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Notice of Appeal.

Notice of Appeal.

Filed February 20, 1919.

New Jersey Supreme Court

10

MORRIS COUNTY.

EDNA DICKINSON,

Plaintiff-Appellant,

vs.

DELAWARE, LACKAWANNA & WESTERN RAIL-
ROAD COMPANY,

Defendant-Respondent.

Action at Law.

Notice of Appeal.

20

To Frederic B. Scott, Esq., Attorney for Defendant-Respondent,
or to whom it may concern:

TAKE NOTICE that the plaintiff, Edna Dickinson, appeals to the
Court of Errors and Appeals from the whole of the judgment
entered in this cause.

Yours, etc.,

LUM, TAMBLYN & COLYER,

Attorneys for Plaintiff-Appellant.

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Grounds of Appeal.

New Jersey Court of Errors and Appeals

Grounds of Appeal.

Filed February 21, 1919.

EDNA DICKINSON,

Plaintiff-Appellant,

vs.

DELAWARE, LACKAWANNA & WESTERN RAIL-
ROAD COMPANY,

Defendant-Respondent.

Action at Law.

*Grounds of
Appeal.*

To Frederic B. Scott, Esq., Attorney for the defendant-respondent, or to whom it may concern:

TAKE NOTICE, that the following are grounds of appeal which the plaintiff-appellant hereby assigns and upon which she will rely at the hearing.

1. Because the Court directed the jury to render a verdict for compensatory damages.

2. Because the Court refused to submit the question of punitive damages to the jury.

3. Because the Court ruled "The jury cannot assess punitive damages and all evidence on that is objectionable."

4. Because the Court refused to admit in evidence the following:

Plaintiff's offer to prove facts from which she would be entitled to punitive damages. To show that the embankment placed by the defendant was unlawful, being in the public road over which the public, including the plaintiff, had the right to travel; that this had been determined by previous judgments.

Judgment entered May 16th, 1914, between the parties (p. 10, l. 20). P. 1 for identification.

Judgment before Judge Speer entered May 10th, 1916 (p. 10, l. 30). P. 2 for identification.

Grounds of Appeal.

Letter from the attorney of the plaintiff to the defendant dated October 1st, 1915 (p. 10, l. 35). P. 3 for identification.

Letter same parties dated October 26th, 1915 (p. 10, l. 40). P. 4 for identification.

Letter same parties dated November 11th, 1915 (p. 11, l. 8). P. 5 for identification.

Letter same parties dated May 18th, 1916 (p. 11, l. 12). P. 6 for identification. 10

Letter from the counsel for Edna Dickinson to Harold S. Vanderbilt dated May 19th, 1916 (p. 11, l. 18). P. 7 for identification.

That Harold S. Vanderbilt and others referred to were at the time in question directors of the defendant company (p. 11, l. 22).

Letter of May 19th, 1916, to various directors of the defendant company (p. 11, l. 35). P. 8 for identification.

Letter from the counsel for the plaintiff to the defendant dated June 26th, 1916 (p. 11, l. 40). P. 9 for identification. 20

Letter same parties dated July 18th, 1916 (p. 11, l. 45). P. 10 for identification.

Letter from attorney of defendant to attorney of plaintiff dated August 7th, 1916 (p. 12, l. 9). P. 11 for identification.

Letter from counsel for plaintiff to counsel for defendant dated March 9th, 1917 (p. 12, l. 15). P. 12 for identification.

Letter from attorney for the defendant to the attorney for the plaintiff dated March 16th, 1917 (p. 12, l. 20). P. 13 for identification. 30

Letter from attorney for the plaintiff to the attorney for the defendant dated March 15th, 1917 (p. 12, l. 26). P. 14 for identification.

Letter from attorney for the plaintiff to William H. Moore dated March 16th, 1917 (p. 12, l. 33). P. 15 for identification.

Letter from the Mayor of Chatham to the engineer of the defendant company dated April 6th, 1917 (p. 12, l. 39). P. 16 for identification.

Extract of original minutes of the Borough of Chatham and the question of closing out contract with defendant company (p. 13, l. 16). P. 17 for identification. 40

Letter from attorney for the defendant to the Mayor and Common Council of the Borough of Chatham dated May 23rd, 1917 (p. 13, l. 26). P. 18 for identification.

Grounds of Appeal.

Letter same parties dated April 3rd, 1917 (p. 13, l. 33). P. 19 for identification.

Letter same parties dated September 29th, 1917 (p. 13, l. 37). P. 20 for identification.

10 Q At the time this contract was entered into did you know whether the railroad contended that this was a public street or road?

Mr. Scott. I object to that.

The Court. Objection sustained. (P. 15, l. 10.)

20 The offer to show that the Mayor if permitted to answer would say that the railroad requested the Borough to vacate rights if the Borough, in addition to this unnamed street, as lying between Passaic Avenue and Bowers Lane, for the purpose of showing the railroad was not acting in good faith and that the plaintiff was entitled to punitive damages.

5. Because the Court admitted in evidence over objection by the plaintiff Exhibits D. 1, D. 2, D. 3, D. 4 and D. 5.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff-Appellant.

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Amended Complaint.

Amended Complaint.

Filed April 27, 1917.

New Jersey Supreme Court

MORRIS COUNTY.

10

EDNA DICKINSON,

Plaintiff,

vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,

Defendant.

Action at Law.

20

The plaintiff, Edna Dickinson, residing at West Livingston, New Jersey, says that:

FIRST COUNT.

1. At the time of the grievances herein stated, the plaintiff was and ever since has been the owner in fee of a tract of land in the Borough of Chatham, in the County of Morris, New Jersey, located upon the corner formed by the intersection of the easterly line of Passaic avenue with the northerly line of a certain unnamed street running at right angles to said Passaic avenue, from said Passaic avenue to Bowers lane.

30

2. Said Passaic avenue, Bowers lane and the unnamed street connecting the two aforesaid streets and running at right angles thereto are all public highways, and for many years last past the public had and still has a right of way over the said streets to pass and repass freely at all times on foot and with horses and vehicles.

3. That prior to the third day of May, nineteen hundred and sixteen, the defendant constructed and built a high wall and embankment upon and through the said unnamed highway, said wall and embankment being built practically parallel with the plaintiff's property line and distant only two or three feet therefrom, by reason of which access to the property owned by the plaintiff over said highway is and was partially obstructed.

40

Amended Complaint.

10 4. That the said defendant since the last mentioned day continuously to the institution of this action has wilfully, unlawfully and without color of right continued to maintain upon said public highway the said wall and embankment as hereinbefore alleged, whereby and by reason whereof the plaintiff's real property as aforesaid has been rendered of little value and the rental income therefrom and the rental value thereof greatly depreciated, and whereby all gains and profits therefrom has been lost to the plaintiff.

SECOND COUNT.

1. The plaintiff realleges paragraphs 1, 2 and 3 of the first count.

20 2. At all times herein mentioned the plaintiff was engaged in carrying on and conducting a real estate business, maintaining offices for that purpose in the building located upon her said premises.

3. That the said defendant since last mentioned day continuously to the institution of this action has wilfully, unlawfully and without color of right continued to maintain upon said public highway the said wall and embankment as hereinabove alleged and by reason whereof the said plaintiff has been greatly and seriously injured in her said business and has been prevented from acquiring the profit and gain from her said business which she otherwise could and would have acquired and gained.

30 All to the damage of the plaintiff, ten thousand dollars (\$10,000).

LUM, TAMBLYN & COLYER,

Attorneys for Plaintiff.

*Answer to Amended Complaint.***Answer to Amended Complaint.**

Filed May 1, 1917.

The above defendant, answering the allegations contained in the plaintiff's complaint, says, as to the First Count:

1. This defendant admits that up until the 3rd day of May, 1916, the plaintiff was the owner in fee of a tract of land in the Borough of Chatham, in the County of Morris, New Jersey, located upon the corner formed by the intersection of the easterly line of Passaic avenue with the northerly line of a certain unnamed street, running at right angles to said Passaic avenue, from said Passaic avenue to Bowers lane. 10

2. This defendant admits, for the purpose of this suit, and as between the parties hereto, that "Said Passaic avenue, Bowers lane and the unnamed street connecting the two aforesaid streets and running at right angles thereto" were "all public highways and for many years last past the public had and still has a right of way over the said streets to pass and repass freely at all times on foot and with horses and vehicles." 20

3. This defendant admits "That prior to the third day of May, nineteen hundred and sixteen, the defendant constructed and built a high wall and embankment upon and through the said unnamed highway, said wall and embankment being built parallel with the plaintiff's property line and distant only two or three feet therefrom, by reason of which access to the property owned by the plaintiff over said public highway * * * was partially obstructed." 30

4. This defendant denies the allegations contained in the fourth paragraph of the plaintiff's complaint.

This defendant, answering the allegations contained in the Second Count of the plaintiff's complaint, says:

1. That it realleges its answers to the first, second and third paragraphs of the plaintiff's First Count, which are incorporated as the allegations in the first paragraph of the plaintiff's Second Count, as its answer to the allegations in the first paragraph of the Second Count. 40

2. This defendant has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the second paragraph of the plaintiff's Second Count.

Postea.

3. This defendant denies the allegations contained in the third paragraph of the plaintiff's Second Count.

F. B. SCOTT,
Attorney of Defendant.

10

Postea.

This case was tried before Judge Willard W. Cutler, to whom it had been duly referred for trial with a jury at the Morris Circuit on February 6th, 1919.

The jury by direction of the Court found a general verdict in favor of the plaintiff and against the defendant for one thousand three hundred and thirty-two dollars (\$1,332).

20

WILLARD W. CUTLER,
Judge.

STATEMENT OF JUDGMENT.

Judgment entered Feb. 19, 1919.

Damages\$1,332.00

Costs { Attorney 83.00
 { Disbursements 19.94

\$1,434.94

ENOCH L. JOHNSON,
Clerk.

30

40

Opening.

MORRIS COUNTY SUPREME COURT.

EDNA DICKINSON,

Plaintiff,

vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,

Defendant.

Action at Law.

10

Morristown, N. J., February 6, 1919.

Before: Hon. Willard W. Cutler, Judge, and a Jury.

Appearances:

For the plaintiff, Messrs. Lum, Tamblyn & Colyer; Ralph E. Lum, Esq., of counsel.

20

For the defendant, Frederic B. Scott, Esq.; Elmer King, Esq., of counsel.

The jury was empanelled, accepted and sworn.

Mr. Lum opened the case to the jury on behalf of the plaintiff.

Mr. Lum. I offer in evidence, may it please your Honor, a stipulation in this matter stipulating the amount of compensatory damages to which the plaintiff is entitled as \$1,332.00, setting forth the time that it covered and the fact that the railroad took condemnation proceedings pursuant to the statute, and that an award of \$5,706.00 was made to the plaintiff in this case.

30

The Court. How much do you say the damages are?

Mr. Lum. \$1,332.00.

The Court. If there is no objection, that may be offered in evidence.

(Stipulation marked Exhibit P. 1.)

Mr. Lum. I now offer to prove facts from which the plaintiff would be entitled to punitive damages. I desire to show that the embankment placed by the defendant in the public highway, an unnamed street, running from Passaic avenue to Bowers lane, was unlawful, being in a public road over which the public, including the plaintiff,

40

Opening.

had the right to travel; that this had been determined by previous judgments; and I offer in evidence a transcript of the judgment entered May 16, 1914, between the parties hereto. I offer the exhibits one at a time.

10 *Mr. Scott.* We object to the offer made on behalf of Mr. Lum in view of the fact that the law of the case is established by the decision of the Supreme Court at the June Term of the Court, which has been handed to your Honor. And I object specifically to the offer of Exhibit P. 1 on the ground that it is immaterial, incompetent and irrelevant, and on the further ground that punitive damages cannot be allowed in this case.

The Court. I will sustain your objection on the decision of the Supreme Court in this case, that punitive damages cannot be allowed.

20 (Judgment entered May 16, 1914, marked P. 1 for identification.)

Mr. Lum. Your Honor will allow an exception?

The Court. Take your exception.

Mr. Lum. Will you note exception to all these rulings. I offer judgment before Judge Speer and entered on May 10th, 1916.

Mr. Scott. I object for the same reason.

The Court. The same ruling.

30 *Mr. Lum.* That will be P. 2 for identification.

(Judgment entered May 10, 1916, marked P. 2 for identification.)

Mr. Lum. I offer letter from the attorney of the plaintiff to the defendant dated October 1st, 1915. (P. 3 for identification.)

Mr. Scott. I make the same objection for the same reason.

The Court. The same ruling.

40 *Mr. Lum.* Note an exception.

I offer letter of October 26, 1915, from same to same. (P. 4 for identification.)

Mr. Scott. What was the date of that?

Mr. Lum. October 26, 1915.

Opening.

Mr. Scott. I make the same objection for the same reason.

The Court. The same ruling.

Mr. Lum. I offer letter of November 11, 1915, from same to same. (P. 5 for identification.)

Mr. Scott. The same objection. 10

The Court. The same ruling.

Mr. Lum. I offer letter of May 18, 1916, from same to same. (P. 6 for identification.)

Mr. Scott. The same objection.

The Court. The same ruling.

Mr. Lum. I offer letter of May 19, 1916, from the counsel for Edna Dickinson to Harold S. Vanderbilt. (P. 7 for identification.)

Mr. Scott. I make the same objection. 20

The Court. The same ruling.

Mr. Lum. And I offer to prove that Harold S. Vanderbilt, and the others who will be referred to in the next exhibit, were at the time directors of the Delaware, Lackawanna & Western Railroad Company.

Mr. Scott. I make the same objection.

The Court. The purpose of that is for punitive damages?

Mr. Lum. For the purpose of showing that we are entitled to punitive damages. 30

The Court. The same ruling.

Mr. Lum. I offer in evidence letter of May 19, 1916, to the various other directors of the railroad at that time. (P. 8 for identification.)

Mr. Scott. I make the same objection.

The Court. And the same ruling.

Mr. Lum. I offer in evidence letter of June 26, 1916, from counsel of the plaintiff to the defendant. (P. 9 for identification.) 40

Mr. Scott. I make the same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from same to same, dated July 18, 1916. (P. 10 for identification.)

Opening.

Mr. Scott. I make the same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from the attorney of the defendant to the attorney of the plaintiff dated August 7, 1916. (P. 11 for identification.)

10 *Mr. Scott.* The same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from counsel of the plaintiff to counsel of the defendant dated March 9, 1917. (P. 12 for identification.)

Mr. Scott. I make the same objection.

The Court. The same ruling.

20 *Mr. Lum.* I offer in evidence letter from the attorney of the defendant to the attorney of the plaintiff dated March 16, 1917. (P. 13 for identification.)

Mr. Scott. The same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from the attorney of the plaintiff to attorney of the defendant—from the attorney of plaintiff to the defendant, dated March 15, 1917. (P. 14 for identification.)

Mr. Scott. I make the same objection.

The Court. The same ruling.

30 *Mr. Lum.* I offer in evidence letter from the attorney of the plaintiff to William H. Moore, dated March 16, 1917, and offer to show that Mr. Moore was at that time one of the directors of the defendant. (P. 15 for identification.)

Mr. Scott. I make the same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from the Mayor of Chatham to the engineer of the defendant dated April 6, 1917. (P. 16 for identification.)

40 *Mr. Scott.* I make the same objection, and the additional objection that on the former trial of this case that exhibit was allowed to go before the Court on the ground that a notice to produce had been served upon the defendant company to produce that letter, and I now have

Opening.

the notice to produce with me, and that notice does not call upon them to produce the letter in question.

The Court. Objection sustained.

Mr. Lum. I offer to prove the original of the letter of April 6, 1917. (P. 16 for identification.)

Mr. Scott. I make the same objection. 10

The Court. And the same ruling.

Mr. Lum. I offer extract of the original minutes of the Borough of Chatham on the question of the discussion of closing out the contract with the Delaware, Lackawanna & Western Railroad Company showing the vote. (P. 17 for identification.)

Mr. Scott. I make the same objection.

The Court. The same ruling.

Mr. Lum. I offer in evidence letter from the attorney of the defendant to the Mayor and Council of the Borough of Chatham dated May 23, 1917, for the purpose of showing that the railroad did not proceed with promptness to effect condemnation, but sought in an improper way to get others to do that which they, under my view, were obligated to do with promptness themselves. (P. 18 for identification.) 20

Mr. Scott. I make the same objection with respect to being incompetent and irrelevant on the question of punitive damages. 30

The Court. The same ruling.

Mr. Lum. I offer in evidence another letter from same to same dated April 3, 1917. (P. 19 for identification.)

Mr. Scott. The same objection.

The Court. The same ruling.

Mr. Lum. I offer another letter in evidence from same to same dated September 29, 1917. (P. 20 for identification.)

Mr. Scott. The same objection. 40

The Court. The same ruling.

Mr. Lum. I offer in evidence the contract between the railroad and the Borough of Chatham covering the matter of the change—of the elevation of the railroad, for

Testimony of William G. Badgley.

the purpose of laying a basis to entitle me to punitive damages.

Mr. Scott. I object to it for that purpose.

The Court. Objection sustained. That is the only reason, for that purpose.

10 *Mr. Lum.* I offer to show that the railroad—

Mr. Scott. May it please the Court, with respect to the offer of the contract—with respect to our objection to the offer of the contract, the ordinance and the contract between the Borough of Chatham and the railroad company, it strikes me that I will withdraw my objection to that one exhibit.

The Court. If your objection is withdrawn, I will allow it to go in.

(Marked Exhibit P. 21 in evidence.)

20 *Mr. Lum.* I offer to prove that the defendant did not undertake condemnation proceedings until—

Mr. Scott. I think it is stated in the stipulation, Mr. Lum.

Mr. Lum. No, I didn't find the date.

Mr. Scott. November 3rd, 1917.

30 *Mr. Lum.* I withdraw that last offer. I do want to ask some questions on the record—to explain some of the other things. I will call Mr. William G. Badgley of Chatham. He is not here; we are simply making our record. I ask Mr. Badgley.

Q You are the Mayor of the Borough of Chatham? A I am.

The Court. Reading from the former record by consent.

Q Do you recall this contract between the railroad and the Borough of Chatham for the elevation of the crossing? A I do.

40 Q Did this contract cover anything with reference to the vacating of a certain street? A No; I don't think that it did.

Q I mean of some street? A Yes, it did.

Q Did the contract, from your examination, cover anything with reference to the vacation of this unnamed street?

Testimony of William G. Badgley.

Mr. Scott. We object on the ground that the contract speaks for itself.

The Court. Objection sustained.

Mr. Lum. Note an objection.

Q At the time this contract was entered into, do you know whether the railroad contended that this was a public street or not?

10

Mr. Scott. I object to it.

The Court. Objection sustained.

Q Had you knowledge of the situation from your own knowledge?

Mr. Scott. If all this testimony is offered on the ground solely of punitive damages—

20

Mr. Lum. For that ground only.

Mr. Scott. For that ground only. I object, now, at this time, rather than for each specific question.

The Court. That is what I understand; counsel is offering it, reading from the testimony, and you make no objection to it being read, the same as if he was here.

Mr. Scott. But I do not desire, under the circumstances, to make a specific objection to each question, if the Court—

The Court. This evidence all goes, as I understand it, to the question of punitive damages.

30

Mr. Lum. Entirely, sir.

The Court. And the Court has ruled, and your rule now under the decision of the Supreme Court, the jury cannot assess punitive damages, and all evidence on that is objectionable.

Mr. Scott. Then I, at this time, make objection to all of the testimony now offered to be read by Mr. Lum of Mayor Badgley for the purpose of proving punitive damages, rather than making an objection to each specific question.

40

Mr. Lum. I will ask the Mayor.

Q Had you knowledge of the situation from your own knowledge? Next question:

Testimony of William G. Badgley.

Q And what was the railroad's contention with reference to this being a street?

The Court. You make an objection to all this line of testimony?

Mr. Scott. Yes.

10

Mr. Lum (reading).

Q Mr. Badgley, I call your attention to a letter that has been marked in evidence, letters from the railroad under date of March 23, 1917, and April 3, 1917, to the Mayor and Council. Do you remember those?

Q I ask if you recognize this as a copy of the letter sent to the railroad in response?

Q Was this sent under your supervision?

20

Q Will you indicate on this map produced by the railroad where Fairmount avenue is?

Q Then this ordinance that the railroad asked you to pass at that time called for the vacation of all the borough rights from a street west of this right of way, did it?

And I offer to show that the Mayor, if permitted to answer that question, would say that the railroad requested the borough to vacate rights of the borough in addition to this unnamed street as lying between Passaic avenue and Bowers lane, for the purpose of showing the railroad was not acting in good faith, and that we are entitled to punitive damage.

30

Mr. Scott. I make a further objection.

The Court. Yes; objection sustained.

Mr. Lum (reading).

Q Mr. Badgley, this contract which has been put in evidence, has that been closed out?

Q Mr. Badgley, were any requests made by representatives of the railroad with reference to closing out this contract before it was closed out?

40

Q Did you have negotiations with various representatives of the railroad with reference to this contract?

Q Will you tell us whether finally the railroad's consent was received to the closing out of this contract?

Testimony of William G. Badgley.

Q Give us the entire conversation with reference to the closing out of this contract.

The Court. Now, you had better see that the stenographer has it the way you want it about this evidence, that it is admitted just as you want to put it so it will appear.

Mr. Lum. I think there can be no question. He has the transcript. 10

The Court. A witness has not been produced.

Mr. Lum. I think the simplest way is to assume that the witness was on the stand.

The Court. And it was agreed that if the witness was produced he would be asked the following questions, whichever way you want it. You may say that if he was called he would be asked and answer the following questions and that puts it all right, and you consent to that? 20

Mr. Scott. I consent that that procedure be followed.

The Court. That covers it all right.

Mr. Lum. We rest.

Mr. Scott. May it please the Court, I desire to offer in evidence a petition presented to the Honorable Charles W. Parker, Justice of the Supreme Court, to condemn the rights and property, the easement of Miss Dickinson, the plaintiff in this suit. I also desire to offer in evidence an order made by Justice Francis Swayze assigning a time and place for the appointment of commissioners. I also offer an order of Justice Parker dated November 24, 1917, appointing commissioners. I also offer an order made by Justice Parker extending the time of the commissioners to file their report. I further offer the report of the commissioners in said condemnation proceedings dated January 8, 1918, and I will call Mr. John Drake. 30

Mr. Lum. I object.

Mr. Scott. I offer them on the ground, sir, to show that the period for which the defendant is entitled to damages, to compensatory damages, is covered and fixed by the condemnation proceedings which these documents show to have been taken. 40

Mr. Lum. There is a stipulation marked P. 1 that the precise time for which damages in the above-entitled

Testimony of William G. Badgley.

action are recoverable is from May 3rd, 1916, to November 3rd, 1917, at which latter date the defendant presented a petition to the Honorable Charles W. Parker, Justice of the Supreme Court of the State of New Jersey, for the purpose of condemning and acquiring the right of way, and so forth.

10 *The Court.* Why isn't that covered by the stipulation?

Mr. Scott. The stipulation doesn't preclude me from putting in the exhibits.

The Court. What benefit would it be in this case, Mr. Scott? If it throws any light on the subject I am going to admit it; if it doesn't, I don't see that it ought to be.

Mr. Scott. I take it that if the stipulation—while the stipulation shows the period, nevertheless I am entitled to have the exhibits go in the record as part of our case.

20 *The Court.* Not affecting the question of pecuniary—as exemplary damages?

Mr. Scott. No, sir. With respect to the matter of compensatory damages.

Mr. Lum. I object to it.

The Court. I suppose Mr. Scott is entitled to let it go in, but I don't see it throws any light on it, it having been agreed upon.

Mr. Scott. I make the offer.

30 *Mr. Lum.* I object. We have stipulated it. It is in. The Court will not permit a record to be cumbered—

Mr. Scott. Either of the parties may have a right to offer any evidence—

The Court. Subject to Mr. Lum's objection, I am going to allow you to offer them, and note Mr. Lum's exception. Swear this witness.

(Marked Exhibits D. 1 to D. 5 inclusive.)

John T. Drake, direct—cross.

JOHN T. DRAKE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Scott.

Q Mr. Drake, you are a civil engineer? A Yes, sir.

Q And employed by the Lackawanna Railroad? A Yes, sir. 10

Q And have been employed for how long? A Nineteen years.

Q And are you familiar with what are known as the Chatham improvements? A Yes, sir.

Q And you are familiar with the facts and circumstances in the action now pending, the Edna Dickinson case? A Yes, sir.

Q And do you know about the wall and embankment on Passaic avenue? A Yes, sir.

Q Referred to in said suit? A Yes. 20

Q And you are familiar with the contract between the Borough of Chatham and the railroad company? A Yes, I have seen it.

Q Referred to as the Chatham improvement? A Yes.

Q Will you tell the Court and the Jury whether the wall and embankment adjoining Miss Dickinson's property and the subject-matter of this suit were constructed under such contract? A Yes.

Q And provided for by the plans and specifications in said contract? A Yes, sir. 30

Q This wall and embankment, Mr. Drake, what relation has that to the right of way of the railroad company? A It is upon—it is constructed upon the right of way of the railroad company.

Mr. Scott. That is all.

Cross examination by Mr. Lum.

Q Now, this contract that you have referred to did not show this as a public street, did it? A Not in the contract, no. 40

Q And no request was made of the Borough at the time of undertaking this work for the vacation of that at the time you requested the vacation of other streets? A That I don't know.

Q You don't know that it was? A I don't know that it was or was not.

Direction of Verdict.

Q You did know that the railroad contended that it was not a public street, didn't you? A Yes, sir.

Mr. Lum. That is all.

Mr. Scott. That is all.

10 Mr. Lum. I have nothing further excepting requests to charge.

The Court. That they are entitled to exemplary—

Mr. Lum. That we are entitled to have punitive damages considered.

The Court. The Court refuses that application, and allows you an exception.

20 The Court. Gentlemen of the Jury, your duties are very light in this case. An action was brought by Miss Dickinson against the Delaware, Lackawanna & Western Railroad for compensatory damages and also exemplary damages. The case was tried at this circuit at a former trial, and the Supreme Court said that all Miss Dickinson was entitled to was compensatory damages, and not exemplary damages, and the case was sent back for retrial on that ground.

30 It is now brought before you, and there is a stipulation signed by the parties in which the actual damages are fixed at \$1,332.00, and you will, therefore, return a verdict in favor of the plaintiff and against the railroad company for \$1,332.00. You may take the verdict.

Exhibits P. 1—P. 2 for Identification.

Exhibits.

EXHIBIT P. 1 FOR IDENTIFICATION.

JUDGMENT.

The case was tried before Judge Charles C. Black, to whom it had been duly referred for trial, with a jury, at the Morris Circuit Court, May 11th, 1914. The jury rendered a general verdict against the defendant in favor of the plaintiff, Edna Dickinson, for Seven hundred and fifty Dollars, and in favor of the plaintiff, Gustave F. Lowe, of six cents. 10

Damages\$750.00 E. D.

Damages06 G. L.

—————
\$750.06

Costs 55.11 20

—————
\$805.17

Whereupon it is adjudged that the plaintiff, Edna Dickinson, recover of the defendant, the sum of Seven hundred and fifty Dollars; and that the plaintiff, Gustave F. Lowe, recover of the defendant the sum of six cents, and their costs, which are taxed at the sum of Fifty-five Dollars and Eleven Cents, making in the whole the sum of Eight hundred and five Dollars and Seventeen Cents. 30

Judgment entered May 16, 1914.

WM. S. GUMMERE,
C. J.

EXHIBIT P. 2 FOR IDENTIFICATION.

JUDGMENT.

This case was tried before Judge William H. Speer, to whom it had been duly referred for trial, with a jury, at Morris Circuit on May third, nineteen hundred and sixteen. 40

The jury rendered a verdict against the defendant and in favor of the plaintiff for Nine hundred and thirty-six Dollars

Exhibit P. 3 for Identification.

(\$936) compensatory damages and Five hundred Dollars (\$500) punitive damages, making a total verdict in favor of the plaintiff and against the defendant of Fourteen hundred and thirty-six Dollars (\$1436).

10 Whereupon it is adjudged that the plaintiff recover
 \$1,436.00 of the defendant, the sum of Nine hundred and thirty-
 48.58 six Dollars compensatory damages and the sum of
 ————— Five hundred Dollars punitive damages, and her
 \$1,484.58 costs, which are taxed at the sum of Forty-eight Dol-
 lars and fifty-eight Cents, making in the whole the
 sum of Fourteen hundred and eighty-four Dollars and
 fifty-eight Cents.

Judgment entered May 10, 1916.

WM. S. GUMMERE,
 C. J.

20

EXHIBIT P. 3 FOR IDENTIFICATION.

October 1st, 1915.

Delaware, Lackawanna & Western Railroad Co.,
 Legal Department,
 90 West Street,
 New York City.

30

Gentlemen:

Dickinson vs. Yourselves and the Borough of Chatham.

40 We wrote you some three weeks ago about this matter. May
 we not have some definite word with promptness? We do not
 wish to apply for an injunctive relief against you and to proceed
 by a mandamus against the Borough if it can be helped, but cer-
 tainly by this time you should know the determination of Miss
 Dickinson and that she is determined to stand up for her rights
 in this case.

Will you please give us some definite word by the early part
 of next week?

Very truly yours,

REL/St.

Exhibits P. 4—P. 5 for Identification.

EXHIBIT P. 4 FOR IDENTIFICATION.

October 26, 1915.

Delaware, Lackawanna & Western Railroad Company,
90 West St.,
New York City.

10

Gentlemen:

Will you kindly let us have word from you with reference to the claim of Miss Edna Dickinson? We have advised Miss Dickinson that she has a claim against you for punitive damages. Moreover, you are guilty of a continuing trespass, or, rather, of a continuing nuisance, in obstructing a public highway. Unless this matter is attended to promptly and satisfactorily it will be necessary for us to institute suit for damages and also apply for injunctive relief. We have taken this matter up also with the Borough of Chatham, and if you both care to co-operate we shall be glad to co-operate with you, but we cannot permit the matter to drift any longer, and we must demand some adjustment at this time.

20

Yours very truly,

REL/P

EXHIBIT P. 5 FOR IDENTIFICATION.

30

November 11, 1915.

D. L. & W. Railroad Company,
90 West Street,
New York City.

Mr. Scott:

Dear Mr. Scott—

I am still in the dark with reference to the matter of the claim of Edna Dickinson. I do not want to proceed with mandamus against the Borough nor do I want to bring a suit for punitive damages against the railroad; nor do I want to apply for an injunction to restrain nuisance; nor do I want to bring suits for continuing damage every week, but unless the railroad and Bor-

40

Exhibit P. 6 for Identification.

ough get busy and get prepared to talk business with me within the next week it is going to be necessary for me to get under way all or a large part of the above. This is a matter of vital importance to my client and I am not justified in letting it remain in the present situation indefinitely. The railroad and the Borough must be prepared to know what figure they would be willing to pay Miss Dickinson for a full general release. If we can agree upon that figure well and good. If not, we will proceed with litigation, but something certainly should be done.

Very truly yours,

REL/St.

EXHIBIT P. 6 FOR IDENTIFICATION.

May 18, 1916.

D. L. & W. Railroad Co.,
90 West Street,
New York City.

Gentlemen:

Edna Dickinson vs. D. L. & W. Railroad Co.

This is to acknowledge receipt of letter of May 16th from Mr. Scott. You will of course follow such proceedings as may seem best to you with reference to the future course of this litigation, but in this connection we would call to your attention the fact that our Court of Errors and Appeals has legally determined that the property occupied by your railroad embankment adjoining the property of Miss Edna Dickinson is a public thoroughfare or roadway in which the public should have full right of passage. This of necessity constitutes the situation one of continuing nuisance, giving rise to new cause of action every day. We have heretofore in communications before the last trial covered the situation with you quite fully. Your disregard of the rights of the plaintiff as well as of the general public in this connection can only be regarded as wilful and must give rise, if you are to force future litigation upon us, to punitive damages. If our understanding of the rulings at the last trial is correct,

Exhibit P. 7 for Identification.

then in order to make sure that the defendant shall be liable for punitive damages, the continuing trespass must be brought to the notice of each of the directors.

We are preparing such notices and enclose them herewith and ask that you acknowledge receipt of the notices on behalf of the respective directors, in accordance with your agreement of the 16th.

10

Very truly yours,

REL/St.

EXHIBIT P. 7 FOR IDENTIFICATION.

Chatham, N. J., May 19, 1916.

Mr. Harold S. Vanderbilt,

20

Dear Sir:

We desire to call your attention as a director of the D. L. & W. Railroad Company, which as lessee, is operating the Morris & Essex Division, that the Court of Errors and Appeals of the State of New Jersey has determined in the case of *Dickinson vs. D. L. & W. Railroad Company*, that a certain unnamed street running from Passaic Avenue to Bowers Lane, Chatham, New Jersey, is a public thoroughfare or roadway, in which all of the public has legal rights and that the property of Miss Dickinson is peculiarly damaged. Since that time another verdict has been rendered in favor of Miss Dickinson which verdict includes an element of punitive damages.

30

The Court left open in that case, however, for the consideration of the jury, the question as to whether or not the continuing trespass had been so brought home to the directors of the defendant as to make it a case for punitive damages. It is to prevent the further existence of that question in the event of further litigation being forced upon us, that we are giving this notice.

40

Yours very truly,

LUM, TAMBLYN & COLYER,

Counsel for plaintiff,

Edna Dickinson.

Exhibit P. 8 for Identification.

EXHIBIT P. 8 FOR IDENTIFICATION.

Chatham, N. J., May 19, 1916.

Dear Sir:

10 We desire to call to your attention as a director of the D. L. & W. Railroad Company, which as lessee, is operating the Morris & Essex Division, that the Court of Errors and Appeals of the State of New Jersey has determined in the case of *Dickinson vs. D. L. & W. Railroad Company*, that a certain unnamed street running from Passaic Avenue to Bowers Lane, Chatham, New Jersey, is a public thoroughfare or roadway, in which all of the public has legal rights and that the property of Miss Dickinson is peculiarly damaged. Since that time another verdict has been rendered in favor of Miss Dickinson which verdict includes an element of punitive damages.

20 The Court left open in that case, however, for the consideration of the jury, the question as to whether or not the continuing trespass had been so brought home to the directors of the defendant as to make it a case for punitive damages. It is to prevent the further existence of that question in the case, in the event of further litigation being forced upon us, that we are giving this notice.

Yours very truly,

LUM, TAMBLYN & COLYER,

Counsel for plaintiff,

Edna Dickinson.

30 On behalf of William Rockefeller, Henry A. C. Taylor, George F. Baker, H. R. Taylor, M. Taylor Pyne, F. W. Vanderbilt, M. H. Dodge, William H. Moore, William Fahnestock, George F. Baker, Jr., William H. Truesdale, John F. Talmage and Harold S. Vanderbilt, I acknowledge service of this notice as counsel.

Exhibits P. 9—P. 10 for Identification.

EXHIBIT P. 9 FOR IDENTIFICATION.

June 26, 1916.

D. L. & W. Railroad Company,
90 West Street,
New York City.

Gentlemen:

10

Dickinson vs. D. L. & W. Railroad Co.

Some several weeks ago we sent you notices addressed to the various directors with a request that you should acknowledge service. They have not been returned nor have we had any further word with reference to this case. We do not desire to issue execution and we don't think that that course should be necessary, neither do we desire to start another suit unless you are absolutely going to compel us to that course.

Won't you let us have some word from you with reference to the matter within the next week?

20

If your company can devise any plan for removing the obstruction from the thoroughfare we will be glad indeed to cooperate, but the continuing nuisance is very serious to Miss Dickinson and I am being pressed to apply to our Court of Chancery for an injunction.

Please let me have some word without further protracted delay.

Very truly yours,

REL/St.

30

EXHIBIT P. 10 FOR IDENTIFICATION.

July 18, 1916.

D. L. & W. R. R. Co.,
90 West Street,
New York City.

Gentlemen:

40

I am returning herewith the letter from Weigel. This is certainly the limit in the way of delays but begins to look like a reasonable prospect at last.

Exhibit P. 11 for Identification.

I still feel, however, that in the mean time the company should be taking steps to abate the nuisance. Let me hear from you in due course.

When do you expect to go away for your vacation and have you reached any determination on the Gore case?

10 Best of Good Wishes.

Yours very truly,

REL/Sc

Encl. (1)

EXHIBIT P. 11 FOR IDENTIFICATION.

Letterhead of D. L. & W. R. R. Co.

Dickinson vs. Company.

20 Ralph Lum, Esq.,
Counsellor at Law,
Firemen's Insurance Building,
Broad & Market Sts., Newark, N. J.

New York, August 7, 1916.

Dear Sir:

30 In printing the above case on appeal I have been wondering whether you consider it necessary to print the "letter" exhibits between you and I which you offered in evidence and read before the jury. Personally, I do not think that any of them are material to the grounds of appeal upon which we rely, and unless I hear from you to the contrary will not have them printed in the State of Case. If you desire to have them printed I will be pleased to have you either loan me the originals or supply me with copies of them at your earliest convenience.

With respect to the notice to the directors which you mailed me some time ago, I will take up that matter during this week and write you concerning the same.

40 We have not come to any definite conclusion on the Gore case at the present time but would be pleased to learn what your client would accept in settlement of her claim against the Company.

Yours truly,

F. B. SCOTT,
Attorney.

Exhibit P. 12 for Identification.

EXHIBIT P. 12 FOR IDENTIFICATION.

March 9, 1917.

Frederic B. Scott, Esq.,
90 West Street,
New York City, New York.

10

Dear Mr. Scott:

Dickinson vs. D. L. & W. Railroad Co.

Will you please return to me with service acknowledged the notices I sent you so many months ago, or else drop me a line saying that you are unwilling to keep your agreement in that respect so that I can make personal service.

The observation of the Chief Justice with reference to punitive damages makes me realize afresh the need of this precaution.

As I told you, if you could control your client I would not think of going to any such extreme as this, but the attitude of the Railroad has been such as to lead me to recognize that I must leave no stone unturned in the attempt to protect my client's interest.

20

Of course if the Railroad should care to attempt to adjust the matter now without further litigation I assure you I shall be most happy to co-operate but unless I hear something by the end of next week I shall consider it necessary to institute another suit.

I am sorry to learn of your illness, but the notices can be returned by some clerk for you on one minute's instruction from you.

30

Very truly yours,

REL/St.

40

Exhibits P. 13—P. 14 for Identification.

EXHIBIT P. 13 FOR IDENTIFICATION.

Letterhead of D. L. & W. R. R. Co.

Ralph Lum, Esq.,
Counsellor at Law,
Firemen's Building, Broad and Market Streets,
Newark, N. J.

New York, March 16, 1917.

Dear Mr. Lum:

I herewith return to you, without acknowledgment, the notices you sent me some time ago in the Edna Dickinson case, having been directed by my next immediate superior that I have no authority to make the acknowledgments which you requested of me. I am in the office to-day for the first time since I saw you recently at Trenton, and intend to take up with our Assistant General Counsel, Mr. Seager, the steps you suggested as preliminary to a conference with respect to the adjustment of the above case. I assure you that I personally appreciate your offer of co-operation with respect to adjusting the matter without further litigation, and I will endeavor to let you have some definite word from us at a very near future date.

Yours truly,

F. B. SCOTT,
Attorney.

FBS:B

EXHIBIT P. 14 FOR IDENTIFICATION.

Delaware, Lackawanna & Western R. R. Co.,
Legal Department,
90 West Street,
New York City.

In re: *Dickinson vs. D. L. & R. R. Co.*

March 15, 1917.

Gentlemen:

Mr. Scott informed our Mr. Ralph E. Lum in Trenton on Tuesday the 13th that he was unable to acknowledge service of certain notices with reference to the continuing trespass in the

Exhibit P. 14 for Identification.

above entitled case and which were given in order that no question might arise on the next trial with reference to punitive damages. There are certain things to which we desire to call your attention in this connection.

First to our letter of May 18, 1916, to your company enclosing the notice bringing the matter specifically to the attention of each director with request for the acknowledgment of receipt on behalf of the respective directors in accordance with an agreement made two days previously. This agreement is contained in letter from Mr. Scott as attorney and on the second page, second paragraph there is a specific agreement to accept notice on behalf of the directors; these were received thereafter in due course by Mr. Scott and the receipt acknowledged. We preferred a written acknowledgment on one of the notices but did not receive it and wrote for it again as per our letter of June 26th followed again by our letter of August 12th &c. At no time was any suggestion raised as to Mr. Scott's authority and as he appeared as attorney of record in open court for you both at the trial and on the argument in the Court of Errors, we think it will be a little difficult for you to now deny his authority. We are adopting the precaution of sending notice to the directors themselves and we wish it expressly understood that this is not a waiver of any of our rights under our notice of May 18th last. If you persist in your position, however, it will, of course, be impossible for us to negotiate hereafter in any matter in any manner without written authorization presented by whoever shall undertake to act or speak for you. We think you will agree with us, if you will look over the files in this matter, that no other course can be open to any attorney who desires to protest his client's interest.

In the printed record in the last case no question was raised with reference to the damages and we accordingly acceded to Mr. Scott's request for the elimination from the record of the letters and notice on which our rights to punitive damages were definitely based. The observation of the Chief Justice at the end of the opinion, which observation was occasioned, we believe, solely by reason of the absence of those letters and notices from the record, will make it clear to you the importance of bringing to those by and through whom your company acts definite knowledge of the continuing wrong which persists from day to day.

Exhibit P. 15 for Identification.

We, of course, have not yet abandoned hope and it may be possible to adjust this whole difficulty but there has been nothing so far in your course to lead us to believe that you intended anything other than continuous defiance. Regardless of anything herein said please be assured that we will be most glad to co-operate in any possible adjustment looking to the protection of Miss Dickinson's interest. We ask some one in authority to review the correspondence in this matter starting with Mr. Scott's letter of May 16th and then either return to us the written acknowledgment of the notices to the directors or give us some valid reason for not doing so.

Yours very truly,

REL/Sc

EXHIBIT P. 15 FOR IDENTIFICATION.

March 16, 1917.

Mr. William H. Moore,
14 Wall Street,
New York City.

Dear Sir:

We are acting as attorneys for Miss Edna Dickinson of Chatham, N. J. She is the owner of certain property on Passaic Avenue adjoining the D. L. & W. R. R. The railroad claimed title to the street and erected large embankments thereon over which it has continuously run its trains. Miss Dickinson brought suit to establish her rights and a judgment in her favor was entered in the Supreme Court, Morris Circuit in May 1914. From this judgment your railroad appealed and the result was sustained by our Court of Errors and Appeals, our Court of last resort in all causes, in an opinion by Justice Kalisch found in 87 N. J. L. 264.

Thereafter the railroad continued to disregard Miss Dickinson's rights as judicially established and added insult to injury by erecting concrete posts and placing thereon wire, cutting off even the little access that was left to such part of the highway as was not built upon by your embankment. Accordingly Miss Dickinson was obliged to bring another suit which resulted in

Exhibit P. 15 for Identification.

judgment for her loss sustained from the date of the first suit to the date of the second trial and an additional sum for punitive damages. From this result your railroad again took an appeal to our Court of Errors and Appeals. On this appeal no questions of damages was involved consequently letters and notices the basis of the claim for punitive damages were, at the request of your attorney, omitted from the record. This caused an observation by the Chief Justice who wrote the opinion but who was, of course, not aware of the omission of the letters &c. referred to, questioning the plaintiff's right to punitive damages. The judgment, however, was sustained and Miss Dickinson's rights further vindicated if further vindication was possible.

Shortly after the second trial deeming action advisable because of the apparent attitude on the part of your company to continuously disregard Miss Dickinson's rights, we made an agreement with your attorney of record by which he would acknowledge notices setting forth the situation and addressed to each of the directors of your company. In his letter of May 16th, he expressly agreed to "accept on behalf of the directors such notices as you will see fit to send me." Such notices were sent on the 18th of May, not returned and no question raised with reference to them. We were accordingly surprised to be told on Tuesday last, March 13th, that the attorney was notified not to acknowledge the notice. We consider that that is a question no longer open to his determination for his receipt of the notices after his agreement in writing of May 16th is, we think, sufficient for our purpose. Lest any question as to your attorney's authority, however, may exist we are herein setting forth the situation bringing it to your personal attention. It will be clear to you, we are sure, that it is unreasonable and unfair to expect Miss Dickinson to bring continuous suits with the incident expense and loss of time merely to recover the actual rental lost through your continuing trespass and unless we can be entitled to punitive damages the situation will prove of continuing hardship to her. This notice is accordingly given to bring the situation to your personal attention as a director of the D. L. & W. R. R. and to say that we shall seek to hold the company liable for punitive damages so long as the nuisance shall continue.

Very truly yours,

REL/Sc

Exhibit P. 16 for Identification.

EXHIBIT P. 16 FOR IDENTIFICATION.

BOROUGH OF CHATHAM, N. J.

April 6, 1917.

10 Mr. G. J. Ray,
 Chief Engineer,
 Hoboken, New Jersey.

My dear Sir:

Enclosed please find check covering first payment on contract which automatically closes same. Check includes interest as per your statement and request.

20 We understand, however, that the closing of this contract at this time and in this manner does not release your Company from its obligations to the Borough of Chatham, so far as you are bound in the contract in connection with finishing railroad banks west of Washington Avenue, and damages to Chatham Rose Co., may appear.

30 We advise you that at a meeting of our Council held Monday night the 2nd inst., the ordinance prepared by your legal department, providing for the vacating of certain parts of Red Road and the construction of concrete sidewalks by you was passed at its third and final reading, and it is our understanding that your Company will pay the Chatham Press for its publication, and we request that you start this improvement at the earliest possible date.

We also ask you to kindly advise your legal department that the Borough of Chatham cannot vacate any more streets or do any other thing until such time as your Company has made some provision to care for our water problem at Lafayette Street and the question of Reasoner Park satisfactorily disposed of.

We have taken steps to clean up your odds ends, now we ask you to do the same.

Yours very truly,

Mayor.

Exhibits P. 17—P. 18 for Identification.

EXHIBIT P. 17 FOR IDENTIFICATION.

EXTRACT FROM BOROUGH MINUTES (p. 200).

A discussion as to the advisability of closing the contract with the D. L. & W. R. R. Co. followed and on motion duly seconded, it was decided to consider this contract closed, and an appropriation authorized in the annual budget for \$2000.00 to meet the first payment on money borrowed and this is now due.

10

The vote on the question of closing this contract was as follows: favor Auble, Walder, Reeve and Middlebrook. Opposed, Brown and Van Wert.

EXHIBIT P. 18 FOR IDENTIFICATION.

March 23, 1917. 20

To the Honorable Mayor and Council of the
Borough of Chatham in the County of
Morris, Chatham, New Jersey.

Gentlemen:

You are doubtless familiar with the decision of the New Jersey Court of Errors and Appeals in the case of *Dickinson vs. D. L. & W. R. R. Co.*, reported in 87 N. J. Law Reports, page 264, which upheld the finding of a jury to the effect that a public street existed over our lands extending from Fairmount Avenue to Bowers Lane. As a result of that decision our embankment, tracks and retaining walls were placed in the category of a nuisance.

30

On the 7th instant, the same court held that such nuisance was a continuing one, for which damages were recoverable until the maintenance of the embankment, etc., were legalized.

In view of the decision last referred to, it becomes necessary to vacate the street, so as to relieve our lands from the burden of the public easement.

The encroachments complained of in the Dickinson case were placed in the street in accordance with the contract between the Borough and the Railroad Companies, dated June 7th, 1913. An examination of the maps annexed thereto shows that the parties intended that they should be so placed, though of course,

40

Exhibit P. 19 for Identification.

at the time the contract was made it was not anticipated that the street brought to light by the Dickinson decision was in existence. In as much, however, as we now occupy this street pursuant to the contract, the Borough is undoubtedly obligated under Section 13 thereof to vacate it upon request.

10 Upon behalf, therefore, of the Morris and Essex Railroad Company and the Delaware, Lackawanna and Western Railroad Company, I respectfully request your honorable body to immediately take steps to that end, and to pass an ordinance effecting the vacation of the street at the earliest possible date.

The necessity for immediate action is apparent from the decision of the Court rendered March 7th, as under it the longer the vacation of the street is deferred, the greater the damages recoverable.

20 For the purpose of expediting the matter I enclose draft of ordinance which I respectfully suggest be introduced and passed, also form of notice, which, I take it, should be given by publication as required by the Borough Act.

Upon passage of the ordinance the matter can be referred to the Commissioners of Assessment for the ascertainment and award of damages.

This Company will, of course, pay all damages to which the property owners are lawfully entitled by reason of the vacation of the street, also the cost of publication of notice and ordinance and other expenses in connection with the proceedings.

30

Yours truly,

W. J. LARRABEE,
Attorney.

EXHIBIT P. 19 FOR IDENTIFICATION.

April 3, 1917.

40 To the Honorable Mayor and Council of the
Borough of Chatham in the County of
Morris, Chatham, New Jersey.

Gentlemen:

On March 23rd, 1917, I wrote you in regard to the vacation of a certain unnamed street which, according to the decision

Exhibit P. 20 for Identification.

of the Court of Errors in the case of *Dickinson vs. D. L. & W. R. R. Co.* (87 N. J. L., p. 264), extended over our lands from Fairmount Avenue to Bowers Lane. A copy of the letter in question is hereto attached. Inasmuch as I have not heard from you with regard to the vacation of this street, I take this opportunity of again bringing the matter to your attention. Will you kindly favor me with a reply to the letter in question?

10

Respectfully yours,

W. J. LARRABEE,
Attorney.

WJL:B
Encl.

EXHIBIT P. 20 FOR IDENTIFICATION.

20

Sept. 29, 1917.

The Honorable Mayor and Council of the
Borough of Chatham in the County of
Morris, Chatham, N. J.

Gentlemen:

Permit me to again direct your attention to the matter of vacating that certain unnamed street which, according to the decision of the New Jersey Court of Errors in *Dickinson vs. this Company* (reported in 87 N. J. L., p. 264), extends across the Company's land in the Borough of Chatham, about which I wrote you on March 23rd and April 3rd last.

30

Under Section 13 of the Agreement between the Railroad Companies and the Borough, dated June 7th, 1913, there appears to be no room for dispute as to the obligation of the Borough to vacate the street in question, as the structures complained of in the case above referred to were placed within the lines of the highway under the contract.

There are now two actions against this Company pending in the Morris County Supreme Court which will come up for trial next month. One of these actions has been brought by Miss Dickinson and is the third suit brought to recover damages sustained by her by reason of the encroachments on the street. I called your attention in my letter of March 23rd, 1917, to the

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Exhibit P. 21.

fact that the Court of Errors had held that the nuisance complained of was a continuing one, for which damages were recoverable until the maintenance of the embankment, etc., were legalized. Miss Dickinson has already been awarded damages twice. She is now suing again and will undoubtedly sue from time to time and recover her damages unless prompt action is taken by your Honorable Body to vacate the street.

Under the circumstances I feel it my duty to advise your Honorable Body that unless proceedings are instituted promptly to vacate this street in accordance with the statutes provided for that purpose this Company will cease efforts to adjust the matter in question through co-operation with the Borough and take such steps to protect its interests as suggest themselves to counsel.

Yours truly,

W. J. LARRABEE,
Attorney.

WJL

EXHIBIT P. 21.

WHEREAS, the Borough of Chatham in the County of Morris, heretofore entered into a certain contract dated June 7th, 1913, with The Morris and Essex and Delaware, Lackawanna and Western Railroad Companies, providing for the elimination of grade crossings in said Borough in accordance with certain plans annexed thereto and made a part thereof; and

WHEREAS, said Railroad Companies, pursuant to said contract and in accordance with said plans, have heretofore elevated their tracks between Fairmount Avenue and Bowers Lane, and placed the same upon an earth embankment located upon lands owned by said Morris and Essex Railroad Company; and

WHEREAS, said lands, since the placing of said embankment thereon have been declared by the Courts of New Jersey to be subject to the burden of the easement of a certain unnamed public street or road extending from Fairmount Avenue to Bowers Lane, which it is now necessary to vacate in order to effectuate the provisions of said contract, therefore

BE IT ENACTED AND ORDAINED by the Mayor and Council of the Borough of Chatham in the County of Morris:

Exhibit D. 1.

Section 1. All that certain unnamed public street or road in the Borough of Chatham, County of Morris and State of New Jersey, lying within the lines of the lands of The Morris and Essex Railroad Company and extending from Fairmount Avenue to Bowers Lane, be and the same is hereby vacated.

Section 2. All ordinances and parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed, and this ordinance shall take effect immediately.

10

EXHIBIT D. 1.

To the Honorable Charles W. Parker,

Justice of the Supreme Court of the State of New Jersey.

The petition of The Delaware, Lackawanna and Western Railroad Company and The Morris and Essex Railroad Company respectfully shows:

20

1. The Morris and Essex Railroad Company is a corporation of the State of New Jersey organized and existing under and by virtue of an act entitled "An Act to incorporate The Morris and Essex Railroad Company," passed January 29, 1835.

2. Pursuant to the terms and provisions of a certain lease dated December 10, 1869, and also of an act of the Legislature of New Jersey entitled "An Act to validate and confirm a certain lease and contract, by which The Morris and Essex Railroad Company lease their road to The Delaware, Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania," approved February 9, 1869 (P. L. p. 28), said The Delaware, Lackawanna and Western Railroad Company leases, operates, has, holds, uses, enjoys, possesses and exercises all and singular the property, things, franchises, immunities, rights, powers and privileges of said The Morris and Essex Railroad Company.

30

3. The railroad of your petitioners extends through the Borough of Chatham, in the County of Morris and State of New Jersey.

40

4. Said The Morris and Essex Railroad Company is the owner of a certain tract of land in said Borough of Chatham, a portion of which is subject to the burden of the easement of a certain unnamed public street or highway extending from Bow-

Exhibit D. 1.

ers lane to Passaic avenue, the lines and location of which are shown upon the map which is hereto annexed and made a part of this petition.

10 5. One Edna Dickinson, of said Borough of Chatham, is the owner of certain lands (which are shown on said map) abutting the northerly boundary line of the lands of your petitioners and of said public highway or street, and as such abutting owner is also the owner of or entitled to a right of way or easement of passage to and from her said abutting lands in, over and along said public street and the lands of your petitioners.

20 6. In the judgment of the proper officers of your petitioners it is necessary for your petitioners to acquire said right of way or easement and all other rights and interests of said Edna Dickinson and those claiming under or through her, in and to such part of the lands of your petitioners as is burdened with the easement of said street for the purpose of constructing and maintaining thereon the embankment, roadbed, tracks and other appurtenances of their railroad, as shown upon said map.

30 7. By virtue of the provisions of said Act to Incorporate The Morris and Essex Railroad Company and the several acts amendatory thereof and supplemental thereto, and also of an Act of the Legislature of New Jersey entitled "An Act concerning railroads (Revisions of 1903)," your petitioners are authorized to acquire and take such rights of way, easements and property by condemnation on the ascertainment and payment of compensation as provided by law.

8. Your petitioners, by their duly authorized agent, have endeavored in good faith to agree with said Edna Dickinson upon a price to be paid for the taking of said right of way, easement and other property, and the damages caused by the taking of the same, but have been unable to so agree.

40 9. The names and addresses of the owner and occupants of said abutting lands and other persons interested therein and in the right of way, easement and property required by your petitioners, are as follows:

Exhibit D. 1.

NAME	INTEREST	RESIDENCE	
Edna Dickinson	Owner	Chatham, N. J.	
Madison Trust Company	Mortgagee	Madison, N. J.	
Justina E. Dickinson	Mortgagee	Livingston, N.J.	
Abner Reeves	Tenant	Chatham, N. J.	
Tony Doe (said name "Doe" being fictitious, real name being un- known to petitioners)	Tenant	Chatham, N. J.	10

WHEREFORE, your petitioners pray for the appointment of three commissioners to fix the compensation to be paid for said right of way, easement and other property, pursuant to the provisions of an act entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public uses (revision of one thousand nine hundred)," approved March 20, 1900.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY AND THE MORRIS AND ESSEX RAILROAD COM-
PANY,

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By A. D. CHAMBERS,
Secretary.

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

A. D. CHAMBERS, being duly sworn, on his oath, says:

That he is the Secretary and Treasurer of the petitioners mentioned in the foregoing petition. That he has read the said petition and that he verily believes that the facts and statements therein contained are true.

30

Sworn to before me this }
2nd day of November, 1917. } A. D. CHAMBERS.

Joseph Fiell,

Commissioner of Deeds for the State
of New Jersey in New York.

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

FREDERIC B. SCOTT, of full age, being duly sworn, on his oath,
says:

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That he is one of the attorneys of the above petitions and that he is familiar with the matters and things set forth in the foregoing petition.

Exhibit D. 2.

This deponent further says that on the 13th day of October, 1917, he made a bona fide offer on behalf of the said petitioners to the said owner of the lands mentioned and described in the said petition for the purpose of acquiring on behalf of the said petitioners the right of way, easement and other property mentioned and described in said petition.

10 This deponent further says that the said petitioners and the owner of the said property, Edna Dickinson, have failed to agree as to the price and compensation with respect to the right of way, easement and said other property mentioned in said petition.

Sworn to before me this
2nd day of November, 1917. } FREDERIC B. SCOTT.

WALTER J. LARRABEE,
M. C. C. of N. J.

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EXHIBIT D. 2.

NEW JERSEY SUPREME COURT.

IN THE MATTER

of

30 The Application of the MORRIS AND ESSEX
RAILROAD COMPANY and THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY to Condemn Right of Way, Ease-
ment and other properties of EDNA DICK-
INSON.

Order.

40 The Morris and Essex Railroad Company and The Delaware, Lackawanna and Western Railroad Company having made application to me, by petition duly verified, dated November 2nd, 1917, for the appointment of commissioners to fix the compensation to be paid for the right of way, easement and other properties of Edna Dickinson required by the petitioner and particularly described in said petition, and the damages by reason of taking the same,

Exhibit D. 3.

Therefore, I, Francis J. Swayze, Justice of the Supreme Court of New Jersey, do hereby assign Saturday, the 24th day of November, 1917, at ten o'clock A. M., at the Court House in Jersey City, New Jersey, at the time and place for the hearing of said petition, and I direct that notice thereof be given to Edna Dickinson, The Madison Trust Company, Justina Dickinson, Abner Reeves and Tony Doe, said Doe being fictitious, his real name being unknown to the petitioners, by service thereof together with a copy of said petition, which need not be verified, at their places of residence within this State.

FRANCIS J. SWAYZE,
Justice of the Supreme Court.

EXHIBIT D. 3.

IN THE MATTER

of

The Application of the MORRIS AND ESSEX
RAILROAD COMPANY and THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY to Condemn Right of Way, Ease-
ment and other properties of EDNA DICK-
INSON.

Order.

Upon this 24th day of November, 1917, being the day fixed for the hearing upon the petition filed in the above entitled matter and upon filing with the Clerk of the County of Morris the proof of service of notice and of the service of a copy of the petition and order herein for the appointment of Commissioners in the manner required by law and by the order herein dated the 3rd day of November, 1917, the same being evidence satisfactory to me that said notice and service have been made as required by the statute and said order, and upon reading said petition and hearing Frederic B. Scott, Counsel for the petitioners, and Earnest Lum appearing for Edna E. Dickinson, Owner, appearing for Justina E. Dickinson, Mortgagee, appearing for Madison Trust Company, Mortgagee, appearing for Abner Reeves, Tenant, and appearing for Tony Doe (said

Exhibit D. 3.

- name "Doe" being fictitious), Tenant, I, Charles C. Parker, Justice of the Supreme Court of New Jersey, do hereby appoint Alfred C. Mills, E. J. Cahill and Charles A. Miller, three disinterested freeholders of the County of Morris, Commissioners to examine and appraise the said right of way, easement and other properties in the petition described and therein set forth
- 10 as the right of way, easement and other property required to be taken by The Morris and Essex Railroad Company and The Delaware, Lackawanna and Western Railroad Company, and to assess the damages to be sustained by the taking thereof and whatever the said Commissioners are required or authorized by law to assess, and I do direct the Commissioners to cause to be given to The Morris and Essex Railroad Company and The Delaware, Lackawanna and Western Railroad Company and to
- 20 Edna Dickinson, Justina E. Dickinson, Madison Trust Company, Abner Reeves, and Tony Doe (said name "Doe" being fictitious), the owner and parties interested in said lands at least six days' notice in writing of the time and place when and where they will meet and proceed to execute their duties under this appointment, which notice shall be served upon the attorneys appearing for them or by leaving a copy thereof at their respective offices or at the residence of the said owner and parties interested in said lands, whether in or out of the State of New Jersey, and I do hereby further direct that the Commissioners file their report with the Clerk of the County of Morris on or before the Twenty-sixth day of December, A. D.
- 30 One thousand nine hundred and seventeen.

CHARLES W. PARKER,
Justice of the Supreme Court
of New Jersey.

Dated, November 24th, 1917.

Stipulation.

Stipulation.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of the respective parties, for the purpose of the trial of the above case at the January, 1919, term of this Court, that the compensatory damages which the above plaintiff, Edna Dickinson, is entitled to recover on the trial of the above-entitled cause is the sum of One Thousand Three Hundred and Thirty-Two Dollars (\$1,332); and it is

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FURTHER STIPULATED that the period of time for which the damages in the above-entitled action are recoverable is from May 3rd, 1916, to November 3rd, 1917, at which latter date the above defendant presented its petition to the Honorable Charles W. Parker, Justice of the Supreme Court of the State of New Jersey, for the purpose of condemning and acquiring the right of way, easement and all other rights and interests of the said plaintiff, damages on account of interference therewith and for which the above-entitled action has been instituted by her against the above defendant; and it is

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FURTHER STIPULATED AND AGREED that the above defendant proceeded with said condemnation proceedings pursuant to the statutes in such case made and provided and that an award was made by the Commissioners in said condemnation proceedings in favor of the above plaintiff for the sum of Five Thousand Seven Hundred and Six Dollars (\$5,706), which award was duly paid to the said plaintiff.

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Dated, January 24, 1919.

LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff,

FREDERIC B. SCOTT,
Attorney of Defendant.

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Exhibit D. 4.

EXHIBIT D. 4.

IN THE MATTER

of

The Application of the MORRIS AND ESSEX
RAILROAD COMPANY and THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY to Condemn Right of Way, Ease-
ment and other properties of EDNA DICK-
INSON.

Order.

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Application having been made to this Court for an order ex-
tending the time on or before which the Commissioners in the
above entitled proceeding, duly appointed by this Court to file
their report, and good cause having been shown to this Court
why the time of the said Commissioners to file their report
should be extended, it is on this 22nd day of December, 1917,
on motion of Frederic B. Scott, attorney of the petitioners,

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ORDERED that the Commissioners duly appointed by this Court
in the above matter to examine and appraise the land or prop-
erty and to assess the damages, etc., as prayed for by the peti-
tion in said cause, do have their time to file their report in
the above proceeding extended until the 16th day of January,
1918.

CHARLES W. PARKER,
Justice of the Supreme Court.

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Exhibit D. 5.

EXHIBIT D. 5.

Before:

HONORABLE CHARLES W. PARKER, a Justice of the Supreme Court.

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IN THE MATTER

of

The Application of the MORRIS AND ESSEX
RAILROAD COMPANY and THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY to Condemn Right of Way, Ease-
ments and other properties of EDNA DICK-
INSON.

Report of
Commissioners.

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We, ALFRED E. MILLS, E. J. CAHILL and CHARLES A. MILLER,
Commissioners appointed in the above entitled matter by the
Honorable Charles W. Parker, a Justice of the Supreme Court
of New Jersey, having first taken and subscribed an oath faith-
fully and impartially to examine the matter in question and
make a true report to the best of our skill and understanding,
which oath is hereto annexed, do report that after giving not
less than six (6) days' notice to the petitioners, owners and
parties interested as appeared by the affidavit of Patrick J.
Grady and the endorsement by the petitioner, which is also an-

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nexed, we met at the time and place designated in said notice,
and having viewed the premises described in the petition and
heard the testimony under oath of the witnesses produced before
us by the petitioner, owners and parties interested and having
duly considered and deliberated upon said matter and the tes-
timony so given and the evidence so adduced before us, do ap-
praise the value of the right of way, easements and other prop-
erties described in said petition and estimate and assess the
damages to be sustained by reason of the taking thereof as of
November 13th, 1917, the date of the filing of the petition
herein, at the sum of Five thousand seven hundred and six
Dollars (\$5,706.00).

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ALFRED C. MILLS,
E. J. CAHILL,
CHARLES A. MILLER.

Dated, January 8, 1918.

New Jersey Court of Errors and Appeals

EDNA DICKINSON,

Plaintiff-Appellant,

vs.

DELAWARE, LACKAWANNA & WESTERN RAIL-
ROAD COMPANY,

Defendant-Respondent.

Action at Law.

Brief for Appellant.

This case is sufficiently well known to this Court in its general aspects to need no introduction. The only question presented on this appeal is the right of the plaintiff to have the matter of punitive damages submitted for consideration by the jury.

This is one of the series of actions brought by the plaintiff to recover damages for a nuisance created and maintained by the defendant company by means of an embankment and wall along a public highway in the Borough of Chatham, upon which highway the plaintiff's property abuts, thereby interfering with her use of the highway and making ingress and egress to her premises more difficult. A brief history of the matter to date shows that the original suit was started with the complaint filed February 14, 1913. Trial on the 8th of March, 1914, before Hon. Charles C. Black and a jury resulted in a verdict for the plaintiff. From this appeal was taken by the defendant. The result is reported in 87 N. J. L. 264. This Court therein established the plaintiff's right and thereby established the defendant as a wrongdoer. The defendants contended, however, that it regarded the verdict of \$750 as full payment, and, moreover, contended that its structure was built in such a way as to make it permanent, and that a recovery having been had, must have been, once and for all, and that it was no longer liable. The second suit was instituted on the 10th of January, 1916, and tried before Judge Speer and a jury on May 3, 1916, resulting in a verdict of \$1,436, which included an element of \$500 for punitive damages. The defendant in due course brought this before this Court and the result is recorded in 90 N. J. L. 158.

A review of the record in these two cases will show that the second case contained two counts; that after the first verdict the defendant caused concrete posts and barbed wire to be erected over the only remaining part of the street that was not covered by the high embankment, cutting off the plaintiff's access entirely at both ends, and making it impossible for her tenant in the little house at the rear of the property to get either in or out without crawling across the wire. It was shown that this was cut by the plaintiff and replaced by the defendant after notice. The case seemed unquestionably then one for punitive damages under any aspect of the matter, but inasmuch as that question was not raised or even considered by the defendant, the notices and letters and data bearing on that phase of the subject were by consent eliminated from the record. This led to the observation made by the Court at the end of the opinion just referred to. (Last paragraph 90 N. J. L., 62.)

In any event, however, the defendant continued baldly to disregard the observation made by this Court to the effect that "in the face of the prior adjudication, the normal method to be adopted by this appellant company for legalizing its structure, so far as the plaintiff is concerned, is by taking advantage of its charter powers to condemn the right of the plaintiff, which has been invaded by its illegal act." The loss to the plaintiff continued, irritation of tenants, of course, increased, for promises of a remedy too long held in their ears were turned back upon the plaintiff, and on April 8th, 1917, another suit was instituted. This was tried before Judge Cutler, and on the 10th of October, 1917, resulted in a general verdict against the defendant for \$4,000. The nuisance had continued, the defendant had made no effort to proceed with condemnation; it had made an abortive effort to induce the borough to vacate the street, but the jury doubtless considered that the defendant did not use good faith even in that effort, for the demand that was made, as shown by the record, was that the borough should vacate other rights in addition. The ordinance which the railroad drew for that purpose included all the property between Passaic avenue and Fairmount avenue (p. 39, l. 5). The defendant on that trial offered the contract in evidence, but on the basis of the decision in 90 N. J. L. the offer was overruled by the Trial Court. The defendant took a rule to show cause, which was submitted to the Supreme Court on December 6, 1917, and decided February 27, 1918. That opinion we do not find reported, but the opinion

says in the third paragraph: "In the present case alleged liability was necessarily predicated upon a willful continuance of the nuisance, based in part on the specific notices to the directors and subsequent inaction of the company. The latter undertook to meet this by showing that whereas by the contract it was bound, at least ostensibly, to maintain the structure it had endeavored unsuccessfully to clear the situation by obtaining a vacation of the public way, which would, of course, require municipal action and an award of damages to the plaintiff. This it was entitled to show, and we think the contract in this aspect was an essential, or at least a material link in the chain of proof, and should have been admitted."

"We think the letters to the directors were admissible as notices through them to their company, and so far as they operated as such were not self-serving declarations." From this opinion the Trial Court on the retrial of the case assumed that the plaintiff was clearly entitled to have her right to punitive damages submitted to the jury, and that was done, and that jury again, in turn, found the defendant liable for punitive damages.

Of course, if the Supreme Court in the opinion just referred to had considered this an improper case for the consideration of punitive damages, it would doubtless have so held, and in that event, of course, the contract of the borough and the notices to the directors were wholly immaterial, for there was no dispute on any side as to the plaintiff's right to recover her loss of rent, and by the opinion above referred to the retrial was confined to the question of damages only.

On this new trial the contract was admitted and the record fully presented to the jury. The mayor and other officials of the borough were sworn and the jury were convinced, as we think, that any numbers of juries without limit must be convinced that the defendant had wilfully disregarded the plaintiff's right, and again a judgment, as we say, was given to her, which included punitive damages. From this again the defendant took a rule to show cause, which came on before the Supreme Court at the June term, and on November 12, 1918, an opinion was filed, which also we find to be not reported. That opinion uses this language: "The embankment and wall are permanent, having been constructed as a part of the right of way of the defendant company by legislative authority." The opinion quotes from the language in 90 N. J. L., 162, above referred to, and says that the factors in that case, so far as they relate to the subject

matter now under consideration, were practically the same as those there presented, except that the cited case was the second and the present was the third or fourth in the series of the cases; this the Court held was immaterial, and it determined that the defendant was not liable to have punitive damages assessed against it and the rule to show cause was made absolute. This could, of course, not be reviewed in this Court, so that the plaintiff proceeded again to trial, and, being denied her right to punitive damages on the basis of this last decision, she has taken proper exceptions to raise the question, and it is that we now seek to review.

If the decision of the Supreme Court filed November 12, 1918, is sound and is to be adopted by this Court, then the opinion of this Court in 90 N. J. L., 158, is very largely negatived. An examination of that record will show that the defendant contended, and with full force and power, that it was not liable for continuing trespass because its embankment had been so solidly constructed that it could not be removed; that its work was done under legislative authority, by competent contract with the borough authorities, and that it was not a continuing trespasser. In the State of the Case on which this matter was presented to this Court at the November Term, 1916, the following language is used by Judge Speer (page 19, line 22): "The reason is that when a Court has once adjudicated a nuisance it is not to be presumed that the defendant will proceed in continuing that nuisance where it exists, but that he will abate it. The presumption is not against a man's disobeying the law, but in favor of it, and if the nuisance be an obstruction of the public highway that obstruction may be removed by an individual who suffers a special damage, or it may be suppressed by the municipality in which the nuisance exists"; and at page 21, line 1: "I don't think that the Court is under any obligation to assume that this is a permanent structure. In the law permanent structures are rendered permanent by their conforming to the rule of law which defines permanent structures, and they are not permanent merely by their physical characteristics."

At that trial the defendant contended that the plaintiff was under the obligation to rearrange her building, put the stairways from the outside at the front, and in other ways accommodate the building to its continuing nuisance. The Trial Court refused to take that view and objection was made, and that point was one of several raised in this Court. In 90 N. J. L., bottom of

page 160, the Court says: "The general rule that a person suffering from a nuisance created by another is under the duty to take proper measures for the lessening of damages resulting therefrom has never been considered to be so far reaching in its effect as to relieve the wrongdoer from the responsibility for the existence of conditions like those exhibited in the present case, and to impose it upon the innocent sufferer *by requiring him to assume that the creator of the nuisance will continue indefinitely to maintain it in violation of law*, and upon this assumption oblige him to alter or add to the building upon his property for the purpose of adapting it to those conditions." (Italics are ours.) At the bottom of page 161, the opinion in 90 N. J. L. considers the objection, among others, that the structure was a permanent one, and at page 162 says: "In the second place there was no intimation at the time of the offer that there was anything in the contract to show that it was the intention of the parties that this illegal structure should be permanently maintained. In the third place, even if such an intention did so appear, it would be quite immaterial, for there is nothing in the statute appealed to which permits a railroad company and a municipality to agree that the former shall erect and maintain a nuisance in a public highway," and the opinion then points out to the defendant both its right and its duty as to how to proceed to legalize its structure. It seems to us impossible to reconcile this language with the decision filed November 12, 1918, and we respectfully and deferentially submit that the opinion of this Court above referred to was an accurate and concise statement of the law and that we are not concerned with the contract which the defendant may have made with the municipality, if in fact that contract violated the established rights of this plaintiff. It would be a new doctrine in this State to hold that two parties by contract might so agree as to negative and override the independent rights of a third party not bound by the contract and not a party thereto, yet this can be the only result of the Supreme Court opinion as we understand it.

The decision in the Court of Errors above referred to pointed out to the defendant its method for legalizing its structure, and a method which was entirely under its own control, not dependent upon the claims or control of any but itself. This was filed on the 5th of March, 1917.

The plaintiff had previously caused full notice to be brought to the attention of the defendant as to the continuance of this

wrong (Exhibit P. 3, P. 4, P. 5 for identification), were written as early as October and November, 1915). In order to eliminate any question of fact as to whether the continuing wrong was brought to the attention of the directors, and because of the rule of Judge Speer in one of the earlier trials, notices as set forth (P. 6, P. 7, P. 8; see also P. 9, P. 10, P. 11, P. 12 for identification) were sent in May, 1916. After this decision of this Court these notices were returned by the attorney of the railroad with notices that he could not keep his agreement as to acknowledging service for the directors. Thereupon, on March 15, word was sent direct again to the railroad reviewing the whole situation and to each of the directors (P. 13, P. 14, P. 15).

Now, by reviewing this case in parts, as almost necessarily must be done, it is difficult to keep clearly in mind how serious a situation was constantly presented here for this plaintiff and how important was the element of time. A corporation cannot act with the prompt despatch of an individual. If we forget for a moment that we are dealing with a corporation as a defendant and assume that we here have an individual claiming an individual right, it would be clear at once that failing to abate the nuisance, failing to remove this obstruction from the highway, is an act which, after this second Court of Errors case, would lead to serious results, undoubtedly to an indictment. We may assume that this railroad, operating through its departments, might well take a week or ten days to do what a single individual would be expected to do in the way of remedying this condition in perhaps two or three days, but in spite of all the notices the defendant made absolutely no effort to proceed with condemnation, and it was not until the 23rd day of March, eighteen days after the case was decided, that the defendant showed any even casual interest in the matter (P. 18), and then disregarded the observation of this Court as to the proper method to legalize the situation, wrote to the borough and asked it to pull its chestnuts out of the fire, and then wrote again on April 3rd, 1917 (P. 19). On the 6th it was advised by the borough that it could not vacate any more streets (P. 16) or do any other thing for the railroad until it had performed certain things on its part to be performed, and there the matter rests during May, June, July and August, until the last day of September, before any further effort was made, and then the railroad's attorney again writes the borough, just as though nothing had ever happened and as though its former letters had

been merely overlooked (P. 20). This was about the time that the previous suit started in April ~~and~~ was about to be brought to trial. In the meantime a month and three days had elapsed after the Court of Errors decision had been filed, during which time the plaintiff had been communicated with in no way at all, in fact utterly ignored.

Under the admitted facts throughout the plaintiff was suffering a rental loss of at least \$72 a month as a direct result of this embankment. To say that she has been compensated by collecting this rent as a result of this catalogue of trials is to announce that which denies the fact.

If the course pursued by this defendant may be hereafter pursued by other defendants under like circumstances, it is well that it should be definitely so decided by this Court at this time, for in that event the members of the Bar, who are concerned with their duties as counsel as well as advocate, will, if conscientious, advise a plaintiff in like posture to abandon the attempt to secure clearly established rights. If this defendant was not liable to punitive damages at the end of the third or fourth suit, as at the time of the filing of the Supreme Court opinion above referred to, it will not become liable at the end of the sixth or seventh suit, or at a period four years later. It is within a few weeks of six years since the plaintiff started this litigation to secure her rights in an established highway. In the meantime her property was very seriously impaired in value. This was finally clearly established by a condemnation proceeding from the award in which this defendant did not appeal. This proceeding, however, was not even instituted until eight months after the Court of Errors had indicated to the defendant its right and duty in that connection, and note this original injury at the start of 1913 and the institution of condemnation at the end of 1917. This plaintiff would undoubtedly have lost her entire interest in the property by foreclosure had not it been for personal credit and sterling individual worth entirely independent of the *res* involved in this litigation.

Justinian pointed out a very long time ago that "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*" This litigation as it now stands would seem rather to show a determined and ever present desire to prevent this plaintiff from receiving her due, for the amount of rent which she has received, less the expense of the collecting of it at the most reasonable rate that it can be figured will show as a purely mathematical

problem that a very substantial sum must yet be added to make the scales weigh even. In this connection may it be noted that this is the first appeal throughout this whole course of litigation in any Court in which this plaintiff has been the appellant, so that it may not be said that she wasted her substance in riotous appeals.

A determined and ever-present desire to give every man his due would compel a recognition that under like conditions as set out in the history of this case to date, a normal plaintiff, with property encumbered and without other credit to draw on, would doubtless have long ago been wiped out by foreclosure and left without standing even as a plaintiff for the final protection of her rights.

The matter now in issue is something bigger than even the single question of justice to this individual plaintiff, significant and important as that may be and is.

This loss of rentals is today based upon the amount of rent being received by this plaintiff almost six years ago. The general experience throughout the length and breadth of this country is such that the tax rate during that time has very vastly increased. The narrow, cramped rules of damages eliminate consideration of a speculative nature and hold to the actual loss, and confine this plaintiff to the old figure of rent. No one can doubt but that the rent would have increased very substantially, and there is no one who had actual experience in the matter but knows the difficulty of proving the loss of profits never received.

For a single trespass, where a question of rights is to be settled at law, damages should of course be confined to strict bounds, but where a wanton trespass continued defiant trespass persists, to hold that that same rule must obtain is to injure under the name of law.

We recognize that there originally existed a disagreement in this Court as to the rights of this plaintiff in this highway and six members were opposed to that view. Her rights, however, were established and thereupon became an object entitled to continued protection.

The fairest way to consider this case, in our view, is to forget that we are dealing with a corporate defendant and review the matter as though we were dealing with our own property in relation to an individual citizen, and then merely add at any point, where time becomes an element, a reasonable limit, whether it

should be five days or ten, for greater deliberation and procedure, but weigh the results by identically the same scales, with the exception of that element of time. In that event we think we are on safe ground in affirming that the plaintiff would unquestionably be held in all courts to be entitled to punitive damages. We are asking now merely for the right to submit to a jury our right to such damages.

To say, as did the Supreme Court opinion of November, 1918, that the situation is the same whether we are trying the second case or the fourth, is to inaccurately state the proposition as it seems to us. Our books abound with cases where punitive damages would not be allowed in a first trespass case, where some punitive damage would be allowed in a second, but much more in a third, fourth or fifth. How could it be well otherwise held?

Apparently the Supreme Court which filed the opinion of February 27, 1918, considered this a proper question for submission to the jury.

With reference to the general law applicable, it is clearly settled that a corporate company can be held for punitive damages.

Hoboken Printing Co. v. Kahn, 59 N. J. L., 218.

Peterson v. Middlesex & Somerset Traction Co., 42 Vr., 296.

Carey v. Wolff & Co., 72 N. J. L., 510.

Our Court of Errors and Appeals has already determined in what cases punitive damages may be awarded. In *Trainer v. Wolff*, 58 N. J. L., page 381 (Court of Errors and Appeals), Chief Justice Gummere, on page 382, says:

"This, in my opinion, was erroneous. If the jury found that the act of the defendant was a wilful trespass it was their province to say whether or not the plaintiff should have exemplary damages. The finding of the jury established the fact that the act was done with a wanton and reckless disregard of her rights, and it is well settled that in such a case the jury are not confined in assessing damages to compensation, but may give damages as a punishment to the defendant."

In *Blackmore v. Ellis* (Court of Errors and Appeals), 70 N. J. L., page 264, Justice Garretsen, on page 266, says:

"It is further assigned for error that the Judge charged the jury that punitive or exemplary damages might be recovered if the wrongful act of the defendant was founded in malice. In this direction we think the Judge was fully sustained by the cases of *Magie v. Hollair*, 3

Dutcher, 86; Haines *v.* Schmeltz, 21 Vr., 481; Trainor *v.* Wolff, 29 *Id.*, 381; Am. and Eng. Encyc., L. (2nd Ed.), 23."

In *Wendelken v. Stone* (Court of Errors and Appeals), 86 Atl. Rep., page 376, in which the above entitled case is cited and followed, Justice Parker, on page 376, says:

"But it should be unnecessary to repeat the well-settled rule that 'malice' in law means nothing more than the intentional doing of a wrongful act to the injury of another without just cause or excuse," citing

King v. Paterson, 49 N. J. L., 417.

McFaddin v. Lane, 71 N. J. L., 624.

More v. Beck, 71 N. J. L., 7.

Brennan v. United Hatters, 73 N. J. L., 729.

Our highest Court has held that the embankment was a nuisance and unlawful. The undisputed facts in this case are that the defendant, knowing it to be a wrongful act, continued to maintain and keep the embankment in exactly the same position and condition as it was before.

The act of continuing this nuisance was done with full knowledge that it is a wrongful act; yet it is continued by the defendant wilfully and without just cause or excuse.

The case, therefore, falls directly within the decisions of the cases cited above and the plaintiff is entitled to punitive or exemplary damages.

We are not, of course, here concerned with any consideration of the fact such as the good faith of the defendant with reference to obtaining consent of the borough for the removal of this embankment. With those facts a jury must, of course, deal. The Supreme Court opinion of November says: "It is at least doubtful whether under the circumstances recited this company has the power to destroy any part of the construction embraced in the contract without the consent of the Borough of Chatham." If there were in this case any evidence that the defendant had ever asked the borough for permission to destroy the construction or to change the line of its track, that question as one of the facts might be raised for consideration by a jury, but we should hardly anticipate the double contingency when the facts show that in the first place the company made no such request or the borough any such refusal, but if the railroad, eight months before the Supreme Court opinion was filed, had constantly in its power the way to legalize the structure and failed

to do so, can we say as a question of law that it absolutely did not act either wilfully, wantonly or maliciously in disregard of the rights of the plaintiff?

It may be said that it is a matter of indifference to the plaintiff whether her property is condemned the first of March or the last of November, but this is simply to beg the question. The inadequate verdicts for part of the rent collected at the end of litigation, carried to the limit of the defendant's power, is small compensation to the plaintiff and meager protection on the calling of mortgages by the mortgagee concerned by the impairment of the security. With the lump sum for the entire damage as received on condemnation the situation is quite different.

In the present suit which this Court is now considering, the plaintiff is not claiming damages either compensatory or punitive because of the alleged erection or building of this nuisance, as that has already been covered in previous litigation. She simply claims punitive damages for the period covered in the suit from May 3, 1916, the end of the period covered by the preceding suit, to the time of the filing of the petition to condemn, November 3, 1917; not because the embankment was originally erected, but because it was wilfully and deliberately continued and maintained throughout the time covered by this suit after it had been adjudged by this Court to be nuisance and unlawful. This Court has likewise determined heretofore that this embankment was not a permanent structure, and it cannot be assumed that this unlawful structure was a permanent one and would continue.

There is no evidence whatsoever before the Court that it could not be removed, that the railroad during the period of over a year and a half covered by this suit ever applied to the borough for permission to remove the structure, or did anything, in fact, except make an abortive effort to have an ordinance passed in which the borough should surrender other rights at the same time it vacated this street.

The origin of the nuisance is now immaterial. It is the continuance of it that is complained of, and that there was a contract between the defendant and a third party, under which the embankment was originally constructed, is utterly irrelevant and immaterial, except on the clear jury question of good faith.

The plaintiff's contention in this suit is not that the defendant erected this embankment knowing it to be wrongful, but we

do insist that the defendant, knowing it to be wrongful, wilfully and deliberately continued this structure, and clearly this question as to whether the defendant knowingly, wilfully and deliberately continued a wilful act, and whether it had for so doing any justification or excuse in fact, must be a jury question.

The defendant was at its own peril in placing this structure originally on a public highway, and surely no contract can be made with a third person binding upon this plaintiff which will relieve the defendant of all the consequences that may normally flow from its own wrong.

If this defendant can carry forward its course as done in this case for the time covered, any other defendant may with impunity follow the same course for double that length of time. If for five years, why not for fifty?

The whole question of punitive damages has been seriously criticized more than once, but it remains as an integral part of our substantive law, and when it is eliminated the revision must be carried through this whole subject of damages.

The defendant in this case discusses delays in weeks and months, as though they were matters of minutes only. We do not permit citizens of this State to take the law into their own hands. If that condition is to prevail, if that is to be continued, it in turn places a reciprocal duty of seeing full justice done to those who must abide by the law's delays.

That the defendant could really really have little justification for its course in this case seems clear from the letters of its own attorney offered in evidence (P. * for identification). "It is needless to call your attention to the fact that the matter of the vacation proceedings can be taken up independently of the judgment in your Dickinson case." This was written by the attorney for the defendant charged with the conduct of this litigation throughout, and was written three years ago this coming May.

*(We here observe that, through an oversight, this exhibit seems not to have been printed, and may we at this time also call to the attention of the Court the further error which appears in the printed record on page 14, line 12. The ordinance and the contract were offered as P. 21. The ordinance appears as P. 21, page 38, but the contract was omitted. This has previously been printed in several of the former records before this Court and the Supreme Court, and the counsel for the defend-

ant has kindly agreed to have it printed in his brief, with the same force and effect as though included in the State of Case.)

We would seek to emphasize that it is a travesty on justice to say the plaintiff has been or can be compensated by suits to recover for the loss of rents. If ever a case was presented for a jury's consideration of punitive damages, this is one.

The defendant placed this embankment and these structures on a public highway.

It was not misled in so doing by this plaintiff nor by the borough.

The contract shows that this was not included as one of the streets that the borough was asked to vacate.

The plaintiff's right was established in 1914, affirmed by this Court in the same year. In 1916 this Court held that the structure was continued illegally, that it was not permanent, that this defendant should proceed to legalize it, and yet the end of this litigation has not arrived. Surely this plaintiff is not to be blamed for seeking to follow up in our Courts the rights which have been heretofore established by our Courts.

We respectfully urge that this judgment should be reversed, which will in effect overrule the Supreme Court opinion before referred to, and that the question of punitive damages may come properly for consideration on the full facts before a jury.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

RALPH E. LUM,
Of Counsel.

March, 1919 Term—Case 51.

New Jersey Court of Errors and Appeals.

EDNA DICKINSON,

Plaintiff-Appellant,

v.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,

Defendant-Appellant.

Action at
Law.

10

BRIEF OF RESPONDENT.

The statements in the brief of the appellant substantially set forth the facts relating to the subject matter of the above case and the course of litigation between the parties, although it will be observed appellant has seen fit to travel away from the record of the case which is now before the court for consideration.

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The instant case presents to this court the sole question as to whether the appellant was entitled to have the jury consider the question of punitive damages on account of the continuance of the wall and embankment constructed by the respondent in the unnamed highway parallel to the appellant's property line at Chatham, New Jersey, under and by virtue of a contract with the Borough of Chatham for the elimination of grade crossings authorized by Section 30 of the Act Concerning Railroads, Revision of 1903.

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The contract referred to, while offered in evi-

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dence at Page 14 of the State of Case, is not set forth in the printed case, but it has been agreed between the counsel for the respective parties that the respondent may set the same forth in its brief for the consideration of the court.

brief for the consideration of the court. This contract was marked Exhibit D-21, and is printed at page 7 of this brief.

10 The evidence in the case now before this court shows that the wall and embankment were constructed as a part of the right of way of the respondent under the contract with the Borough of Chatham hereinbefore referred to (p. 19, ll. 1 et seq).

20 It further appears in this case, both by stipulation (p. 9, ll. 27, et seq., and p. 47) and by exhibits D-1, D-2, D-3, D-4 and D-5 (pp. 39, et seq.) that the respondent, prior to the trial of the instant case, condemned whatever rights the appellant had in the unnamed street on account of the maintenance of the wall and embankment in said unnamed street, paying to said appellant the sum of \$5,706.00.

30 The reason, we conceive it, that the appellant considers that she is entitled to have the question of punitive damages submitted to a jury in this case, is that the respondent did not instantly condemn the rights of the plaintiff in said unnamed street after the decision of this court in the case between the appellant and this respondent reported in 90 N. J. L. at 158.

In the appellant's brief it is stated that:

40 "A review of the record in these two cases" (the cases between the appellant and the respondent reported in 87 N. J. L. 264, and 90 N. J. L. 158) "will show that the second case contained two counts and that after the first verdict the defendant caused concrete posts and barbed wire to be erected over the

only remaining part of the street that was not covered by the high embankment, cutting off the plaintiff's access entirely at both ends and making it impossible for her tenant in the little house at the rear of the property to get either in or out without crawling through the wire. It was shown that this was cut by the plaintiff and replaced by the defendant after notice."

This respondent, feeling that the actions of the Department which erected the concrete posts and barbed wire and replaced the same after the notice from the appellant to the respondent constituted on the trial of the second case sufficient matter for the consideration of the jury with respect to punitive damages in that particular, raised no objection to the amount of the punitive damages then and there given and, with the consent of the appellant, eliminated from the appeal record which was submitted to this court on the second case all the data relative to which it conceived punitive damages in that case had been properly assessed, *this elimination placing before this court a record, the situation of which is identical to the situation in the instant case,* with the exception of the letter Exhibits P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18, P-19, and P-20. marked for identification.

Upon a record presenting identically the same features, with the exception above noted, this Court, in a unanimous affirmance of the judgment recovered by the respondent in that suit, said:

"One other matter has been called to our attention, namely: that the jury were permitted by the trial court, in making up its verdict, to assess punitive damages against the appellant. We are unable to perceive any theory upon which, under the facts before us, the appellant had subjected itself to

liability to have the damages of this character assessed against it, but as this judicial action has not been made the basis of a ground of appeal the judgment under review cannot be reversed for this error, notwithstanding its injurious character."

10 Our Supreme Court, as the appellant has shown in her brief, as late as November 12th, 1918, in this same case which was before it on a Rule to Show Cause with all of the exhibits which have been referred to and marked for identification on behalf of the appellant in this case, before it, said:

20 "The only question presented on this rule is the validity of the verdict so far as it includes punitive damages assessed against the defendant. This is one of a series of actions brought by the plaintiff to recover damages for a nuisance created and maintained by the defendant company in the building of an embankment and wall along a public highway in the Borough of Chatham upon which the plaintiff's property abuts, thereby interfering with her full use of the highway and making ingress and egress to her premises more difficult. The embankment and wall are permanent, having been constructed as a part of the right of way of the defendant company by legislative authority and under a contract made by the company with the Borough of Chatham, which required the embankment and wall to be built in accordance with certain plans and specifications. It was so built.

30 "It is at least doubtful whether, under the circumstances recited, this company has power to destroy any part of the construction embraced in the contract without the consent of the Borough of Chatham. Certainly, it cannot be said, in view of these circumstances, that in failing to destroy this construction the defendant is acting in wilfull and wanton disregard of the rights of the plaintiff.

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"In a prior litigation between these parties resting on the same cause of action and being the second of the series of suits brought by the plaintiff against the defendant, our Court of Errors and Appeals on review of the judgment entered therein on a verdict for the plaintiff, used the following language:

"One matter has been called to our attention, namely: that the jury were permitted by the trial court, in the making up of its verdict, to assess punitive damages against the appellant. We are unable to perceive any theory upon which, under the facts before us, the appellant had subjected itself to a liability to have damages of this character assessed against it, but as this judicial action has not been made the basis of a ground of appeal the judgment under review cannot be reversed for this error, notwithstanding its injurious character' (90 N. J. L. 162).

"The facts in that case so far as they related to the subject matter now in consideration were practically the same as those here presented, except that the cited case was the second and the present case is the third or fourth of a series of these cases, and this, we think, is immaterial.

"Like the Court of Errors and Appeals, we are unable to perceive any theory upon which, under the facts recited, the defendant company has subjected itself to a liability to have punitive damages assessed against it."

The chief merit of the appellant's brief we conceive to be the strenuousness and fervor with which her counsel seeks to maintain the appellant's contention that she is entitled to have punitive damages. We must content ourselves with our reliance upon the pronouncements of our Supreme Court and this Court on the identical question now before this Court, and in fact between the same parties, and, though we are aware of the fact that this Court has said, through the

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late Justice Dixon, with respect to punitive damages, that they are "abnormal and irrational at best." (*Eve. Journal Asso. v. McDermott*, 44 N. J. L. at 433), we do not for an instant urge upon this court in behalf of the present respondent that it revise or eliminate the question of punitive damages from our substantive law, where it is, and has been for years past, an integral part thereof.

10 We do however, respectfully urge that an examination of the record in the instant case will not disclose evidence sufficient to warrant this court in saying that an injury has been inflicted upon the appellant by this respondent from wanton or malicious motives, or in a reckless disregard of her rights, or that the evidence warrants any inference whatsoever that the acts of this respondent resulted in oppression of the appellant.

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It is, therefore, submitted that the judgment entered upon the verdict of the jury be affirmed.

Respectfully submitted,

FREDERIC B. SCOTT,

Of Counsel for The Delaware,

Lackawanna and Western Railroad

Company, Defendant-Respondent.

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Exhibit D-21.

An ordinance to authorize and empower the Council of the Borough of Chatham to make and enter into a contract with the Morris & Essex Railroad and the Delaware, Lackawanna & Western Railroad Company, lessee of the Morris & Essex Railroad Company, for the elimination of the grade crossings in the said Borough of Chatham, the construction of a new passenger station, new drive-ways and station grounds and to provide for the execution of said contract. 10

Be it ordained by the Council and the Borough of Chatham, County of Morris and State of New Jersey.

Section 1. That the Mayor and Clerk of the Borough of Chatham be, and they are, hereby authorized, and directed to make, enter into and execute on behalf of the Borough of Chatham, the contract with the Morris & Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company, for the elimination of the grade crossings in the said Borough, the construction of a new passenger station, new drive-ways and station grounds according to the plans submitted to the Borough of Chatham, which contract shall be as follows: 20

(The necessary specifications, plans, maps and profiles together with the necessary dates and seals, signatures and acknowledgments being thereto attached or therein inserted and added.) 30

FRANK L. KELLEY.

Mayor.

Ordinance passed

May 5th, 1913.

W. S. Angell,

Borough Clerk.

Agreement made this seventh day of June in 40

Exhibit D-21.

the year 1913, between the Borough of Chatham (in Morris County) a municipal corporation of the State of New Jersey, hereinafter called the Borough, of the first part, and The Morris & Essex Railroad Company, a corporation of the State of New Jersey, and the The Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, lessee of the Morris & Essex Railroad Company, of the second part, hereinafter called the Railroad Companies.

Whereas, the main line of the Railroad Companies, which extends through the Borough of Chatham, consists of two main tracks and various sidings and switches crossing at grade the public highways known as River Road, Willow Street, Watchung Avenue, Red Road, Hillside Avenue, Passaic Avenue, Fairmount Avenue, Washington Avenue, Kings Road, Lafayette Street and Division Street.

Whereas, for the purpose of securing greater safety to persons and property, and to facilitate the construction and maintenance of other than grade crossings in the said Borough, the parties hereto desire to have the main tracks of the said railroad relocated and elevated so as to cross River Road, Watchung Avenue, Hillside Avenue, Passaic Avenue, Fairmount Avenue, Washington Avenue, Lafayette Street and Kings Road over and above the same, and below Division Street, and

Whereas, to relocate and elevate the said railroad and to change the grade of the above mentioned streets to effectuate the purposes aforesaid is practicable and, in the judgment of the Mayor and Council of the said Borough, will be best adapted to secure the safety of the lives and property, and provide for other than grade crossings of the street in said Borough, and promote the interest of said Borough, and

Exhibit D-21.

Whereas, by section 30 of the act entitled "An Act concerning Railroads, (Revision of 1903)", Approved April 14th, 1903 (Chapter 257), and the amendments thereof and supplements thereto, authorize the making and entering into of contracts to effectuate the purposes aforesaid; and

Whereas, The Council of the Borough of Chatham, the proper municipal authority of the said Borough of Chatham, has by its ordinance passed the fifth day of May, 1913, authorized the making and entering into of this agreement, now therefore in consideration of the premises and of the sum of \$1.00 to each of the parties hereto to the other paid, the receipt whereof is hereby acknowledged, the parties hereto do hereby covenant and agree to and with each other as follows:

ELEVATION AND RELOCATION OF TRACKS.

1. The tracks of the Railroad Companies shall be relocated and elevated as shown upon the attached maps and profiles so as to cross over and above the grades of River Road, Watchung Avenue Hillside Avenue, Passaic Avenue, Fairmount Avenue, Washington Avenue, Lafayette Street and Kings Road, at the respective grades thereof, to be established as hereinafter provided, upon steel plate girder bridges, resting upon concrete abutments, paralleling the street lines. Division Street shall be elevated so as to cross over and above the tracks of the railroad at the grade shown on the attached maps upon a steel plate girder bridge resting on concrete abutments. At Hillside Avenue, Fairmount Avenue, Washington Avenue and Kings Road, said bridges are to be supported also by steel columns erected along the curb lines of said street.

2. Annexed hereto are maps, plans and profiles properly attested by the Mayor of the Borough of Chatham, on behalf of the Borough, and by the

Exhibit D-21.

Chief Engineer of the Railroad Companies on behalf of the Railroad Companies, showing the location of the tracks and lines of the railroad, bridges and structures, and profiles showing elevation and grade of the tracks and streets and the various structures to be erected in accordance with the terms of this agreement; said maps, plans and profiles are as follows:

(1) General location plan from Passaic River crossing to Fairmount Avenue, dated April 1st, 1913.

(2) General location plan from Fairmount Avenue to Division Avenue, dated April 1st 1913.

(3) Chatham Track Elevation profile, dated May 25th, 1912, revised April 1st, 1913.

(4) Proposed Chatham station and approaches, Chatham Track Elevation, dated May 29th, 1912, revised April 1st, 1913.

(5) Chatham Track Elevation—Profile of proposed street crossing, dated March 28th, 1912, revised April 1st, 1913.

Each and all of said maps, plans and profiles are hereby declared to be made a part of this agreement.

As it may be found necessary by both parties hereto during the progress of said work, to make changes in plans or parts of plans, or in the construction of said work, it is hereby agreed that when such changes are agreed upon by the parties hereto, and approved by resolution of the Council of the Borough of Chatham, the work shall proceed in accordance therewith and this agreement shall be thereby modified accordingly, a certified copy of such resolution being furnished to the Railroad Companies.

CHANGE OF GRADE OF STREETS.

3. The grades of the following named streets:

Exhibit D-21.

shall be depressed, as shown by the following table (measurements given being at the intersection of the center line of the railroad and the center line of the street) so as to provide the clearance shown:

Street	Depression of Street.	Under Clearance.	Width of Opening.	
River Road	16 ft. 0 in.	12 ft. 6 in.	40 ft.	10
Watchung Avenue	12 ft. 6 in.	12 ft. 6 in.	50 ft.	
Hillside Avenue	4 ft. 0 in.	12 ft. 6 in.	66 ft.	
Passaic Avenue	4 ft. 7 in.	11 ft. 6 in.	48 ft.	
Fairmount Avenue ...	5 ft. 0 in.	12 ft. 6 in.	66 ft.	
Washington Avenue ...	1 ft. 1 in.	12 ft. 6 in.	60 ft.	
Lafayette Street	6 ft. 0 in.	12 ft. 6 in.	50 ft.	
Kings Road	3 ft. 10 in.	12 ft. 6 in.	60 ft.	

VACATION OF STREETS.

4. The Borough shall, by proper proceedings according to law, vacate all those parts of Willow Street and Fuller Avenue within the lines of the right of way in front of the lands of the Railroad Companies. 20

RED ROAD SUBWAY.

5. At Red Road the Railroad Companies shall construct a concrete subway beneath the tracks for use of pedestrians, which subway shall be eight feet wide and eight feet high, with stairs at each end leading to the sidewalk on the westerly side of said street. The Borough shall vacate all that part of Red Road within the lines of the Railroad Companies' embankment, excepting 8 feet thereof for the said subway, which subway and the passage through the said subway, shall continue to be a public highway. The Railroad Companies, in the construction of said subway, shall install the necessary wires and electric lights therein and shall furnish a row of lighting fixtures along the center of said subway. The Borough, at its own expense, shall provide all wiring to said subway, and shall thereafter furnish the necessary current and maintain said fixtures. 30 40

Exhibit D-21.

NEW STREET.

6. The Borough shall, by appropriate proceedings according to law, lay out or establish and alter the lines and grades as shown upon attached maps of a new street, along the southerly side of the railroad, extending from Washington Avenue easterly a distance of 540 feet, more or less, to the
 10 westerly limits of the new station grounds, to be provided by the Railroad Companies as hereinafter set forth.

NEW STATION, STATION GROUNDS AND APPROACHES.

7. The Railroad Companies are to construct a new passenger station on the southerly side of the tracks, at a point about 350 feet west of Fairmount Avenue, which shall be substantially the
 20 same as the Railroad Companies' station at Short Hills; also a shelter house or waiting room on the northerly side of the tracks, connected with the main station building by a subway. The Railroad Companies shall also provide and lay out station grounds and approaches on the southerly side of the track from Fairmount Avenue to point of connection with the new street hereinabove mentioned, about 540 feet east of Washington Avenue, all as shown in brown shading on the maps attached. The Railroad Companies shall also provide and lay out a driveway and station approach
 30 on the northerly side of the tracks, extending from Fairmount Avenue westerly for a distance of 550 feet; thence extending northerly a distance of about 200 feet to Main Street and provide all paving, curbing and sidewalks upon said station approaches and driveways, as indicated upon plans.

NEW FREIGHT FACILITIES.

- 40 8. The Railroad Companies will also construct a new freight house and freight yard near Red Road, substantially as shown on attached plans.

Exhibit D-21.

PARKING, ETC.

9. The Railroad Companies embankments shall be furnished with top soil and seeded or sodded with grass from River Road to Division Street and planted with shrubbery from Passaic Avenue to Washington Avenue, and a walk will be provided by the Railroad Companies at the foot of the embankment between Passaic Avenue and Fairmount Avenue, along the property of the Railroad Companies known as Reasoner Park, and the said park space will be maintained by the Railroad Companies as at present until such time as the Railroad Companies shall require the said lands for other purposes. 10

STORM WATER SEWER.

10. The Railroad Companies shall obtain the necessary easements for and construct a storm water sewer of not less than three feet in diameter, or in a box of equal area, extending from Fairmount Avenue to the easterly side of Hillside Avenue, as shown upon the plans. 20

11. The Railroad Companies shall permit the use of such part of its right of way as is not required for railroad purposes at the end of Bower Lane, which may be necessary for use as a turning space for vehicles using said lane. 30

DIVISION OF COST.

12. The Railroad Companies will assume and pay the cost of the relocation and elevation of its tracks and the construction of its embankments, bridges and masonry and also of the excavation for the changing grades of streets to be depressed, and the fill for elevation of Division Street, and also the cost of acquiring the necessary lands for station grounds, approaches and driveways, as shown in brown shading upon the attached plans, 40

Exhibit D-21

- and the cost of grading, paving and curbing the same and the sidewalks thereon. Also of the new storm water sewer from Fairmount Avenue to Hillside Avenue and of all other work herein specifically mentioned to be performed or provided by the Railroad Companies. But the Railroad Companies shall not be required to do any
- 10 work or assume any expense excepting as herein specifically agreed upon. In addition to the foregoing items, the Railroad Companies shall pay 80% of the amount of all damages which may be lawfully awarded to the owners of lands on account of the change of the grades of streets and the Borough shall pay 20% of the amount of all such damages. Unless damages shall be adjusted
- 20 by agreement with the property owners, they shall be determined and awarded as provided by law and upon due notice to the Railroad Companies of all proceedings instituted for that purpose, and no settlement of any claim for such damages shall be made by either party hereto without the consent of the other. The Borough shall assume and pay the cost and expense of the necessary paving, repaving, curbing, guttering and sidewalks on all of the streets and highways mentioned in the agreement and the maintenance of same, and of the necessary removal or reconstruction of all
- 30 poles, wires, sewers, pipes, conduits and all other overhead, surface or sub-surface transmission lines or structures on or along the streets, which may be affected by the improvements hereinabove mentioned, or cause the same to be removed or reconstructed by the owners thereof.

ORDINANCES, RESOLUTIONS, ETC.

13. The Borough shall take all such official action as may be necessary to change the lines and
- 40 alter the established grades of streets, as shown upon the attached maps and profiles, at such times as may be required, to facilitate and expedite such

Exhibit D-21.

changes, and do all such other acts and things to the extent of its powers for the furtherance and prosecution of the improvements herein mentioned and shown upon the attached plans.

TEMPORARY CLOSING AND OBSTRUCTION OF STREETS.

14. As it may be necessary during the progress of the work to temporarily obstruct streets from time to time, the Borough shall temporarily close such streets as shall be designated by the Railroad Companies when required to enable the Companies to properly carry on the work. The Railroad Companies shall also have and are hereby given the right to erect and temporarily maintain false work within the lines of the streets for the purpose of erecting the bridges and temporarily supporting the tracks, which false work shall be removed as soon as the permanent structures are completed.

TEMPORARY TRACKS.

15. The Railroad Companies shall also have and are hereby given the right to lay and temporarily maintain any additional track or tracks at grade across any of the streets for construction purposes and for the purpose of operating trains while the bridges and embankments are being constructed.

COMMENCEMENT AND PROSECUTION OF WORK.

16. The Railroad Companies will commence work on that part of the improvement lying west of Watchung Avenue within fifteen days after the execution and delivery of this agreement and prosecute the same as rapidly as conditions will permit. That portion of the work extending from and including Watchung Avenue to the Passaic River, shall be commenced not later than April 1st, 1914, and prosecuted with all reasonable despatch.

Exhibit D-21.

ADVANCE OF MONEYS.

17. In order to assist the Borough in financing the share of the above mentioned work and expenses, the Railroad Companies will advance to the Borough, as may be required, a sum not exceeding \$10,000, for which the Borough shall deliver to the Railroad Companies its written obligations or undertakings to repay said amount to the Railroad Companies in five equal payments of \$2,000 each, the first installment of \$2,000 to be paid at the expiration of one year after the completion of the work, and the other payments annually thereafter, with interest of 4%, payable annually from the time said amount is advanced by the Railroad Companies.

IN WITNESS WHEREOF, the parties to these presents have hereunto caused their corporate seals to be hereto affixed, the party of the first part have caused these presents to be signed by its Mayor and attested by its Clerk, and the parties of the second part have caused these presents to be signed by their Vice-Presidents and attested by their Secretaries the day and year first above written.

BOROUGH OF CHATHAM,
By Frank L. Kelley,
Mayor.

30 Attest:

W. S. ANGELL,
Borough Clerk. (Seal.)

THE MORRIS & ESSEX RAILROAD COMPANY.

By E. E. Loomis,
Vice President.

Attest

A. D. CHAMBERS,
Secretary. (Seal.)

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD CO.,

By E. E. Loomis,
Vice-President.

Exhibit D-21.

Attest:

A. D. CHAMBERS,
Secretary. (Seal.)

Authorized by Executive Committee
of the D. L. & W. R. R. Co., April
15th, 1913.

J. G. ENDERLIN,
Clerk of the Ex. Com. 10

Form approved:

W. S. JENNEY,
General Counsel.

STATE OF NEW JERSEY, }
County of Morris. }

BE IT REMEMBERED, that on this seventh day of June, in the year nineteen hundred and thirteen, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared 20
William S. Angell, known to me to be the Clerk of the Borough of Chatham, the party of the first part within named, who, being by me duly sworn, on his oath said and made proof to my satisfaction that he is the Clerk of the Borough of Chatham and that he well knows the corporate seal of said Borough and that the seal so affixed is such corporate seal and was thereto affixed by order of the Council of the Borough of Chatham and that said agreement was by Frank L. Kelley, 30
the Mayor of said Borough, signed and delivered as and for the voluntary act and deed of said Borough, in the presence of said deponent, who thereupon subscribed his name thereto as attesting witness.

W. S. ANGELL.

Sworn and subscribed before me on }
the day and year first above written }

LAWRENCE DAY,

A Master in Chancery of New Jersey. 40

Exhibit D-21.

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

BE IT REMEMBERED, that on this 9th day of June, in the year one thousand nine hundred and thirteen, before me the subscriber a Notary Public in and for the County of New York in the State of New York, personally appeared A. D. Chambers, who, being by me duly sworn, did depose and say, that he is the Secretary of the Morris & Essex Railroad Company and the Delaware, Lackawanna and Western Railroad Company, the parties to the second part to the foregoing agreement, that the seals thereto affixed are the proper corporate seals of the said companies; that the same were so affixed thereto and the said agreement signed and delivered by E. E. Loomis, who was at the date of execution thereof the Vice-President of the said companies, in the presence of the deponent, as the voluntary act and deed of the said companies, and that deponent thereupon signed the same as subscribing and attesting witness.

A. D. CHAMBERS.

Subscribed and sworn to before }
 me this 9th day of June, 1913. }

Joseph Fiell,

Notary Public, New York County.

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Southwestern

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