in favor of plaintiff and against the defendants for the sum of six cents, without costs. 20

Entered: April 1, 1930, as of
April 10, 1928

On motion of
KING & VOGT, Attorneys.

Damages \$.06.
No Costs. 30

Order.

NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

10	<p>THE ROCKAWAY ROLLING MILL, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.</p>	} Action at Law.
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Application having been made to this Court on the trial of the above entitled cause, on April 5th, 1928, by the defendant for leave to file an amended answer in said cause, it is hereby

ORDERED on this 5th day of April, 1928, that the said defendant have leave to file said amended answer.

RULIF V. LAWRENCE,
Judge.

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Entered April 10, 1928,
On Motion of Frederic B. Scott,
Attorney for Defendants.

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Amended Answer.

10 to the defendant, The Morris and Essex Railroad Company, by deed dated February 25th, 1847, and recorded in the Office of the Clerk of the County of Morris, in Book M-4 of Deeds for said County, pages 49, etc.," certain lands and properties specifically set forth in said deed, but deny the balance and remainder of the allegations of said paragraph.

20 VI. They admit that upon the tract of land conveyed to The Morris and Essex Railroad Company and specifically referred to in the fifth paragraph of the plaintiff's complaint, The Morris and Essex Railroad Company erected a railroad which is operated by the defendant, The Delaware, Lackawanna and Western Railroad Company, but they deny the balance and remainder of the allegations in said paragraph.

VII. They admit the allegations contained in the seventh paragraph.

VIII. They admit the allegations contained in the eighth paragraph.

30 IX. They have no knowledge or information sufficient to form a belief so as to answer the allegations in the ninth paragraph.

40 X. They admit that from June 7th, 1915, to February 1st, 1927, "there was a crossing at grade across its railroad tracks from the land on one side of its railroad to the land on the other side of its railroad, said crossing being constructed of planks of the width of about fifteen (15) feet, and being located directly opposite the entrance to the gates of what the plaintiff now claims is its plant, but they have no knowledge or information

Amended Answer.

sufficient to form a belief so as to answer the balance and remainder of the allegations contained in the plaintiff's complaint.

XI. They deny the allegations contained in the eleventh paragraph.

XII. They admit that on February 1st, 1927, the defendant, The Delaware, Lackawanna and Western Railroad Company, by its agents and servants, removed the * * * crossing which the plaintiff theretofore had used as a wagon-way to cross defendants' railroad from the lands on the one side, upon which plaintiff's factory is located, to lands on the other side, and erected and constructed on each side of said railroad a fence across said crossing but deny the balance and remainder of the allegations in said paragraph.

XIII. They deny the allegations contained in the thirteenth paragraph.

XIV. They deny the allegations contained in the fourteenth paragraph.

AND FOR A SPECIAL SECOND, SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the plaintiff at no time, pursuant to the 9th Section of the charter of the defendant, The Morris and Essex Railroad Company, gave notice to said defendants, or either of them, to provide and keep in good repair suitable wagon-ways over or under their railroad.

AND FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the said defendant, The Morris and Essex

Amended Answer.

Railroad Company, in acquiring the tract of land from Jabez L. Estile, by deed dated February 25th, 1847, and referred to in the fifth paragraph of the plaintiff's complaint, but not here admitted by the defendants to be the same and identical land referred to in the fourth paragraph of the plaintiff's complaint, was relieved and released from the charter obligations of the said The Morris and Essex Railroad Company and Section 26 of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Railroads," (P. L. 1903, p. 659), referred to in the eighth paragraph of the plaintiff's complaint.

AND FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE, these defendants say that the said plaintiff ought not to have or maintain its action against them, for that the plaintiff and its predecessor in title never had any right in and to said wagon-way or crossing referred to in the plaintiff's complaint, for the reason that said wagon-way or crossing was permitted by the defendant, The Delaware, Lackawanna and Western Railroad Company, to be installed and maintained by the International High Speed Steel Company under a revocable license agreement, which license agreement or permission The Delaware, Lackawanna and Western Railroad Company duly revoked, and said crossing was taken up and made inaccessible for use by the defendant, The Delaware, Lackawanna and Western Railroad Company on February 1st, 1927.

AND FOR A FIFTH AND SEPARATE AND DISTINCT DEFENSE these defendants say that the plaintiff ought not to have or maintain its action against them because by the order of the Court of Chancery, attached to the defendants' answer heretofore filed

Amended Answer.

in this Court, and made a part of that answer, the plaintiff was permitted leave of said Court to bring an action at law against the above defendants for the purpose of the determination of the right of an easement claimed by the plaintiff over and across the lands of the defendants, and that the plaintiff in instituting the above entitled action against the defendants has brought the above entitled action against the defendants contrary to the order of the Court of Chancery, as aforesaid. 10

AND FOR A SIXTH AND SEPARATE AND DISTINCT DEFENSE these defendants say that the said plaintiff ought not to have or maintain its action against them for that the plaintiff's predecessors in title, abandoned, gave up and relinquished any and all claims to a suitable wagon-way over defendants' railroad as a means of convenient access from and to such portion of their lands as were and are intersected and separated by the railroad of the defendants. 20

AND FOR A SEVENTH AND SEPARATE AND DISTINCT DEFENSE these defendants say that the said plaintiff ought not to have or maintain its action against them for that the said defendants have adversely and hostilely held and possessed against the plaintiff's predecessors in title for a period of over sixty years the lands and property over and by which the plaintiff claims it is entitled to a suitable wagon-way over defendants' railroad. 30

WHEREFORE, these defendants pray that the above entitled action may be dismissed as against them with their taxed costs.

FREDERIC B. SCOTT,
Attorney for Defendants. 40

Rule to Show Cause.

NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

THE ROCKAWAY ROLLING MILL,
Plaintiff,

vs.

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THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

Action at Law

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Application having been made to the Court within six days after the rendition of the verdict in the above entitled cause, by the above defendant for a Rule to Show Cause why the verdict in the above entitled cause should not be set aside and a new trial granted, it is on this 9th day of April, 1928,

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ORDERED that the above plaintiff do show cause before the Supreme Court, at the State House in Trenton, New Jersey, at the next and ensuing term of the Supreme Court why the said verdict in the above entitled cause should not be set aside and for nothing holden, and a new trial granted; and

IT IS FURTHER ORDERED that all the proceedings in the above entitled cause be and hereby are stayed until the disposition of said Rule to Show Cause by the Court in the premises.

RULIF V. LAWRENCE,
Judge.

Entered April 10, 1928

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On motion of Frederic B. Scott,
Attorney for Defendants.

Amended Reply.

NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

THE ROCKAWAY ROLLING MILL,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

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Action at Law.

The plaintiff, by way of amended reply to the
amended answer of the defendants, says that: 20

1. The same sets forth no first separate and distinct defense.

2. Plaintiff will object that the special second separate and distinct defense discloses no defense for the following reasons:

(a) Because this action is brought pursuant to the order of the Court of Chancery of New Jersey, dated May 31st, 1927, referred to in defendants' answer, which order directed plaintiff to bring action in a court of law against defendants to establish its rights to a suitable wagon-way or crossing over defendants' railroad. 30

(b) Because it was not necessary for plaintiff, under Section 9 of the charter of defendant, Morris and Essex Railroad Company, to give notice to the defendants in order to have or maintain an action against them, or either of them, to pro- 40

Amended Reply.

vide and keep in repair suitable wagon-ways over or under defendants' railroad.

10 3. Plaintiff denies the third separate and distinct defense, and also objects in point of law that this supposed defense is no defense because said deed therein mentioned only conveyed to the defendants the same right and privilege, and neither more nor less than they had acquired by assessment, as alleged in the fourth paragraph of the complaint.

4. Plaintiff denies the fourth separate and distinct defense, and also objects in point of law that the supposed defense is no defense:

20 (a) Because the alleged license agreement is without consideration and void.

(b) Because the defendants could not relieve themselves, or either of them, from their statutory obligation to provide and keep in repair a suitable wagon-way or crossing by such an alleged license agreement.

30 (c) Because plaintiff had neither actual nor constructive notice of said alleged license agreement at or before the time of acquiring title to the instant lands intersected by defendants' railroad.

5. Replying to the fifth separate and distinct defense of the answer, plaintiff says:

40 Said action is to determine the right of an easement as claimed by the plaintiff over and across the lands of the defendants, and said defense is not good in point of law and is pleaded contrary to the rules and practice of this court.

Stipulation.

6. Plaintiff denies the sixth separate and distinct defense.

7. Plaintiff denies the seventh separate and distinct defense.

KING & VOGT,
Attorneys of Plaintiff.

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Stipulation.

NEW JERSEY SUPREME COURT.

THE ROCKAWAY ROLLING MILL,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

Action at Law.
On Rule to
Show Cause.

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IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of the respective parties, that in view of the fact that the court stenographer cannot furnish the defendants with a transcript of the testimony for the purpose of preparing said cause for the May 1928 Term of Court, that the argument on said rule to show cause and the preparation of said rule to show cause for argument, be and the same are adjourned and postponed to the October 1928 Term of said Court, the same as if said rule to show cause was originally made returnable at said October 1928 Term.

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Stipulation.

10 AND IT IS FURTHER STIPULATED AND AGREED by and between the attorneys of the respective parties, that the defendants' time to file their grounds and reasons on said rule to show cause, be and the same hereby is extended until ten days after the said court stenographer furnishes the said defendants with the transcript of the testimony taken on said cause.

Dated, April 20, 1928.

KING & VOGT,
Attorneys of Plaintiff.

FREDERIC B. SCOTT,
Attorney of Defendants.

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Stipulation.

NEW JERSEY SUPREME COURT.

ROCKAWAY ROLLING MILL,
Plaintiff,

vs.

30 THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

Action at Law.

On Rule
to Show
Cause.

40 IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of the respective parties, that the argument on the Rule to Show Cause, and the preparation of said Rule to Show Cause for argu-

Stipulation.

ment, and the serving of a State of Case in said matter, now adjourned and postponed by stipulation to the October 1928 Term of the above Court, the same as if said Rule to Show Cause was originally made returnable at said October Term, be further adjourned and postponed to the January 1929 Term of said Court, the same as if said Rule to Show Cause was originally made returnable at said January 1929 Term; and it is further

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STIPULATED AND AGREED by and between the attorneys of the respective parties that the defendants' time to file their Reasons on said Rule to Show Cause be and the same hereby is extended until ten days after the Trial Court disposes of the matter of the amended complaint proposed on the trial of said cause, by permitting and ordering said amended complaint to be filed, etc.

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Dated: September 8, 1928.

KING & VOGT,
Attorneys of Plaintiff.

FREDERIC B. SCOTT,
Attorney of Defendants.

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Amended Complaint.

NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

10 THE ROCKAWAY ROLLING MILL, a
Corporation,
Plaintiff,

vs.

20 DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, a Cor-
poration, and MORRIS & ESSEX
RAILROAD COMPANY, a Corpo-
ration,
Defendants.

Action at Law.

The plaintiff, The Rockaway Rolling Mill, a corporation of the State of New Jersey, having its principal place of business in the Borough of Rockaway, in the County of Morris and State of New Jersey, says:

30 FIRST COUNT.

1. On and prior to September 22nd, 1846, plaintiff's predecessor in title, Jabez L. Estile, was the owner in fee simple by deed of conveyance to him, dated March 29, 1820, and recorded in the Office of the Clerk of the County of Morris in Book K-2 of Deeds for said County, Pages 32 &c., of the following described premises in the Borough of Rockaway, formerly Township of Rockaway, Count of Morris and State of New Jersey.

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Complaint.

BEGINNING in the middle of Rockaway River at a corner of Barnabas King's land and from thence running (1) along said King's line South seventy-nine degrees West eight chains forty-four links to stake and stones, thence (2) South fifteen degrees West nine chains thirty links to a stone heap, thence (3) South thirteen and one-half degrees West Eight chains to a stone heap, thence (4) South fifty-six and one-half degrees West six chains sixty-three links to a small white oak, thence (5) South twenty-seven degrees East two chains to the middle of Rockaway River, thence (6) up said river about South Twelve degrees West eleven chains eighty links or thereabouts, thence (7) North eighty-six degrees West nine chains fifty-three links to a stake in Noah Estile's line, thence (8) South seven degrees West one chain eighty links to two small may cherry trees, thence (9) South forty-nine degrees West four chains ten links to a white oak tree a corner of Noah Estile's land and a corner of Ezra Abbot's land, thence (10) South fifty-seven degrees East nine chains thirty links to a small white ash tree on a small island near the East side of Rockaway River, a corner of Frederick Beem's lot, thence (11) North eighty-three degrees East twelve chains five links to a small white oak, thence (12) North thirty-one and one-half degrees East eight chains forty-four links to the corner of John Clark's land, thence (13) North Sixty-seven degrees West nine chains twenty-nine links, thence (14) North twenty-nine degrees East ten chains eighty-four links to a black oak tree on the

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Complaint.

East bank of Rockaway River, thence (15) North sixty degrees West to the middle of said river, thence down the middle of said river the several courses thereof to the place of Beginning.

10 Containing thirty-one acres more or less.

2. The Morris & Essex Railroad Company, one of the defendants herein, is a railroad corporation and was incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Morris & Essex Railroad Company," passed January 29th, 1835; and the Delaware, Lackawanna & Western Railroad Company, the other defendant, is a railroad corporation organized under the laws of the State of Pennsylvania.

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3. By Section 7 of the Act of incorporation of the defendant, the Morris & Essex Railroad Company, it was empowered to acquire lands by assessment for railroad purposes, where it could not agree with the owner as to the price thereof.

4. On or about September 22nd, 1846, defendant, the Morris & Essex Railroad Company, by virtue of said Section 7 of its Act of incorporation, took proceedings to acquire by assessment the right, liberty and privilege of entering upon a certain strip or tract of land of said Jabez L. Estile, in the Borough of Rockaway aforesaid, described as follows:

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BEGINNING at Selee Tompkin's East line and pursuing a line of stakes North thirty-five degrees forty-five minutes East eleven chains to Joseph Jackson's West line embracing one and one-half rods on each side of said

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Complaint.

line of stakes, and containing three-fourths of an acre and twelve perches of land.

and to take possession of, hold, have, use and occupy the same for railroad purposes, as in said Act provided, and in and by said proceedings commissioners were appointed to assess the price or value of the lands of said Jabez L. Estile so taken, and his damages, and by their instrument in writing dated September 22nd, 1846, recorded in the Office of the Clerk of the County of Morris in Book L-4 of Deeds for said County, on Pages 530 &c., said commissioners assessed the price or value of said strip or tract of land of said Jabez L. Estile so taken, as well as his damages occasioned by the occupancy of his lands by the defendant, the Morris & Essex Railroad Company, all of which more fully appears by said instrument, a copy of which is hereto annexed and made a part hereof, marked Schedule "A."

5. Thereafter and on or about February 25th, 1847, said Jabez L. Estile conveyed to the defendant, the Morris & Essex Railroad Company, by deed dated February 25th, 1847, and recorded in the Office of the Clerk of the County of Morris in Book M-4 of Deeds for said County, on Pages 49 &c., the same right, liberty and privilege of entering upon said strip or tract of land above described, and to possess, hold, use, occupy and erect thereon embankments, bridges and all other works necessary to lay rails, as the defendant, the Morris & Essex Railroad Company, had acquired in the proceedings aforesaid, under its Act of incorporation and the acts supplemental thereto, which define what rights the company shall ac-

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Complaint.

quire by assessment; a copy of which deed is here-
to annexed and made a part hereof, marked Sched-
ule "B".

6. The said strip or tract of land so acquired
by the defendant, the Morris & Essex Railroad
10 Company, intersected said lands of said Jabez L.
Estile, described in the 1st paragraph hereof, and
upon said strip or tract of land it erected a rail-
road which is operated by defendant, the Dela-
ware, Lackawanna & Western Railroad Company.

7. By an Act of the Legislature of the State of
New Jersey, entitled "An Act to validate and con-
firm a certain lease and contract by which the
Morris & Essex Railroad Company leases their
20 road to the Delaware, Lackawanna & Western
Railroad Company," approved February 9th,
1869, the defendant, the Delaware, Lackawanna
& Western Railroad Company, exercises all rights,
powers and privileges of the defendant, the Mor-
ris & Essex Railroad Company, and is obligated
to do and perform all acts and things which the
defendant, the Morris & Essex Railroad Com-
pany, as owners of said property was and is
required and bound to do.

30 8. By Section 9 of said Act of incorporation of
the defendant, the Morris & Essex Railroad Com-
pany, it is provided that where its railroad shall
intersect any farm or lands of any individual, it
shall provide and keep in repair suitable wagon-
ways over or under its railroad so that said indi-
vidual may pass from one part to the other of his
lands so intersected by said railroad; and the
same duty is imposed on every railroad company
40 by Section 26 of an Act of the Legislature of New

Complaint.

Jersey, entitled "An Act Concerning Railroads" (P. L. 1903, p. 659).

9. By mesne conveyances the following described tracts of land in the Borough of Rockaway aforesaid, which are a part of said lands formerly owned by said Jabez L. Estile, described in paragraph 1 hereof, were conveyed to plaintiff, The Rockaway Rolling Mill, on or about June 2nd, 1926, by deed of that date which is recorded in the office of the Clerk of the County of Morris in Book B-30 of Deeds for said county, on pages 30, &c. 10

FIRST TRACT: BEGINNING at a stone monument in the Westerly line of the right-of-way of the Morris & Essex Railroad Company and running thence (1) along land of Morris & Essex Railroad Company South eighty-eight degrees thirty-nine minutes ten seconds West four hundred feet to an iron monument, thence in the same course fourteen feet to East bank Rockaway River thence (2) North forty-one degrees fifty-four minutes fifteen seconds East five hundred fifteen and four hundredths feet and running along the Easterly side of said Rockaway River to a point in said Easterly side line, thence (3) still along said side line North nineteen degrees fifty-six minutes twenty seconds East one hundred eight and fifty hundredths feet to a point in the same, thence (4) still along said side line North three degrees fifty-seven minutes forty seconds East one hundred thirty and thirty-one hundredths feet to a point in said side line, thence (5) still along said side line North ten degrees fifty-seven minutes East eighty-three and twenty-two hundredths 30 40

Complaint.

feet to a point in the same said point being also in the Southerly side line of the right-of-way of the Dover and Rockaway Railroad Company now leased by the Central Railroad Company of New Jersey, thence (6) North 10 sixty-three degrees thirty-one minutes twenty seconds East along said side line of said railroad one hundred forty-eight feet to a point in the same, thence (7) South sixty-three degrees three minutes fifty seconds East three hundred seventy-five and fifty-three hundredths feet to a stone monument in the West- 20 erly side line of the right-of-way of the Morris & Essex Railroad aforesaid, thence (8) South thirty-eight degrees thirteen minutes West seven hundred forty-two and twenty-five hundredths feet along said side line to the point or place of Beginning.

SECOND TRACT: BEGINNING at a stone monument the mose Southerly corner of this second tract and running thence (1) South 30 eighty-eight degrees thirty-nine minutes ten seconds West two hundred ninety and thirty-seven hundredths feet to a point in the Easterly side line of the Morris & Essex Railroad Company, thence (2) along said side line of said Railroad Company North thirty-eight degrees thirteen minutes East seven hundred and eighty-eight hundredths feet to a point in the same, thence (3) South sixty-three degrees three minutes fifty seconds East one hundred ninety-nine and sixty-five hundredths feet to a stone monument, thence (4) 40 South thirty-five degrees nineteen minutes twenty seconds West five hundred fifty-five

Complaint.

and seventy hundredths feet to the point or place of Beginning.

and said conveyance was made subject to such rights, if any, which the Morris & Essex Railroad Company and its lessee may have in the above described tracts of land. 10

10. At and prior to the time of said conveyance to plaintiff, there was located on the First Tract of land described in Paragraph 9 hereof, several large factory buildings of great value, constituting a manufacturing plant which plaintiff was and is repairing and putting in shape for extensive manufacturing purposes and operations; and, until February 1st, 1927, access to said manufacturing plant was by a wagon-road over the Second Tract of land described in said Paragraph 9, to defendants' railroad and thence across said railroad by means of a wagon-way or crossing at grade, constructed of planks, of the width of about 15 feet, directly opposite the entrance gates to plaintiff's plant, being 718 feet Easterly from the intersection of defendants' right of way with the most Westerly part of the fence on plaintiff's property and being 329 feet Westerly from the intersection of defendants' right-of-way with the most Easterly part of the fence on plaintiff's property. 20 30

11. The said two tracts of land described in said Paragraph 9 hereof have always at the same time been in the same common ownership since the acquisition by the defendant, the Morris & Essex Railroad Company, of the strip or tract of land described in said Paragraph 4 hereof; and by the devolution to the plaintiff of the title to the two 40

Complaint.

tracts of land described in said Paragraph 9 hereof, it became seized and possessed of a right to a suitable wagon-way or crossing over defendants' railroad, which defendants or either of them must provide and keep in repair.

- 10 12. On February 1st, 1927, defendant, the Delaware, Lackawanna & Western Railroad Company, by its agents and servants, removed the wagon-way or crossing which the plaintiff theretofore had used as a wagon-way to cross defendants' railroad from the lands of plaintiff on the one side upon which its factory is located to its lands on the other side, and erected and constructed on each side of said railroad a fence across said wagon-way, thereby depriving plaintiff of its only
20 access to its manufacturing plant.

13. Defendants, by their acts or omission to act, have failed and neglected to provide and keep in repair a suitable wagon-way or crossing over said railroad so that plaintiff might pass from its lands on one side of defendants' railroad to plaintiff's lands on the other side thereof, as required by law.

- 30 14. By reason of the foregoing, plaintiff is now deprived and has ever since February 1, 1927, been deprived of the failure and neglect and wrongful acts of the defendants, of a suitable wagon-way over defendants' railroad as a means of convenient access from and to such portions of its lands as are intersected and separated by said railroad.

Complaint.

SECOND COUNT.

1. Paragraphs 1 to 7 inclusive, 9, 10 and 12 of the First Count are made part of this count.

2. The said two tracts of land now owned and possessed by plaintiff, described in Paragraph 9 of the First Count have always at the same time been in the same common ownership since the acquisition by the defendant, The Morris & Essex Railroad Company, of the strip or tract of land described in Paragraph 4 of the First Count and upon which said strip or tract of land it erected a railroad which is operated by defendant, The Delaware, Lackawanna & Western Railroad Company, as stated in Paragraph 6 of the First Count. 10

3. At the location or place described and designated in Paragraph 10 of the First Count, as suitable wagon-way or crossing over defendants' railroad for the benefit of plaintiff and its predecessors in title existed for twenty years or more prior to 1915, and the right to said suitable wagon-way or crossing has continued from that time to date. 20

Plaintiff demands \$2950. damages on each count.

KING & VOGT, 30
Attorneys for Plaintiff.

NOTE: Herewith omitted Commissioners' Award and Estile deed printed pp. 19-22 and 23-25 *ante*.

Substitution of Attorney.

NEW JERSEY SUPREME COURT,
MORRIS COUNTY.

10	<p>THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, and THE MORRIS AND ESSEX RAILROAD COMPANY, Defendants.</p>
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20 EDWARD P. STOUT, Esq., is hereby substituted
as attorney for the plaintiff in the above entitled
matter.

Dated April 22nd, 1929.

Entered June 18, 1929,

On Motion of: EDWARD P. STOUT,
Attorney of Plaintiff.

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Stipulation.

NEW JERSEY SUPREME COURT,

MORRIS CIRCUIT.

ROCKAWAY ROLLING MILL, a corporation,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

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} Action at Law.

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IT IS HEREBY STIPULATED by and between the attorneys of the respective parties that the above defendants have until the 1st day of July, 1929, to file and serve their reasons on the rule to show cause heretofore obtained in said matter.

Dated, May 13, 1929.

EDWARD P. STOUT,
Attorney of Plaintiff.

FREDERIC B. SCOTT, 30
Attorney of Defendants.

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Reasons.

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">THE ROCKAWAY ROLLING MILL, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, ET AL, Defendants.</p>	} On Rule to Show Cause.
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20 The Delaware, Lackawanna and Western Railroad Company and The Morris and Essex Railroad Company, defendants in the above entitled cause, herewith set out and file their reasons why the verdict in the above entitled case should not be set aside and a new trial granted:

30 1. Because the trial court erred in allowing and permitting the plaintiff to file an amended complaint in said action after the trial of said cause and the filing of the postea and entry of judgment in said matter.

2. Because the said verdict was contrary to the evidence adduced on the trial of said cause.

3. Because said verdict was contrary to the weight of the evidence adduced upon the trial of said cause.

40 4. Because the trial court erred in refusing to direct a nonsuit in favor of the defendants and against the plaintiff.

Reasons.

5. Because the trial court erred in refusing to direct a verdict in favor of the defendants and against the plaintiff.

6. Because the trial court erred in failing and neglecting to decide the issues under the first count of the plaintiff's complaint. 10

7. Because the trial court, over the objection of the defendants, permitted the plaintiff to question the witness Stickle as follows:

“Q. Won't you generally tell the jury when you first knew it to be there?

“Q. Just describe to the jury when you first knew it? A. The first I knew anything about the crossing was in the early 90's, I heard the Crampton's had some timber and we sent our teams there and carted it over that crossing.” 20

8. Because the trial court erred in permitting the plaintiff to put the following question, over the objection of the defendants, to the plaintiff's witness Ehlers:

“If this crossing is closed up, have you any other access to your Mill? 30

9. Because the said verdict was contrary to the law.

FREDERIC B. SCOTT,
Attorney for Defendants.

Notice of Argument.

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">ROCKAWAY ROLLING MILL, a corporation, Plaintiff,</p>	}	Action at Law.
	<p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, ET AL., Defendants.</p>		

20 To EDWARD P. STOUT, Attorney of Plaintiff:
Sir:

YOU WILL PLEASE TO TAKE NOTICE that on Tuesday, the 1st day of October, 1929, at ten o'clock in the forenoon of that day, or as soon thereafter as I can be heard therein, I shall move the argument of the above Rule to Show Cause before the Supreme Court at the State House in Trenton, New Jersey.

30 Yours truly,

FREDERIC B. SCOTT,
Attorney of Defendants.

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Rule Discharging Rule to Show Cause.

NEW JERSEY SUPREME COURT.

No. 29, OCTOBER TERM, 1929.

THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff, <i>vs.</i> DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, and MORRIS AND ESSEX RAILROAD COMPANY, Defendants.	}	Action at Law On Defendants' Rule to Show Cause.	10
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This action was tried before Judge Rulif V. Lawrence and a jury, at the Morris Circuit, and the jury rendered a verdict on the second count of the complaint herein, as follows:

“We find as a matter of fact that a suitable wagon-way or crossing over defendants’ railroad for the benefit of plaintiff and its predecessors in title, existed for twenty years or more prior to 1915, and find a verdict in favor of the plaintiff, The Rockaway Rolling Mill, against the defendants, with Six Cents Damages.”

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and judgment was entered thereon. A rule to show cause why a new trial should not be granted was duly allowed the defendants. The reasons assigned by the defendants for a new trial having been submitted, and this court having heard the

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Rule Discharging Rule to Show Cause.

argument of counsel for the respective parties on the only two reasons urged for ordering a new trial, and having considered the same, and being of the opinion that said reasons are without merit, ordered that the rule to show cause be discharged.

10 It is, thereupon, on this 1st day of April, 1930, ORDERED that said rule to show cause be and the same is hereby discharged.

Rule Actually entered, April 1, 1930.

On Motion of:

EDWARD P. STOUT,
Attorney for Plaintiff.

On Motion of:

20

EDWARD P. STOUT,
Attorney for Plaintiff.

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On Postea.

NEW JERSEY SUPREME COURT.

THE ROCKAWAY ROLLING MILL, a
Corporation,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
and THE MORRIS AND ESSEX
RAILROAD COMPANY,
Defendants.

Action at Law.

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Damages .06. No Costs. R. To S. C.

IT IS ORDERED that judgment be and hereby is
entered in favor of plaintiff and against the de-
fendants for the sum of six cents, without costs.

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Entered April 10, 1928.

On motion of
KING & VOGT,
Attorneys.

Edward P. Stout substituted as Atty. for Pltff.
see Min. May Term, 1929, under date of June 18,
1929.

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R. to S. C. dischgd. & Judgt. final April 1, 1930,
as of Apr. 10, 1928. See Min. Jan. 3, 1930, under
date of April 1, 1930.

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Order Vacating Costs.

NEW JERSEY SUPREME COURT.

No. 29, OCTOBER TERM, 1929.

10	<p>THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff, <i>vs.</i> DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, and MORRIS AND ESSEX RAILROAD COMPANY, Defendants.</p>	<p>Action at Law On Rule Discharging Defendants' Rule to Show Cause (Consent on file)</p>
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It appearing to the court that the Rule, entered in the above entitled cause on April 1st, 1930, discharging defendants' rule to show cause herein, inadvertently ordered costs to be taxed;

IT IS, therefore, on this 30th day of April, 1930, ORDERED that so much of said Rule ordering costs to be taxed be and the same is hereby vacated.

Entered May 1, 1930,

30 On Motion of:

EDWARD P. STOUT,
Attorney for Plaintiff.

40

Verified Bill for Printing.

NEW JERSEY SUPREME COURT

No. 29, OCTOBER, 1929, TERM.

<p style="text-align: center;">THE ROCKAWAY ROLLING MILL, a Corporation, Plaintiff, <i>vs.</i> DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and MORRIS AND ESSEX RAIL- ROAD COMPANY, Defendants.</p>	}	<p style="text-align: center;">Action at Law On Defendants' Rule to Show Cause.</p>	10
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STATE OF NEW JERSEY }
County of Hudson } ss.:

EDWARD P. STOUT, being duly sworn according to law, upon his oath deposes and says that he is Counsel for Plaintiff in the above-entitled action; that annexed hereto is a receipted bill of the PANDICK PRESS, INC., for printing Brief for Plaintiff in said cause, for \$65.20 being the amount stated in said bill, which amount was actually paid by plaintiff to said Pandick Press, Inc. 30

EDWARD P. STOUT.

Subscribed and sworn to at
Jersey City, N. J., this 31st
day of March, 1930.

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Clerk's Certificate.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this Sixteenth day of September, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD.
Clerk.

(Seal)

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(Endorsement on Copy of Proceedings.)

63-570

IN CHANCERY OF NEW JERSEY.

10 THE ROCKAWAY ROLLING MILL, a corporation,
Complainant,

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY and MORRIS & ESSEX RAILROAD COM-
PANY,

Defendants.

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

CERTIFIED COPY OF PROCEEDINGS IN NEW JERSEY
SUPREME COURT IN THIS CAUSE

30 Edward P. Stout,
Solr. for Petitioner,
921 Bergen Avenue,
Jersey City, N. J.

Filed June 11, 1930.

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New Jersey Court of Errors and Appeals

THE ROCKAWAY ROLLING MILL,
Complainant-Respondent,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, and
MORRIS & ESSEX RAILROAD COM-
PANY,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

BRIEF FOR RESPONDENT.

Appellants contend that the decree of the Court below is erroneous in that:

1. It determined and decreed matters and things not alleged or set up by complainant's bill of complaint filed in the Court of Chancery.
2. It was without justification either in law or fact.
3. The counsel fee awarded complainant was unjustified both in law and fact.

Respondent's reply is that there is no merit to these contentions.

Statement of the Case.

The facts pertinent to this controversy may be found: in the opinion of this Court, *Rockaway Rolling Mill vs. D. L. & W. R. R. Co., et al.*, 143 Atl. (N. J.) 334, affirming the Court below, on appeal by defendants from the order of the Court

retaining the bill of complaint, with liberty to the complainant to institute a suit at law against the defendants for a determination of the right of easement claimed by complainant, and granting a preliminary mandatory injunction requiring the defendants to immediately restore or provide and keep in repair pending such a suit a suitable wagon-way or crossing over defendants' railroad substantially as same existed on and prior to February 1st, 1927; and, in the opinion of the New Jersey Supreme Court, *Rockaway Rolling Mill vs. D. L. & W. R. R. Co. et al.*, 149 Atl. (N. J.) 532, discharging defendants' rule to show cause why a new trial should not be granted to determine the right of easement claimed by complainant.

The facts alleged in the bill, as appears by the opinion of this Court, *supra*, are:

“The complainant is the owner of a tract of land in the township of Rockaway, which is bisected by the defendant railroad companies' right of way. A large manufacturing plant has been erected upon a portion of the tract lying west of the right of way, and is being operated by the complainant. The only means of access to and egress from the complainant's plant is a private road, or wagon-way, leading therefrom over and across the defendants' right of way, and then through the remaining section of the complainant's tract to a public highway. In February, 1927, the railroad companies erected a fence on each side of their right of way at the point where the complainant's private road crossed it, completely blocking it. In this situation the present bill was filed. By it the complainant seeks a mandatory injunction compelling the defendants to remove the obstructions to the crossing over its right of way and restoring it to its original condition, basing its claim to this relief upon the averment that it has a permanent easement of way over the defendants' railroad at this point.”

The right of easement determined in the action at law, as appears by the verdict of the jury (Postea, Case, p. 123), is:

“We find as a matter of fact that a suitable wagon-way or crossing over defendants’ railroad for the benefit of plaintiff and its predecessors in title, existed for twenty years or more prior to 1915, and find a verdict in favor of the plaintiff, The Rockaway Rolling Mill against the defendants, with Six Cents Damages.”

The facts found by the Supreme Court, in its opinion, *supra*, are:

“The plaintiff corporation is the owner of two tracts of land in the County of Morris which are separated from one another by the right of way of the defendant railroad company. Originally the two parcels and the right of way of the railroad company constituted a single tract of land; and from the time when the defendant constructed its railroad up to the time of the institution of the present suit, the tracts now owned by the plaintiff were connected by a suitable wagon-way or crossing. The question involved in the present litigation is whether that crossing is a permissive one which the railroad company can close at its option or whether it is an easement of way the title to which is in the plaintiff and of which it cannot be deprived by any action of the railroad company. The trial of this issue resulted in a verdict in favor of the plaintiff.”

Obviously, the right of easement claimed by the complainant in its bill of complaint was determined by the jury in the action at law.

ARGUMENT.

POINT I.

The right of easement claimed by complainant in its bill of complaint having been established in an action at law, it was proper for the Court below to make a final decree in accordance with the prayer of the bill.

It is to be noted that the second count of the complaint (Case, p. 147) in the action at law sets forth all of the factual allegations of the bill (Case, pp. 5-14). The only difference is that the second count of the complaint at law does not plead the statutory obligation set forth in paragraph 8 of the bill, but instead thereof alleges (Case, p. 147), that:

“2. The said two tracts of land now owned and possessed by plaintiff, described in Paragraph 9 of the First Count have always at the same time been in the same common ownership since the acquisition by the defendant, The Morris & Essex Railroad Company, of the strip or tract of land described in Paragraph 4 of the First Count, and upon which said strip or tract of land it erected a railroad which is operated by defendant, The Delaware, Lackawanna & Western Railroad Company, as stated in Paragraph 6 of the First Count.

3. At the location or place described and designated in Paragraph 10 of the First Count a suitable wagon-way or crossing over defendants' railroad for the benefit of plaintiff and its predecessors in title existed for twenty years or more prior to 1915, and the right to said suitable wagon-way or crossing has continued from that time to date.”

Manifestly all of these allegations of this second count of the complaint at law must have been proven by the evidence at the trial, in order to justify the Supreme Court in discharging defendants' rule to show cause, and same, therefore, cannot now be questioned.

Appellants, however, contend in their Brief (p. 13) that the Court of Chancery erred in seeking the benefit of a suit at law to determine the right claimed by complainant, and that the Court of Chancery should have decided the question as to whether complainant was entitled to a right of easement.

How can appellants make such a contention, when this Court has already passed on this question adversely to appellants?

The right of easement sought to be established under the second count of the complaint in the action at law arose out of a statutory or charter obligation of the defendant, Morris & Essex Railroad Company, to provide and keep in repair a suitable wagon-way or crossing over its railroad so that the land-owner might pass to and from the intersected lands. This was the kind of easement or crossing set forth in the bill of complaint in the Court of Chancery, and the proofs offered by the plaintiff, Rockaway Rolling Mill, at the trial of the second count of the complaint in the action at law and controverted by the defendant railroad companies, were to establish that there had existed for more than twenty years prior to 1915,—in fact since the acquisition by defendant, Morris & Essex Railroad Company, of its railroad right of way,—a physical wagon-way or crossing which was maintained by the defendant railroad companies to permit plaintiff's predecessors in title to pass from one side of its lands to the other side thereof, intersected by the railroad.

In the case of *Rockaway Rolling Mill vs. D. L. & W. R. R. Co., et al.*, 143 Atl. (N. J.) 334, *supra*, the Chief Justice said:

“A large part of the argument submitted to us is devoted to a discussion of the question whether, by the affidavits submitted to the Vice Chancellor, a permanent easement or crossing over the defendants’ railroad was shown to exist in the complainant, or whether its right of crossing was merely permissive, subject to revocation at the will of the defendants. But this matter is not before us for determination, *the Vice Chancellor having very properly refused to decide it, considering that the relative rights of the parties in this respect should be tried out and determined in a court of law*, and that the injunction should issue pending the determination of the existence *vel non* of the complainant’s alleged easement. *That he was justified in refusing to pass upon the underlying question in the case is clear.* It is entirely settled that when the fundamental right on which the complainant prays equitable relief is the legal title to an easement in lands of the defendant, and that right is in substantial dispute, the establishment of the right at law is necessary to justify the interference of a court of equity.” (Italics ours.)

It is submitted that since the complainant, by decree of the Court of Chancery affirmed by this Court, was required to establish in a court of law the right of easement claimed by it, and having established that right of easement in a court of law, both of these questions are *res adjudicata*. The right of easement determined in the action at law being the same as claimed in the bill, the proof thereof establishes the allegations of the bill.

Therefore, there is no merit in the contention of appellants that the final decree of the Court of Chancery is not supported by proof of the allegations of the bill.

POINT II.

The decree of the Court below was made in conformity with established practice and according to law.

In the instant case, respondent, after obtaining its judgment at law determining its right to the easement claimed by it, petitioned the Court of Chancery on June 3rd, 1930, for further directions in accordance with the order of the Court of Chancery, affirmed by this Court. In this petition the respondent set out the record of the pleadings, trial, judgment, and the entire proceedings in the action at law, alleging that thereby had been determined and settled complainant's right of easement claimed by it in its bill of complaint, and praying that the cause be set down for further hearing (Case, pp. 88-94). An order to show cause based upon this petition was made by the Court of Chancery, returnable June 9th, 1930 (Case, pp. 95, 96). On the return of the order to show cause, the Court fixed June 11th, 1930, as the time for final hearing (Case, p. 103, ll. 11, 12). At the time so fixed, appellants filed an answer to the petition (Case, pp. 97-100) denying that the right of easement determined in the action at law was the same as claimed in the bill, and denying that complainant was entitled to have a summary disposition of the matter, and that counsel had been adequately paid and was not entitled to any further compensation, and that the action at law was not a part of the cause in Chancery, &c. The Court, after filing the answer, proceeded to hear the appellants and the respondent. The respondent offered in evidence (Case, p. 103, ll. 18-23) certified copy of the proceedings in the action at law (Case, pp. 106-160) by which respondent's

right of way had been established. The Vice-Chancellor, who heard the cause, then advised the final decree in which is recited the proceedings which lead to the decree of the court below.

The practice pursued is that laid down in *D. L. & W. R. R. Co. vs. Breakenridge*, 56 N. J. Eq. 595.

The Court of Chancery having followed the established practice in this cause, and having heard the cause on complainant's bill, affidavits, defendants' answer and answering affidavits, the interlocutory decree, the petition for further directions, the order to show cause, and answer thereto, the proof in open Court of the judgment and proceedings at law (appellants having offered no objections to their receipt in evidence), it is submitted that the final decree of the Court below is justified both in law and fact.

D. L. & W. R. R. Co. vs. Breakenridge,
supra.

The judgment in the action at law having determined the right of easement claimed by complainant in its bill, and the final decree of the Court below having so adjudged, the question raised by Point II of "Brief for Appellants" (p. 17) whether the Estile deed or the award was controlling on complainant's right of easement, is obviously without merit.

Furthermore, a complete answer to appellants' contention under this point is found in *Green vs. Morris & Essex R. R. Co.*, 12 N. J. Eq. 165, and *Perry vs. Penn. R. R. Co.*, 55 N. J. L. 178.

POINT III.

The award of counsel fee to complainant is justified both in law and fact.

Appellants contend, in effect, that when the Court of Chancery retained complainant's bill with leave to complainant to institute a suit at law against the defendants for a determination of the right of easement claimed by complainant, the Court of Chancery lost control of the cause pending the action at law.

The order of the Court below on this question was (Case, pp. 86, 87):

“That the bill in this cause be retained with liberty to the complainant on or before the 15th day of June, 1927, to institute a suit at law against the defendants for a determination of the right of easement claimed by it.

“That in case the complainant shall not on or before the 15th day of June, 1927, promptly institute such a suit at law and diligently prosecute the same to finality, the defendants may apply to this court for a dissolution of the injunction aforesaid and dismissal of the bill of complaint.”

The complainant instituted such suit at law, within the time limited, and diligently prosecuted same as required by the order of the Court of Chancery, and by the decree of the Court below complainant had established by the judgment in the action at law the right of easement claimed by it in its bill of complaint.

To say that the proceedings in the action at law and the judgment recovered therein are not a part of the cause in the Court of Chancery and under its control, when it was necessary to make proof of those proceedings and the judgment in order

to obtain the final decree establishing the right of easement of complainant, is contrary to the decisions of our Courts.

In *D., L. & W. R. R. Co. vs. Breakenridge*, *supra*, Vice-Chancellor Emery, speaking for the Court of Chancery, said, at pp. 596, 597:

“Complainant now applies on the petition for a final decree for injunction under the bill. The first question which arises on the application is one of practice, and relates to the proper method of bringing before this court for further proceedings the judgment in an action at law which has been directed, and the formal status of the cause in chancery when the judgment is obtained. Under the former English practice, where an action was directed upon the hearing, the cause in chancery was, at final hearing, usually directed to stand over until a day fixed in the order. In 2 Sm. Ch. Pr. (1st Am. Ed.) *90 *et seq.*, this earlier practice is given in detail. In *Rodgers v. Nowill*, 6 Hare 334, 338, the form of order was given. If the action had not been determined by the day fixed, the time might be extended on application. *Smith vs. Earl Effingham*, 10 Beav. 589, 596. When judgment had been entered in the action at law, then the practice was to apply by petition to set the cause down for further hearing, and the petition set out the proceedings in the action at law. For the purpose of bringing the cause again before the court of chancery, after the trial of the action at law, the formal proceeding was usually the same as when an issue at law was directed and the *postea* was returned into chancery, the cause in either form of proceeding being set down for further directions in chancery. 2 Smith Ch. Pr. 90, 91.

Following the analogy of this established practice in this proceeding, the petition (in the absence of a day fixed for hearing by the original order) should now be treated as applying for further directions, and the cause should be considered as now before me for

further hearing upon the original evidence and upon the petition, answer and affidavits.”

and, at p. 598:

“Defendants’ counsel contend that the judgment at law should be brought before the court by supplemental bill, in accordance with the general rule as to setting up matters occurring subsequent to the filing of the original bill. *But this principle is not applicable, as it seems to me, to the present case, where the action at law and its result are to be considered as simply one step taken in the conduct of the cause and for the purpose of proceeding to decree in the cause. The action at law is only the method of trial by which the issue as to the legal title originally contested in the bill and answer in the cause is finally settled for the purposes of the equitable relief to be asked thereon.*” (Italics ours.)

Manifestly, if the action at law and its results are simply one step taken in the conduct of the cause in the Court of Chancery, and for the purpose of proceeding to decree in that cause, counsel for complainant is entitled to be compensated for the services rendered by him in the action at law as a part of the proceedings taken in the conduct of the cause in the Court of Chancery.

The case of *Hitchcock vs. American Pipe & Constr. Co.*, 90 N. J. Eq. 576, cited in brief for appellants, is not in point. What was decided in that case was that:

The Court of Chancery of this state has no power to allow counsel fees, in a cause instituted in this state, for professional services rendered in a foreign jurisdiction in an independent litigation. The allowance must be for services rendered in a cause over which the Court making the allowance has jurisdiction.

It is, therefore, submitted that there is no merit to the contention of appellants that the award of counsel fee to complainant in the instant case was unjustified in law.

As to the amount of the allowance, appellants and the Court below knew that counsel for respondent here was counsel for complainant in the instant cause in the Court of Chancery and in the action at law (which was directed by the Court below as a step in that cause).

This litigation was compelled by the action of appellants in erecting a fence on each side of their railroad right of way at the point where the complainant's private road crossed it, completely blocking access to and egress from complainant's manufacturing plant. The bill of complaint was filed February 16th, 1927, and the final decree made July 3rd, 1930. The cause was litigated before Vice-Chancellor John J. Fallon on complainant's bill and affidavits, and defendants' answer and answering affidavits; before the Chancellor on proceedings by defendants to vacate the writ of injunction issued by the Court of Chancery; before this Court on appeal by defendants to reverse the order of the Court of Chancery retaining the bill and directing the suit at law and granting the preliminary mandatory injunction; before the New Jersey Supreme Court, Morris County, in the action brought to determine the right of easement claimed by complainant; before the New Jersey Supreme Court, on defendants' rule to show cause; before the Court of Chancery, on petition for further directions; and on final hearing of the cause.

The \$500.00 allowed as a counsel fee by the Court on the original hearing of the cause was only preliminary and not awarded as compensation for the services then rendered.

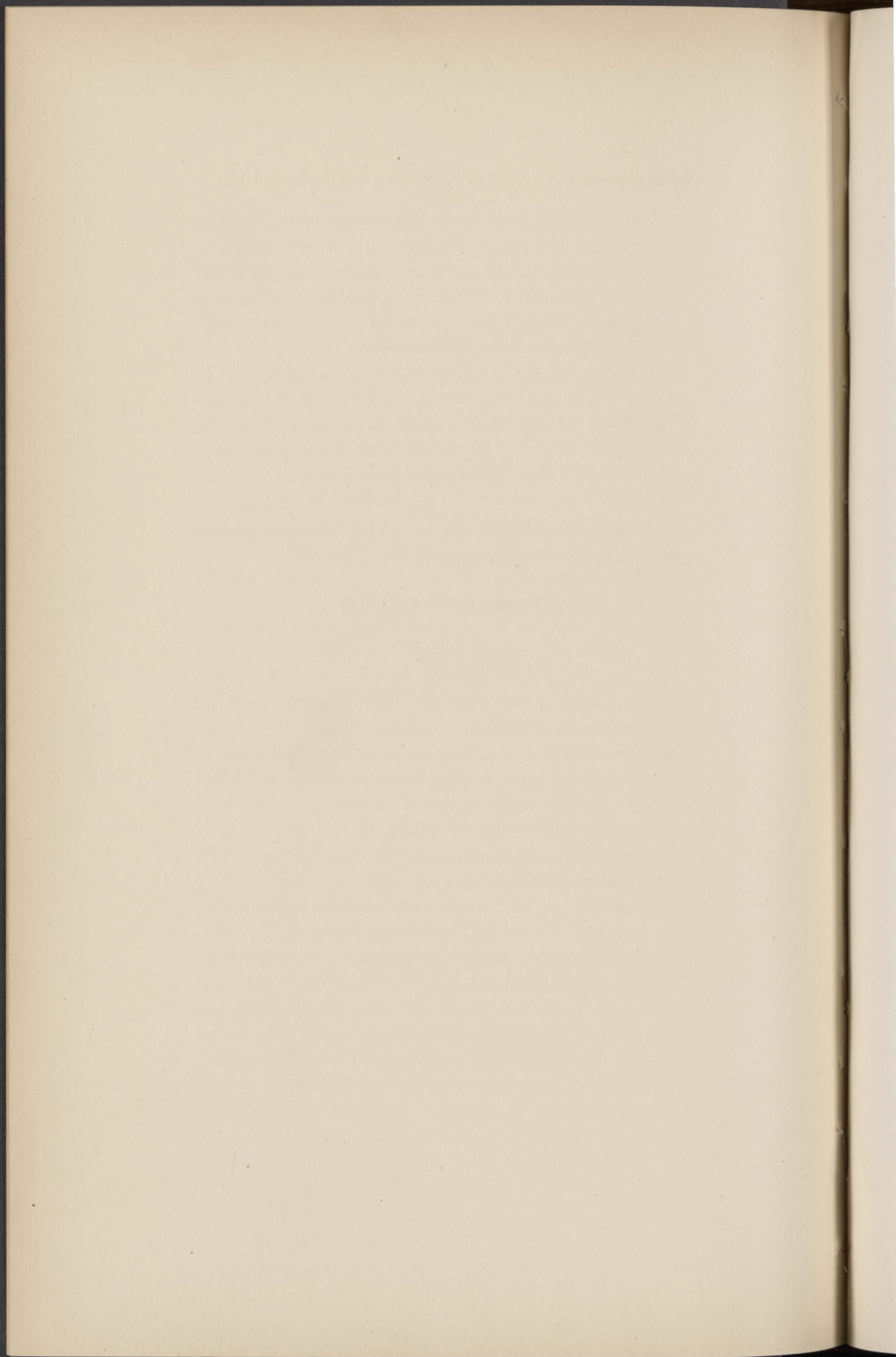
It is submitted that Vice-Chancellor Fallon, who heard the cause in the court below and was familiar with the importance of the litigation and character of the services rendered and the results achieved by counsel for complainant, is best qualified to judge of the value thereof.

In this cause the allowance of a counsel fee to complainant was discretionary with the Court below and, unless it is made to appear that the Court abused its discretion, the allowance made should have the approval of this Court.

Respondent, therefore, contends that the decree of the Court below should be affirmed.

Respectfully submitted,

EDWARD P. STOUT,
Solicitor for and of Counsel with
Respondent.



New Jersey Court of Errors and Appeals

Between

THE ROCKAWAY ROLLING MILL, a
Corporation,
Complainant-Respondent,

and

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY
AND THE MORRIS & ESSEX RAIL-
ROAD COMPANY,
Defendants-Appellants.

ON APPEAL FROM
COURT OF
CHANCERY.

BRIEF OF APPELLANTS.

Statement.

This is an appeal from the final decree of the Court of Chancery made on the 3rd day of July, 1930, ordering the issuance of a permanent mandatory injunction requiring the defendants-appellants to provide and keep in repair a suitable wagon-way or crossing over the defendants' railroad where it intersects complainant's lands in the Borough of Rockaway in the County of Morris and State of New Jersey, substantially as the same existed on or prior to February 1, 1927, so that the complainant may pass over the same as and in such manner as the nature of complainant's business and the proper use of its said lands may require; that the defendants-appellants, or either of them, immediately restore or keep in repair said wagon-way or crossing, and that they be enjoined and restrained from removing, de-

stroying, obstructing or in any way interfering with said wagon-way or crossing when so restored. Said decree further provided for the payment of the complainant's taxed costs on final hearing of the said suit, including a counsel fee of \$3500 which was thereby allowed as a reasonable counsel fee for the services of counsel for complainant in the cause. Appeal in the cause was promptly taken, said cause noticed for argument at the last term of this court, but not being reached was carried over to the present February, 1931, term of this court.

The opinion of the Court of Chancery on the issuance of temporary mandatory injunction is reported in 10 N. J. E. p. 192.

History of the Case.

On April 26, 1915, the International High Speed Steel Company applied to the appellant, The Delaware, Lackawanna and Western Railroad Company for permission to make a crossing of its tracks at grade on its Rockaway New Jersey Branch for teaming purposes into a plant which it was erecting along said branch. As a result of said application and subsequent negotiations, an agreement was entered into with the International High Speed Steel Company on May 3, 1915, as set forth in Schedule A (pp. 44-46). This agreement licensed and permitted the Steel Company to lay, construct, maintain and use a road across the Railroad Company's tracks at grade, the same to be constructed and maintained by the Steel Company at its own expense. On June 7, 1915, the crossing contemplated by the agreement was constructed and laid by the employees of the Steel Company, and it was maintained by said

Company until that Company ceased to do business and went into the hands of a receiver. A serious railroad accident having occurred at the crossing in September, 1922, the Railroad Company determined to eliminate the crossing provided for by said agreement, and revoked the license and permit given to the Steel Company, and on February 1, 1927, took up said crossing and effectually blocked it from subsequent use.

Subsequent to the insolvency of the International High Speed Steel Company, the complainant, The Rockaway Rolling Mill, advised the appellant, The Delaware, Lackawanna and Western Railroad Company, that it had purchased the plant of the International High Speed Steel Company, and requested that the Railroad Company protect said crossing into the plant of the former Steel Company by adequate crossing warnings, to which request the Railroad Company advised the complainant that the crossing in question was a licensed crossing granted by it under its agreement with the International High Speed Steel Company, and inasmuch as the Steel Company had gone out of business, unless the complainant would indemnify the Railroad Company against any accidents happening at said crossing it was the intention of the Railroad Company to eliminate the same. The complainant, after securing from the Railroad Company a copy of the license agreement, abandoned its activities to have said crossing protected, and on February 1, 1927, the Railroad Company eliminated said crossing as hereinbefore mentioned.

On February 16, 1927, the complainant filed its bill of complaint in the Court of Chancery requesting that Court to decree that the defendants provide and keep in repair a suitable wagon-way and crossing over the defendants' railroad so

that complainant may pass over the same, as and in such a manner as the nature of complainant's business and the proper use of its lands may reasonably require, and that a mandatory injunction issue out of the Court of Chancery compelling the defendants to immediately restore or provide and keep in repair a suitable wagon-way or crossing over said railroad for complainant.

In its complaint the complainant set forth that on September 22, 1846, complainant's predecessor in title, one Jabez L. Estile, was the owner in fee simple of certain property conveyed to him in 1820 containing some 31 acres, more or less; that The Morris and Essex Railroad Company, one of the appellants, was a railroad corporation incorporated by an Act of the Legislature of the State of New Jersey in 1835, and that The Delaware, Lackawanna and Western Railroad Company, the other defendant and appellant, was a railroad corporation of the State of Pennsylvania; that by section 7 of the Act of incorporation of The Morris and Essex Railroad Company it was empowered to acquire lands by assessment for railroad purposes, where it could not agree with the owner as to the price thereof; that on or about September 22, 1846, The Morris and Essex Railroad Company, by virtue of the 7th section of its act of incorporation took proceedings to acquire by assessment the right and privilege of entering upon a certain strip or tract of land of the said Estile, and to take possession of, hold, have, use and occupy the same for railroad purposes, and that Commissioners were duly appointed to assess the value of the lands so taken and Estile's damage, and that said Commissioners assessed the value of the tract of land so taken, as well as his damages by the occupancy of his lands by the Railroad.

Company, in the amount of \$25, as shown by the award of said Commissioners (pp. 19-22); that thereafter, on February 25, 1847, said Estile conveyed to the defendant, The Morris and Essex Railroad Company, a strip of land, which the complainant claimed was identical with the land taken under the condemnation proceedings referred to, but which the learned Vice Chancellor, who heard said cause, showed a variance in the description of the land acquired through the condemnation proceeding and that acquired by the deed (p. 72, line 11, *et seq.*).

The difference between the award and the deed is apparent from an examination of the same, sufficient extracts of which are herewith set forth:

AWARD OF 1846.

“Beginning at Selee Tompkins’ east line and pursuing a line of stakes north $35^{\circ} 45'$ east 11 chains to Joseph Jackson’s west line embracing one and one-half rods on each side of said line of stakes
* * * ”

DEED OF 1847.

“Beginning in the northeasterly line of lands owned by Selee Tompkins where the survey of railroad crosses the same and running thence in a northeasterly direction as the stakes are set for said survey to the line of lands in possession of Joseph Jackson embracing such width as may be necessary for the construction and maintenance of railroad not exceeding two rods in width on each side of the line of stakes set for the middle of said road
* * * ”

Complainant further set out in its complaint reference to the validating act of the Legislature

of New Jersey confirming the lease and contract by which The Morris and Essex Railroad Company leased their road to The Delaware, Lackawanna and Western Railroad Company, approved by the Legislature on Feb. 9, 1869, wherein The Delaware, Lackawanna and Western Railroad Company was granted the right to exercise all the rights, powers and privileges of The Morris and Essex Railroad Company and obligated itself to do and perform all acts and things which The Morris and Essex Railroad Company as owners of said property was obliged, required or bound to do. Reference in the bill was made to the 9th section of the act of incorporation of The Morris and Essex Railroad Company which provided that where its railroad should intersect any farm or lands of any individual, it should provide and keep in repair suitable wagon-ways over or under its railroad so that said individual may pass from one part to the other of his lands so intersected by the railroad; and further reference was made to a similar duty imposed upon every railroad company by section 26 of an Act Concerning Railroads (P. L. 1903, p. 659).

The complainant then set out that by mesne conveyances tracts of land which were formerly owned by the said Estile were conveyed to the complainant by deed on June 2, 1926, and that said conveyance was made subject to such rights, if any, which the Morris and Essex Railroad Company and its lessee may have in the above described lands. It further set out that at the time and prior to the conveyance to the complainant there were, located on one of said tracts of land several large factory buildings constituting a manufacturing plant, which the complainant was repairing and putting in shape for manufactur-

ing purposes, and that up until February 1, 1927, access to said manufacturing plant had been had by a wagon-road over another tract of its land and across said railroad; *and that because the two tracts of land had always at the same time been in the same common ownership since the acquisition by the defendant, The Morris and Essex Railroad Company, of the strip of land separating complainant's property, that complainant had become seized and possessed of the right to a suitable wagon-way or crossing over the defendants' railroad, which they or either of them were bound to provide and keep in repair; and that on account of the action of The Delaware, Lackawanna and Western Railroad Company in removing said crossing on February 1, 1927, the complainant had been deprived of its access to its manufacturing plant, and relief was sought by its bill of complaint as hereinabove related.*

The case was heard by the Honorable John J. Fallon, Vice Chancellor, on bill and affidavits of the complainant, and answer and answering affidavits of the defendants. The defendants' answer left the complainant to its proof as to common ownership, admitted the making of the award by the commissioners in 1846 and the acquisition of certain property from Estile, but denied that the property acquired by the Estile deed was identical with the property awarded by the commissioners; it further set forth that the crossing in question was installed by the International High Speed Steel Company as a result of its application hereinbefore described; and aside from the crossing provided by said Steel Company agreement the answer denied that there ever had been any crossing or roadway over defendants' tract or right of way, connecting the properties separated by said right of way.

As a result of the preliminary hearing before the Vice Chancellor, he ordered the bill to be retained, gave the complainant the privilege of instituting a suit at law against the defendants for the determination of the right of easement claimed, and ordered the issuance of a preliminary mandatory injunction requiring the defendants to immediately restore or provide and keep in repair pending such suit a suitable wagon-way or crossing over their railroad, substantially as the same existed on and prior to February 1, 1927.

Pursuant to the privilege given the plaintiff of instituting a suit at law against the defendants for the determination of the easement claimed, a suit at law was started within the time permitted by the preliminary injunction by the complainant against the defendants by the issuance and service of a summons in the Supreme Court of Morris Circuit on June 10, 1927, by Messrs. King & Vogt, attorneys (p. 106). The complaint in which cause consisting of one count (pp. 106-116) being substantially the same as the complainant's original bill of complaint in the Court of Chancery, but instead of claiming or praying for the equitable features set out in its Chancery complaint, it sounded in damages. The defendants' answer to the law complaint (pp. 116-120) was substantially of the same character as its answer to the Chancery complaint with the exception of setting up three additional separate defenses.

On the trial of the law case, however, the plaintiff sought permission and was accorded the right to amend its complaint and filed an amended complaint of two counts (pp. 138-147), the first count of which amended complaint was identical with the first count in the original law complaint. *But the second count, while incorporating the major features of the first count, set up a different*

theory of the complainant's right to the roadway in question, basing it on the existence by prescription for twenty years or more of the wagon-way or crossing involved in the present litigation. On the trial of said cause, which took place on April 5, 1928, the trial court considered the issues raised by the first count to be matters of law and reserved its opinion thereon (p. 123, ll. 24, etc.), and submitted the cause to the jury on the second count. The jury thereupon rendered a verdict on the second count as follows:

“We find as a matter of fact that a suitable wagon-way or crossing over defendants' railroad for the benefit of plaintiff and its predecessors in title existed for twenty years or more prior to 1915 and find a verdict in favor of the plaintiff, The Rockaway Rolling Mill, against the defendant with six cents damages” (p. 123, ll. 31, etc.).

Judgment was entered in the New Jersey Supreme Court on the postea in favor of the complainant and against the defendants for the sum of six cents damages without costs, on April 1, 1930, as of April 10, 1928. Subsequently a rule to show cause was allowed by the Supreme Court and the same was discharged after argument had thereon (p. 125), and judgment final duly entered.

On June 3, 1930, the complainant filed a petition in the Court of Chancery (pp. 88-94) praying that the cause be brought to a hearing for further directions in accordance with the interlocutory decree of the Court of Chancery and for the relief prayed for by the complainant in its bill of complaint, and that counsel for the complainant be allowed a reasonable counsel fee in said cause.

Upon said petition, an order to show cause was allowed by the Court of Chancery why a hearing should not be had for further directions in accordance with the interlocutory decree or order of the Court of Chancery dated May 31, 1927, why complainant should not be granted the relief prayed for in its bill of complaint and why counsel for complainant should not be allowed a reasonable counsel fee for his services in said cause. The hearing on said rule, returnable June 9, 1930, was adjourned by the Vice-Chancellor to June 11, 1930, at which time the defendants-appellants filed an answer to said petition, upon which said order to show cause was obtained (pp. 97-100), in which answer the defendants-appellants denied that the cause tried at law in the Supreme Court was the action at law the complainant was authorized to bring by the interlocutory decree or order of the Court of Chancery referred to in the complainant's petition, and further denied that it was the same suit, with the same issues, as permitted by the order of the Court of Chancery referred to. In the defendants-appellants' answer to said petition for instructions, it further objected to the allowance of any other or further counsel fee to the complainant-respondent's counsel, for the reason that the complainant's counsel had been adequately paid for his services in the main proceeding in the Court of Chancery; that the complainant was adequately able to pay its counsel for the conduct of so much of the litigation in said matter as the complainant's counsel participated in, because complainant's counsel rendered no actual services in the trial of said issue at law on the trial of the Supreme Court action and because such services as the complainant's counsel had rendered in said action at law were not such services as were contemplated by

the order of the Court of Chancery permitting the complainant to bring an action at law against the defendants-appellants.

Inasmuch as the order to show cause merely called upon the defendants-appellants to show cause why a hearing should not be had for further directions in accordance with the interlocutory decree of the Court of Chancery of May 31, 1927, the defendants-appellants prayed that a due and proper hearing of said cause be had before the Vice-Chancellor. This hearing the defendants-appellants claim was not had for the reason that the Vice-Chancellor adjourned said hearing on the return of the order to show cause on June 9, 1930, to his Chambers on June 11, 1930, at which time he proceeded to accept the certified copy of the proceedings in the Supreme Court (pp. 106-159), the defendants' answer to the petition upon which the order to show cause was obtained and then proceeded upon those documents alone to make the determination embodied in the final decree without permitting the defendants-appellants the right and privilege to place before the Court of Chancery adequate evidence that the counsel for the complainant had been adequately remunerated for his services in said cause, it being a fact that the Court of Chancery theretofore had allowed the counsel for the complainant \$500 for his services at the time of the signing of the interlocutory order made by it retaining said cause in the Court of Chancery, and the issuance of a preliminary mandatory injunction (p. 87).

Questions Involved.

The questions presented in this appeal and pressed upon this argument involve the following matters:

(a) That said final decree is erroneous and illegal in that it determined and decreed matters and things not alleged or set up by the complainant's bill of complaint filed in the Court of Chancery.

(Reason 3, p. 4, ll. 1, etc.)

(b) That said final decree was erroneous and without justification either in law or fact.

(Reason 4, p. 4, ll. 5, etc.)

(c) That said final decree was erroneous in the making of an allowance to the complainant or its counsel of an additional counsel fee in said cause, and further that the counsel fee even if allowable was excessive and greatly disproportionate to the labor involved in said matter and bore no fair relation to the services of the complainant's counsel actually rendered in said cause.

(Reason 5, p. 4, ll. 8, etc.; Reason 7, p. 4, ll. 25, etc.).

ARGUMENT.

POINT I.

The Final Decree of the Court of Chancery Is Erroneous and Illegal in That It Determines Matters and Things Not Alleged or Set Up by the Complainant's Bill of Complaint Filed in the Cause.

The crux of the issues presented by the bill of complaint and answer filed in the Court of Chancery, irrespective of the use or non-use of the crossing in question, resolved itself in and about the construction and effect of the award of Commissioners (pp. 19-22 and the Estile Deed, pp. 23-25), the difference between the award and the

deed being apparent from an examination of them, sufficient extracts of which are herewith set forth:

AWARD OF 1846.

“Beginning at Selee Tompkins’ east line and pursuing a line of stakes north $35^{\circ} 45'$ east 11 chains to Joseph Jackson’s west line embracing one and one-half rods on each side of said line of stakes
* * * .”

DEED OF 1847.

“Beginning in the northeasterly line of lands owned by Selee Tompkins where the survey of railroad crosses the same and running thence in a northeasterly direction as the stakes are set for said survey to the line of lands in possession of Joseph Jackson embracing such width as may be necessary for the construction and maintenance of railroad not exceeding two rods in width on each side of the line of stakes set for the middle of said road
* * * .”

If the award was controlling, the plaintiff was entitled to a final decree.

If the Estile Deed was controlling, the defendants should have prevailed, and this irrespective of the use or non-use of the crossing in question prior to the filing of complainant-respondent’s bill of complaint.

This primarily presented a question not necessitating a jury’s determination and a suit at law. In this the Court of Chancery erred in seeking the benefit of a suit at law to determine the right claimed by the complainant.

The Court of Chancery, however, having determined to retain the complainant-respondent's bill of complaint, and at the same time permit the institution of a suit at law against the defendants-appellants for a determination of the right of easement claimed by it, the appellants urge *that no suit at law so instituted by the complainant could be beneficial to it, in furtherance of its Chancery suit which was not instituted along the identical lines and theory of its bill of complaint as filed in the Court of Chancery.*

This the complainant inferentially conceded by instituting a suit at law wherein its complaint was almost identical with the bill of complaint filed in the Court of Chancery (see original bill of complaint in law action, pp. 107-116).

Subsequently, however, the complainant, not being satisfied with its original law complaint, completely changed its theory as to its rights by amending its initial complaint and filing an amended complaint which contained an additional second count (p. 147), based solely on a prescription as distinguished from the statutory right of crossing over the appellants' railroad.

That the issue involved in the original complaint filed in the Court of Chancery and used almost verbatim as the first count in the complainant's suit at law was not tried in the law action is clear from an examination of the postea in the law action, wherein it appears that the trial Judge reports and determines that

“the court, having considered the issues raised by the first count to be matters of law, reserved its opinion thereon, and now being of the opinion that decision thereon is unnecessary inasmuch as the jury rendered a verdict on the second count” (p. 123, ll. 24, etc.).

Inasmuch as the Court of Chancery did not retain the control of the cause but merely permitted the complainant-respondent to institute a suit proceed in a court of law, no return was made by the court of law to the Court of Chancery, but the record of the law proceedings were offered in evidence before the Vice-Chancellor prior to the making of the final decree (p. 103, ll. 20, etc.), whereupon the Court of Chancery proceeded with the making of its final decree, *not on the theory of the judgment obtained by the complainant-respondent in its action at law, but on the theory of the original complaint filed in the Court of Chancery*, because if the complainant-respondent was but entitled to have its right to the easement established in the law action protected by the Court of Chancery, the Court of Chancery would have indicated the same in its final decree, but an examination of the final decree shows that what the Court of Chancery did determine was

“that complainant is entitled to the relief prayed for in its bill of complaint, that the defendants, the Delaware Lackawanna & Western Railroad Company, a corporation, and The Morris & Essex Company, a corporation, and each of them, be and they are hereby required to provide and keep in repair a suitable wagon-way or crossing over the defendants' railroad where it intersects complainant's lands in the Borough of Rockaway, County of Morris and State of New Jersey, so that complainant may use the same in such manner as the nature of complainant's business and the proper use of its said lands may reasonably require, that a permanent mandatory injunction issue out of this court compelling defendants or either of them to immediately restore or provide and keep in repair a suitable wagon-way or crossing over said railroad for complainant, its successors

and assigns, that the defendants, their respective officers, directors, agents, servants and employees be enjoined and restrained by said permanent mandatory injunction from removing, destroying, destructing, obstructing or in any way interfering with such wagon-way or crossing when so restored or provided as aforesaid" (p. 104, ll. 10, etc.).

The foregoing right so determined by the Court of Chancery being the identical right claimed by complainant-respondent by virtue of the 9th Section of the Act incorporating the defendant, The Morris & Essex Railroad Company (p. 9, ll. 23, etc.).

Having claimed to base its determinations upon the results of the law action which were in no way or sense within the terms of the complainant-respondent's bill of complaint in Chancery, the final decree is manifestly erroneous and should be set aside.

It is elementary that the complainant can only recover upon the case made by his bill. The *allegata* and *probata* must correspond.

Parson v. Heston, 11 N. J. E. 155,

or to put it in the words of other cases, a complainant cannot make one case by his bill and another by his proofs and still have a decree.

L. V. R. Co. & M. C. & B. Co. v. McFarland, et al., 30 N. J. E. 180,

or, as said in *Andrews v. Farnham*, a complainant cannot make one case by his bill, and having failed to prove it, abandon it and recover upon a different one established by the evidence.

10 N. J. E. 91.

POINT II.

The Final Decree Is Erroneous in That It Was Without Justification Either in Law or Fact.

If the final decree entered by the Court of Chancery went beyond the scope of the law court's determination as urged under Point I, it is manifestly erroneous. If it is now urged or can be said that the final decree was within the jurisdiction of the Court of Chancery to make under the original proceeding, to wit, the bill and affidavits and the answer and answering affidavits, it is erroneous, and this for the following reasons:

An examination of the award of the commissioners to the appellant, The Morris and Essex Railroad Company (pp. 19-22) of Estile's land for the sum of \$25 shows that they did not award to that company the same property or upon the same conditions as the Railroad Company acquired from Estile in the deed of 1847 for the consideration of \$100.

AWARD OF 1846.

“Beginning at Selee Tompkins' east line and pursuing a line of stakes north 35° 45' east 11 chains to Joseph Jackson's west line embracing one and one-half rods on each side of said line of stakes
* * * ”

DEED OF 1847.

“Beginning in the northeasterly line of lands owned by Selee Tompkins where the survey of railroad crosses the same and running thence in a northeasterly direction as the stakes are set for said survey to the line of lands in possession of Joseph Jackson embracing such width as may be necessary for the construction and

DEED OF 1847.

maintenance of railroad
not exceeding two rods
in width on each side of
the line of stakes set for
the middle of said road
* * * ”

The deed expressly requires the Railroad Company at the time of making its road to construct and build good and sufficient cattle guards where the road enters upon and leaves said Estile's land, not exceeding two such cattle guards in number, and provides that such guards shall be kept in good form (p. 24, line 4, etc.). This condition nowhere appears in the award of the commissioners (pp. 19-22).

This situation, then, presents the following question:

Did the condemnation proceeding award in 1846 exhaust Jacob L. Estile's power to execute the deed of 1847?

To this question the appellants respectfully contend that the answer should be that the condemnation proceeding and award of 1846 did not exhaust Estile's power to execute the deed of 1847, and that for two reasons: The first is apparent by an examination of the award and the deed itself, it being readily observable from such examination that the deed of 1847 granted more in width to The Morris and Essex Railroad Company for its right of way than did the award. The complainant has signally failed to establish that the land acquired by the Railroad Company by said deed, over and above that purported to be acquired by it by the condemnation proceeding, did not in fact form a boundary on both sides of

the right of way purported to be acquired by the condemnation award, and thereby make the deed the controlling factor in the determination of the obligations of the Railroad Company.

The other reason may well be likened to the reasoning set forth by our Court of Errors and Appeals in *Meeks vs. Bickford*, 125 Atl. 15, where lands were conveyed by bargain and sale deeds and later by the same grantor again conveyed by a quitclaim deed. Justice Kalisch, speaking for the Court, there said:

“For it is only with the aid of a court of equity in a course to accomplish a just and equitable result that the intention of the releasor, coupled with an interest in the property, for which a valuable consideration has been paid, that that court will give to a quitclaim the effect of a deed of bargain and sale.

“With the indisputable facts that Juliet Smith had conveyed all her right, title and interest to and in the property of the complainant, and that when she made and executed the quitclaim deed to defendant for the same premises she had no more interest in the same than an utter stranger, it is incomprehensible how it can be said, in the absence of any proof, with any show of reason, that it was her intention to convey to the defendant property which she had previously conveyed to the plaintiff. For if it was the intention of Juliet Smith to convey the same premises to the defendant which she had previously conveyed to the plaintiff, she was guilty of fraudulent conduct. The court will not presume fraud. Fraud must be proven. The making of the release is consistent with the notion that a representation might have been made to Mrs. Smith, that she had an interest in the property which she had not disposed of, and hence the making of a quitclaim deed would be quite natural.”

Nowhere in the complainant's bill of complaint or its affidavits has there been any suggestion of fraudulent conduct on the part of Jabez L. Estile in conveying by deed the property covered by the same, and when one takes into consideration from an examination of said deed that it was for a greater monetary consideration that he made the deed in question and that he conveyed a greater or larger tract of land (see parallel column reference to quantity of land conveyed, *supra*), it becomes immediately apparent that the Estile deed of 1847 governs the instant case.

If the appellants' contention is correct, that the Estile deed of 1847 governs the instant case, the determinative question of law regarding the case as presented by the bill of complaint then resolves itself into the inquiry as to whether the Estile deed of 1847 obligated The Morris and Essex Railroad Company and its lessee, The Delaware, Lackawanna and Western Railroad Company, to provide a crossing such as contemplated by section 9 of its charter. An examination of the deed discloses that there were no conditions imposed upon The Morris and Essex Railroad Company in said deed, with the exception therein contained, as follows:

“This deed is upon the condition that said railroad company shall at the time of making said road, construct and build good and sufficient cattle-guards where the said road enters upon and leaves said Estile's land not exceeding two such cattle-guards in number and shall keep such cattle-guards in good form. The said Estile to fence said road at his own expense” (p. 2, 4, l. 4 *et seq.*).

This condition must be conceded as having no bearing on the question of the crossing sought by the complainant-respondent; and while the appel-

lants also concede that said condition has no relevancy to the matter of the crossing in question, it is urged that it has a bearing on the issues involved, when coupled with the habendum clause of the deed of 1847, which reads:

“To have and to hold the said tract of land and premises unto the said Morris & Essex Railroad Company, and to its successors and assigns forever, for the purpose above mentioned in the Act of incorporation and the several supplements thereto” (p. 2, 4, l. 33 *et seq.*).

The condition becomes extremely pertinent, for as said by Vice Chancellor Van Fleet in *Havens vs. Seashore Land Company*, 47 N. J. E. 365, at 371:

“When the granting clause of a deed is silent as to the estate intended to be conveyed, resort may be had to the habendum to ascertain the intention of the grantor in that regard. It cannot be used either to enlarge or diminish the estate specifically defined in the granting clause for if it is repugnant to that clause it is void. But if that clause is either silent or ambiguous then the habendum becomes the standard by which the estate granted must be measured. The Chief Justice speaking for the Court of Errors and Appeals in *Staffordville Gravel Co. v. Newell*, November Term, 1889, said: ‘The well settled rule is that if the granting part of the conveyance does not by clear and definite terms conclude the question, this clause (the habendum) whose office is to define the extent of the ownership granted may be resorted to. It may be used to explain but not to vary or control the premises.’ ”

One searches the deed in vain to find an obligation on the part of the Railroad Company to fur-

nish the common owner of the land adjacent to its right of way with anything in the nature of the crossing contended for by the respondent. Complainant-respondent is driven to its final alternative of returning to its claims in the bill of complaint that, irrespective of the fact that the Railroad Company obtained the property involved by deed or agreement from Estile, nevertheless it is still subject to provide and keep in repair suitable wagon-ways over or under its railroad as provided by the 9th section of its Act of incorporation. This contention we feel is without merit, because this Court has approved, in the case of *Marino v. Central R. R. Co.*, 69 N. J. L. 628, the doctrine laid down in *Brearley v. Delaware & Raritan Canal Co.*, Spenc. 236. In the Marino case the Court said (p. 631):

“In *Brearley v. Delaware & Raritan Canal Co.*, Spenc. 236, a clause in the charter of that corporation was under consideration, and the Supreme Court held that the duty imposed by the act was not due to the owner of lands who had conveyed to the company a strip of land intersecting his farm for the purpose of constructing the Canal.”

and at page 632:

“Therefore, a grantee of a part of such lands lying wholly on one side of the intersecting railroad does not fall within the provisions of section 9 of the act above cited. The right reserved the duty imposed by that section is only in favor of the person who owned the lands intersected by the railroad when the railroad right was acquired by condemnation or his grantees of the whole or a portion of such lands still intersected by the railroad.”

The Brearley case, *supra*, we believe, lays down the rule of law which should govern the instant case, when it says:

“The liability of the defendants in this respect is to be decided upon the contract between the parties without reference to their charter of incorporation. The plaintiff sold the land for the express purpose of making a canal thereon. There is no condition or reservation in the deed, nor is there any covenant on the part of the defendants that they will build a bridge or do any other act for the convenience of the plaintiff in passing over his farm” (pp. 237-238).

“The liability of the defendants in this respect depends, not upon the provisions of their act of incorporation, but upon the contract between the parties, and for that reason their right to enter upon the land and dig their canal is founded upon contract and not upon statute” (p. 238).

Appellants do not doubt that much stress will be laid by respondents upon the case of *Green v. Morris & Essex R. R. Co.*, 12 N. J. E. 165, wherein the Court of Chancery, construing a rather similar deed as involved in the instant case with respect to its charter obligations, said (p. 173):

“The deed confines the company to the same use of the land as the act confines them under the assessment. The language in the deed is an exact copy of the language of the act.”

But when the Green case was before your Honorable Court, it was said, with respect to the construction placed by the Court of Chancery upon said deed (50 N. J. E. 475):

“The point is not directly before the Court nor is it needful to express an opinion upon it in order to give the complainant relief.”

Speaking again in reference to the Green case, *supra*, your Honorable Court has said, in the case of *Pipe Line Co. vs. D., L. & W. R. R. Co.*, 62 N. J. L. 254, with respect to the remarks of the Chancellor in the Court of Chancery opinion, 12 N. J. E. 165, as follows:

“If the remarks of the Chancellor are to be taken as a judicial determination that a conveyance by deed will not affect charter obligations which would subsist where premises were taken by condemnation, such a construction was contrary to the decision of the Supreme Court in *Brearley v. Delaware & Raritan Canal Co.*, Spenc. 236, and was overruled in *Perry v. Pennsylvania R. R. Co.*, 26 Vroom. 178.”

Finally, with respect to the *Brearley* case, the observation made by Justice Dupue in 1893 in *Perry v. Pennsylvania R. R. Co.*, 55 N. J. L. 178, we feel is strictly apropos, for therein he said (p. 186):

“*Brearley v. Delaware & Raritan Canal Co.* was the construction of the charter of this company. It was decided in 1843, and its soundness has never been denied or doubted. For nearly half a century the profession has acted upon and the public has acquiesced in that decision. Titles have been made and taken relying upon the rule established in that case as a rule of property. If the decision be unsound, which I am far from conceding, the case has stood unimpeached too long to be drawn under discussion at this late day.”

In conclusion we would but add as a pertinent controlling observation, what your Honorable Court said in the case of *Spear v. Erie Railroad Co.*, 68 N. J. E. 615, at 618:

“Even if the charter provisions had been in the usual form at that date in railroad charters, it would have been competent for the owner of the land to agree with the railroad company as to the method of the crossing, and where a deed for land is made embodying such an agreement, it is to the deed we must look for the obligations of the parties.”

POINT III.

The Counsel Fee Awarded Complainant Was Unjustified Both in Law and Fact.

An examination of the record shows that the preliminary mandatory injunction ordered that the complainant-respondent's bill be retained with liberty to the complainant to institute a suit at law against the defendants for a determination of the right of easement claimed by it (p. 86, ll. 24, etc.). The distinction in practice must here be noted between an issue framed by the Court of Chancery and a direction by the same court entitling the complainant to bring an action at law upon a right claimed, for in the former the proceedings are at all times under the control of the Court of Chancery, the pleadings in the law court there being a matter of convenience. In those cases where the Court of Chancery retains the control of the cause, the issues are sometimes submitted in writing to the jury for their answer, and when that answer is given, the judge before whom the issues are tried returns the *postea* into the Court of Chancery together with a statement of the trial. No judgment is given thereon and all objections to the trial must be still made in the Court of Chancery, and that court is not bound by the result of the trial at law, and may, if it sees

fit, treat such a verdict as a nullity. However, where the court directs that an action at law may be taken, such as was the situation in the instant case, that action must be prosecuted in compliance with the practice and proceedings in actions at law, *and the case at law is not one over which the Court of Chancery has or retains jurisdiction.*

In the petition of the complainant for further instructions and hearing prior to the entry of the final decree, complainant seeks counsel fee for his services in the law action, services in a court of distinct and separate jurisdiction, and the situation in allowing such a counsel fee by the Court of Chancery to the counsel of the complainant is not unlike that before this court in the case of *Hitchcock vs. American Pipe & Construction Co.*, 90 N. J. L. 576, where this court said:

“The Court of Chancery of this state has no power to allow counsel fee in a cause instituted in this state for professional services rendered in a foreign jurisdiction in an independent litigation. The allowance must be for services rendered in a cause over which the court making the allowance had jurisdiction.”

Justice Bergen, speaking for this court with respect to a counsel fee allowed by the Court of Chancery for services rendered in the federal courts of New Jersey in the growing out of the identical proceedings before the Court of Chancery, there said (p. 579):

“The services were rendered in another and foreign jurisdiction over whose procedure he had not the slightest control and the allowance of counsel fee in such a case is not sanctioned by any statute or rule prevailing in this state.”

Such allowance, this court stated, was a clear abuse of judicial discretion and amounted to a judicial sequestration of the property of a litigant.

From an examination of the final decree allowing the complainant's counsel \$3500 it is impossible to ascertain how much of said counsel fee was allowed complainant's counsel for his alleged services in the action at law.

One finds from an examination of the state of case that the attorneys for the complainant in the action at law were Messrs. King & Vogt, not counsel for the complainant (pp. 106, 116, 122, 124, 125, 136, 137, 147, 155), although later counsel for complainant was substituted (p. 148).

Bearing in mind that counsel for complainant was allowed a counsel fee of \$500 at the time the preliminary mandatory injunction was issued (p. 87, ll. 13, etc.), *the only other distinctive services at all rendered while the cause remained under the control of the Court of Chancery were those rendered by him in the proceedings to vacate the preliminary injunction before the Chancellor and his services in this court on the appeal from the interlocutory decree of the Court of Chancery and those in obtaining the final decree.* Nowhere in the complainant's petition for further instructions can one find one scintilla of proof as to the actual time taken by complainant's counsel in that portion of the handling of the cause for which in the final decree he was allowed \$3500. Nowhere in said petition or the case itself is there any evidence or any testimony to support the determination by the Court of Chancery that the services of the counsel for the complainant-respondent bore any relation to the fee of \$3500 allowed by the Court of Chancery, and inasmuch as it uncontradictedly appears that the complainant was ade-

quately able to pay its counsel for the conduct of the litigation in question, the allowance by the Court of Chancery in the final decree of \$3500 appears to the appellants as much of a judicial sequestration as did the allowance to the counsel in the case of *Hitchcock vs. American Pipe & Construction Company*, 90 N. J. Eq. 576, above referred to.

CONCLUSION.

The defendants-appellants, therefore, pray, for the reasons hereinbefore set forth, that the decree of the Court of Chancery may be, for the reasons urged, set aside and for nothing holden.

Respectfully submitted,

FREDERIC B. SCOTT,

Solicitor for and of counsel
with appellants.



quately able to pay its counsel for the conduct of the litigation in question, the allowance by the Court of Chancery in the final decree of \$3300 appears to the appellants as much of a judicial acquiescence as did the allowance to the counsel in the case of *Hatchcock vs. American Pipe & Construction Company*, 90 N. J. Eq. 576, above referred to.

CONCLUSION.

The defendants-appellants, therefore, pray for the reasons hereinbefore set forth, that the decree of the Court of Chancery may be, for the reasons urged, set aside and for nothing holden.

Respectfully submitted,

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