

New Jersey Court of Errors and Appeals.

RACHEL STULTS,

vs.

THE EAST BRUNSWICK AND NEW
BRUNSWICK TURNPIKE COMPANY.

In Error
to
Middlesex Circuit.

Points for Plaintiff in Error.

This action was brought to recover tolls for travel by the stages of plaintiff in error upon the turnpike road operated by defendant in error, between Old Bridge and New Brunswick.

The declaration contains a count for tolls generally, and also a count upon an alleged agreement by plaintiff in error to pay \$65 per year in consideration that the plaintiff would (and did) permit the stages, &c., of defendant, to travel from South River to New Brunswick at pleasure (*Case, pg. 4, line 20, &c.*).

Among other pleas the defendant pleaded that the road had not been constructed as required by §11 of the charter (*P.L., 1869, pg. 56, &c.*), upon which plea issue was joined.

On the part of plaintiff, J. Biddle Herbert, one of the directors of the company, testified to a contract made with him, on its behalf, by one Seaman T. Christian, representing the defendant, whereby she was to pay \$65 per year in commutation of her tolls (*Page 16, l. 28, &c.*) Christian also testified on the subject (*Pg. 19, line 10*).

Alfred Stults, the husband of defendant, and who acted as her agent, was then sworn for the defence, and testified that he had a conversation with Herbert prior to said agreement, which he was asked to state (*Pg. 68, line 30*). On objection by plaintiff's counsel, the question was overruled, and defendant excepted thereto.

This ruling is assigned as error in the fifth assignment (*pg. 152*).

The evidence was competent to throw light upon the subsequent agreement and to show that it was, in fact, made upon the condition that the defects in the construction of the road should be remedied, which had not been done.

II.

Defendant sought to prove by John Newmeyer and Saxton Newmeyer instances in which they had severally helped persons out of the mire in said road in 1885, and previous years, since its alleged completion (*pp.* 114 and 116), which evidence was overruled and exception taken by defendant.

Sixth and Eighth Assignments of Error.

The evidence was competent in connection with other evidence in the case as tending to show that the road never had been made solid, firm and even, as required by the charter.

III.

The Court refused to permit Seaman T. Christian, a witness for the defence, to testify as to replies made by Herbert, Disbrow and Peterson to complaints respecting construction of the road (*pp.* 121-122).

The purpose was to show admissions of these officers of the defective construction and promises to remedy defects.

They were the agents of the company for the purpose of receiving such complaints, and their statements in reply were evidence against the company.

*Halsey v. L. V. R.R. Co.
16 Or. 26.35.*

Disbrow was the engineer in charge of construction (pg. 35, bottom).

Herbert, superintended construction (p. 27, l. 30), and had general management afterward.

Peterson was gate-keeper, *on base (p. 23. l. 27.)*
p. 56 l. 15
p. 58 bottom
p. 68 20

IV.

The testimony of Disbrow and Devoe, in rebuttal (pages 127 to 133), should have been stricken out. It did not appear that the measurements testified to by them, were at precisely the points mentioned in the testimony for the defence, and therefore this testimony was not properly rebuttal.

V.

The testimony of Serviss (*page 133*) to show that the stakes planted by Disbrow, and from which his measurements were made, were not located as testified by him, was certainly competent.

The whole value and competency of the testimony given by Disbrow and Devoe depends upon the location of the stakes.

The ruling of the Court denied us the opportunity of showing, as we offered to do, that the measurements were not made at the points were the Court (*pg. 128, line 5*) declared that they must be made in order to be competent evidence.

VI.

The Court erred in holding that the requirement of the charter (*P.L., 1869, pg. 56, §11*) that the road should not be less than 32 feet wide, referred to the entire width between fences, and not merely to that portion adapted to travel.

VII.

The Court erred in refusing to charge without qualification that the 16 feet wide of road bed required to be made solid, firm and even, must be made so at all times, and in charging that allowance might be made for action of frost, the nature of the soil and springs, &c., which might affect it. (*Case, page 145.*)

The charter (*P.L., 1869, pg. 57, line 4*) requires that "sixteen feet of the same shall be sufficiently bedded and "faced with stone, gravel or other material to make a solid "firm and even road."

The ordinary action of frost, the nature of the soil and the springs, &c., existing therein, being things that would naturally and necessarily affect the road, should have been taken into account in constructing it.

The language is susceptible of an exact fulfillment. It is certainly possible to make a road which shall be solid, firm and even in all ordinary seasons. It was the purpose of the Legislature to secure this. Not merely a road good under favorable conditions only, but one not subject to be made bad by frost or springs or the natural soil.

The construction of such a road is the only consideration for the grant to take tolls.

The grant is in derogation of the public right, and must be construed strictly, and full compliance with conditions must be proved.

VIII.

There was error in the charge respecting the commutation agreement.

The Court stated to the jury (*Case, pg. 147, line 29*) that this agreement was made upon consideration of a settlement of a dispute between these parties as to plaintiff's right to charge toll, and during its continuance was conclusive, as to the defence set up.

(1.) There was no evidence that any question as to the construction of the road entered into the contract in any way, or that it was mentioned between the contracting parties.

J. Biddle Herbert, who represented the Company in making the contract, says that there had been a previous agreement with Mrs. Stults for payment of toll at a reduced rate, but that she had fallen behind in payment, and so the gates had been shut and toll collected regularly. He then says (*page 16, line 28*):

"Mr. Christian spoke to me and asked if some arrangement could not be made whereby I could give them a less toll; I told him I was willing to make the arrangement; after some talk, seeing him a few times, we agreed to let him have the toll at \$65 per year.

"Q. Payable how?

"A. Payable monthly."

And on cross-examination (*page 18, line 3 &c.*):

"Q. This arrangement that you made with Mr. Christian—give it to me fully—\$65 a year?

"A. Yes, sir; to be paid monthly.

"Q. For how long?

"A. No definite time.

"Q. Don't you remember that Mr. Christian said that Mr. Stults would try that for a year?

"A. No, sir.

"Q. Did Mr. Christian say to you that Mr. Stults made it a condition that he would try it for a year, and see in what kind of order your turnpike was put?

"A. Nothing of the kind.

"Q. Nothing of the kind took place?

"A. No, sir; I don't remember anything of the kind."

Seaman T. Christian (page 19, line 10), testifies:

"Q. State in your own way what the conversation was?

"A. I went and talked to Mr. Herbert; I came across him somewheres, and wanted to know whether Mrs. Stults could not commute on that turnpike, as paying too much toll; I wanted it done to make it peaceable between the two; Stults was finding a good deal of fault with the turnpike; I proposed that Mr. Stults pay him \$50 a year; I think they were then paying full toll.

"Q. You suggested \$50?

"A. I did.

"Q. Did he object or accept?

"A. He objected to the \$50.

"Q. What sum did he suggest?

"A. He said \$65; my impression was it was \$60; I may be mistaken about that."

He says, on cross examination (*pp. 20 and 21*), that he does not think he mentioned to Mr. Herbert the complaint made by Stults about the construction of the road, and that Herbert did not say that Stults could have the toll at that rate if he would keep still, or anything to that effect. (*Page 21, line 12.*)

This is, in substance, the whole testimony with regard to this agreement.

It shows that it was simply an ordinary commutation agreement, whereby an unusual rate was agreed to in consideration of the unusual amount of travel by these stages.

(2.) But if there is anything in the evidence to sustain the idea of a compromise of a dispute as to the construction of the road, it should at least have been left to the jury to find whether or not that was the contract.

(3.) If the agreement was as stated by the Court, it was illegal and void.

It was buying off the right of the defendant to object to what she claimed to be a public nuisance. The exaction of tolls by the obstruction of travel on a public highway was clearly a nuisance, unless legalized by compliance with the conditions imposed by the charter.

It is for the benefit of the public that such complaints should be investigated and not stifled for private gain.

It is true that such compromise would only affect the right of the individual to complain, and could not bar a public prosecution, but it removes the inducement to the institution of a public prosecution, by depriving the individual of any benefit from an abatement of the nuisance, either as the result of a public prosecution or by individual action, and also deprives the individual of the right to abate the nuisance himself.

The public has an interest in the exercise of this private right of abatement, for, when exercised, it is beneficial to all by destroying that which is injurious to every traveler.

In principle the case of *Smith v. Applegate*, 3 Zab., 352, is in point. It was there held that a contract, by a caveator,

to withdraw his opposition to the laying out of a public road, was contrary to public policy and void.

Sharp v. Teese, 4 Hals., 352.

Gulick v. Ward, 5 Hals., 87.

Church vs. Muir, 4 Vroom, 318.

In *Pingry vs. Washburn*, 1 Aikens (Vt.), 264, an agreement for exemption from toll in consideration that the grantee would withdraw his opposition to the granting of a charter to a turnpike company, was held void.

The present case is not at all analogous to those where a party who has suffered by a crime already committed, is allowed to settle the private injury that he has sustained.

The injury here sought to be compromised is not one that is past, but one to be committed.

No case can be produced which has countenanced a settlement *in advance* of a private wrong, which involves an illegality or crime.

Agreements which contemplate the commission or continuance of such an act, are universally declared void.

Agreements to settle a contention whether or not an act contemplated to be done is illegal, are equally against sound policy.

ALAN H. STRONG,

Of Counsel with Plaintiff in Error.

New Jersey Court of Errors and Appeals.

RACHEL STULTS,

Plaintiff in Error ;

vs.

THE EAST BRUNSWICK AND NEW

BRUNSWICK TURNPIKE COMPANY.

Defendants in Error.

On Writ
of Error
to
Middlesex
Circuit Court.

Points and Authorities on the Part of Defendants in Error.

A. V. Schenck, Attorney for Defendants in Error.

The declaration in this case is based upon a *special contract* made by the plaintiff in error, October 1st, 1879, with the defendants in error, for the use by her of their turnpike road, for an indefinite period of time, at the rate of Sixty-five Dollars per year, payable monthly (Case, page 4).

The plaintiff in error ran a line of stages (by her husband as her agent) from the City of New Brunswick to South River, in the County of Middlesex, and her stages were run over the Turnpike Road of the defendants in error, from New Brunswick, through one turnpike gate, and for the distance of about $2\frac{1}{2}$ miles over the said road (Case, page 14).

The declaration avers that the plaintiff in error did, under and by virtue of the said contract, use the said road for the purpose of travelling her stages, carriages and horses on and over the same, from the time of the making of the said contract until October 4th, 1883, the commencement of the suit; that on the first day of October, 1883, the sum of \$260.00 became and was due, under the said contract, from the plaintiff in error to the defendants in error; that after the said first day of October, 1879, by reason of the premises, and under and by virtue of the said agreement, the plaintiff in error paid to the defendants in error, from time to time, divers small sums of money, amounting in the whole to \$102.92, leaving due and unpaid to the defendants in error, \$157.08 (Case, pages 4 and 5); the verdict was for that sum and interest.

The pleas of the plaintiff in error and replications thereto, put in issue the question of the proper construction of the road under the charter (Case, pages 7 to 11), and the greater part of the testimony taken on the trial of the cause, was upon that point.

The defendants in error were incorporated by special act of the Legislature of this State, approved February 10, 1869 (Acts of 1869, page 54); and the road was completed, in the year 1872 (Case, pages 15 25).

It is insisted, on the part of the defendants in error, that substantial justice was done by the verdict of the jury in this case, and that there was not any error, either in the

charge of the Court to the jury, or in the admission or rejection of evidence on the trial.

The plaintiff in error has assigned twenty-six errors, some of them so exceedingly technical as to be frivolous, and which may be classified as follows :

1. The refusal by the Court to charge the jury certain specific matters at the request of the plaintiff in error.

2. The exception by the plaintiff in error to certain matters contained in the charge as made by the Court to the jury.

3. The rejection by the Court of evidence alleged to be lawful and admissible.

4. The admission by the Court of evidence alleged to be unlawful and inadmissible in law.

FIRST :—AS TO EXCEPTIONS TO THE CHARGE.

The principal question in the cause was, "Whether the road had been originally constructed by the defendants in error according to the requirements of the charter?"

This question was submitted by the Judge, in his charge to the jury, as a question of fact to be decided by them under the pleadings and the evidence in the cause (Case, pages 137, 138, 139, 142), and they did decide it by their verdict.

The judge (on page 137 of the case), in his charge, says : "Then the important question to be determined is, first, "was there a *substantial compliance* with the act in the original construction of the road? If this be so, then the right to demand toll will be established, and it can be continued, unless, by section 18, the gates are thrown open, upon an application to a Judge, as not being tollable."

And again (on page 138 of the case): "As I have already said, the plaintiffs, in order to entitle them to take toll,

“are to do all that *reasonable skill* and *the use of materials specified in the charter* will accomplish, to effect the purpose and satisfy the terms of the act.”

It is insisted on the part of the defendants in error that this charge of the Court, fairly and properly submits to the jury for their consideration, under the evidence in the cause, all the questions of fact arising as *conditions precedent*, in the charter (Case, pages 135, 136), and which, according to the directions of the charge, were to be *first* determined by them. A *substantial* compliance, according to the intent of the charter, is all that the law requires, whether the conditions be *precedent* or *subsequent*.

The People vs. The Kingston and Middletown Turnpike Road Co., 23 *Wend.*, 194.

Thompson vs. The People, 23 *Wend.*, 537.

The People vs. The President, &c., of the Williamsburg Turnpike Road and Bridge Co., 47 *N. Y. Court of Appeals* (2 *Sickels*) 586.

The People vs. The Waterford and Stillwater Turnpike Co., 2 *Keyes, N. Y., Court of Appeals*, on page 331.

The language of the charter (Sec. 13, page 59) is, “That as soon as the said company shall have constructed in a workmanlike manner, the said road, &c., it shall be lawful for the said company to erect gates, &c., and to demand and receive toll,” &c.

Counsel for the plaintiff in error assumed on the trial of the cause, and bases some of his assignments of error on the assumption, that the defendants in error, notwithstanding a *special contract* with the plaintiff in error, are not only prevented by the terms of their charter from demanding toll, by non-compliance with the conditions precedent contained

in section 11 of the act (Page 56), by virtue of the language of section 13, above quoted, but also that *by failing afterwards to keep the road in repair*, the defendants forfeit, *ipso facto* the right to demand toll.

It is submitted that such is not the law; that the language and terms of the charter do not, even in the absence of an express contract, warrant such assumption, and that the Judge properly so charged the jury (Case, pages 137, 138, 139).

Section 18 of the act (Page 60) prescribes "*That if the said company should not KEEP the said road, bridges, &c., in repair,*" complaint is to be made to a Judge of the Court of Common Pleas, and a remedy is provided by ordering the turnpike gates to be kept open until otherwise ordered.

The *keeping* of the road in repair, *after* its construction in accordance with the requirements of the act, is not a condition precedent to the right to demand toll.

This would amount to a *forfeiture of the franchise* by neglect to repair; which cannot be set up in a collateral way in an action for toll.

Adams vs. Beach, 6 Hill, 273.

Angell & Ames on Corp., Sec. 777.

2 *Kent's Comm.*, marginal page 312.

DeCamp vs. Dobbins, 4 Stew., 676, *note*, and authorities there cited.

Shippen vs. Paul, 7 Stew., on page 320.

Exception 16.—The Court admitted testimony on the trial on the part of the plaintiff in error, in relation to the condition of the road *subsequent* to its construction in 1871 and 1872, simply as bearing upon the question of how the

road had been *originally* constructed in reference to the requirements of the charter (Case, page 139).

In this light only was the testimony admissible; and in order to arrive at a just and intelligent conclusion, it became necessary to take into consideration those causes which contributed to the *present* condition of the road, viz: not only ordinary wear, but also in the language of the Court (Case, page 138-139), "The action of the frost at certain seasons of the year; the nature of the soil upon which the road was constructed and the springs and other things that would affect its maintenance and continuance in good condition."

"For all those things (the Court says on page 139 of the case) an allowance should be made, and a reasonable limit put to the requirements of the act."

Exceptions 14 and 15.—The charge of the Court to the jury in reference to the width of the turnpike road, and the specified *sixteen feet* thereof which is required by the charter to be "sufficiently bedded and faced with stone, gravel or other material, to make a solid, firm and even road," (Sec. 11 of charter, page 57), is in conformity with the language of the act, and in all respects conformable to the law. (Case, pages 136, 137.)

Exceptions 17, 18, 20, 21, 22, 23, 25.—And also in regard to the *express contract* between the parties, and the presumptions and conclusions of law resulting therefrom (Case, pages 140, 141, 142, 143).

1. There can be no question in regard to the *legal right* to make such contract; it was not disputed on the trial.

Angell on High., Sec. 13.

Com. vs. Alleghany Bridge Co., 8 Harris, 185.

Dorman vs. The Turnpike Co., 3 Watts, 128.

2. The parties having made the contract in good faith, with full knowledge of all the facts, and for a good and lawful consideration, both parties are equally held by law to its performance during its continuance, and therefore the plaintiff in error was bound, under her contract, to pay for the use of the road of the defendants in error, for the time that she used the same.

And this entirely irrespective of what the condition of the road was, in fact, at the time of the contract, or had been before that time, as it was shown by the evidence and conceded on the trial, that the plaintiff in error had full knowledge of those facts at the time of and long before the making of the contract (Case, pages 53, 56 et seq).

Whether by force of the legal effect of the contract; by the presumption of law arising from user or acquiescence; or the doctrine of equitable estoppel, the *result* is the same; the plaintiff in error is legally bound by her contract during its continuance, whatever the condition of the road may have been before or during that time.

She voluntarily made the contract; derived the benefit therefrom; used the road, and is legally and equitably bound to perform her part of the contract and pay for her use of the road for the time that she used it, in accordance with the terms of the contract.

Lucas vs. Godwin, 3 Bing., N. C., 744.

Note of Hare and Wallace to the case of Cutter vs. Powell, 2 Smith's Lead. Cas., on page 48, Ed. of 1855, (5th American).

Burton vs. Stewart, 3 Wend., 236.

Van Epps vs. Harrison, 5 Hill, 64.

Thornton vs. Wynn, 12 Wheat., 183.

Kase vs. John, 10 Watts, 107.

Everett vs. Gray et al., 1 Mass., 101.

Hibblewhite vs. McMorine, 5 M. & W., 462.

- 2 *Story on Con., Sec. 1331.*
 1 *Greenl. Ev., Sec. 207, 208.*
Ollivant vs. Bayley, 5 Q. B., 289.
Chanter vs. Hopkins, 4 M. & W., 399.
Bozarth vs. Dudley, 15 Vroom, page 308.
Den. ex dem., Richman vs. Baldwin, 1 Zab., 403.
Notes to "Duchess of Kingston's case."
 2 *Smith's Lead. Cas., pages 619, 642, et seq., Ed. 1855,*
(5th American.)

A contract, upon a sufficient consideration, for the performance of an act, *even by a third person*, is binding.

- 1 *Chit. on Con., P. 67.*
Mounsey vs. Drake, 10 Johns., 29.

Exceptions 19 and 24.—The counsel for plaintiff in error also assumed on the trial of the cause and bases some of his assignments of error on the assumption, that it was necessary for the defendants in error to prove, and that the Court on the trial should have compelled them to prove, notwithstanding the special contract, an absolute compliance with the terms of the charter in the construction of their road, not only for the distance of $2\frac{1}{2}$ miles travelled by her, but also from Weston's mill to Mrs. Tanner's (Hardenbergh's corner), which is about a mile beyond the point where the stages of the plaintiff in error turned off from the turnpike road on their route to Washington, South River. (Case, pages 14, 22, 25, 30, 56.)

Exception 26.—The Court could not charge as requested without entirely repudiating the contract of the plaintiff in error; and it is submitted that the charge of the Court in these particulars, as in all other respects, was eminently fair and just, and entirely in accordance with both law and fact. (Case, pages 141, 146, 149.)

SECOND :—AS TO EXCEPTIONS TO EVIDENCE.

The conduct of the trial and general course of the examination and cross-examination of witnesses, is a matter of discretion with the Court, and is not ground of error.

Donnelly vs. The State, 2 Dutch, 463, 601.

West vs. The State, 2 Zab., 213.

1 Greenl. Ev., Sec. 431.

This principle applies to Exceptions 1, 2, 3, 7, 10, 11, 12, 13.

Exception 7.—The Court expressly charged the jury (Case, page 142,) “That the defendant is not prevented from raising the question” of the proper construction of the road, “because she *and others* have for years used the “turnpike and paid toll.”

Exception 3.—The testimony of R. D. Conover was not in the nature of *expert* testimony. It went to the jury for what it was worth, subject to cross-examination and contradiction.

1 Greenl. Ev., Sec. 440 a.

Exceptions 11 and 12.—The Court (Case, page 128,) limited the testimony of Disbrow and DeVoe, in rebuttal, to the single points spoken of by the witnesses of the plaintiff in error, Serviss and Blue. Whether the testimony covered those particular points, was a question of fact for the jury, and the Court very properly refused to strike it out.

Exception 4.—Seaman T. Christian was not, either in fact or in law, the agent of the defendants in error; but on the contrary, he was the agent of the plaintiff in error, and acted on her behalf in making the special contract in lieu of tolls, referred to. (Case, pages 16, 17, 18, 19.)

Exception 5—The offered testimony was clearly inadmissible, because it refers to a conversation with J. Bidder Herbert *before* the special contract for reduced tolls was made. It was incompetent for the *purpose* for which it was offered, “as showing *the understanding* upon which the agreement “aforesaid for reduced tolls over plaintiff’s road was *afterward* made;” and the evidence does not show that Herbert was at that time, either in fact or in law, the agent of the defendants in error.

Story on Agency, Sec. 134, 135, 137.

1 *Greenl. on Ev., Sec. 113, 114, a.*

Luby vs. Hudson River R.R. Co., 3 Smith, N.Y., 131.

Sooy vs. The State, 12 Vroom, 394.

Exceptions 6 and 8.—The offered testimony was unlawful, because the time referred to in Exception 6 was nearly two years *after the commencement of the suit*; and in regard to both exceptions, the Court had admitted evidence to show generally the condition of the road *after* its construction, as having relation to the question of how the road had been *originally* constructed, and very properly refused to go into specific details.

Exception 9.—The same objection and authorities apply to the admissibility of this testimony, as in the case of Exception 5, *supra*.

Mr. Disbrow was simply a stockholder in and the Secretary of the corporation (Case, page 37). There was no evidence to show the identity of the “Mr. Peterson” referred to in the question, or whether he held any office in the corporation (Case, pages 121, 122).

The alleged conversation was not at the time of the making of the special agreement concerning tolls (Case, pages 121, 122), and there was not any evidence that Mr. Herbert,

Mr. Disbrow and Mr. Peterson were acting, at the time of the alleged conversation, in the line of their authority as the agents of the defendants in error, so that their declarations could legally bind the corporation.

No declaration or admission of an agent will bind his principal except in cases within the scope of the authority conferred.

The declaration must be at the very time of the contract, and constitute part of the *res gestae*.

See authorities above cited to Exception 5.

This case was very carefully and patiently tried; opportunity was given to the plaintiff in error by the trial Judge to present every lawful defence to the action; the law and the evidence were fairly and lawfully presented and submitted to the jury by the charge of the Court, and it is respectfully submitted that substantial justice was done by the verdict, and that the judgment should be affirmed.

A verdict will not be set aside because illegal testimony has been admitted, if it appears clearly to the Court that the verdict is right, irrespective of such illegal evidence.

The State vs. Engle, 1 Zab., 348.

Where justice has been done by a verdict, though there has been a misdirection by the Judge, a new trial will not be granted.

Den, ex dem., Steelman vs. Steelman, 1 Harr., 68.

The Princeton and K. Turnpike Co. vs. Gulick, 1 Harr., 166.

McEowen vs. Lewis, 2 Dutch., on page 457.

The first part of the paper is devoted to a general discussion of the problem of the origin of the universe. It is shown that the origin of the universe is a problem which has been discussed by philosophers and scientists since the beginning of time. The author discusses the various theories which have been advanced to explain the origin of the universe, and concludes that the most reasonable theory is that the universe originated from a single point of infinite density and temperature, which is known as the Big Bang.

The second part of the paper is devoted to a discussion of the evidence for the Big Bang. It is shown that there are several lines of evidence which support the Big Bang theory. These include the discovery of the cosmic microwave background radiation, the observed expansion of the universe, and the abundance of light elements in the universe.

The third part of the paper is devoted to a discussion of the problems which remain to be solved. It is shown that there are several important questions which have not yet been answered. These include the question of the origin of the matter in the universe, the question of the nature of the dark matter, and the question of the ultimate fate of the universe.

The fourth part of the paper is devoted to a discussion of the implications of the Big Bang theory. It is shown that the Big Bang theory has several important implications for our understanding of the universe. These include the fact that the universe is finite in size, the fact that the universe has a beginning, and the fact that the universe is expanding.

The fifth part of the paper is devoted to a discussion of the future of cosmology. It is shown that there are several important areas of research which are currently being pursued. These include the study of the early universe, the study of the dark matter, and the study of the ultimate fate of the universe.

The sixth part of the paper is devoted to a discussion of the philosophical implications of the Big Bang theory. It is shown that the Big Bang theory has several important philosophical implications. These include the fact that the universe is finite in size, the fact that the universe has a beginning, and the fact that the universe is expanding.

The seventh part of the paper is devoted to a discussion of the historical development of cosmology. It is shown that cosmology has a long and rich history, and that the Big Bang theory is the result of a long process of discovery and debate.

The eighth part of the paper is devoted to a discussion of the current state of cosmology. It is shown that cosmology is currently in a period of rapid advancement, and that there are several important discoveries which are being made.

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NEW JERSEY

Court of Errors and Appeals.

RACHEL STULTS,
Plaintiff.
vs.
THE EAST BRUNSWICK AND
NEW BRUNSWICK TURNPIKE
COMPANY,
Defendant. } In Error.

Bills of Exceptions.

[Filed August 25, 1885.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Rachel Stults,
Plaintiff,
vs.
THE EAST BRUNSWICK AND NEW
BRUNSWICK TURNPIKE COMPANY,
Defendant. } In Error to Middlesex Circuit Court.

Returnable May 19, 1885.

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New Jersey, ss.—The State of New Jersey to Hon. Edward W. Scudder, Judge of our Circuit [L. s.] Court at New Brunswick, in and for the the county of Middlesex, or such Justice of

the Supreme Court of New Jersey as shall hold such Circuit Court, greeting—

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our Circuit Court holden at New Brunswick, in and for the said county of Middlesex, between the East Brunswick and New Brunswick Turnpike Company, plaintiff, and Rachel Stults, defendant, of a plea of trespass on the case, manifest error hath intervened to the great damage
 10 of the said Rachel Stults, as by her complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly to send under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the nineteenth day of May next, together with this writ, that the record and proceedings aforesaid
 20 being inspected, we may further cause to be done thereupon for correcting that error what of right and according to law ought to be done.

Witness his Honor, Theodore Runyon, our Chancellor and president judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the thirtieth day of April, in the year of our Lord eighteen hundred and eighty-five.

HENRY C. KELSEY,
Clerk.

30 WOODBRIDGE STRONG & SONS,
Attorneys.

The answer of the judge of the Circuit Court, in and for the county of Middlesex and State of New Jersey, within named.

The record and proceedings, whereof mention is within made, with all things touching and concerning the same, I do certify to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within I am commanded.

E. W. SCUDDER, *J.*

Pleas before the judge of the Middlesex County Circuit Court, of the twenty-third day of April, as yet of the Term of April, in the year of our Lord one thousand eight hundred and eighty-five.

The East Brunswick and New Brunswick Turnpike Com- pany,	}	In Case. Witness— Hon. E. W. Scudder, Judge. Clarence M. Slack, Clerk. 10
v.		
Rachel Stults.	}	

Middlesex County, *ss.*

Rachel Stults, the defendant in this suit, was summoned to answer "The East Brunswick and New Brunswick Turnpike Company," a corporation created by and existing under the laws of the State of New Jersey, the plaintiffs in this suit, of a plea of trespass on the case upon promises; and thereupon the said plaintiffs, by Abraham V. Schenck, their attorney, complains: For that whereas, by a certain act of the legislature of the State of New Jersey, entitled "An act to incorporate the 20 East Brunswick and New Brunswick Turnpike Company," which said act was duly approved by the governor of the said State on the tenth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, the said plaintiffs were duly incorporated and were created a body politic by the name of "The East Brunswick and New Brunswick Turnpike Company," with all the rights, powers and privileges appertaining to corporate bodies and necessary to carry the objects of the said act into effect; and also with power 30 to construct and make a turnpike road from Old Bridge, in the said county of Middlesex, to New Brunswick, in the said county; and also with power to erect gates and turnpikes across the said road; and also with power to demand and receive toll for traveling each mile and all fractions over half a mile of said road, not exceeding the following rates, to wit, for every carriage, sleigh or sled drawn by one beast, one and a-half cents; for every

additional beast, one and a-half cents; for every horse and rider, or led horse or mule, one cent, to wit, at New Brunswick, in the said county of Middlesex, as by the said act of incorporation, now of record in the office of the Secretary of State of the said State of New Jersey, at Trenton, in the said State, reference being thereunto made will more fully and at large appear.

And whereas, heretofore, to wit, on the day and year aforesaid, and in the county aforesaid, the said plaintiff, 10 under the power and authority in them vested by the said act of incorporation, did duly construct and make a turnpike road from Old Bridge, in the said county of Middlesex, to New Brunswick, in the said county, in the manner prescribed in the said act, and did then and there duly erect gates and turnpikes across the said road, to wit, at New Brunswick aforesaid, and in the county aforesaid.

And thereupon afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight 20 hundred and seventy-nine, at New Brunswick, in the said county, in consideration of the premises and that the said plaintiffs, at the special instance and request of the defendant, would suffer and permit the stages, carriages and horses of the defendant to travel on and over the said turnpike road of the said plaintiffs between South River and New Brunswick aforesaid, when and so after and for so long time as the said defendant should choose and should deem necessary, she, the said defendant, undertook and then and there promised the said 30 plaintiffs to pay them therefor and during the continuance of such travel, at the rate of sixty-five dollars per year, the same to be paid by the defendant to the plaintiffs monthly thereafter; and the plaintiffs aver that they, confiding in the said promise and undertaking of the said defendant, did then and there and from thenceforth at all times suffer and permit the stages, carriages and horses of the said defendant to travel on and over the said turnpike road of the said plaintiffs between South River and New Brunswick aforesaid, when and so 40 often as the said defendant did choose and did deem

necessary; and that the stages, carriages and horses of the said defendant did in fact travel on and over the said turnpike road of the said plaintiffs between South River and New Brunswick aforesaid by the sufferance and permission of the plaintiffs, under and by virtue of the said agreement, when and so often as the said defendant did choose and did deem necessary, to wit, from the day and year last aforesaid until the day of the commencement of this suit; and the plaintiffs aver that afterwards, to wit, on the first day of October, in the year 10 of our Lord one thousand eight hundred and eighty-three, at New Brunswick aforesaid, in the county aforesaid, by reason of the premises, a large sum of money became and was due and payable from the defendant to the plaintiffs, to wit, the sum of two hundred and sixty dollars, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at New Brunswick aforesaid, had notice; and the said plaintiffs further aver that the said defendant did, after the said first day of October, in the year of our Lord one thousand eight hundred and seventy-nine, at New Brunswick aforesaid, and in the county aforesaid, by reason of the said premises, and under and by virtue of the said agreement, pay to the said plaintiffs, from time to time, divers small sums of money, amounting in the whole to the sum of one hundred and two dollars and ninety-two cents, leaving due and unpaid to the said plaintiffs the sum of one hundred and fifty-seven dollars and eight cents, to wit, at New Brunswick aforesaid.

And whereas, also, the said defendant afterwards, to 30 wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-three, at New Brunswick, in the said county of Middlesex, was indebted to the said plaintiffs in the further sum of three hundred dollars of lawful money for divers other tolls before that time, due and payable by the said defendant to the said plaintiffs for divers other beasts and carriages of the said defendant, which before that time had traveled on and over the said turnpike road of the said plaintiffs in the first count of this declaration men-40

tioned, by the sufferance and permission of the said plaintiffs, and at the special instance and request of the said defendant; and being so indebted, the said defendant in consideration thereof afterwards, to wit, on the day and year last aforesaid, at New Brunswick aforesaid, and in the county aforesaid, undertook, and then and there promised the said plaintiffs to pay them the said last mentioned sum of money on request.

And whereas, also, the said defendants on the first
10 day of October, in the year of our Lord one thousand eight hundred and eighty-three, at New Brunswick aforesaid, in the county of Middlesex, and within the jurisdiction of this court, was indebted to the said plaintiffs in the further sum of three hundred dollars, lawful money, for the work and labor, care and diligence of the said plaintiffs, by them, the said plaintiffs, before that time done, performed and bestowed in about the business of the said defendant and for the said defendant, and at her special instance and request; and also in the
20 further sum of three hundred dollars for divers other tolls before that time due, and of right payable by the said defendant to the said plaintiffs for divers other beasts and carriages of the said defendant, which before that time had traveled on and over a certain turnpike road of the said plaintiffs by the sufferance and permission of the said plaintiffs and at the request of the said defendant; and also in the further sum of three hundred dollars of the like lawful money, for other money
30 by the said defendant before that time had and received to and for the use of the said plaintiffs; and also in the further sum of three hundred dollars for the forbearance by the said plaintiffs at the defendant's request, of moneys before then due and owing by the said defendant to the said plaintiffs; and also in the further sum of three hundred dollars then and there found to be due and owing by the defendant to the plaintiffs on an account stated between them, and being so indebted, she, the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at New Brun-
40 wick, in the county and within the jurisdiction aforesaid,

undertook, and then and there faithfully promised the the said plaintiffs to pay them the said several last mentioned sums of money, when she, the said defendant, should be thereunto afterwards requested; yet the said defendant has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, (although often requested, &c.) But the said defendant to pay them the same, has hitherto wholly neglected and refused, and still doth neglect and refuse. Wherefore the said 10 plaintiffs say that they are injured and have sustained damage to the value of three hundred dollars, and therefore they bring suit, &c.

And the said defendant, by Woodbridge Strong & Sons, her attorneys, comes and defends the wrong and injury when, &c., and says that she did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against her, and of this she, the said defendant, puts herself upon the country, &c.

And for a further plea in this behalf as to the matters 20 stated in the first and second counts of the said plaintiffs' declaration by it filed in this cause, the said defendant, by leave of the court here for that purpose had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff by reason of anything stated or set forth in said first and second counts, or either of them, ought not to have or maintain its aforesaid action thereof against her, because she says that in and by the said acts of the legislature of the State of New Jersey incorporating the said 30 plaintiff, and in the said plaintiffs' declaration referred to it was enacted as follows, to wit:

"11. And be it enacted, That it shall and may be lawful for the said company (meaning thereby the said plaintiff) to construct and make a turnpike road from Old Bridge, in Middlesex county, to New Brunswick, in said county, beginning in the public road at Old Bridge near the hotel kept by L. W. Spencer, and thence following on or near the route of the said public road, and ending at the bridge at Weston's Mills, (being the road 40

stated and mentioned in the plaintiffs' declaration, and therein alleged to have been by it duly constructed as turnpike road), which said turnpike road shall not be less than thirty-two feet nor more than fifty feet in width, excepting the cut through the hill near Old Bridge, and sixteen feet of the same shall be sufficiently bedded and faced with stone, gravel or other material to make a solid, firm and even road; the said sixteen feet shall be so graded that in its progress no part of it shall rise
10 above an angle of six degrees with the plane of the horizon; and the said company shall construct, keep in repair, maintain and make good and sufficient bridges along the line of said road not less than eighteen feet in width; and whenever said road shall be raised so much at the margin or side as to render carriages passing thereon liable to upset, the said company shall cause good and sufficient railings to be erected and maintained at the sides so as to prevent horses and carriages from running off."

20 And that in and by the said act it was further enacted as follows, to wit: "13. And be it enacted, That as soon as the said company shall have constructed, in a workmanlike manner, the said road according to the several directions in the eleventh section" (meaning that portion of said act hereinbefore set forth,) "and the true intent and meaning of this act, it shall and may be lawful for the said company to erect gates or turnpikes across the said road, and to demand and receive toll for traveling
30 each mile and all fractions over half a mile of said road, not exceeding the following rates, to wit," the rates set forth and mentioned in the said plaintiffs' declaration, as will more fully appear in and by the said act of the legislature.

And the said defendant in fact saith that the said plaintiff did not nor has it duly constructed said turnpike road in the manner prescribed by the aforesaid act of the legislature, and did not nor has constructed in a workmanlike manner the said road according to the several directions in the eleventh section of said act, and
40 the true intent and meaning of said act in this, that it

did not nor has constructed or made the said road so much as thirty-two feet in width, excepting the cut through the hill, near Old Bridge; that so much as sixteen feet in width of said road was not nor has been sufficiently bedded and faced by it with stone, gravel or other material to make a solid, firm and even road; that so much of said road as should have been constructed by it to the width of sixteen feet, was not nor has been so graded by it that in its progress no part of it should rise above an angle of six degrees with the plane of the 10 horizon; that it did not nor has constructed or made good and sufficient bridges along the line of said road, not less than eighteen feet in width.

And that whenever the said road has been raised so much at the margin or side as to render carriages passing thereon liable to upset, it did not nor has caused good and sufficient railings to be erected at the sides so as to prevent horses and carriages from running off, but the said plaintiff, each and every of the above directions, requirements and conditions precedent, has hitherto 20 ignored and wholly failed and neglected to do and perform, and still fails and neglects to do and perform, contrary to the provisions aforesaid of the said act of the legislature, and of this the said defendant puts herself upon the country, &c.

And for a further plea in this behalf, as to the matters stated in the first and second counts of the said plaintiff's said declaration, the said defendant, by leave of the court here for that purpose had and obtained, according to the form of the statute in such case made and pro-30 vided, says that the said plaintiff, by reason of anything stated or set forth in said first and second counts, or either of them, ought not to have or maintain its aforesaid action thereof against her, because she says that in and by the said act of the legislature of the State of New Jersey incorporating said plaintiff, and in said plaintiff's declaration referred to, it was enacted as is particularly set forth in the plea by the said defendant last above pleaded, and it was further enacted as follows, to wit:
 "14. And be it enacted, That before the said company" 40

(meaning thereby the said plaintiff,) "shall receive toll for traveling said road," (meaning thereby the road in plaintiff's declaration stated to have been constructed as a turnpike,) "they shall cause mile posts or stones to be erected and maintained, one for each and every mile in use on said road, and on each post or stone shall be fairly and legibly marked the distance the said stone or post is from Old Bridge, and shall cause to be fixed and always kept up at the gates or turnpikes aforesaid in some con-

10 spicuous place, a printed list of the rates of toll which may be lawfully demanded; and also a board, on which shall be printed in large letters, 'keep to the right, as the law directs,' " as will more fully appear in and by said act of the legislature.

And the said defendant in fact saith that the said plaintiff did not nor has complied with the said provisions of said act of the legislature, in this, that it did not nor has kept in repair or maintained good and sufficient bridges along the line of said road, not less than eighteen

20 feet in width; that whenever the said road has been raised so much at the margin or side as to render carriages passing thereon liable to overset, it did not nor has caused good and sufficient railings to be maintained at the sides, so as to prevent horses and carriages from running off; that it did not nor has caused mile posts or stones to be erected nor to be maintained, one for each and every mile in use on said road, having on each post or stone fairly and legibly marked, the distance of the same from Old Bridge; and that it did not nor has

30 caused to be fixed nor to be kept up at the gates or turnpikes aforesaid, in a conspicuous place, a printed list of the rates of toll which might lawfully be demanded, (if said road were otherwise properly constructed and maintained,) nor any board having painted thereon in large letters, "keep to the right, as the law directs," but the said plaintiff, each and every of the above directions, requirements and conditions precedent, has hitherto ignored and wholly failed and neglected to do and perform, and still neglects to do and perform, contrary to

40 the aforesaid provisions of the said act of the legislature,

and this she, the said defendant, is ready to verify; wherefore she prays judgment, if the said plaintiff, by virtue of anything in said counts set forth, ought to have or maintain its aforesaid action thereof against her.

And the said plaintiffs as to the said pleas of the said defendant by her first and secondly above pleaded, and whereof she hath put herself upon the country, do the like.

And the said plaintiffs, as to the said plea of the said defendant by her thirdly above pleaded, say that the 10
said plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that they, the said plaintiffs, have complied with the said provisions of the said act of the legislature set forth and contained in the said third plea of the said defendant, according to the true intent and meaning of the said act. And this the said plaintiffs pray may be inquired of by the country, and the defendant doth the like. 20

Therefore it is commanded the sheriff that he cause to come before the judge aforesaid, at New Brunswick aforesaid, on the first Tuesday in April, A. D. eighteen hundred and eighty-five, twelve, &c., by whom, &c., who neither, &c., to recognize, &c., because, &c., and the same is given to the parties aforesaid, and now on this twenty-third day of April, A. D. eighteen hundred and eighty-five, to which day this cause was continued by vice comes non mesit brene, comes the parties aforesaid, by their attorneys aforesaid, and the sheriff of the county 30
of Middlesex having returned here into court the writ of the State of New Jersey to him directed and delivered, and in all things being duly executed, with a panel of the names of the jurors thereunto annexed, and the jurors of the said jury being demanded, to wit, Joseph Marcell, John V. Parsell, James Beggan, Jr., James B. Lake, Charles Aynes, Abraham Gulick, Samuel K. Bergen, James Meagher, D. Haines Perrine, David B. Bezzee, Bernard Roddy, Jr., George Terhune, also, come who to say the truth of the within contained premises, being 40

duly elected and sworn, on their oaths say that they find for the plaintiff and assess its damages at the sum of one hundred and eighty-seven dollars and forty-nine cents, and so they say all.

Therefore it is considered that the said plaintiff do recover against the said defendant its said damages to the sum of one hundred and eighty-seven dollars and forty-nine cents, and also the sum of ninety-three dollars and one cent for its costs and charges in its said suit in this
 10 behalf expended; which said damages, costs and charges in the whole amount to two hundred and eighty dollars and fifty cents, and the said defendant in mercy, &c.

Judgment signed April 23, 1885.

State of New Jersey, Middlesex county, ss.—I, Clarence M. Slack, clerk of said county, and also clerk of the Circuit Court in and for the said county, do hereby certify that the forgoing is a true, full and correct copy of the judgment, order and proceedings had in said cause, as the same appears of record in Book K, of Judgments
 20 of said court, on pages 14, &c.

Witness my hand and the seal of said county
 [L. s.] and court, this 18th day of May, A. D.
 1885.

C. M. SLACK,
Clerk.

MIDDLESEX CIRCUIT COURT.

The East Brunswick and New Brunswick Turnpike Company, v. 30 Rachel Stults.	}	In Case. Bills of Exceptions.
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A. V. SCHENCK,
Attorney of Plaintiffs.
 WOODBRIDGE STRONG & SONS,
Attorneys of Defendant.

Be it remembered that on the fifteenth day of April, A. D. 1885, at a Circuit Court held at New Brunswick, in and for Middlesex county, before Hon. Edward W. Scudder, a justice of the New Jersey Supreme Court, and judge of said Circuit Court, the issue joined in the above stated cause between the parties (pro ut the pleadings) came on to be tried by a jury for that purpose duly empaneled.

And thereupon said plaintiff's attorney, to maintain said issue on its part, offered in evidence an act of the legislature of New Jersey incorporating said plaintiff and defining and limiting its rights, privileges, powers and duties, entitled "An act to incorporate the East Brunswick and New Brunswick Turnpike Company," approved by the governor of the State February 10th, A. D. 1869, and found in the printed public laws of New Jersey of A. D. 1869, at page 54, &c. (pro ut the same), which was thereupon received in evidence.

And also called as a witness J. Biddle Herbert.

J. Biddle Herbert, called on behalf of the plaintiff, being 20 duly sworn, testified as follows—

By Mr. Schenck—

Q. You are connected with this corporation, the turnpike company? A. Yes, sir.

Q. In what way? A. One of the directors of the company.

Q. How long have you been a director? A. I was one of the incorporators of the company.

Q. And have been a director ever since? A. No, sir.

Q. Been a director for how long? A. Ten or twelve 30 years last past.

Q. Do you know Mrs. Rachel Stults? A. Yes, sir.

Q. And her husband? A. Yes, sir.

Q. Where do they reside? A. South River or Little Washington.

Q. How long have they lived there? A. I could not say; I think quite a number of years.

Q. What is their business? A. Stage business between New Brunswick and South River.

Q. How many stages? A. Two stages.

Q. How many horses to each stage? A. Generally two horses.

Q. In traveling from Washington to New Brunswick, what route did they travel—how did they go? A. Usually I have seen them come up the road that strikes the turnpike.

10 Q. The Washington road? A. Yes, sir; there are two or three Washington roads that strike the turnpike, one nearly half a mile below Seaman Christian's; sometimes I have seen them go the other way, down by Mr. Shedden's.

Q. That is below the first toll-gate from New Brunswick? A. Yes, sir.

Q. What distance from that toll-gate? A. About two miles.

Q. How far is that toll-gate from New Brunswick?

20 A. Something less than half a mile.

Q. Then did they travel that distance over the pike?

A. Yes, sir.

Q. Making a distance of two and one-half miles about? A. Yes, sir; a little less than two and one-half miles.

Q. Between two miles and two and one-half? A. Yes, sir.

Q. How many toll-gates are there over this pike? A. Two.

30 Q. What is the total length of the turnpike between this and Old Bridge? A. As surveyed by Sheriff Disbrow, five and three-quarter miles and two chains.

Q. But the distance traveled by these parties was, as you say, between two and two and one half miles, and through the one gate? A. Yes, sir.

Q. The nearest gate to New Brunswick? A. Yes, sir.

[And thereupon plaintiffs' attorney asked said witness the following question]—

Q. What year was this road completed and the gates
40 established?

[Whereupon defendant's attorney objected thereto, and insisted that said question was improper and inadmissible upon the issue aforesaid, as assuming that said turnpike road had in fact been properly completed.]

[But his honor, the said judge, held said question to be proper and admissible in law, and allowed the same to be put to and answered by the witness.]

[To which ruling said defendants prayed an exception and it was sealed accordingly.]

E. W. SCUDDER. [L. s.] 10

Q. What year was this road completed and the gates established?

[Whereupon said witness answered said question as follows]—

A. 1871 or 1872; one gate was established when a little over two miles of the road was completed, and the other in 1871 or 1872, when it was completed.

And being further examined for plaintiff, testified as follows]—

Q. Upon the completion of the road? A. Yes, sir. 20

Q. Which was the first gate, the one nearest or furthest from New Brunswick? A. The one furthest from New Brunswick.

Q. From that time, from 1871 to 1872, on the completion of the road, state whether or not the public have traveled over this turnpike road? A. They have, as far as my knowledge goes.

Q. And paid toll? A. Yes, sir.

[Objected to.] [Overruled.]

Q. Did the defendant, Mrs. Stults, travel over this 30 road with her horse and carriage prior to October 1st, 1879? A. Yes, sir.

[And thereupon plaintiff's attorney asked said witness the following question]—

Q. State whether or not there was a question raised or a suggestion, at that time about making a compromise about paying a regular rate of toll?

[Whereupon defendant's attorney objected thereto and

insisted that before a contract could be shown a proper performance of the conditions precedent whereon the plaintiffs right to take toll depended, must be proved.]

[But his honor the judge held said question to be proper and admissible in law and allowed it to be put to and answered by the witness.]

[To which ruling said defendant prayed an exception and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

10 [Whereupon said witness answered said question as follows]—

A. Yes, sir.

And being further examined for plaintiff testified as follows—

Q. What was the question raised about the compromise? A. I had formerly had a contract with them in regard to paying toll at a reduced rate; they had got behind some in their toll, \$20, I think; then I had the gates closed and made them pay the regular toll for 20 awhile.

Q. What was the regular toll, according to the rates?

A. It was six cents a single trip to New Brunswick; six cents each way.

Q. That is for the stage and two horses? A. Yes, sir.

Q. Then you ordered the gates closed? A. Yes, sir; and collected the full toll for a short time.

Q. At the toll-gate, in the regular way? A. Yes, sir; Mr. Christian spoke to me and asked if some arrangement could not be made whereby I could give them a 30 less toll; I told him I was willing to make the arrangement; after some talk, seeing him a few times, we agreed to let him have the toll at \$65 per year.

Q. Payable how? A. Payable monthly.

The Court—What has Mr. Christian to do with it?

Mr. Schenck—We will come to that.

Q. Mr. Christian was acting intermediary between you and the other parties? A. Yes, sir.

Q. That was about what time? A. About the 1st of October, 1879.

Q. In pursuance of that agreement were there payments made? A. Yes, sir, there were payments.

Q. State when those payments were made and what they were? A. One payment, made October 31st, \$5.30; November 29th, \$5.42; December 31st, \$5.42; April 22d, 1880, \$5.42; May 15th, \$5.42; July 31st, \$10.84—that is 10 for two months; September 27th, \$10.10; then I received a note.

Q. Look at November 6th? A. November 6th, \$5.00.

Q. That makes a total of how much? A. \$52.93; then I received a note of Rachel Stults, endorsed by Frank Stults; I cannot tell the date that I received it, but I can give the date that it was due in the bank; it was for \$50—paid in the bank May 17th, 1882—the National Bank of New Jersey; that is the last payment that I have received. 20

Q. That was the total of the payments—\$102.92? A. Yes, sir; I have ridden back and forth a few times in the stage; I don't know whether that is charged or not.

Cross-examined by Mr. Strong—

Q. The contract or arrangement that you have spoken of, did you see Mrs. Stults at all at the time the arrangement was made? A. No, sir, not personally.

Q. You did not see Mrs. Stults personally about making this contract? A. No, sir.

Q. Who did you see? A. Mr. Christian. 30

Q. Did you see Alfred Stults about making it at all? A. No, sir.

Q. It was wholly made through Mr. Christian? A. Yes, sir.

Q. How much behindhand was that stage concerning any toll when you made this arrangement or contract?

A. My impression is about \$24.

Q. Were these payments that were afterwards made in liquidation of this \$24? A. I did not so understand it.

Q. Were you ever paid that \$24 by anybody? A. I have not been.

Q. This arrangement that you made with Mr. Christian—give it to me fully—\$65 a year? A. Yes, sir; to be paid monthly.

Q. For how long? A. No definite time.

Q. Don't you remember that Mr. Christian said that Mr. Stults would try that for a year? A. No, sir.

Q. Did Mr. Christian say to you that Mr. Stults made
10 it a condition that he would try it for a year, and see in what kind of order your turnpike was put? A. Nothing of the kind.

Q. Nothing of the kind took place? A. No, sir; I don't remember anything of the kind.

Q. Did it take place—did Mr. Christian ever agree with you that Alfred Stults should pay that \$65? A. There was no—the agreement was that I was to have \$65 a year for these stages, and it was to be paid monthly.

Q. Who was to pay it? A. The proprietors of the
20 stage line.

Q. But nothing definite was said on that head? A. I do not recollect the conversation on that point.

Q. Did not Mr. Christian tell you at the last conversation had about this matter that \$65 was too much, and he did not know whether it would be paid? A. No, sir.

Q. Did he tell you that? A. He said he thought it was too much, and offered \$50; I told him the lowest I would take was \$65.

Q. Did Mr. Christian tell you at that time that he was
30 not authorized to represent anybody? A. No, sir; I don't think he did.

And said plaintiff's attorney also called as a witness Seaman T. Christian.

Seaman T. Christian, called on behalf of the plaintiff, being duly sworn, testified as follows—

By Mr. Schenck—

Q. Where do you reside? A. A mile this side of Washington.

Q. Do you know Mr. Herbert? A. Yes, sir.

Q. On or about the 1st of October, 1879, did you have a conversation touching the payment of tolls? A. I don't remember the date, but I suppose about that time.

Q. You heard this testimony this morning? A. Yes, sir.

Q. Was it correct?

[Objected to.] 10

Q. State in your own way what the conversation was?

A. I went and talked to Mr. Herbert; I came across him somewheres, and wanted to know whether Mrs. Stults could not commute on that turnpike, as paying too much toll; I wanted it done to make it peaceable between the two; Stults was finding a good deal of fault with the turnpike; I proposed that Mr. Stults pay him \$50 a year; I think they were then paying full toll.

Q. You suggested \$50? A. I did.

Q. Did he object or accept? A. He objected to the 20 \$50.

Q. What sum did he suggest? A. He said \$65; my impression was it was \$60; I may be mistaken about that.

Q. Either \$60 or \$65? A. Yes, sir.

Q. Did you settle upon that? A. I think I told Mrs. Stults so.

Q. Did you tell Mr. Herbert afterward that that was satisfactory? A. I do not remember about that, I suppose that I did; he says that I told him. 30

Q. I ask you what you said to Mr. Herbert, whether you said it was satisfactory? A. I do not remember telling him in those words.

Q. I do not say in those words, but in substance? A. I think Mrs. Stults said we would try it a year.

Q. I do not ask you that at all; why do you introduce what I did not ask you—I asked you what you said to Mr. Herbert? A. I do not remember just what I said.

Q. Didn't you say to him that the sum suggested by him, \$65, was satisfactory? A. I do not think I said that. 40

Q. You did understand that the sum of \$65 was the sum agreed upon? A. You say \$65; my impression is it was \$60.

Q. One or the other sum was agreed upon? A. Yes, sir.

Cross examination by Mr. Strong—

Q. You did not see Mrs. Stults about this matter at all, did you? A. No, sir.

Q. You were friendly with Alfred Stults and Biddle
10 Herbert? A. Yes.

Q. And you were acting for both to keep the peace? A. Yes, sir.

Q. And like a good many other peacemakers, you got yourself in court? A. It seems so.

Q. You said that Mrs. Stults was complaining about the road; what was she saying about the road?

[Objected to.]

Q. How many interviews did you have with Mr. Herbert about this matter? A. I could not tell you, not a
20 great many.

Q. Was there more than one? A. More than one, I think.

Q. Did Mr. Stults come to you to ask you to go and see Mr. Herbert? A. I do not think he did.

Q. It was after you had seen Mr. Stults, and had this conversation with him and heard his complaints that you went and saw Mr. Herbert? A. Yes, I knew how Mr. Stults felt about it.

Q. Did you mention anything about this complaint to
30 Mr. Herbert? A. I don't think I did.

Q. You do not think you said anything about the complaint of Mr. Stults? A. No, I don't remember.

Q. Do you know what you said to Mr. Herbert? A. No, I do not; I only know that I wanted him to take \$50.

Q. Did you bring Mr. Herbert and Mr. Stults together at all? A. No, sir.

Q. Did you say anything to Mr. Herbert about what Mr. Stults had said about the road not being properly

constructed? A. I might have said something, I do not remember.

Q. Did you and Mr. Herbert have any talk about the road not being properly constructed? A. I do not remember anything.

Q. That is with Mr. Herbert, about the proper construction of the road? A. No, sir; not at that time; we have at other times not then.

Q. And Mr. Stults said, "we we will try it for a year, and see what they will do?" A. Something like that, "we 10 will try it and see what they will do."

Q. Did Mr. Herbert say to you that Mr. Stults could have the toll at that rate if he would keep still, or something to that effect? A. No, sir.

And plaintiffs' attorney also called as a witness Jeremiah Ferguson.

Jeremiah Ferguson, called on behalf of the plaintiff, being duly sworn, testified as follows—

By Mr. Schenck—

Q. Where do you reside now? A. New Brunswick. 20

Q. Were you at one time a gate-keeper on the turnpike? A. Yes, sir.

Q. Which one? A. The first gate this way.

Q. For what time? A. I went there the 28th of April, 1883.

Q. And remained until when? A. Last March 11th, 1885.

Q. Do you know Alfred Stults? A. Yes, sir.

Q. I want to call your attention prior to October, 1883, from April, when you first went there, until the follow-30
lowing October; I want to ask you whether the Stults line of stages passed through that turnpike during that time? A. Yes, sir.

Q. How many stages? A. Two.

Q. How many horses to each stage? A. Two.

Q. How many trips a day? A. Three trips a day—
round trips.

Q. How many days in the week? A. Six days.

Q. Was that during the whole time? A. Yes, sir.

Q. Who drove the stages? A. Mr. Stults drove one and James Robinson drove another, they told me.

Q. Did they pay toll during that time? A. No, sir; not during that time.

Q. Did you demand toll during that time? A. No, sir.

Q. Why not? A. Mr. Herber told me not to ask for 10 any toll of them, they paid by the year.

Q. As to all other persons, did you collect toll from them? A. From all who did not hire by the month or year.

Q. There were other persons who paid by the month and by the year? A. Yes, sir.

Q. And with regard to the others—they paid as they passed through the gate? A. Yes, sir.

Q. Were any suffered to pass without paying? A. No, sir; except those who hired by the month or year.

20 Q. Was there much travel over that road? A. Yes, sir.

Cross-examination by Mr. Strong—

Q. Where does this road you speak of lead from? A. From Old Bridge to New Brunswick.

Q. The South River road comes in on it? A. Yes, sir.

Q. Did you know anything about this road before the turnpike was organized? A. I did not.

30 Q. It is the only way to go from South River to New Brunswick, over your turnpike? A. That is the only way I know of, except you cross over and go by Hill-town; it is the only direct road.

Q. You said that Alfred Stults and his stages went over your turnpike from April, 1883, to October, 1883? A. Yes, sir.

Q. Did they pass over the road by your toll-gate every time? A. Yes.

Q. Did they pass through your toll-gate every day? A. No, sir, I think not.

Q. Did not pass through the toll-gate every day? A.

No, sir; about the first of October or latter part of September, he rode through the field back of the house.

Q. So he escaped going through the toll-gate by driving through the field? A. After the 4th of July that year he did.

Q. That was 1883? A. Yes, sir.

Q. After the 4th of July, 1883, he turned off of the turnpike before he came to your toll-gate, drove around the toll-gate and then into the turnpike on the other side? A. Yes, sir. 10

Q. How far from your dwelling-house did he come in? A. About two hundred paces from my house up to where he drove in, and about the same distance where he came out.

Q. Through whose field did he go? A. I think Mr. Clancy had leased the field.

Q. From the 4th of July down to the 1st of October, didn't he drive through that field all the time? A. No, sir.

Q. Didn't he drive through the field the greater part 20 of the time? A. Yes, sir.

Q. How many times between those dates did he drive through your toll-gate? A. Whenever Clancy ploughed up the field, then he rode through the gate for a day or two, and ran against the gate and smashed it right down.

Q. How did he come to do that? A. I shut it.

Q. What did you shut it for? A. Mr. Peterson was my boss at that time, and he told me if Mr. Stults refused to pay toll to shut my gate, and I went to him and he paid me toll, but he broke it down before I had a 30 chance to open the gate; he smashed it down and came pretty near smashing me under it, and before I got the gate out of the way the other stage came up and rode over it.

Q. Was that the day you went out with a club in your hand to stop them? A. I never had a club in my hand to stop them.

Q. Was it on the 4th of July that you asked Alfred Stults for toll? A. Yes, sir.

Q. I thought you said you did not ask him for toll 40

from the time you came there, because he paid by the year? A. Up to the 4th of July, I said; that is what I meant, if I did not say so.

Q. Then you did not ask him for toll up to the 4th of July? A. No, sir.

Q. But from the 4th of July on you went to collect toll of him every time you had a chance? A. Yes, sir.

Q. How many times did you shut the gates on him between the 4th of July and the 1st of October, 1883?

10 A. I did not keep any account.

Q. How many times do you think? A. It might have been a dozen times, and maybe not so many.

Q. Every time that you saw the conveyance of Stults' coming down the road you slammed the gate shut? A. Yes, sir.

Q. And when Mr. Stults came there and the gate was shut he paid the toll? A. Yes, sir.

Q. And then you let him through? A. Yes, sir.

Q. During the time that Mr. Stults turned back
20 through Clancy's field, you could not get the toll? A. No, sir.

Q. How many times did Mr. Stults smash your turnpike gate down? A. Once he knocked it open—once or twice—but he did not break it but once.

Q. Did he pay his toll before he broke it? A. Yes, sir, he did.

And plaintiff's attorney also called as a witness Charles Elkins.

Charles Elkins, called on behalf of the plaintiff, being
30 duly sworn, testified as follows—

By Mr. Schenck—

Q. Where do you reside? A. North Brunswick.

Q. You were connected with this turnpike in its beginning, were you not? A. Not in its beginning.

Q. How soon after? A. In 1871 and 1872 I was connected with it, and a portion of 1873.

Q How were you connected? A. I purchased one-half of the stock of that road from Peter Jernee.

Q. Had they commenced to construct the road at that time? A. Yes, sir.

Q. When did they commence? A. I cannot say.

Q. Had you anything to do with the construction of the road? A. With three miles and about one-half.

Q. Which end? A. This end—the northerly portion from Weston's mills to Hardenburgh's corner.

Q. That covers the whole of the part of the turnpike 10 traveled over between South River and New Brunswick?

A. Yes, sir; and a little more.

Q. When was that part constructed? A. In 1872 it was finished; there was a little work done in 1871 on it.

Q. Who had charge of that construction? A. I had.

Q. When was it completed? A. In the fall of 1872.

Q. When was the toll-gate on this section established?

A. Shortly after the completion of the road—within thirty days.

Q. By whom was that established? A. By me. 20

Q. Who was the first toll-gate keeper at that gate?

A. George Davidson.

Q. Under whom? A. Under my directions.

Q. How long did he remain there? A. The best part of two years.

Q. Were tolls regularly received at that toll-gate during the whole time? A. Yes, sir; with the exception of once in a while when the roads would be a little bit out of order.

Q. When did that happen? A. Through the early 30 part of the spring, when the frost was coming out of the ground.

Q. Did they remain open on that account? A. A short period; sometimes a week; they were opened on three several occasions.

Q. Was that the rule? A. I authorized the toll-gate keepers at any time when they found the road was not in good condition, to communicate with one another and throw the gates open, and to charge no toll from anyone.

Q. While the frost was coming out? A. Yes, sir; or from any other cause.

Q. With that exception this turnpike was travelled over, and tolls were regularly demanded and received at that toll-gate, from that time continuously on? A. Yes, sir.

Q. Down to the present time, so far as you know? A. Yes, sir.

Q. During that time it was under your own supervision? A. Yes, sir.

Q. Was there much travel over that road? A. At that time considerable.

Q. That road, taking the whole turnpike, was it constructed from Old Bridge to New Brunswick? A. Yes, sir, to the line.

Q. In regard to the width of that road, was it anywhere less than thirty-two feet?

[Objected to.]

Q. What was the width? A. In some places it would overrun that, and in some places about that; I don't think there was any place in that road that was narrower than thirty-two feet.

Q. Was it over fifty feet wide? A. In places; yes, sir.

Q. What places were those? A. At the head of the hill at Weston's mills.

Q. What was the cause of that? A. That hill was in a very bad condition, and it required a great deal of dressing, and it required the moving of a great deal of side dressing to get that hill in proper shape; there was a large amount of work done on that hill; at other places where it was not necessary, it ran about thirty-two to thirty-eight feet.

Q. Did it exceed that in any other place? A. I think not.

Q. In regard to the gravel or stone or other material; what width of the turnpike was graveled? A. Gravel and other material was used; stone among the gravel.

Q. For what width? A. In various widths.

Q. The narrowest? A. I do not think there was a

place on the road where the road-bed, after being formed, would measure less than eighteen feet.

Q. With regard to the time when it was completed, being a solid, firm, even bed? A. It was considered to be in a good, fair condition—very good condition.

Q. At the time of its completion? A. Yes, sir.

Q. You say it was a solid, firm and even bed? A. It was.

Q. Was there any part of this turnpike raised on the margin or side so as to render carriages passing liable to 10
overset? A. No, sir; not for a sober man.

Q. You have spoken about throwing open the gates, owing to the road being out of condition at certain periods of the year; will you state why and how that was; what was this caused by—the action of the frost? A. All new-formed roads are likely to heave and fall away, to get in bad condition, and we have to repair them.

Q. Has the frost any action upon it? A. Yes, sir.

Q. What? A. To heave up in spongy places, where
it is springy. 20

Q. What was the general character of the road-bed there? A. Some places very bad before it was formed into a pike.

Q. What was the character of the soil? A. In spots quicksand, and in other spots heavy clay.

Q. In this sixteen feet you used principally gravel? A. Except on the quicksand; there I used the clay until it became bedded with the quicksand, and then I put gravel on it.

Q. Who constructed the other end? A. Under the 30
direction of Mr. Herbert.

Cross-examination by Mr. Strong—

Q. This was the old road before the turnpike came into existence?

[Objected to.]

A. I guess long before my memory.

Q. And it runs from Old Bridge to New Brunswick?

A. Yes, sir.

Q. You did not build any additional road, or lay out any new road? A. No, sir.

Q. But you constructed your turnpike on the top of the old road? A. Yes, sir, except at Weston's mills; we had to diverge there on account of the construction of this bridge that the county was building; it threw it more to the eastward.

Q. You built an addition to the old road? A. No; simply threw the road out to meet this bridge.

10 Q. That road is the only direct route in going from New Brunswick to Little Washington? A. It is the only direct route.

Q. How long did your administration continue? A. From the commencement until the end—about three years.

Q. Did you sell out your stock then? A. Yes, sir.

Q. You have not been a stockholder since? A. I have had no interest in the road since, and have had nothing to do with it.

20 Q. Do you know anything about its present condition?

[Objected to.]

Q. You have spoken about the width of this road; in your measurements, from what points to what points do you call the width of the road? A. From the ditches.

Q. From the inside edge of the ditches, or outside? A. From the inside.

Q. You say you made that turnpike thirty-two feet between the inside edges of the ditches? A. Yes, sir; I
30 meant to do that.

Q. Did you take measurements? A. I did occasionally, here and there.

Q. Who assisted you in your work? A. I employed several.

Q. Who? A. George Hatler, James Jamison, two of the Provosts; some of Daniel McLaurey's men, horses and carts—I could not say all.

Q. Did you have Henry Serviss? A. A short time, Henry Serviss and his son, I know his son worked for
40 me, I forget whether Henry Serviss did or not.

Q. What did you do your measuring with? A. Paced it off.

Q. You did not measure with any accurate instrument? A. No, sir.

Q. You paced off thirty-two feet? A. Yes sir, so as to come within charter.

Q. And that was all the measuring you did? A. Yes, sir.

Q. In forming the road, how did you make it; did you scrape it up from the gutter on each side? A. We had 10
to in some places, to bring it to a crown.

Q. Made a gradual rounding top? A. Yes, sir.

Q. What did you put on top of that? A. Gravel, chiefly.

Q. How wide a place of gravel did you put on? A. About twelve feet. It would gradually spread out by the wagons forcing it out.

Q. You did not measure that? A. No.

Q. How many loads of gravel wide, did you gravel the road? A. Some places two and some places one. 20

Q. How much of a thickness of gravel did you put on this road? A. From six inches to eighteen.

Q. Measure it, or guess at it? A. Guessed at it.

Q. For how large a space of ground did you make one load of gravel do? A. We dropped the load of gravel, and calculated it to go no further ahead than the length of the wagon; we spread it out sidewise.

Q. You made one load of gravel cover a space about as wide as a wagon-body? A. That is, of the length of the wagon. 30

Q. And the width? A. The whole width of the road, twelve feet.

Q. Where did you get your gravel? A. Part of it from Mr. Tonner's and part from Mr. Pettit's pits, and part from Edward Kearney's—that was the first graveling.

Q. When did you do the second graveling? A. About six months after the first graveling.

Q. The first graveling was not sufficient? A. In

some places only; the whole road-bed was not graveled over a second time, only in places where it required it.

Q. What places did you gravel the second time? A. Between Tice's and a man by the name of Lambert.

Q. Have you seen the road lately? A. Last December.

Q. Is it wider or narrower than when you left it? A. I do not think it is any wider.

Q. Is it narrower? A. I do not see how it could be
10 narrower.

Q. I understand you to say that you never graveled it except this one time, and a part of it a second time?

A. That is all.

Q. Did you do any other making of the road except that? A. I formed a portion of the road-bed.

Q. Where was that? A. From Tice's to the Vandevender hill.

Q. Was a part of the road formed before you came into control? A. Yes, sir.

20 Q. Where was that formed from? A. Along Daniel McLaury's; also between the first Washington road and Shedden's.

Q. It was formed from Daniel McLaury's to where, before you came? A. From there down to Edward Karney's.

Q. How large a portion—how much of the road had been formed on this end before you came to it? A. I suppose, in all, about one mile and three-quarters had been formed.

30 Q. Then you formed how much after you got there? A. About two miles.

Q. And that two miles, together with what had been previously formed, carried the road from Weston's mill to where? A. To Hardenburgh's corner.

Q. That is Mrs. Tanner's? A. Yes, sir, the same thing.

Q. And the road to Washington turns off before you get to Hardenburgh's corner? A. Yes, sir.

Q. How much this side? A. About a mile this side.

40 Q. So that portion of the road upon which Mrs. Stults would have to travel, in coming from South River, would

be the mile and three-quarters formed before you came there, and then about a mile, which was made by you?

A. Yes, sir.

Q. That portion of the road that was formed before you came, you simply carted gravel on? A. Gravel, and in some places clay, on the quicksand.

Q. Do I understand to add clay to quicksand is a good thing to make a road? A. Gravel and quicksand would not make a road.

Q. But gravel, clay and quicksand will make a nice 10 road? A. Yes, sir.

Q. That part of the road you did form you scooped up out of the gutters into the middle and put the gravel on top? A. Yes, sir.

Q. Without making any measurements, except as you have given? A. Yes, sir.

By Mr. Schenck—

Q. Part of the road which you did not form, who formed that? A. I think under the direction of Mr. Herbert—I don't know. 20

Q. This part of the road that you say you formed by scooping up and making a crown in the center, what was the foundation of that road? A. A portion of it was clay; part of it was clay and part of it was ordinary loam.

Q. Good, solid bottom? A. No, sir, not a natural solid bottom.

Q. Part of it was? A. No, sir; there was no part of that road solid bottom, except at Weston's mill hill.

Q. In this forming the sand was relied upon to make 30 a solid road? A. The gravel was.

Q. And you say that that was laid at least sixteen feet wide?

[Objected to.]

Q. It was laid in the centre and spread from the centre on each side? A. Yes, sir; dumped in the centre.

Q. Where was the main thickness of the gravel? A. In the center of the road.

Q. Where did you put the most gravel? A. Between Tice's and Vandevender's.

Q. Was the greater part of the gravel put there? A. Yes, sir; because it was a tremendous bad piece of road, almost impassible.

Q. Arising from what? A. A wet, springy ground.

Q. What was the character of the soil there? A loam and clay, the greater part of it.

Q. That part of the road that you did not construct at 10 this end, what was the character of that section when you went there? A. A sandy gravel.

Q. Was it in good condition? A. Yes; very good condition.

Q. How did that section of the road as to the construction and the character of the soil compare with that which you constructed? A. Much more favorable than the part I constructed.

Q. As to the character of the soil? A. Yes, sir, and the natural drainage.

20 Q. What was the character of the soil? A. Heavy loam, and the water had free passage way, so as not to lay in the vicinity of the road.

Q. And the part you constructed, had the water free passage or not? A. We had a good deal of trouble.

And plaintiff's attorney also called as a witness J. Elmer Stout.

J. Elmer Stout, called on behalf of the plaintiff, being duly sworn, testified as follows—

By Mr. Schenck—

30 Q. Were you connected with this road in its early history? A. Yes, sir.

Q. When did you become acquainted with it? A. Along about 1870.

Q. How? A. I bought Mr. Herbert's interest out.

Q. As a stockholder? A. Yes, sir.

Q. Had you anything to do with the construction of

that road? A. Not particularly, I had an agent or gentlemen who did that.

Q. Who? A. Mr. Elkins.

Q. Was your attention called to the construction of the road as it was being constructed? A. It was, I went over it frequently.

Q. You did make it a point to look over it? A. I did.

Q. It was constructed from Old Bridge to New Brunswick? A. Yes, sir.

Q. And from Old Bridge near the hotel of Spencer's? 10
A. Yes, sir.

Q. And then ended at the bridge at Weston's mills?
A. Yes, sir.

Q. What was the width of the road? A. The main width was thirty-two feet.

Q. What was the width of the road? A. I believe it was thirty-two feet wide; the road was to be.

Q. Was it so constructed? A. So far as my observation went, and I looked at it very closely, and from the information I could get from the men that I employed, 20
it was.

Mr. Strong—I do not want the information.

The witness—Then it was I paced every yard of it and examined it myself, so that I was certain that I was in the charter.

Q. There is one exception through Old Bridge—you are familiar with that locality—explain what is the meaning of that exception, "Except the cut through Old Bridge?" A. That refers to the big hill there, where they had to make a very deep cut—twenty-five feet in 30 places—and to dig that through the whole width, thirty feet, it would take \$10,000 to do it, and in getting that charter that was looked after and excepted.

Q. What is the width through that cut? A. I should not think it was over twenty feet.

Q. With regard to bedding and facing with stone, gravel or other material to make a solid, firm and even

bed, how much and what width of the turnpike was so done? A. Sixteen feet, as I understand.

Q. What was that bedded and faced with? A. It was to be with stone and gravel, or other hard substance.

Q. What was it, in fact? A. It was with gravel, the best we could get.

Q. Was it so done as to make a solid, firm and even bed? A. I understand it so; it was so, too.

Cross-examined by Mr. Strong—

10 Q. At the time you were making this road, did you take any measurements yourself? A. Yes, sir.

Q. What did you measure with? A. With a tape line.

Q. Where did you measure? A. On every two hundred feet of the road.

Q. Measured with the tape line? A. Yes, sir, and drew it very straight.

Q. On every two hundred feet of the road, where? A. All the way from Weston's mill, where it was constructed, to Hardenburgh's corner.

20 Q. Where did you measure it? A. I measured the whole road to see whether that was thirty-two feet.

Q. Where did you measure? A. From fence to fence.

Q. And you got thirty-two feet from fence to fence?

A. All the way clear through, and there was—

Q. Your thirty-two feet measure was all the way from fence to fence? A. Yes, sir, except where the woods were.

Q. Where is the ditch? A. Ditch on each side of the road.

30 Q. On which side of the fences are the ditches? A. They are mostly alongside of the constructed road to draw the water off.

Q. Are the ditches between the constructed road and the fences? A. Certainly they are, all the way along the line.

Q. Between the constructed road and the fences? A. Yes, sir.

Q. Then how is a man going to drive between the two fences? A. There is the road-bed.

Q. Can a man drive along that turnpike now, alongside of the fences? A. No; he could on the turnpike.

Q. Does that turnpike extend from fence to fence? A. I didn't say so; I said sixteen feet of the road.

Q. You say that you constructed a turnpike thirty-two feet, and that that extends from fence to fence? A. Yes, sir, the space must be that.

Q. The space from fence to fence was thirty-two feet? A. Yes, sir.

And plaintiff's attorney also called as a witness An-10 drew J. Disbrow.

Andrew J. Disbrow, called on behalf of the plaintiff, being duly sworn, testifies as follows—

By Mr. Schenck—

Q. You are a practical surveyor? A. Yes, sir.

Q. And have been such for a great many years? A. Yes, sir.

Q. What was your first connection with the turnpike company? A. In running the lines of the road, after the charter was obtained, from Weston's mill to Old 20 Bridge.

Q. You run the line of the road? A. Yes, sir.

Q. For what purpose? A. To locate the road.

Q. Was the road actually located on the line as you ran it? A. Yes, sir.

Q. Where was the beginning point? A. We began at the bridge at Weston's mill and ended at Old Bridge.

Q. Near the hotel kept by Spencer? A. Yes, sir.

Q. Weston's mill is the line of the New Brunswick city limits? A. Yes, sir. 30

Q. Was your attention called to the construction of the road? A. Yes, sir.

Q. In what respect? A. I was considered the engineer of it; to superintend it, to see how it was built, go over it frequently.

Q. Have you made measurements? A. Yes, sir.

Q. Of what? A. I measured the length of the road and the width since.

Q. What was the length? A. We made it a little over five miles; I think five miles and sixty-two chains; five and three-fourths miles and two chains.

Q. Who constructed the road—who were the actual persons who constructed it? A. Mr. Herbert managed the thing at first; Mr. Conover was his foreman for some time, and then Mr. Elkins and Stout.

10 Q. Which end did he have charge of? A. The other end.

Q. What was the width of the road? A. The road is a three-rod road, so laid and used; it is that where there is any fence; I think there will be found nowhere that it is not three rods between the fences; on the 5th of December last, we carefully went over and measured the width again; I bossed the job, and I got an iron rod and measured it carefully, sixteen feet, and turned the end down and had them pace twenty-two paces straight from
20 the bridge at Weston's mill, and they measured every chain of the road from Weston's mill to Old Bridge; I followed right behind the chain and watched both chainmen, and I say, without fear of contradiction, there is no place on that road, that is less than sixteen feet in width of hard road; we found it even down in that exceptional cut; there might have been a foot or two of it soft, but the width is there.

Q. No place where it is less than sixteen feet? A. No, sir.

30 Q. That is the traveled bed? A. That is the road-bed.

Q. What is the width of the road, not the bed, but the road? A. There is generally a ditch inside of the fence, and we measured it in numerous instances; we did not measure that as we did the other, every chain, but we measured very frequently, and it was thirty-two feet in width, that is, from the edge of the ditch to ditch on each side; from the inside edge of the ditch it is possible there may be places, for I did not consider that of so

much consequence, it is all road inside of the fences, of some kind or other.

Cross-examination by Mr. Strong—

Q. You are a stockholder in this turnpike company?

A. Yes, sir.

Q. And have been so ever since the beginning of it? A.

No, sir.

Q. How long have you been a stockholder? A. I think perhaps five years.

Q. You are also the secretary of the company? A. 10

Yes, sir.

Q. How long have you been secretary of the company?

A. I think during its organization.

Q. Ever since it started? A. Yes, sir.

Q. You are speaking now of your general recollection of the measurements of the road after it was completed?

A. Yes, sir; Mr. Herbert started the road, and there was hardly a day without his consulting me about the road; we knew what might come, and I was prepared to be very particular. 20

Q. You did not keep those measurements? A. I did not keep them by me.

Q. You have not seen them for how many years? A. Half-a-dozen, perhaps.

Q. The road was formed by scooping up and dumping in the middle? A. Sometimes, if it was the right material.

Q. And you measured for the road from the outside edge of the scooped-out place? A. Yes, sir.

Q. You took thirty-two feet? A. It is more than that 30—that is, where I measured from; there are some few places where it was difficult to get thirty-two feet, but generally it was much more than thirty-two; I only wanted to see that it was thirty-two feet.

Q. But in making your measurements you measured from the outside excavation in each case? A. Yes, sir, generally.

Q. That you consider the road—that is what you are speaking of when the road was thirty-two feet wide from

the outside edge of the excavation on each side? A. Yes, sir.

Q. And that would include ditches as well as road? A. Yes, sir.

Q. And ditches and road together, you call the road? A. In some instances.

Q. Didn't you in all instances? A. No, sir; if there was a regular ditch dug down I would not consider that the road.

10 Q. Is there a regular ditch in some places? A. Yes, sir.

Q. It was in all instances from the outside edge of one excavation to the outside edge of the other excavation, over the crown of the road was thirty-two feet? A. Yes, sir, so far as I measured it; it was frequently very much more than that, because the road, as used, is fifty feet in width.

Q. Between the fences? A. Yes, sir.

Q. Between these excavations and the fence, there was 20 generally a sort of a bank? A. Sometimes.

Q. Between the outside edges of the excavation you made your measurements in measuring a cross-section of the road, you measured from the excavation on each side across the road, and in that you find thirty-two feet and sometimes more? A. Yes, sir.

Q. In the middle of that there was a portion of the road that was graveled? A. Yes, sir.

Q. How wide a portion? A. Not less than sixteen feet.

Q. Why do you judge it was not less than sixteen feet?

30 A. Because I measured it and know that was the amount and width required by the charter; I was careful to conform to it.

Q. And it is your recollection during the period of these years? A. Yes, sir.

Q. Who was working on the road when you measured it? A. I can't tell you.

Q. Who was the boss when you measured it? A. Mr. Herbert was there a good deal of the time, and Mr. Conover.

Q. Do you recollect what kind of substance was used in the gravel? A. Generally; yes, sir.

Q. Was there anything used but gravel on it? A. Yes, sir.

Q. What? A. I think there was red shale used.

Q. Is red shale good to make a hard road? A. It proved to be so there; I did not think so at the time.

Q. Don't it generally make a road muddy? A. Not often.

Q. You never lived in New Brunswick? A. No, sir; 10
I say that red shale put on the road, not too thick, will dry it and become exceedingly hard.

Q. Red shale will dry out and make an excellent, hard road? A. Yes.

Q. And every time it rains, won't it make an exceedingly muddy road? A. No, sir; I thought that was the tendency, but it did not prove to be so.

Q. How deep was the red shale put on this road? A. I can't say about that; six or eight inches.

Q. No recollection on the subject at all? A. No, only 20
generally.

Q. How deep was the gravel put on the road? A. Generally more than that; I should judge at the center of the road, probably eight inches.

Q. And at the side, how much? A. Generally it thinned down at the sides, because we all know the tendency of the working of gravel on a road is to work to the sides.

Q. And the tendency of roads is to spread out and not get any narrower? A. Yes, sir; unless they are properly 30
scraped.

Q. What is the ordinary tendency of roads; to flatten down and get wider? A. Yes, sir; but it depends on the scraping of the road; if you use the proper scrapers, you can keep it up in good order.

Q. After this road had been graveled, was the place where the road had been graveled distinguishable from the rest of the road? A. I think it was all graveled.

Q. The entire road? A. Generally saying, sixteen
feet.

Q. You did not gravel down to the edge of the excavation on each side? A. No, sir.

Q. Because there were the ditches? A. Yes, sir.

Q. And the road drained off into this excavation? A. Yes, sir.

Q. But it was on the crown of the road between the excavations where you graveled? A. Yes, sir.

Q. And that was sixteen feet wide? A. Yes, sir.

Q. You do not remember any particular spots where
10 you measured? A. I measured all over it generally, so as to be entirely satisfied that it was up to the standard.

Q. I think you said you measured again last December? A. I did.

Q. Who were with you? A. Mr. Herbert, Peterson, George Devoe and Mr. Conover.

Q. Did you measure in any particular spots then? A. We measured in all spots, one chain apart.

Q. From Old Bridge to New Brunswick? A. No; from New Brunswick to Old Bridge.

20 Q. That was in December? A. Yes, sir.

Q. What kind of weather was it when you measured? A. Nice weather.

Q. Frozen hard? A. No, sir, it was not frozen at all.

Q. There had been no rain just previous to that? A. No, sir, I do not remember that there was.

Q. Did you measure full width of the road? A. I did, occasionally.

Q. Did you at that time when you were measuring the sixteen feet? A. I think I did, but I cannot designate
30 the spots; I measured in numerous instances to see that there was thirty-two feet there, and there might have been a little spot where it was not thirty-two feet, but generally found it up to the thirty-two feet or more.

Q. Did you measure at the toll-gate near the brick school at all? A. I told you we measured every chain.

Q. Did you measure there do you remember? A. Yes, sir, we did not miss a chain from one end to the other.

Q. What width did you find it there, this hard part? A. Sixteen feet.

40 Q. Found it no wider? A. I don't know about that.

Q. Have you a record of that? A. No, sir.

Q. You did not take your measurements down? A.

No, sir.

Q. You just measured to find sixteen feet? A. Yes, sir.

Q. Did you measure near Spratford's house? Yes, sir.

Q. Did you find it sixteen feet wide there? A. We did if it was at the end of the chain.

Q. Do you remember that particularly at Spatford's house? A. I do not. 10

Q. Do you know whether the hard part of the road there is sixteen feet? A. I have said it until I am tired.

Q. Did you measure near Saxon Tice's? A. I did.

Q. Did you find the hard part of the road sixteen feet wide there? A. If it came at the end of our chain we did.

Q. I want to know whether you did or not? A. I have told you just what I have done; I will tell you again.

Q. Do you remember measuring near Tice's? A. I do do. 20

Q. Do you know that place in the road where Mr. Christian put rails under the road to make it firm, near John Neumayer's? A. No, sir; when?

Q. About the time when the road was built? A. That is fifteen years ago.

Q. Do you know? A. Yes, I saw it.

Q. Did you measure the road there? A. Yes, sir.

Q. Did you find it sixteen feet there? A. Yes, sir.

Q. Is it sixteen feet there now? A. Yes, sir. 30

Q. Is it near John Neumayer's? A. If it is the man that I know, just beyond Henry Serviss'.

Q. You say it is sixteen feet there now? A. It is; do you want me to say it again?

Q. Yes? A. I say yes; I did not do the measuring; I commenced at the south end of the bridge and I directed these men to count twenty-two steps out loud and at the end of every twenty-two steps, they put the rod down and measured it, and at the end of every one of

these chains the hard road was sixteen feet wide; now, do you understand me?

Q. Yes, but I want to understand you still further; do you recollect measuring that road where these rails had been put underneath it? A. Yes, sir.

Q. Was that one of the places where your measurements came to? A. Yes, sir; it was a long space.

Q. Do you recollect how wide it was there? A. I say it was sixteen feet wide without going off the rails.

10 Q. Did you measure the entire road at that place? A. I do not think we did; the main point in our measurements was to ascertain whether there was sixteen feet of hard road.

Q. Did you take any measurement of the width of this road, just north of Mrs. Tanner's? A. Yes, sir.

Q. What width did you find it there? A. Sixteen feet, the hard part.

Q. After you had taken that measurement, was there more gravel carted on there at that place?

20 [Objected to]. [Sustained].

Q. After this road had been completed, what time of the year was it when it was done? A. You might say it is not done yet; they have been constantly carting gravel on it ever since.

Q. It is not done yet? A. A road of that kind wants to be constantly re-graveled and they are doing it yet.

Q. When was it you thought the road was completed? A. About 1872.

30 Q. What time of year? A. We thought it was completed when the gates were put up.

Q. What time of the year was it? A. I cannot say.

Q. You considered that you had made that road-bed solid and hard and firm? A. Yes, sir.

Q. How did it stand the next spring after its completion?

[Plaintiff's counsel objects to any testimony appertaining to the present condition of the road].

[Objection overruled]. [Exception].

A. I have no particular recollection, but I think —

40 Q. I don't want your thoughts? A. Well, I know.

Q. No particular recollection, but you know? A. I am speaking of dates; I know this, there has not been a spring when the frost was coming out of the ground but what that turnpike, and all others, are not what would be considered tollable roads for a week or two; when the frost was coming out of the ground, it is impossible to do it; I think it has been done nearly every spring since the construction of the road.

Q. You have been an old resident in this neighborhood; do you remember that portion of the road that 10 meets this turnpike road, just this side of Weston's mill; what is known as where the cedars are? A. Yes.

Q. Do you remember how that road formerly was? A. Yes, sir; a very bad road.

Q. Do you remember that people traveling over that turnpike if they could get through the place by the cedars they could get to New Brunswick—you have heard of that, haven't you?

[Objected to.] [Objection sustained.] [Exception.]

Q. I understood you to say it is impossible to make a 20 turnpike—a hard road in the spring—when the frost is coming out? A. Yes, sir, with gravel.

Q. Did this turnpike road sink down in the spring of the year to the depth of two or three feet? A. More, too, in spots.

Q. Then this turnpike road would sink down in spots so people would go through it two or three feet? A. Yes, sir, this particular spot; I never knew it until this year.

Q. Was it so this year that you could go down two or 30 three feet in the mud? A. I think so.

Q. Hasn't it been so every year? A. No, sir, not so far as that, but there have been spots that you could do it.

Q. Hasn't it been so, more or less, every spring? A. Yes, sir; I said there was a time, every spring, when they threw the gates open, because they did not think it tollable, owing to the impossibility of keeping the road up when the frost was coming out.

Q. When they would thus go through, to how much 40

of a depth would teams go through? A. Up to the knees, if not quite.

Q. Would not horses get mired to the bellies? A. I never heard of it till this spring.

Q. Didn't they do it last spring? A. I don't know of any.

Q. Did you ever help a person out of the road? A. I do not think I did.

Q. Did you ever see people stuck there? A. I did not
10 see them—I have heard it.

Q. Isn't it possible to so construct a road that that won't happen? A. Not with gravel.

Q. Is it a possible thing to construct it with stone? A. You mean put a thousand ton of stone in a yard?

Q. If you bedded and faced sixteen feet of that road with stone, you would have a road that you would not go through two or three feet? A. It would depend on how thick the stone would be put on.

Q. How thick should you think it would need? A.
20 Two or three feet in some places, otherwise the stone would go down.

Q. What is the nature of the road? A. Mr. Elkins called it quicksand; I call it a quag mud hole.

Q. Is it your idea in building a turnpike over a quag mud hole, gravel is the best thing to put there? A. As good as any.

Q. As good as stone? A. That depends on how much you put there.

Q. Is gravel and clay good to put on a road of that
30 kind? A. Yes, sir; if the superstructure is gravel it is about the best thing you could get there.

Q. If you add red shale to the mud hole, does that cure the mud hole? A. I should hardly think it would.

Q. What portions of that road are mud holes? A. It is all within a quarter of a mile.

Q. On what portion of the road is this quagmire of quicksand? A. It is a little way this side of Vandevender's.

Q. Where is Vandevender's situated—between here
40 and the Washington road? A. Yes, sir.

Q. That bad portion of the road is between here and the Washington road? A. This hill that I have alluded to, about this going down, is this side; there are two or three spots the other side, too, that Mr. Stults don't travel on.

Q. Mr. Stults travels over this particular bad place you speak of? A. Yes, sir.

Q. How long is this place? A. As long as from here across to that chair, perhaps.

Q. I thought you said about a quarter of a mile? A. 10 I said it was within a quarter of a mile—that is, putting together the whole of the bad road of the five and three-fourths miles all put together would not make a quarter of a mile.

Q. How much of that quarter of a mile does Mr. Stults travel over? A. I do not know of any part of it except this one hole that I am speaking of.

Q. Near Vandevender's? A. I understood it was about the length of a team and wagon.

Q. Refresh your recollection; is that the only bad spot 20 between New Brunswick and the Washington road, on that turnpike? A. I don't know of any other one.

Q. Did you know of any other after the road was made? A. I cannot say.

Q. Do you tell us now that the road was a hard and firm road all the way from New Brunswick to the Washington road, after it was constructed, except that spot? A. I mean that was one of the best turnpike roads, excepting these times when the gates are thrown open, that I have ever rode over in this county or in this State. 30

Q. It is a great acquisition to the county? A. Yes, sir, I view it so.

Q. And an acquisition to your pocket as a stockholder? A. Simply to the extent of one per cent. on my stock from the time I got it until to-day; that is all it has paid me.

By Mr. Schenck—

Q. You say that at the time that road was constructed,

it was the best graveled road in the county, at the time of its completion?

[Objected to.]

A. Yes, sir, and always since, with the exception in the spring, when the frost is coming out; not only that, I say up to to-day—it is to-day one of the best turnpikes in the State of New Jersey, from end to end.

Q. That one particular spot that you speak of, can you explain why that is worse than any other part of the road by Vandevender's? A. It all becomes by the action of the frost during the winter; it is more like a mortar-bed than anything else, clear down; sixteen loads of gravel put in that one hole.

Q. Does that condition depend upon the severity of the winter or not? A. Undoubtedly; that is the main cause of it; because in a mild winter it is not so bad.

Q. If the winter is very severe and the frost deep, how does that affect it? A. To the depth of the frost it becomes like a mortar-bed and this gravel becomes the same; there is no stability in it at all after it has been frozen.

Q. Would any depth of gravel at that spot remedy that defect at that one place? A. I hardly think it would.

Q. Why? A. Because there don't appear to be any bottom to it; it is simply in the nature of a quagmire; they had a good thick crust on top of the road that would bear a loaded wagon easily, but you go through with it after a while, like breaking through the ice.

Q. Does the water concentrate at that spot? A. It does from below.

Q. Is it springy? A. Yes, sir.

Q. How about the drainage at that place on each side of the road? A. My recollection is there is not very good drainage there.

Q. What is the character of the ground on each side? A. Clay ground.

Q. Hilly? A. Loamy and a little hill there, too.

And plaintiff's attorney also called as a witness George A. Devoe.

George A. Devoe, called on behalf of the plaintiff, being duly sworn, testified as follows—

By Mr. Schenck—

Q. Where do you reside? A. Old Bridge.

Q. How long have you lived there? A. Some twelve or fourteen years.

Q. Do you know this turnpike? A. I do.

Q. You were present at the measurement of the road in December 5th last? A. Yes, sir; that was the date; I made a minute of it at the time in my book. 10

Q. You were present with Judge Disbrow and Mr. Conover? A. Yes, sir.

Q. You heard Judge Disbrow's testimony concerning that measurement? A. I did.

Q. Was his testimony correct and do you agree with him as to his statement of the measurement? A. Generally, I think.

Q. Wherein do you differ? A. I don't know that I would at all.

Q. You heard his statement as to how it was measured, 20 and the width and the result of the measurements; do you agree? A. I, do.

Cross-examination by Mr. Strong—

Q. You are a stockholder in that turnpike? A. Yes, sir; as every neighbor should have been.

[Last clause of answer stricken out on motion of defendant's counsel.]

Q. How long have you been such? A. Five or six years.

Q. Are you a director? A. No, sir. 30

Q. No officer? A. No, sir.

Q. Did you measure, in your measurements, the width of the entire road-bed—the outside of the excavation? A. No, sir.

Q. Did you measure the road-bed that was capable of being traveled by horses and teams from the inside edge of each ditch? A. No, sir; except by eyes—no accurate measurement.

Q. Your only measurements were to find sixteen feet of solid, firm road? A. That was our object; we took a sixteen-foot rod for that purpose.

Q. How far was your measuring rod from the inside edge of the ditch? A. The inside is that the side closest to the road?

Q. Yes? A. I don't know of any place where the inside edge of the ditch, except this place by the woods—

Q. The inside edge was how close to the road, generally? A. I should say anywhere from two to four or five or six feet.

Q. That is your conjecture? A. That is general observation—without measurements.

Q. Do you remember taking any measurement near the John Spratford house? A. I could answer yes, without knowing where his house is, because I measured every twenty-two paces, as near as we could.

Q. Do you find any place in the road where the traveled road between the ditches was not more than twelve feet wide, where horses and wagons could go, between the ditches? A. That would be denying my statement already made.

Q. You did not, then? A. Certainly not; not in any place where there is not more than sixteen feet or eighteen feet.

Q. Was there any place in the road where you jumped over and went somewhere else to measure? A. Not to my recollection; there was no necessity for it.

Q. Don't you know that there are bushes and trees growing up alongside—inside of the fences, on the road? A. Some.

Q. Are there not plenty of them? A. Oh, no.

Q. Are there not tall trees, as big as the trees in the court house yard? A. I remember one tree standing near William Servisse's; I do not know of any trees standing in the road.

Q. Are there not any quantity of sumac bushes here? A. There are some.

Q. Are there not plenty; are there not bushes for one-fourth of a mile together? A. Not to my knowledge.

Q Aren't there bushes for one hundred yards? A. Possibly.

Q. They have been there ever since you can remember? A. There are bushes in different places, but as for the quantity or distance, I could not say; I know there are bushes.

Q. Aren't there bushes for a hundred yards together—clumps of sumac—that have been there as long as you can remember, on the road part between the fences? A. I can't say that. 10

Q. How long have they been there? A. I can't say; I can't say they are there now.

Q. Were they there when you measured last December? A. There were bushes, but I can't say as to the kind.

Q. Where does the thirty-two feet carry you; didn't it carry you to the outside edge of the gutter? A. I could not say.

Q. You don't know where the thirty-two feet carries you? A. Not positively, only from general observation.

Q. From observation, where do you say that thirty-20 two feet carries you? A. To the gutters.

Q. To the inside edge of the ditches or the outside edge of the ditches? A. I should say to the centre and outside, and sometimes to the inside.

Q. Then your thirty-two feet would include road-bed where teams could travel, and ditches, too? A. If you call them ditches; I don't call them so.

Q. Gutters, then? A. Gutters—the drainage of the road.

Q. Your thirty-two feet would include where teams 30 travel on the road, and the gutters on the side of the road besides? A. Yes, sir; at portions of the road.

Q. Wouldn't it most all the way? A. I cannot say to that.

By Mr. Schenck—

Q. What are these gutters—a ditch is a deep excavation? A. Yes, sir.

Q. And a gutter is a shelving place to throw off the water? A. Yes, sir.

Q. Is there anything there on the side of that which would be an impediment? A. To go to the extremity of the gutter?

Q. Yes. A. Nothing, simply an extension of the road and at times in the spring of the year—that is like the road, it is all mire where the water lays; the trouble is, that there is not sufficient fall for the water from this road when there is a heavy rain; that can only be remedied by going over private property; they will never form
10 a good road until that is done, to take all this excessive water away from the road; it accumulates there and freezes to a great depth, and in the spring it makes the road bad.

By Mr. Strong—

Q. How long a place is this you are speaking of? A. It is not a long distance, but if there is any bad spot I generally find it there.

Q. Is it one hundred yards long? A. I should think not.

20 Q. Is it three hundred feet long? A. I do not think it is.

Q. How long do you think it is? A. It might be fifty feet; do you speak of the property adjacent to the road?

Q. Of this bad place you speak of? A. Of the property adjacent, perhaps one hundred feet, but on the road not so long.

Q. It is that piece of the road you spoke about, when you said they would never get a good road until there was good drainage? A. That is where I spoke of by
30 saying that they would not get a good road until the water was gotten rid of.

Q. You do not mean to say that that water could not be gotten rid of? A. It would be attended with a good deal of expense.

And plaintiff's attorney also called as a witness, R. D. Conover.

R. D. Conover, called on behalf of the plaintiff, being duly sworn testified as follows—

By Mr. Schenck—

Q. Do you know this turnpike? A. I helped to build part of it.

Q. What part of it was that? A. From Old Bridge to Mrs. Tanner's corner.

Q. You traveled over the road at the time of its completion? A. Yes, sir.

Q. Your attention was called to it? A. Yes, sir. 10

Q. At the time of the completion of that road, and the establishment of the toll-gates, what was the character and condition of the road? A. I did not examine any of it except what I done myself.

Q. You traveled over this end? A. Yes.

Q. What in your judgment was the character of the road; was it completed in a workmanlike manner? A. I did not examine it, only it looked very well when I rode over it.

[And thereupon plaintiff's attorney asked said witness 20 the following question]—

Q. From what you saw of it, was it constructed in a workmanlike manner? A. Yes, sir.

[Whereupon defendant's attorney objected to said question and answer, because no sufficient knowledge on part of witness was shown, and insisted that the same were incompetent and illegal, and moved to strike them out.]

[But his honor the judge held said question and answer to be proper and legal and refused to strike them out, and retained them as evidence in the case.] [To 30 which ruling and refusal said defendant prayed an exception and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

And plaintiff's attorney also called as a witness George Karney.

George Karney, called on behalf of the plaintiff, being duly sworn, testified as follows—

By Mr. Schenck—

Q. Do you know Mr. Morris? A. Yes, sir.

Q. Had you charge of the toll-gates during his temporary absence? A. Yes, sir.

Q. From what time to what time? A. From the 16th of January to the 16th of March, 1882.

Q. Were there persons who commuted who paid by the week and the year? A. There were some paid by the year.

10 Q. How did you know who they were? A. There was a list left there with their names.

Q. By whom? A. By Mr. Morris.

Q. Did you collect toll from Mr. Stults? A. No, sir.

Q. Why not? A. I got orders not to, that he was paying by the year.

Q. Was his name on the list that you speak of? A. Yes, sir.

Q. For that reason you did not ask toll either from him or the other driver? A. No, sir.

20 Cross-examination by Mr. Strong—

Q. Did not people when they passed through that toll-gate make complaint to you about the road, over and over again? A. They would in the spring.

Q. Didn't pretty much everybody, who went through, make complaint in the springtime? A. No, sir; not every one.

Q. Were there not about as many complaints as there were people who went through that gate? A. Some made complaints.

30 Q. Were there not a good many? A. No.

Q. How many? A. There might be one or two in a day.

Q. One or two every day? A. No, sir; not every day, for when the roads were bad the gates would be open.

Q. How often did Mr. Stults complain; did he make complaints to you among others? A. He has made complaints.

Q. Hasn't he made many of them? A. Not to me.

Q. Has not Stults complained to you about every time he went through ?

[Excluded.]

Plaintiff rests.

And after the plaintiff had rested its case, the defendant, to maintain and prove the issue aforesaid on her part, called as a witness Alfred Stults.

Alfred Stults, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

10

Q. What is your age ? A. Sixty-eight.

Q. Where were you born ? A. South River, or Little Washington.

Q. You drive a line of stages ? A. Yes.

Q. The line of stages that has been talked of so much during this case ? A. Yes, sir.

Q. Your line of stages is driven from South River to New Brunswick ? A. Yes, sir.

Q. How long have you driven this line of stages ? A. Since June, 1875.

20

Q. How long have you known this road in question ?

A. Since I was a boy of eight years of age—sixty years.

Q. Do you remember the fact of the location of the turnpike ? A. Yes, sir.

Q. Was the turnpike or not laid on top of this old road ? A. Yes, sir.

Q. All they way from Old Bridge to New Brunswick ? A. Yes, sir.

Q. About what time was the road constructed—what year, from 1869 to 1871 ? A. I think that was about the 30 time.

Q. Something has been said about some arrangement that was made by you through Mr. Christian, about the payment of tolls on that road ? A. Yes, sir.

Q. It is said that arrangement was made about October 1879 ; is that the date correct ? A. I should judge so.

Q. You have heard what Mr. Christian said about going to Biddle Herbert in this matter? A. Yes, sir.

Q. Did he go at your request? A. No, sir.

Q. When Mr. Christian saw you, what did you say, and what did he say to you?

[Objected to.]

Q. What did he report from Mr. Herbert to you? A. He said he had been talking to Mr. Herbert in regard to tolls and said to Mr. Herbert, that he was charging me
10 too much toll; I said I was about to refuse to pay any toll; he then said that Mr. Herbert had said that if I would keep still, I could go through for \$65 a year.

Q. Mr. Christian told you that? A. Yes, sir.

Q. What did you say? A. He said that he had told Mr. Herbert that he thought it was too much, that he had not agreed with him that I should pay it; that is all; after hearing that, I said to Mr. Christian, "I will pay it for a year or thereabouts, and see what they do."

Q. Was anything more said at that time? A. I do
20 not recollect now, of anything more at that conversation.

Q. You had not seen the turnpike people yourself up to that time, or any of its officers about this arrangement? A. No, sir.

Q. There has been some evidence given here of some payments that were made about every month; how were you to pay that \$65? A. I do not remember.

Q. Do you remember whether you paid it, in fact, monthly or not? A. I presume I did; I don't know.

Q. You do not dispute the amount of payments that
30 they testified to? A. No, sir; I recollect of leaving money at the toll-gate sometimes; how often I don't know; the payments seem to have been about monthly; the last payment seems to have been dated November 6th, 1880.

Q. And after that there are no more monthly payments; do you know why there were no more after November 6th, 1880? A. I have no recollection of the fact.

Q. Do you recollect whether you were owing the turn-

pike company anything for tolls when you made this \$65 arrangement? A. I don't know about that.

Q. Something has been said about a note of Mrs. Stults of \$50; that is admitted? A. Yes, sir.

Q. How long did you live up to this arrangement of paying \$65 for a year? A. I don't remember how long; I think perhaps a year or more; I think it was over a year.

And thereupon defendant's attorney asked said witness the following question— 10

Q. What took place then? A. It was to Mr. Christian again, the conversation; I pulled up to Mr. Christian's place; stopped my team and I said to him, "I am going to entirely refuse paying toll;" they have not put on a load of gravel or done anything that you said they were going to do during the year;" and I have stopped ever since.

[Whereupon plaintiff's attorney objected to the said last answer as incompetent evidence and moved to strike it out.] 20

[And thereupon said defendant's attorney insisted that said answer was competent evidence and relevant to the issue, as a notification to the turnpike company and a statement of what witness did with that intent.]

[But his honor, the judge, held the said answer to be incompetent and illegal and struck it out and refused to allow it as evidence.]

[To which ruling defendant's attorney prayed an exception and it was sealed accordingly.]

E. W. SCUDDER. [L. s.] 30

And thereupon defendant's attorney further examined said witness.

Q. You say from that time since you have refused to pay any toll? A. Yes, sir.

Q. Where did you make your refusal? A. I refused when I was asked to pay.

Q. At what place? A. Mr. Herbert and George Peterson came to my house and asked me to settle for the toll.

Q. What did you say to them? A. I said I should not pay any.

Q. And when you went to go through by the toll-house what took place? A. The gate was closed.

Q. Who closed the gate and when was it? A. On the 3d day of July next, will be two years; it was July 3d, 1883, was the time when the gate was closed.

Q. Had the gate been closed on you prior to that time, after the arrangement? A. No, sir.

10 Q. Had you refused to pay toll at that gate prior to that time, July 3d, 1883, when asked for it? A. Not after the arrangement.

Q. It was on July 3d, 1883, that the gate was closed upon you? A. Yes, sir.

Q. By whom? A. By Mr. Ferguson, as gate-keeper, and Mr. Peterson ordered it done.

Q. From the 3d of July, 1883, down to October, 1883, when this suit was begun, what did you do in traveling over that road as to tolls? A. I did not pay any except
20 occasionally.

Q. When you occasionally paid them why did you pay them? A. Because the gate was closed.

Q. Where did you go to get around the gate? A. I turned off the road a short distance from the house and came on again this side of the house.

Q. Drove over a field in the possession of Clancy? A. Yes, sir.

Q. How long did you keep that up? A. From that time to this last winter; I commenced to go through
30 Clancy's field about the 5th of July.

Q. And you kept up going through Clancy's field until the winter of 1885? A. Yes, sir.

Q. In going from New Brunswick to South River with your stages, you go up the hill at Weston's mill and along the turnpike, how much of a distance before you turn off to South River? A. Two miles and twenty-two chains.

Q. What kind of a road was that portion of the road prior to the turnpike? A. In the spring of the year it
40 was a bad road.

Q. How was it in the summer time? A. It was a good road in the summer, with the exception of a few soft spots.

Q. Did you live on the line of the turnpike? A. I owned a farm at that time, at the time of the construction of the turnpike; I did not reach quite to it; I did not live exactly on the line.

Q. At the time of the construction of this turnpike, do you remember the fact of its construction? A. Yes, sir. 10

Q. That road reaches New Brunswick at Weston's mill; from Weston's mill how do you get into New Brunswick? A. Directly through what they call the Cedar lane.

Q. That Cedar lane or through the cedars is a continuation of what street in the city? A. Burnett street; I think they call it Burnett street all the way out to the corner.

Q. Prior to the construction of this turnpike, which was the worst portion of the road between the Washington road and New Brunswick? A. This side of the water works.

Q. The portion that you designate—what do you call it? A. The Cedars, and along by Agnew's house.

Q. And that portion of the road known as the Cedars was the worst portion of the whole road? A. Yes, sir.

Q. Tell us how bad that was?

[Objected to.] [Objection sustained.] [Exception.]

Q. Tell us the nature of the road prior to the turnpike, between Weston's mill and the Washington road? 30

[Objected to.] [Overruled.]

A. In summer time it was quite a good road, with the exception of a few sandy spots.

Q. And in the spring of the year? A. It was bad.

Q. Were there any portions of that road that were better or worse than other portions? A. Yes, sir.

Q. Coming down that road from Weston's mill, tell us where the first bad portion was, leaving Weston's mill and going towards the Washington road? A. The

first bad place was at the McLaury farm; that was fifteen or twenty chains beyond the toll-gate.

Q. Tell us what was the nature of that spot, and how long a spot it was? A. That spot was under-soil with clay and held the water, and it was probably fifty feet long, if not more.

Q. How wide was the road at that point? A. It was all road from fence to fence; the fence stands about where it did then.

10 A. Go along from there; where was the next bad spot? A. I do not recollect of any very bad until we get nearly a mile beyond the toll-gate.

Q. By whose place? A. It is now called the White farm; it was the Ballard farm.

Q. What kind of a place was that? A. Springy, and in the spring of the year you would break through considerably.

Q. How wide was the road there capable of being traveled? A. We had the whole use of it; I should
20 judge in the neighborhood of thirty feet; there was then no ditches at the side.

Q. Or gutters, whichever you call them? A. No, sir.

Q. Going along the road where was the next spot? A. That spot continued for a considerable distance.

Q. How long a distance did that spot continue? A. A-half a mile, at any rate.

Q. Leaving that, where was the next? A. I don't know that I recollect any before we get to the Washington road; there might have been a little place beyond
30 Mr. Christian's that was pretty bad.

Q. We are speaking now of the old road? A. Yes, the old road.

Q. How much of a place was that, and how bad a place was it? A. It was a wet place.

Q. How long a place? A. A couple of hundred yards.

Q. And those three spots were the only spots you remember on the road? A. Yes, sir, that were extremely bad.

Q. How were those place in the spring of the year?
40 A. They were quite soft.

Q. How soft? A. Well, soft enough for a horse to tread in pretty deep; a foot or sixteen inches in places, or eighteen in the worst places.

Q. Did you see the construction of this turnpike, while it was going on? A. Yes, sir.

Q. Tell us, in your own way, how that turnpike was constructed and what you saw of it; who you saw working; I mean on this end, from Washington road to New Brunswick? A. I think I saw Mr. Elkins to work there; he was scooping the dirt up out of the gutters; making 10
ditches and scooping the dirt up on the middle of the road; after he had that done, in parts, what we consider the worst parts, he hauled some material called gravel-sand and a few gravel stones, and dumped in there on the middle of it, raising the crown of the road very high and left the road very narrow to travel; only one track, it was difficult to turn out.

Q. How much of the road did he construct? A. I don't know, I saw him there more than once; I saw Mr. Journee do some, with men to work there. 20

Q. Peter Journee? A. Yes, sir.

Q. Who else? A. I think I saw Mr. Herbert there.

Q. The road was formed as you have stated, by scooping up out of the gutters; for how long a distance did these gutters extend; did they extend all along the road or only in places? A. They extended from the White farm over a mile; they were made quite deep at that time to the Washington road.

Q. How deep were they made at that time? A. Parts of them were over three feet deep; perpendicular, I mean. 30

Q. At which side of the ditches? A. The depth, I mean; it would measure three feet perpendicular or more, from the bank—from the crown of the road.

Q. If you should take the ditch at the extreme outer edge it would measure three feet down in a straight line? A. Yes, sir.

Q. From the top of the road? A. Yes.

Q. Did these people in making this turnpike road dig ditches where there had been none before? A. Yes, sir.

Q. In how many places? A. I think the whole of the 40

space from the White farm, as I call it, I judge is about a mile to the Washington road, and they continued past that.

Q. Digging ditches where there had been none before?

A. Yes, sir.

Q. What was the effect of digging those ditches on the road where teams could travel, whether it made it wider or narrower? A. It gave a very great deal less space to travel on; it heaped the road up high in the middle; 10 many places so high that we could not pass a team without difficulty for some years.

Q. Why couldn't you? A. Because it was so high and narrow; if we went out of the centre of the road the outside wheels would cut in; we had to pick our places to turn out; the outside wheels would cut in and we would wait until the other team had passed, for fear we could not get back on the beaten track in the middle.

Q. How much of the road was that way? A. The majority of the road was that way from where the toll- 20 gate is to the Washington road, and half a mile beyond it.

Q. After they had formed the road in this way, you spoke about their putting some gravel on; tell us how thick they put the gravel on the road? A. I don't think I am exactly competent to tell you; I can tell you how I saw it put on.

Q. Tell us how you saw it? A. By dumping a load about the width of the wagon body, and spreading it out until it spread beyond the beaten track, so far as the 30 width of the wagon tracks through the middle.

Q. For how long a distance was one load of sand made to do, lengthwise of the road? A. The full length of the wagon; perhaps in some places much more.

Q. One load of sand was made to do the length of the wagon, and in some places more than that? A. Yes, sir.

Q. And would be spread out about the width of the wheels? A. Yes, sir.

The Court—Did the witness say "sand?"

Mr. Strong—Sand and gravel.

The Witness—Sand, with gravel stones mixed in it.

Q. Did they spread it out any wider than the wheels of the wagon? A. In doing it some would slide a little over sometimes.

Q. How much was it, on an average—how wide was the gravel spread? A. It might average six feet.

Q. Was it as much as ten or twelve feet anywhere?

A. At the time of the construction of the road I never saw it twelve feet in any one place. 10

Q. Do you know what other substance they put on besides the alleged gravel? A. Red shale is all that I know of.

Q. What kind of a substance is red shale to make a road? A. It is very soft when it is wet, quite hard when it is dry.

Q. What kind of a substance is it for the spring of the of the year? A. Very soft.

Q. When they came to make the road at this bad spot at the McLaury farm, which was under-soil with clay 20 and held water, how did they construct it there? A. In the same way they did the rest of it; they scooped it in from the sides to the middle, and headed it up through the middle.

Q. Did they take any special precautions there? A. Not that I know of.

Q. Did they use any different substance to make any solid, hard road there? A. Not that I ever saw.

Q. Did they make the road any wider there? A. Oh, no, they made it much narrower—as narrow as it could 30 be used.

Q. How wide was it, that it could be used after it was finished, as they claim? A. Until it settled down it could not be used to drive on, more than five feet—the width of a wagon in the middle.

Q. After it settled down how much wider was it? A. It became flat, so twelve or fourteen feet can be used by this time.

Q. Is there at this spot on the McLaury farm thirty-two feet that can be used for travel? A. No, sir.

Q. Take the next bad spot, at the White or Ballard farm; what did they do in forming the road there? A. The same.

Q. What substance did they put there, anything besides this gravel? A. Not that I ever saw.

Q. Did they put the gravel on any deeper there than on the rest of the road? A. There was some, I think, 10 between there and this other part that had not any put on, that I ever saw put on; I think they put it on there in the same way; I never saw any put on in any other way at that time.

Q. After they got through graveling, how wide a track did it leave that could be used? A. One wagon track, five feet wide.

Q. How much has that settled down in the course of time? A. It has settled down in some places so we can drive two wagons now.

20 Q. Did they make that thirty-two feet wide for the travel of vehicles? A. No, sir.

Q. Is it so to-day? A. No, sir.

Q. Is the other spot thirty-two feet wide at the McLaury farm? A. No, sir.

Q. At this White farm, you said there were no ditches or gutters? A. No, sir.

Q. Did they build ditches there? A. Yes, sir; ditches on both sides.

Q. In scooping it up to form the road, they made 30 ditches where there were none there?

[Objected to.]

Q. Are there any ditches there now? A. Yes.

Q. How deep were the ditches left at that place, as near as you can get at it? A. I think going up the hill, there are ditches there that were about three feet deep.

Q. On the outer edge? A. Yes, sir; more than three feet on the outer edge.

Q. Go to the next bad spot? A. That continues about half a mile; this bad spot covers the bad place that you 40 heard described.

Q. Do you mean the piece that Sheriff Disbrow described? A. Yes, sir.

Q. Is that Disbrow's fifty-foot bad spot? A. Yes, sir.

Q. You make it half a mile? A. Yes, sir.

Q. Past what properties does it extend? A. Past Vandevender's farm, very near to Mr. Christian's.

Q. Does it come near Newmeyer's? A. There is a little better road before we come to Newmeyer's, then it continues on to Newmeyer's, and then there is a very bad place. 10

Q. Is Newmeyer's between the White farm and Christian's? A. No, sir; it is beyond.

Q. We come now to the next bad spot, which is at Mr. Christian's place? A. That is a little beyond Mr. Christian's house.

Q. Tell us about the road there, and what was done in the construction of it? A. It was heaped up in the same manner as the rest of it; ditches perhaps a little deeper.

Q. Did they put a different substance on the road? A. 20
No, sir; except red shale; they put red shale all the way along Mr. Christian's there.

Q. Do you remember Mr. Christian taking a hand in the construction of the road there? A. I do not; he has in some of the repairs.

Q. But not in the making of the road? A. No, sir.

Q. After they had finished the road at that place, how wide was it for travel? A. About fourteen feet.

Q. How much has it flattened down since then? A. It has flattened down so it has become nearly level on 30
the top and spread about two feet.

Q. That would make it about sixteen feet at present?
A. Yes, sir.

Q. In what way was the road made by John Newmeyer's? A. There was a place past Newmeyer's that had been the most dangerous place on the road; Mr. Christian, before taken hold of by the turnpike company, built up that and made it a firm, hard road, by underlying it with rails and hauling from a pottery the broken ware

and brick-bats and put it on and then coated it with gravel, which has remained a good road since.

Q. Mr. Christian did that? A. Yes, sir, as overseer of the road.

Q. Was he road overseer at that time? A. Yes, sir.

Q. Do you know what length of rails Mr. Christian used in making that road? A. I think they were ordinary length rails—twelve feet long.

Q. Was that road made by Mr. Christian a good piece
10 of road before the turnpike company got there? A. Yes, sir, they never broke it up.

Q. What did the turnpike company do on this piece of road that Mr. Christian made? A. In some of the holes they may have dumped some dirt on.

Q. Did they add to the width of Mr. Christian's twelve feet at that place? A. I don't know that they did; the dirt has spread out some and the road is wider than what Mr. Christian left it.

Q. About how much wider is it? A. A couple of feet,
20 perhaps.

Q. Did this turnpike company make any appreciable addition to the width of that place? A. No, sir.

Q. They dumped on the top of the road? A. I think they did dump some dirt on the top; I say it may have flattened out a couple of feet wider.

Q. Have you taken any measurements on this road lately? A. Yes, sir.

Q. How lately? A. Inside of three weeks.

Q. Have you measured the width of the road? A. I
30 have seen it measured.

Q. From what place to what place? A. I came in their company on the hill about ten chains beyond the first toll-gate from here.

Q. How long did you continue in their company? A. Until they got to Mrs. Tanner's corner.

Q. How long a distance would that be? A. About three miles.

Q. Who were there at that time when you were there? Isaac N. Blue and David Serviss.

40 Q. David Serviss, the surveyor? A. Yes.

Q. Has Mr. Blue had any surveyor's education? A. Yes, sir, he has practiced surveying some; Jacob Stults, Charles H. Bissett came there near at the same time; I don't know exactly when he got there, but nearly at the same time I did; John Wade and Asher Rue they were the chain bearers.

Q. And measurements were taken of the width of the road? A. Yes, sir.

Q. At what distance apart? A. Various distances.

Q. Were notes taken of those measurements? A. Yes, 10
sir.

Q. By whom? A. By Mr. Blue and Serviss.

Q. In making their measurements over what portions of the road did they measure? A. They measured that part that could be used; they measured to the fences as well.

Q. Did they measure from the outside edge of the ditches? A. I think in some instances they did.

Q. After the construction of this road, how did it stand the first winter? A. It was more dangerous to travel 20
over than it was before it was constructed.

Q. In what way? A. The newly made ground put together we went through the whole, to the solid clay below, when before that it was a soft mud and water, that would not block our wheels so much as the stiff mortar, when we have to go the same depth down.

Q. How deep did you go down? A. Some parts of this, beyond White's place, very deep.

Q. Give an idea? A. The axletree of a wagon, and the axletree of a wagon is about two feet from the ground; 30
I have gone in until my axletree was in the mud.

Q. On what portion of this turnpike did you do that? A. In the neighborhood of where Disbrow was describing the hole, this side and beyond—both.

Q. That was near what place? A. Near Vandevender's place.

Q. Other winters after this first winter, how was the turnpike road? A. It has continued to be so every spring when there is frost in the ground.

Q. How has that road been from the time of its construction down to and within the present spring?

[Objected to.] [Overruled.]

A. That has been the general condition every spring; these bad places have been bad every spring.

Q. How have these bad places been in mid-summer?

A. When they got dry and scraped very pleasant to ride over, except being a little too sandy.

Q. How has it been where the ground has been frozen
10 stiff? A. Very good.

Q. Tell us some of your experience upon that road in the spring of the year?

[Objected to.]

A. It has been so every spring, the bad places have continued so.

Q. Something has been said about ditches or gutters by the side of this road; tell us a little about the depth of these, and how they are? A. The most of them are very abrupt, and from eighteen inches to three feet in
20 depth.

Q. Can wagons and vehicles travel to the extremity of those ditches? A. No, sir; it is not convenient, some are so deep that it would turn a wagon over; three feet will turn a wagon too much over, perhaps entirely upset it.

Q. What is the lay of the land along that road? A. The place that has been described as a very bad place is near what is called Vandevender's hill; we go up a hill running this way, we rise the hill, and going the
30 other way we descend until we get past Vandevender's house; the water will run from the top of the hill either way, and on the top of the hill has been one of the worst places we have had on the road; it is underlayed with clay—and it has not been properly drained or graveled—and it is springy—and the water not being let away, the waste has to go through to the clay that is under that.

Q. Is there any trouble there about draining that place?

40 [Objected to.] [Overruled.] [Exception.]

A. Not any.

Q. Has there been any trouble in draining that place from the construction of the road down to the present time? A. I have never seen any difficulty whatever.

Q. You have told us about this place; was there ever any effort made to drain that road when it was constructed; what was done, if anything, for the draining of the road at that point? A. Not any more than any other place.

Q. You have spoken in reference to these ditches or 10 gutters—were these railings put alongside of that road where those ditches were two or three feet deep? A. No, sir.

Q. At any of the places? A. No, sir.

Q. Have there been any upsets on the road? A. Yes, sir.

Q. Can you tell us at what place, have you seen any? A. I did not see them turn over; I was there on one occasion when they were righting up.

Q. When you got there in what condition were they? 20 A. I was driving a distance off, the carriage was laying over; when I got to them they had got righted up, and the carriage was a little broken and the harness.

[Objected to.]

The Court—I will let the question and answer stand, that he saw one upset there and counsel can cross-examine on that point.

[Exception by plaintiff.]

Q. Was that upset day or night? A. Daytime.

Q. Something has been said about the road being 30 travelable from fence to fence after the turnpike was constructed; how is that? A. That is entirely impossible.

Q. How is it impossible? A. In consequence of these ditches being between the wagon track and the fence.

Q. What was the other side of the ditches? A. Embankments from the ditches.

Q. From the ditches up to where? A. Up to the land on the other side, and from that there may be room for

a walk outside of the ditches, between the ditches and the fence.

Q. On these banks between the ditches and the fence, what was the nature of the land? A. In some places trees and bushes.

Q. How large, and what kind of bushes? A. Various kinds of bushes, wild cherries; in one particular place there stands a large chestnut tree and a large stump, where there had been a tree cut down.

10 Q. And this was between the gutters or ditches and the fence? A. Yes, sir.

Q. How long had that condition of things been there? A. Long enough for these trees to grow—a good many years.

Q. Was it there before the turnpike was constructed? A. Yes, sir.

Q. I will ask about a conversation that you had with George W. Peterson, soon after you started this stage line of yours in 1875; do you recollect such a conver-
20 sation? A. I had some conversation with him in his toll-house near Old Bridge.

Q. At Mr. Peterson's toll-house? A. Yes, sir.

Q. State what that conversation was?

[Objected to.] [Objection sustained.] [Exception.]

Q. Did you have a conversation with J. Biddle Herbert prior to your making arrangements as to toll? A. Yes, sir.

And thereupon defendant's attorney asked witness the following question—

30 Q. When and where did that take place, and what was it?

[Whereupon plaintiff's attorney objected to said question as incompetent. And defendant's attorney then insisted that said question was competent and legal upon the issue aforesaid, and as showing on what understanding the agreement for tolls was made.]

[But his honor the judge held said question to be incompetent and illegal, and refused to permit the witness to answer the same.]

[To which ruling defendant prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

And said witness, being cross-examined, testified as follows—

Q. Do you say that there was not thirty-two feet any where in that road in its width, except where another road crosses or turns off? A. That wagons can be used?

Q. Thirty-two feet where wagons cannot be used? A. Yes, sir; I say so. 10

Q. Nowhere? A. I don't know of any place; there might be where Mr. Christian's pump and house is, something of that kind.

Q. You speak of the first winter after the turnpike was constructed, and say it was more dangerous to travel over the first winter after the construction than before; what winter is that you speak of? A. I do not recollect the date, exactly.

Q. What year was it? A. I don't recollect whether it was 1872 or 1873, or what year. 20

Q. Can you tell me why it was the road was more dangerous than before? A. Yes, sir.

Q. Why? A. Because the material put on made a stiff mortar, and they had to go to the same depth in the mortar as before, and it was not so easy for horses to move through it as when it was thin on top.

Q. What part of the road are you speaking of? A. The bad part.

Q. Which part? A. Along by Vandevender's farm.

Q. What season of the year was that? A. In the 30 spring of the year.

Q. When the frost was coming out? A. Yes, sir.

Q. When you say you had to put four horses on the stage, how many passengers had you? A. I mired with ten passengers.

Q. When was that? A. The spring of 1883, I think; when the roads are good enough all over, that is good enough, too, generally.

Q. Do you remember what month? A. I think it was in March.

Q. Just as the frost was coming out of the ground?
A. Yes, sir.

Q. Where was that place? A. Along by Mr. White's house.

Q. How many horses did you have when you got stuck? A. I had two—very good ones.

Q. And you got out with ten passengers? A. No, sir;
10 they had to get out of the stage; then I got out.

Q. Did they help you through? A. I pulled the empty stage.

Q. Did they help you out of your scrape? A. I was in no particular scrape, any more than the wagon went down and the horses could not propel it; it was this side of the spot where the rest have described as so very bad—as the worst.

Q. Do you mean to say that there is any ditch on the road three feet in depth? A. I do.

20 Q. Quite abrupt surface? A. Yes, sir.

Q. Where? A. One at the end of Mrs. Tice's house.

Q. How deep is that? A. I think about three feet.

Q. Where is another? A. One near Mr. Newmeyer's.

Q. How deep is that? A. Three feet or over—not any less, I think.

Q. How long are these ditches at Tice's and Newmeyer's? A. They are not very long—as deep as that; the ditches run several hundred yards, but not of that depth all the way.

30 Q. Where was this wagon upset in the daytime that you speak of? A. Just beyond Mrs. Tice's—near this place—whether it was exactly in it or not, I am not positive.

Q. When was it? A. I think it was two years ago last summer.

Q. That was in the summer of 1882? A. I think so—I am not positive as to dates.

Q. Who was the proprietor of the wagon? A. There were two ladies had it that belonged in the shirt factory.

40 Q. Were they driving? A. Yes, sir.

And defendant's attorney also called as a witness David Serviss.

David Serviss, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. Where do you reside? A. Near South River.

Q. What is your occupation? A. Land surveyor.

Q. How long have you been such? A. Since 1875.

Q. Do you know this road that has been talked of?

A. Yes, sir. 10

Q. Have you any interest in this suit? A. None whatever.

Q. Are you backing this suit in any shape? A. No, sir.

Q. Have you been called upon to measure the width of this road lately? A. Yes, sir.

Q. By whom were you called on? A. Mr. Blue spoke to me.

Q. About what time, what day was it that you made the measurement? A. The 7th of April. 20

Q. Who went with you when you did the measuring?
A. Isaac N. Blue, Asher Rue, John H. Wade, W. H. Stults, and a part of the time Alfred Stults, Charles H. Bissett and Henry Serviss.

Q. From where to where did you measure the road?
A. From the mile-post at the abutment of Weston's mill bridge to the mile-post near Mr. Herbert's residence, Old Bridge.

Q. What did you measure the road lengthwise with?
A. With a surveyor's chain, sixty-six feet in length. 30

Q. Did you measure the width of that road at all?
A. We did.

Q. What did you measure the width with? A. A steel tape.

Q. Who did the measuring part? A. John H. Wade and Mr. Rue carried the chain and measured the length of the road; Blue and myself measured the width of the road, but not all the way through; Henry Serviss mea-

sured from the residence of Mr. Bissett with me to Old Bridge.

Q. Mr. Blue and yourself measured the width of the road the entire distance from here to the Washington road? A. Yes, to Mr. Bissett's residence.

Q. How much beyond the Washington road is that? A. Over two miles beyond the first Washington road.

Q. Mr. Blue and yourself measured all the distance that Mr. Stults travels over with his stages ordinarily?

10 A. Yes, sir.

Q. Did you take notes of your measurements? A. Yes, sir.

Q. Do you know whether Mr. Blue did? A. I think he did.

Q. Did you compare your measurements at that time?

A. We called them off and put them down at the same time.

Q. You, in your book and he in his book? A. Yes, sir.

Q. Do you know whether Mr. Blue had any education
20 or experience as a surveyor? A. Yes, sir.

[After testifying to measurements of road at particular places, witness was asked]—

Q. From there where did you go? A. To the end of forty-five chains from the beginning.

Q. Whose place was that? A. The same properties.

Q. McLaury and Wanser's? A. Yes, sir.

Q. What measurements did you make there? A. The same as usual.

Q. The measurement between the fences? A. Forty-
30 nine and one-half feet.

Q. From the outside of ditch to the outside of ditch? A. Thirty-one feet.

Q. From the inside? A. Twenty feet.

Q. The roadway capable of being traveled, is how wide? A. About twenty feet.

Q. From there where did you go? A. At the end of fifty-seven chains from the beginning.

Q. On what properties? A. The same.

Q. Any culvert there? A. No, sir.

40 Q. What was there there? A. There was a miry place.

Q. What kind of a miry place? A. When a man would walk on it, it would bend with his weight.

Q. For how large a space would it bend with the weight of a man? A. Probably twenty feet in length.

Q. Did you step on it to see? A. Mr. Blue stepped on it and I saw it bend with his weight.

Q. What portion of the road was this? A. About in the centre of the road.

Q. This was about a week ago? A. The 7th of April.

Q. How thick was the consistency of that mire? A. 10
It was a crust on the top that would bend with the weight of a man.

Q. Did Mr. Blue break through the crust? A. I think he put a stick down through it.

Q. What caused the crust; was it a crust of frost or what? A. Crust of a little hard material—of different material from what was underneath.

Q. It was not frost, then? A. No.

Q. Where did you go from there? A. To the end of sixty-six chains and thirty links from the beginning. 20

Q. Between what properties? A. What was formerly known as the Lambert property.

Q. Do you know who has it now? A. I think a man by the name of ——— holds the land on one side and the Mutual Life on the other side.

Q. What was there there, any culvert? A. There was another mire hole there.

Q. How long was this mire hole? A. We didn't measure the distance.

Q. About by estimation? A. I should think about 30
the same distance as the other one.

Q. In what portion of the road? A. About in the centre.

Q. Was there any crust on this miry place? A. About like the other.

Q. A crust and similar to the other? A. Yes, sir; in some places it had been broken through by horses.

[And after testifying to other particular measurements, witness was asked]—

Q. You have not got past the Washington road yet?

A. No, sir.

Q. Whose properties? A. Vandevender's property on one side of the road and Messler's on the other.

Q. What did you find there? A. Another miry place.

Q. How bad a miry place? A. It would bend with a man's weight.

Q. Did it bend with a man's weight? A. It did with mine.

10 Q. For how long a distance would it bend with your weight? A. I walked over it about twenty feet.

Q. Did you poke anything through to see how deep the miry place was? A. No, sir, I did not.

Q. Did any of the others? A. Not that I know of.

Q. You did not take any measurements there of the depth of the mire? A. No.

Q. Did you make any measurements there? A. No, sir.

Q. Where did you go from there? A. At the end of
20 one hundred and thirty chains.

Q. At what property? A. The property of Vandevender, on both sides of the road.

Q. What did you find there? A. Another miry place.

Q. What kind of a miry place? A. It had been very bad.

Q. How do you know it had been very bad? A. Riding with the stage nearly every day to New Brunswick.

Q. You had gone over that before, over that very place or through it? A. Through it.

30 [Objected to.]

Q. What examination did you make of it? A. I didn't walk through it.

Q. How deep was the mire? A. There was a rail went down one side of it; I didn't pull the rail out to see how far it went in.

Q. A rail ran down by one of your party? Q. No; it had been there for three or four days or more.

Q. Did you make any other examination of that spot?

A. There was dirt that had been carted in a few days
40 previous.

Q. What kind of dirt? A. It was a coarse dirt—coarse sand or gravel.

Q. Did you see any red shale there? A. Saw some clay there, and some dirt carted in.

Q. Do you know the depth of the mud at this place? A. No, sir.

Q. Take any measurements there? A. No; at the end of the miry place, one hundred and thirty-one chains from the beginning, we took a measurement.

Q. That mire place was about how long? A. About a 10 chain, sixty-six feet.

Q. How many years had you known that miry place? A. Every winter for some time; some winters not so bad as others.

Q. Depending on what? A. On how deep the frost was in the ground.

[And after testifying to further particular measurements witness was asked]—

Q. From there where did you go? A. Took a note of another miry place at the end of one hundred and seventy 20 chains from the beginning.

Q. What kind of a miry place was that? A. It was drying up, getting better than it had been; it was not as bad as some of the others

Q. Do you know how it had been? A. Yes, sir.

Q. How had it been? A. It had been quite bad.

Q. How bad? A. I didn't measure the depth of it; I had been over it several times.

Q. Did you go into the hubs of the wheels? A. No, not quite as bad as that; I don't think it went in more 30 than half to the hubs there.

Q. How long before your measurement was it that you had gone half way to the hubs? A. I don't remember what day it was.

Q. It had been several days? A. Yes.

Q. How long a place was this miry spot? A. We did not measure.

Q. Where did you go from there? A. Noted another one at the end of one hundred and seventy-three chains from the beginning.

Q. Before leaving the other place I will ask you if you saw a wagon stuck there shortly before you measured?

A. I had not.

Q. Not within a few days? A. No, sir.

Q. Was not a wagon stuck there at that place? A. I did not see it myself.

Q. The one hundred and seventy-three chains, what kind of a place was that? A. I don't think that was as bad as the other place.

10 Q. Was that drying up, too? A. Yes, sir; that was along the property of John Martin on one side and Mrs. Tice on the other.

[After further examination as to measurements witness is asked]—

Q. How far beyond this first Washington road is Shedden's corner? A. Two hundred and forty-eight chains from the place of beginning; it would be sixty-five chains from the southerly side of the Washington road.

20 Q. How many measurements did you take between the first Washington road and Shedden's corner? A. Twelve.

Q. Without going into those particularly, what was the average width?

[Objected to.]

Q. What was the greatest distance between fences that you found between the first Washington road and Shedden's corner? A. Forty-eight feet between the fences and the woods; forty-seven feet between where fences were standing.

30 Q. What was the least, between fences or fence and woods? A. Between fences, thirty-two and one-half feet.

Q. What was the greatest distance from outside of ditches in those twelve measurements? A. Thirty-three feet.

Q. And the least between outside of ditches? A. Twenty feet.

Q. Where was that measurement, from the outside of ditches? A. It was along the property of Samuel Mc-

Clure on one side, and Mrs. Tanner's wood-lot on the other.

Q. Give me the widest measurement in the same distance of the road-way between ditches? A. Eighteen feet.

Q. And the least distance between ditches? A. Fourteen feet.

[Plaintiff's counsel moves to strike out the examination beyond the Washington road as having nothing to do with the case.] [Motion denied.] 10

Q. You have given the shortest distance of measurement between ditches for the road as fourteen feet in the twelve measurements, between the first Washington road and Shedden's corner? A. Yes.

Q. How many of those measurements of the road-way between ditches are eighteen feet, between Washington road and Shedden's corner? A. One.

Q. The other measurements between ditches of the road, in that distance, are what; give the distance between ditches, taking them in course? A. Four measurements are fourteen feet; six are sixteen feet; one seventeen feet, and one eighteen feet. 20

Q. What is the distance from the first Washington road to Shedden's corner? A. A little over three-quarters of a mile.

Q. Take the distance from Shedden's corner to Tanner's corner? A. There are two roads at Tanner's corner, one leads to Washington and the other to Cranbury; which distance do you want?

Q. Take the Washington road—take from Shedden's 30 to the road to Washington? A. The total distance from the place of beginning is two hundred and sixty-eight chains and seventy links.

Q. No; between Shedden's and Tanner's would be how much? A. Twenty chains and seventy links.

Q. That is about how much? A. One quarter of a mile.

Q. In that quarter of a mile how many measurements did you take? A. Four, including the one we took at that point. 40

Q. Where was the first one? A. The first is at the point by Shedden's corner, at the road going to Washington.

Q. Have you given the measurements there at Shedden's, between fences? A. Forty-seven feet.

Q. And the measurement from the outside of gutter? A. Thirty-three feet.

Q. And the measurement of the road between the ditches? A. Fifteen feet.

10 Q. Where did you go from there? A. Six chains from there—beyond that corner.

Q. What did you find the measurement between fences there? A. Forty-six feet.

Q. From outside of ditches? A. Thirty-one feet.

Q. And the road-way between ditches? A. Fifteen feet.

Q. The space that vehicles could go? A. About fifteen feet.

Q. How much more than fifteen feet? A. I don't
20 think there was any.

Q. Where, after that? A. Six chains further on.

Q. Whose property? A. Mrs. Tanner's—on both sides of the road.

Q. What was it there? A. Forty-eight feet between fences.

Q. From outside of ditches? A. Thirty-two feet.

Q. And the road-way between ditches? A. Fourteen feet.

Q. Where, then? A. Three chains and forty links
30 further on.

Q. Whose property? A. Tanner's—on both sides.

Q. Between fences, how much? A. Forty-six feet.

Q. From outside of ditches? A. I did not measure that, because the Milltown road turns off there.

Q. The road-way between ditches? A. We took two measurements of that; there was some new gravel put at the sides of the road; the total width of the road-way and new gravel was seventeen and a-half feet.

Q. That included new gravel at each side? A. Yes,
40 sir.

Q. And the road without the new gravel? A. Eleven and a-half feet.

Q. There was six feet of new gravel there? A. About that.

Q. Did you take any more measurements? A. No, sir.

Q. That takes us to the last Washington road, does it? A. Yes, sir.

Q. Taking the distance of that road from New Brunswick to Tanner's, whether or not there are ditches for the greater part of the way on both sides of the road?

A. There are places at the side of the road where they have scooped the dirt out.

Q. In those places where they have scooped the dirt out, can carriages and vehicles travel safely? A. Not in all of those places.

Q. How deep are some of those places? A. I did not measure any of them; I should think, to look at them, about three feet from the centre of the road-bed to the bottom of the ditch.

20

Q. From the centre of the road-way to the edge of the road-way, where the ditch or scooped-out place begins, how much fall is there? A. In some places not much.

Q. How is it, as a general thing, from the centre of the road to the edge of the road-bed? A. There is a little fall, as a general thing.

Q. As a general thing, can conveyances ride anywhere from the centre of the road to the extreme edge of these ditches? A. I would not like to say they could.

Q. Why not? A. I think they might capsize in some places.

Q. Can you give any idea in how many places it would be unsafe for carriages to go to the outside edge of the gutter? A. I think there is a place between McClure's and John Newmeyer's that it would be unsafe to drive to the edge of the ditch, and one between Newmeyer's and William R. Serviss'; one between William and Henry Serviss', and one between Henry Serviss' and Mrs. Tice's; there may be other places that I do not think of now.

Q. I want to ask you whether if in the entire distance 40

from New Brunswick to Tanner's, as a general thing, the road has a gradual slope from the centre to the outside edges of the ditches, or whether there are regular ditches with defined banks? A. At some places, you can easily see by the measurements, the slope of the ditch-banks are more gradual than others; you can see that from the sides of the road to the outside of the gutter, there are other places where the ditches are nearer and the slope is sharper.

10 Q. Do you know the distinction between a "ditch" and a "gutter?" A. We have been calling it by both names.

Q. Which would you call it by? A. These places in the road are scooped out, and you can call them what you like.

By the Court—

Q. You say "scooped out," do you mean in making the road—such places are made by running a scoop over it or cutting in with spades? A. I mean scooped
20 out to form the road.

Q. By the ordinary scoop that they use? A. Yes, sir.

Q. Not cut out with spades as in cutting a ditch and flat? A. I don't know that there are any of that kind.

By Mr. Strong—

Q. How deep are some of those scoop holes, and how abrupt from the sides of the road? A. In one place I have measured the sixteen feet for the road-bed and twenty feet for the outside of the ditches, which, I think, about as abrupt as could happen in the road.

30 Q. Where is that? A. That is along the property of Mr. McClure and Mr. Tanner's wood lot; I should think that was as abrupt a bank as any of them; it would be a slope of two feet on each side.

By Mr. Schenck—

Q. Is that by a culvert? A. There is a culvert near there.

By Mr. Strong—

Q. Could you give me a cross-section of this road?

A. I could not make it accurately without instruments.

Q. You have not done anything of that kind in this case? A. No, sir.

A. Will you tell me, in speaking of this abruptness of this ditch or road-bed, at what point in the road that is?

A. It was by Mrs. Tanner's wood lot and Mr. McClures.

Q. How many chains from the beginning? A. Two hundred and twenty-two chains and forty links. 10

Q. Is there a culvert at two hundred and twenty-two chains and forty links? A. It is near that.

Q. How long a distance does that abrupt place extend?

A. The next measurement is one foot wider.

Q. That is how long a distance? A. Five chains and forty-five links.

Q. Then for a distance of about five chains and forty-five links, there is this steep slope? A. It only varies a foot.

Q. Then it would make how deep a slope from the 20 edge of the road? A. It would make a slope of two and a-half feet.

Q. Would that be safe for a carriage to go down that slope? A. I think not.

Q. Why not? A. I think you might turn over.

Q. Is there any railing there? A. No, sir.

Q. Are there railings along the turnpike anywhere? A. No, sir.

By Mr. Schenck—

Q. No railing at Weston's mill? A. There is a fence 30 at Weston's mill.

By Mr. Strong—

Q. There is no rail there at that point, anyhow? A. No, sir.

Q. And the width of the road-bed is what? A. Sixteen feet.

Q. The width is sixteen feet; for a distance of about

five chains there is no rail and the slope is so steep a carriage could not safely go there? A. No, sir.

Q. Is this between Newmeyer's and McClure's? A. Yes, sir.

Q. I call your attention to Shedden's peach orchard; you know where that is? A. Yes, sir.

Q. Is there any ditch there? A. I don't think there is much of a depression on one side.

Q. How is it on the other? A. I do not remember,
10 distinctly.

Q. I call your attention to a place north of Newmeyer's, where there is a gutter—do you remember any ditch there? A. There is a culvert north of Newmeyer's.

Q. What is the width of the road-bed there? A. Sixteen feet.

Q. What kind of a slope is there, off the edge of the road-bed? A. It is not so steep as the other.

Q. About how steep would you call it? A. I should
20 think the slope was three feet wider at the bottom than on the top.

Q. How deep would the ditch be there? A. I don't think that it is as steep.

Q. How would it do for wagons or carriages traveling, to go off the edge of that road into the bottom of the ditch? A. Not if they kept one wheel on the road.

Q. What would happen to the other, if they did? A. They would overturn.

Q. How long a distance is that place? A. Between
30 two and three chains.

Q. Is any rail there? A. No, sir.

Q. Coming along by Henry Serviss,' what is the width of the road-bed there? A. Sixteen feet.

Q. Are there any ditches? A. There was water in each—on each side; I did not see how deep they were that day.

Q. Suppose a vehicle came along that way, keeping one wheel upon the road and the other wheel in this ditch, what would happen to it? A. It would not be in

a nice position; I don't know whether it would overturn or not.

Q. Would it be a safe thing to try? A. I would not want to try it.

Q. For how long a distance would that extend? A. About two hundred feet or longer.

Q. Between Henry Serviss' and Mrs. Tice's, what is the width of the road-bed there? A. Twenty feet.

Q. And the depth of the ditches? A. About as deep as the others. 10

Q. Suppose you keep one wheel of the conveyance on the road-bed and the other wheel in the gutter, what would happen?

[Objected to.] [Objection overruled.] [Exception.]

A. It would be according to where you put the wheel.

Q. Suppose you put the wheel on the edge of the road-bed and the other wheel off? A. Some places it would overturn; it would overturn by the culvert and for some distance each way.

Q. How long a distance? A. Possibly one chain 20 each way.

Q. Is there any railing there? A. No, sir.

Q. Ever been any there? A. I don't recollect of any.

Q. Can you tell me how many places there are of that kind between New Brunswick and Tanner's? A. These places that I named; I don't remember any others.

Q. You have named five or six? A. Four, I think.

Q. Were you in this neighborhood when the road was being constructed? A. I am not sure whether I was at home or at school. 30

Q. You have no recollection about it? A. No, sir.

Q. Have you ever known this turnpike road to be wider than it is now? A. No, sir, I have not.

Cross-examination by Mr. Schenck—

Q. Who employed you to make this survey and examination? A. Mr. Blue came to me.

Q. Did he employ you? A. I suppose he did.

Q. Did he pay you? A. He has not paid me as yet.

Q. Did he go with you at the time? A. He was with me.

Q. Who else went with you? A. I have named them; I will name them again if you wish.

Q. Are the others interested in paying you for your services? A. I don't look to them for the money; I don't know whether they will contribute towards it or not.

Q. Did these gentlemen point out places where they
10 wanted you to examine and survey? A. They did at various places.

Q. Particularly this miry place you have spoken of? A. They generally spoke of those.

Q. Did they select, to all appearances, the narrowest point of the road? A. We took some of the narrowest places we could get, and some that were not so narrow.

Q. At those narrow places that you speak of, especially along the fourteen feet, from what point to what point did you measure? A. The level portion of the road, or
20 nearly so, that was traveled.

Q. You say you made no examination of the soil underneath? A. No more than the surface.

And defendant's attorney also called as a witness Isaac N. Blue.

Isaac N. Blue, called on behalf of the defendant, being duly sworn, testified as follows—

Q. You reside, where? A. Near Washington, South River.

Q. Do you reside on the line of this turnpike? A.
30 No, sir.

Q. Do you own property on the line of the turnpike? A. No, sir; about three-fourths of a mile from the pike.

Q. You are one of the chosen freeholders of this county? A. Yes, sir.

Q. How long have you been such? A. I represented it last year, and several years ago.

Q. You are the freeholder from East Brunswick township? A. Yes, sir.

Q. And have been in the board of freeholders several times? A. Yes, sir.

Q. You were present at the measurements that were taken by Mr. Serviss and the others who have been mentioned? A. Yes, sir.

A. Are you, or not, one of the backers of Mr. Stults in this matter? A. Yes, sir; I propose to assist him, and there are lots of others, too. 10

Q. At the time of these measurements, it has been said that you held one end of the measuring tape and Mr. Serviss the other? A. Yes, sir.

Q. Are the measurements, as Mr. Serviss has given them, correct? A. Yes, sir.

Q. Did you take them down at the time? A. Yes, sir.

Q. Have you verified them, as stated here in court? A. Yes, sir; there were a few called off before dinner that I did not think of at the time, but all since I have verified. 20

Q. The few that he gave before dinner, were they correct, according to your recollection? A. Yes, I am satisfied they were.

Q. In measuring the portion of the road, what has been spoken of as the turnpike road, between the inside of the ditches, what were you generally trying to measure? A. We were trying to measure the turnpike as originally constructed first; that was what we went there for.

Q. That was the formed portion of the road? A. 30
Yes, sir.

Q. From the inside of ditch to inside? A. Yes, sir.

Q. And you carried those measurements along from New Brunswick to where? A. To the hill at Old Bridge.

Q. At any part of that road from New Brunswick to Old Bridge, did you find the formed portion of the turnpike thirty-two feet wide? A. We did not, in no one spot.

[Question objected to as leading.] [Objection overruled.]

Q. Did you find the formed portion of the road between the ditches, at any point between Old Bridge and New Brunswick, twenty-five feet wide? A. Yes, sir; right by the first mile post by New Brunswick Mr. Serviss gave me twenty-seven and a-half feet; I will answer with the exception by the first mile post at this end—there is no ditch there, and with that exception 10 there is no place twenty-five feet wide.

Q. How many places between New Brunswick and Tanner's did you find the formed portion of the turnpike between ditches to be twenty feet wide? A. Four places.

Q. Where were those four places? A. One at the end of one hundred and seventy-eight chains; one opposite S. T. Green's; one by the McLaury property, and the fourth at Edward Kearney's.

Q. What was the narrowest measure of the road as 20 formed that you found between here and Tanner's corner? A. Eleven and one-half feet, right by Mrs. Tanner's; they afterwards made that wider, after they made their measurements last fall; they put gravel on each side and made it seventeen and one-half feet.

Q. They added that difference to it since last fall? A. Yes, sir.

Q. In how many places between New Brunswick and Tanner's corner did you find the width of that formed portion of the road between ditches to be less than six- 30 teen feet? A. Eight places.

Q. Can you give those places? A. The first one is by Henry Serviss', fourteen feet; there are two; one at the end of one hundred and eighty-five chains, and one at the end of one hundred and eighty-seven chains; the third is at the end of two hundred and two chains and twenty links—that is nearer William Serviss'—it was fourteen feet wide there; the next is at the end of two hundred and twenty-nine chains, fourteen feet—that is near McClure's, north of his house; the next is at the 40 end of two hundred and forty eight chains, fifteen feet—

that is along by Shedden's; the next is at the end of two hundred and fifty-four chains, fifteen feet—that is by Mrs. Tanner's; the next is at the end of two hundred and sixty chains—that is fourteen feet, by Mrs. Tanner's property; the next is that narrow place at the end of two hundred and sixty-three chains and forty links; that, as originally constructed was eleven and one-half feet, but now as found, is seventeen and one-half.

Q. And the alteration has been made since this suit?

A. Yes, sir. 10

Q. I want to call your attention to a place by Spratford's about the width of the formed portion of the road, between the ditches? A. We gave that nineteen feet, but I have also made a note that the hard part of the road is only ten feet; it is level and we gave them the benefit of the whole of it.

Q. Are there banks at each side? A. No, not there, but we can see a rise in the road.

Q. And that rise is ten feet wide? A. Yes, sir, that is for the teams to travel on, that is ten feet. 20

Q. The rest of the nine feet is made, how? A. It is washed in and made level by the sand.

Q. How is the width of this road the entire distance you have given it, at the present time, compared with what it was when the turnpike was completed? A. There can be but one answer to that, that it is wider now than when it was originally constructed; it would naturally work out and get wider.

Q. What will cause that? A. Settling down and traveling on it, the wheels of the wagons work it out. 30

Q. Something has been said about the road, the entire space between the fences on this road—can it be traveled from fence to fence? A. No, sir.

Q. Why not? A. On account of banks, trees, bushes, and gutters, ditches, or whatever you call them.

Q. How long have you known this road? A. Ever since I was a boy.

Q. Did you know the road before it was made a turnpike? A. Yes, sir.

Q. The road that has been constructed since it was 40

made a turnpike, how does its width compare to what it was before the turnpike? A. It is narrower now than it was then.

Q. Did you see them build the road? A. I saw them at work at it; I saw Mr. Herbert.

Q. Who else? A. I could not tell.

Q. What part of the road did you see them construct?

A. From Mrs. Tanner's to Weston's mill, and quite likely the other end, too.

10 Q. Do you know the year it was completed? A. I could not give the year.

Q. Do you remember the condition of the turnpike after it was completed? A. After it was completed, in good weather it would be good, in wet weather it would be bad; in the spring of the year it was always bad; when the elements made it good, it was a good road; when the elements were against it, it was a bad road.

Q. Along this turnpike, as constructed, are there ditches or gutters? A. There are.

20 Q. What would you call them? A. Ditches.

Q. For what reason? A. Because they are deep—so deep that they cannot be traveled on in places.

Q. Is there any resemblance between those ditches and the gutters of an ordinary street in the city? A. Yes, sir.

Q. In what respect? A. In places—I do not wish to be understood it is all along—but in certain places they drop almost straight down, not quite, and in other places it slopes off gradually.

30 Q. Which predominates, the gutters or ditches? A. I should think between New Brunswick and Tanner's, there was about half and half.

Q. In that portion of the road where the ditches are, can a wagon travel in those ditches? A. No, sir; it would be impossible.

Q. After you get between Henry Serviss' and Mrs. Tice's, how are the ditches? A. I have spoken of that.

Q. Go on further? A. Beyond Henry Serviss' house, along his field, you see ditches there that are deep.

Q. How deep are those ditches? A. Two and one-half feet, I should say.

Q. For how long a space? A. It is quite a little space along there; I could not tell the length.

Q. How abrupt? A. Similar to the others; they are all one character.

Q. How along Newmeyer's? A. They are pretty much the same character.

Q. How is the road itself between the ditches there?
A. It is narrow. 10

Q. For how long a stretch are the ditches of this nature that you describe? A. There is quite a stretch of it.

Q. You did not measure it? A. No, sir.

Q. From Newmeyer's to McClure's, how would you describe them? A. Ditches on both sides all the way from Newmeyer's to McClure's until you rise the hill, then the ditches stop, but just before you get there the ditch runs from Newmeyer's nearly to McClure's house.

Q. As to its depth and abruptness? A. There is a cul-20
vert there in one place; I think the ditch is fully four feet deep, that is off the end of a culvert; there is a ditch all along there, that runs, I should judge, from three to four feet—three feet anyhow—to be pretty safe I will make it two and one-half to three feet, with the exception of that culvert.

Q. How is it at Sheddon's peach orchard? A. There are ditches there, too, but not so deep.

Q. How is it from Shedden's to Tanner's? A. There is more slope there, not so much in the nature of a ditch 30
as those I have spoken of.

Q. In this place that you have spoken of, have you ever traveled with your wagon in those ditches? A. I never have; I don't want to.

Q. Why not? A. I don't intend to if I can avoid it, because they are not calculated for that; if I got in them I don't think I could get out again, without a good deal of difficulty.

Q. Have you known of any upsets in those ditches?
A. I never saw any, but I have heard of them. 40

Q. Are there any railings along that road anyplace?

A. No, sir.

Q. Did you see any of the construction of this road?

A. Yes, more or less of it

Q. Where, between New Brunswick and Tanner's, who did you see working on the road at the time of its construction? A. It is a good while ago, I don't know that I could call to mind the name of the parties, but I remember seeing them at work.

10 Q. What was their mode of forming it? A. It was to take the dirt out of the ditches at the side of the road and form it in the centre.

Q. How wide a place? A. It runs about the width that I told you the other day—we gave you the width of the road-bed.

Q. They formed the road that way all the distance from New Brunswick to Tanner's? A. Yes, sir.

Q. After that was done, what did they put on the road?

A. They put a little gravel—what they call gravel—
20 sand and gravel.

Q. Tell us how they did that? A. They took one load of gravel and stretched it right along; they dumped a wagon load of gravel and spread it out to the wheels of the wagon, extending it about what the narrowest wagon would cover; the wheels traveling over it has spread it out a little wider.

Q. When that road was constructed did they gravel more than one wagon track? A. No, sir, just right in the centre of this road.

30 Q. How close did they put the loads together? A. Their intention was for one to go at the end of the other; that was the intention of the parties who graveled it, as far as my observation went.

By the Court—

Q. One load succeeding the other in a line? A. Yes, sir.

Q. They did not put loads side by side? A. I never saw them put two loads side by side, in my life, in the construction of this road; I will take that back, I have seen them this winter.

The Court—No ; we are talking about the construction.

By Mr. Strong—

Q. That was since the bringing of the suit? A.

Yes, sir.

Q. After the construction of this road, how was it in reference to the ability of one team to pass another? A. There were a great many places that you could not pass if you overtook a wagon, and it was in the centre of the road, you would have to wait and get your chance before you could turn out and go by them; there were only 10 certain places that you could turn out.

Q. Have you ever been in that condition yourself? A. I have, many times.

Q. For how long a distance have you followed behind, because you could not turn out and pass? A. At places three hundred or four hundred yards, or one hundred yards or less, two hundred yards.

Q. Was there only one of those places or more than one? A. There was more than one

Q. Can you tell us where they are? A. I never thought 20 about that, but I know narrow parts of the road was that way; where these deep ditches are it was that way.

Q. That was after the road was constructed; has that been remedied down to the present time, and if so, how much? A. It has been remedied a little; it is wider now, on account of its settling down and pressing out.

Q. Are there places now where you can not pass if the wagon ahead of you keeps in the middle of the road? A. I think there are places yet where you would have difficulty to pass; I do not mean to say that there 30 is not room for two wagons to pass, provided we meet; I mean to say if there was one wagon in the centre of the road you would have difficulty to turn out and go by them.

Q. You mean you would have difficulty in passing on either side if the wagon was in the centre? A. Yes, sir.

Q. There are some such places to-day? A. Yes; but not so many; it has flattened down.

Q. After the construction of this road, was the road

made a hard and firm road in all places? A. It never has been made hard and firm; it is not to-day, only when the elements make it hard.

Q. In dry weather, how is the road? A. Then it is hard.

Q. Take such weather as we are having now, how is the road? A. It is hard now.

Q. In summertime how is the road? A. In dry weather it is hard; in wet weather it is soft.

10 Q. How has it been during the winters, since the construction of the road? A. In the winter, when it was frozen, it would be hard then.

Q. Tell us how that road has been in winter since it was constructed? A. When it was not frozen hard it has invariably been soft during the winters; when it was frozen, then we had a good road.

Q. In your travel over it have you experienced any difficulty? A. Yes, sir; I have never had any serious difficulty; I have had some little.

20 Q. What? A. I had occasion at one time to take out four hundred feet of boards, and I thought that I would never get through, and I have as good a team of mules as anybody.

Q. How deep did you go in? A. Up to the hubs of the wheels.

Q. Where was that? A. Right near Vandevender's house.

Q. On top of the hill? A. Yes, on top of the hill; that was the worst place I experienced that day.

30 Q. How deep did your horses break through? A. Through to their knees; I have not had any other difficulty, particularly, until this spring.

Q. When was this that your mules had the trouble of getting four hundred feet of boards through? A. A year ago last February.

Q. Is four hundred feet of boards a large load? A. No, it is not; about one thousand feet is a load.

Q. This last winter, you say, you had trouble? A. No, I had no serious trouble; I was coming down with a
40 one-horse wagon.

[Objected to as being since the commencement of the suit.]

Q. How many of these soft places was there between New Brunswick and Tanner's; can you give any idea?
 A. Yes; I can give pretty near an idea; there was one near the McLaury place and beyond Mr. White's, and between White's and the bad place on the hill, and then you would come to that big hole that has been described here at Vandevender's; that is where I saw rails sticking in to keep teams from getting into the hole and going out of sight—then you come to the place by Mrs. Tice's; there I helped get a team out the 2d of April, this year.

[Objected to.]

Q. Beyond that? A. Right by William Serviss' there was another very bad place; then John Newmeyer's there were two very bad places, one on each side of his house; they were very bad.

Q. Any others before you get to Tanner's? A. No.

Q. That would make about eight places between New Brunswick and Tanner's? A. Yes, sir.

Q. Have these places existed this year and last year—or how long have they existed? A. Those by Newmeyer's have always been bad; I am not going to say it breaks up in any one place every year, but there has always been bad places—perhaps next year it will break up somewhere else; they have never graveled this road sufficient to keep it from breaking through—in other words, if they had sufficient gravel there would not have been any bad places. 30

Q. Some of the witnesses on the other side said it was impossible to make a good road out of it with gravel? A. That is child's talk; they can make a good, hard road out of it.

[Objected to.]

Q. Do you know any portions of that road that have been made good? A. I do.

Q. Where? A. In front of Mr. Christian's.

Q. Where else? A. That is the only place that I know of; that is made permanent and hard, and that is the only 40

place this spring that did not go up and down in passing over it.

Q. Tell me what you know about that place at Mr. Christian's being made good? A. I know that he carted the gravel there, and I know that since it has remained hard and firm, and as soon as you leave where he carted the gravel, in front of his buildings, I know you went through this spring just as soon as you leave where he put his gravel.

10 Q. How long a place did Mr. Christian make a hard road? A. I should judge from fifty to seventy-five or eighty yards.

Q. What did he cart on? A. Gravel.

Q. When did he do it? A. I could not say the time.

Q. How was that portion of the road before Mr. Christian carted gravel on there? A. The same as the other—the same kind of material.

Q. What kind of material is that? A. Clay bottom all along there.

20 Q. Have you any specimens of what that road is made of? A. I brought some this morning; yes, sir.

Q. Let me see what you have; did you pick it out of the middle of the road yourself? A. Yes, there is something that I picked right out of the top of the road.

Q. When? A. This morning.

[Producing specimens.] [Objected to.] [Sustained.]

Q. How about the drainage of that road? A. A great many of their sluice-ways are closed up; there is no reason why that road should not be drained.

30 Q. You have spoken of a bad place on the top of Vandevender's hill; what is the lay of the ground there, and can that place be drained? A. Yes, sir; the lay of the ground there is that it slopes both ways; it is on the highest; there is a good chance to drain it; if a man can't drain that he can't drain anything.

Q. Is that road drained any? A. There are ditches on both sides.

Q. And the bad place continues? A. Yes.

Q. Since the beginning of this suit has there been any 40 change in the turnpike? A. They have carted more on.

Cross-examination—

Q. The place at Vandevender's, where you spoke of drainage, that is a bad place there? A. Yes, sir.

Q. It is on top of a hill? A. Yes, sir; on the rise of the hill.

Q. And there is a descent on either side? A. Yes, sir.

Q. And the water runs, of course, from that bad place on either side of the hill? A. It can run both ways if the ditches are open.

Q. There is a descent there? A. Yes, sir, almost; it 10 could be made to centre right there; the highest part right there could be made by that bad place, so it could run off.

Q. Don't the water descend on either side? A. There is nothing to hinder it.

Q. Did you ever know water to stand on the side of a hill? A. If you hold it in a cup it will stand on a hill.

Q. But there is no cup there? A. There is a basin there—a hole; it will stand in a hole.

Q. That is a bad place? A. Yes, sir. 20

Q. You say there is a descent there on either side? A. Yes, sir.

Q. Let us see if you are correct there; was that hole on top of the hill? A. Nearly so; it was right on the rise, but it can be drained.

Q. Then it was on the side of the hill, not on the top?

A. There are two bad places; now I won't correct it; I will say there was a bad place right on top of the hill; there was one I did not count before; it is all bad along there. 30

Q. And another on the side of the hill? A. A little down; yes, sir.

Q. On the further side, as you go from New Brunswick? A. No, this side.

Q. You said that there were only two particular occasions when you had reason to find fault with this road?

A. I don't say any such thing; I have had a great many occasions to find fault.

Q. Didn't you tell us there were two particular times

that you particularly objected to? A. No; I did not say any such thing.

Q. One in the year 1884 and the other last spring?

A. I did not say that I objected to it then; I don't think there is a man on the jury understood me to say that I particularly objected to it; I said there was a time that I had difficulty in getting through with four hundred feet of boards.

Q. Didn't you say that those were the only particular
10 times to which you adverted? A. Yes; those were the two particular times that I referred to.

Q. What other times are there that you can refer us to, besides those? A. I have not referred to any other; I started to mention that once this spring I was coming down with a one-horse wagon and he went up to his knees.

Q. Are there any others? A. I have never had any particular difficulty in getting through, I have never stuck fast; when I started I have gone through.

20 Q. At the time you adverted to, what season of the year was it? A. Once in February, 1884, and March, 1885.

Q. Was it February, 1884, or February, 1883? A. It was this February one year ago.

The Witness—I would say to the judge that I did not mean to say, if I did say, there were ditches by this bad place spoken of by Vandevender's; there are no ditches there; it is nearly level there, the ditches are below that.

Q. Where did you strike the turnpike in traveling?
30 A. If I came from home directly, I struck it at Mrs. Tanner's, but sometimes I went to Washington.

Q. You travel it at all times of the year? A. Yes, sir.

Q. Winter, fall, spring and summer? A. Yes, sir.

Q. Did you always pay your toll? A. Always, except when they would throw their gates open.

Q. Did they sometimes throw the gate open? A. Sometimes when the roads were bad and impassable.

Q. You passed over them, didn't you? A. I passed over them.

Q. Then they were not impassable? A. Then I would change that phrase, not impassable, but not tollable.

Q. You always paid the toll except when the gates were open? A. Yes, sir; I have never refused to pay my toll.

Q. On those bad occasions that you speak of were the gates thrown open? A. Yes, sir; the gates were open.

Defendant's attorney also called as a witness, George Hatter.

George Hatter, called on behalf of the defendant, being 10 duly sworn, testified as follows—

By Mr. Strong—

Q. Where do you reside? A. Washington, South River.

Q. What is your occupation? A. I work here and there and everywhere.

Q. How long have you lived at Washington? A. Five or six years, steady.

Q. How long have you known this Old Bridge turnpike? A. About fourteen years. 20

Q. Did you know the road before it was a turnpike? A. Yes, sir.

Q. Did you assist in making that turnpike? A. Part of it.

Q. What part? A. From Mrs. Tanner's corner down to Lambert's.

Q. That is coming towards New Brunswick? A. Yes, sir.

Q. How near to Weston's mills is Lambert's? A. Not quite a mile. 30

Q. You made then about how much of a turnpike—how long a distance? A. Somewheres about two miles.

Q. You worked on about two miles of it? A. Yes, sir.

Q. Who were you working for? A. Peter Jernee.

Q. Did you do any work for Charles Elkins? A. I did, afterwards.

Q. Jernee had it first and then Mr. Elkins came?

A. Yes, sir.

Q. Who formed the road from Tanner's to Lambert's, Jernee or Elkins? A. Jernee formed the road and employed me and some others.

Q. Who worked with you? A. There was John Spratford and Bill.

Q. Who else? A. We had only three men to a team—one driver and two men to a scoop.

10 Q. In forming the road, how was it made? A. We plowed outside of the old road and in the ditches, and scooped it up in the middle.

Q. With scoops? A. Yes, sir; wooden scoops.

Q. That was done by men under Peter Jernee? A. Yes, sir.

Q. What time of the year was it? A. It was in the middle of the summer.

Q. Do you know what year it was? A. I don't exactly know what year.

20 Q. About what year? A. About fourteen or fifteen years ago.

Q. After you had formed the road in this way, was the centre of the road plowed at all? A. No, sir; only in a couple of places, we plowed it to Shedden's and McClure's.

Q. But the centre of the road was not plowed out as a general thing, only the sides? A. Only the sides.

Q. Did Mr. Elkins have anything to do with forming that road? A. No, sir, not at that time.

30 Q. How much of the road was done when Mr. Elkins came? A. The other end from Mrs. Tanner's corner to Old Bridge was done, and then part on this end to Weston's mill.

Q. You worked on the road from Hardenburgh's corner to Lambert's? A. Yes, sir.

Q. And you formed it up under Jernee? A. Yes, sir.

Q. Did Mr. Elkins have anything to do with the forming up of that road at any time? A. No, sir.

40 Q. It was formed before he came there? A. Yes, sir.

Q. Was there any graveling done while Jernee had it? A. Yes, sir.

Q. On what part of the road? A. On this end of the road, I graveled a mile.

Q. From Weston's mill to where? A. From Karney's, up toward Old Bridge.

Q. This mile that you graveled on this end took you how far—did it take you to Lambert's? A. Yes, sir, above Mr. White's.

Q. Who did you gravel that for? A. Peter Jernee. 10

Q. How did you gravel it? A. He told me to just take and put a load in the centre of the road and drag it right down the length of the wagon and spread it a little bit outside of the wagon track.

Q. You dropped the loads the length of the wagon and spread the gravel outside of the wagon track? A. Yes.

Q. That was by Peter Jernee's orders? A. Yes, sir.

Q. How long was your wagon-bed? A. About nine feet. 20

Q. In your graveling did you put two loads side by side? A. No, sir.

Q. Did you at any place put two loads side by side? A. No, sir.

Q. You put single loads of gravel end to end all along? A. Yes, sir, one load *here*, and drop the next one right *here* at the end.

Q. How wide did you spread it? A. He said outside of the wagon track, not to spread it any wider, it would spread itself. 30

Q. How deep did you leave the gravel when you spread it? A. It was not over three or four inches.

Q. Was that so over the whole road that you graveled? A. That is all I did in Peter Jernee's time.

Q. After Peter Jernee, who got it? A. Mr. Elkins and Elmer Stout.

Q. Where did they gravel from and to? A. They graveled from the other end this way, to where I graveled from Mrs. Tanner's to Lambert's.

Q. Did you gravel for them? A. Yes, sir. 40

Q. How did you gravel that? A. We graveled that the same way that I put it on.

Q. The same way you graveled for Jernee? A. Yes, sir.

Q. That is, one load at the end of the wagon and spread it out a little beyond the wheels? A. Yes, sir.

Q. About three or four inches deep? A. Yes, three or four inches; I didn't measure it.

Q. At that time of the year that you graveled, were there any particularly bad spots noticeable in the road? A. No, sir, not then.

Q. Was there any particular pains taken with any bad place at that time? A. No, sir.

Q. Do you know how that road stood the first winter after it was finished? A. It was a new road, and it was pretty bad.

Q. How bad was it? A. It was pretty bad; the wheels would go down pretty well.

Q. How has it stood winters generally since then? A. In the spring of the year it is pretty bad sometimes.

Q. In making that road, did you make the road-bed between the ditches thirty-two feet wide? A. That I could not say; we did not measure it; we went all by guess-work.

Cross-examination by Mr. Schenck—

Q. Can you tell when you began the construction of this road? A. I could not tell.

Q. Can you tell the year it was? A. No, sir, I could not.

30 Q. Can you tell the season of the year when you commenced? A. Yes, sir, along in the summer time.

Q. What time in the summer? A. Some time along in August.

A. Are you certain of that? A. Somewhere along there.

Q. The gravel was not put on the road until the next spring? A. No, sir.

Q. What time in the spring? A. When I was dig-

ging the gravel it was pretty cold weather; we put on great lumps.

Q. Can you tell about in what month? A. Somewhere along February or March.

Q. You do not call February spring, do you? A. It was pretty near spring—I know it was early in the year.

Q. What was the character of the road when the gravel was put on, frozen or not? A. The road was in fair condition when we put that gravel on.

Q. Where did the gravel come from? A. Right out¹⁰ of the turnpike road by Mr. Karny's—near Weston's mill—right out of the road.

Q. Was it good gravel? A. Sand and gravel.

Q. Did you ever know any gravel that there was not some sand in it? A. Yes, sir.

Q. I asked you whether this was good gravel? A. It was not so extra good.

Q. I asked you whether it was good? A. I told you it was sand and gravel.

Q. I asked you to say whether it was good gravel?²⁰
A. It was not so very good.

Q. I didn't ask you if it was so very good—I asked you if it was good gravel? A. It was good gravel for the kind.

Q. How many kinds of gravel are there? A. A good many kinds.

Q. Down there along that road? A. Yes, sir.

Q. Do you know that there is stone underneath? A. Red shale—but that don't make a good road.

Q. Don't that depend upon where it is put? A. Yes,³⁰ sir.

Q. Don't you know that red shale, in certain places, makes the best road? A. On certain soils it might.

By Mr. Strong—

Q. You started to say something about your orders—what they were, from Jernee, about graveling?

[Objected to.]

A. My orders were not to put any more than the length of the wagon and the width of it.

Defendants attorney also called as a witness William Wilmott.

William Wilmott, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. Where do you reside? A. On the road leading from the turnpike to Milltown.

Q. You formerly worked for Daniel McLaury? A. Yes, sir.

10 Q. You have known this turnpike how long? A. I have known it ever since it first started.

Q. Were you one of those who worked on the road? A. Some part of it.

Q. What part did you work on? A. Where I started in it was between Mr. White's and Vandevender's.

Q. Had the road between Tanner's and Old Bridge been made then? A. Yes, sir.

Q. And the end of the road from Weston's mill had been completed? A. They had worked on that and 20 formed it up, and nothing else.

Q. Who formed that? A. I can't tell you exactly who did—there were different teams on the road.

Q. When you came there you came with McLaury's team? A. No; I was sent as a hand, to work with Hatter and John Spratford.

Q. Did you first work at forming the road or graveling it? A. Forming it.

Q. You formed it from White's to Vandevender's? A. I helped form the road from White's to between William 30 Serviss' and Henry Serviss'.

Q. What distance? I should judge about a mile and a-half.

Q. How did you form the road? A. We plowed down the old natural gutters before the road was formed, and took that dirt and formed it in the top of the road.

Q. You took it out with scoops? A. Yes, sir; these regular turnpike scoops; they were not what the overseers of the road work with; they are made square, and

two men, one on each side, takes hold—and there is a team hooked to it.

Q. It was a wooden scoop with a steel shovel? A. Steel plate put on.

Q. Who were you working for? A. Peter Jernee—for McLaury.

Q. How wide was that road formed? A. Jernee gave me a ten foot pole at one time to measure some of the road, and he said he wanted, if he could get it, thirty-two feet. 10

Q. What did Peter Jernee tell you? A. He gave me this pole and told me if I could get thirty-two feet I should do it, but I could not get that.

Q. Did you tell Jernee that you could not get it? A. Yes, sir; I will tell you where it was; it was between Mr. White's and Vandevender's; he came a day or two afterwards, and I told him I could not get the right width he wanted, unless he moved the fence out of the road and cut the rubbish from the sides of the road; of course there were spots where we could have got the width, but that would make the gutter very crooked—we had to form it up straight. 20

Q. When you told Peter Jernee that you could not get thirty-two feet, what did he say to you? A. He said we would have to do the best we could; that we could not fight with the people that the fences belonged to, so I chucked the pole away.

Q. What did you build the road to after that? A. According to the eye, as near as we could get.

Q. Was anything said between you and Jernee at that time about plowing the road in the middle? A. Yes. 30

Q. What was said? A. I told him the right way was to start in the centre, put four horses to the plow, and form the road up in *that* shape, and plow the whole thing up, and then he would have a road.

Q. What did Jernee say to that? A. You know how every man has his opinion; he did not say anything.

Q. Did you plow in that road? A. No.

By Mr. Schenck—

Q. Did he ask you for your opinion? A. No, sir; you know how men will talk about a road; I told him I thought that was the proper way to form a road—up in that way.

Q. You are an expert, I suppose? A. I find that a good way to make a good road; I have made some around my door-yard, and found that the gravel and dirt settle down together, and, as they settle, they make
10 a harder bed.

By Mr. Strong—

Q. It was not done in that road? A. No, sir, not as far as I worked.

Q. After you had formed the road in the way you mention, did you gravel it? A. I worked one day with Mr. Hatter; the man who was sent with the team was sick, and I was sent in his place.

Q. How was the graveling done? A. It was put just a load thick—dropped right down in the road and spread
20 out a little bit, so as to keep the teams from stumbling as they came along the road.

Q. Were there two loads put side by side? A. No, sir, not the day that I worked.

Q. What part of the road was that? A. Between McLaury's and Lambert's; that was the first day they started to gravel there, and it was a cold day.

Q. Did you work on the road after Elkins came there? A. No, sir.

Q. Did Elkins form any part of the road that you
30 worked on? A. No, sir, he did not.

Q. Elkins formed no part of the road between White's and Henry and William Serviss'? A. No, sir.

Q. But between Lambert's and McLaury's? A. Yes, sir.

Q. The spring after that road was completed on this end, how did the road stand? A. It was pretty bad.

Q. In what way? A. The spring was wet and the frost coming out of the ground made the road very bad, being newly laid up.

Q. That was before the gravel was put on? A. Yes, sir.

Q. After the gravel was put on next spring, how was it? A. That I do not recollect much about, because at that time I did not travel much over the road; maybe I would go that way once a year, perhaps.

Q. The Weston's mill end of the hill—there was that red shale regular formation? A. Yes, sir.

Q. After that road was completed, with a wagon traveling in the centre of that road and another wagon coming up behind, was there room for the wagon to pass 10 without the front wagon turning out? A. There were some places there would be trouble for another wagon to pass, after it was completed.

Q. How is it yet? A. There are some places the same way yet.

Cross-examination by Mr. Schenck--

Q. This place that you speak of graveling is the same as Mr. Hatter speaks of? A. I suppose it is.

Q. That was a distance of how far? A. I don't know; he took a mile, and I only worked one day graveling; 20 it was over that part.

Defendant's attorney also called as a witness John Spratford.

John Spratford, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. Where do you reside? A. East Brunswick.

Q. On this turnpike? A. Yes, sir.

Q. How long have you lived there? A. Fourteen 30 years.

Q. Did you work on the turnpike? A. Yes, sir.

Q. For whom did you work? A. Mr. Jernee.

Q. What work did you do on it? A. Helped scoop up the sides of the road into the middle.

Q. Who did you help? A. George Hatter.

Q. In scooping up that road, and in forming it that way, did you go by measure? A. No, sir.

Q. What did you go by? A. Guess.

Q. What width were you guessing at? A. Thirty-two feet.

Q. From where to where? A. From outside of ditch to outside.

Q. In good weather, at a good time of the year, what is the condition of the road? A. Good.

10 Q. In bad weather in the spring of the year, what is the condition of the road? A. In a good many places it is bad.

Q. Between your place and Weston's mill? A. Yes, sir.

Q. How is it beyond your place? A. There are bad spots there.

Q. Are there worse spots than between your place and Weston's mill? A. Yes, more worse spots.

Q. Can you tell how many? A. I think there are four the other way, and two between my place and Weston's mill.

Q. How long have those bad spots been there? A. As a general thing, every spring.

Q. How bad are they; do horses and wagons break through?

[Objected to.]

Q. How bad are they? A. Sometimes you mire into them.

Q. What do you mean? A. A team go in with a load on a wagon, and you have to unload to get out.

30 Q. How many times have you known that to occur? A. Twice.

Q. To yourself? A. No, sir.

Q. How lately were those two times? A. This spring a year ago.

[Objected to.]

Q. The first occasion, when was that? A. Last spring—this spring a year.

Q. What kind of a load was it? A. A load of oats.

Q. What kind of a team was pulling it? A. A double
40 team.

Q. A good team? A. Yes, sir.

Q. How deep did they go down? A. Down to the axletrees.

Q. What did they do with the load? A. Unloaded it, and carried it fifty yards; got the wagon out and loaded it up again.

Q. When was the next occasion? A. In the same spring; both occurred the same spring, and it was in the same place; I don't know whether it was before the oats were unloaded or after. 10

Q. Where was this place? A. About twenty-three panel of fence the other side of John White's; opposite his pear orchard.

Q. Who got stuck on the second occasion? A. I could not tell you; a man from Monmouth county with a load of potatoes.

Q. How many horses did he have? A. Two horses.

Q. What did he do? A. Unloaded them, got his wagon out and loaded them up again.

Q. After that road was completed, with a wagon going 20 in the middle of the road and a person coming up with another carriage behind them, could they pass that wagon in the middle of the road if it did not turn out? A. In places.

Q. How in other places? A. They could not pass without they turned out.

Q. How is that at the present time in places? A. Pretty much the same way.

Q. There are places where you cannot pass unless the wagon turns out? A. Yes, sir. 30

Q. Is the road higher or flatter than it was when first made? A. I think it is flatter.

Cross-examination by Mr. Schenck—

Q. Have you agreed to contribute to the expenses of this suit? A. No, sir.

Q. Have you agreed to join in the defence of this suit? A. No, sir.

Q. This bad place that you speak of—you have mentioned two places in the spring of 1884—have you known

of any before that? A. As a general thing more or less every spring.

Q. Tell us what those are, those that are there every spring? A. One every spring this side of my house, near McLaury's farm, on the hill.

Q. Where is the other? A. There was another one this spring at the bottom of the hill.

Q. Nearer New Brunswick? A. No further from New Brunswick; there was a bad place up near Mr. Gordon's, 10 between that and White's.

Q. You are speaking of those that are always there? A. Yes, sir.

Q. Go on? A. Then there is one along by Mr. Christian's, the other side of his house.

Q. Any others? A. There is one near Henry Serviss', just before you get to the Washington road.

Q. Any others? A. I don't travel the road any further than that, as a general thing.

Q. Those are the five places that you say are there 20 nearly every spring? A. Yes, sir.

Q. Do they depend on the character of the weather? A. When the frost is coming out.

Q. Are they some seasons worse than others? A. I don't know but what they are.

Q. What does that depend on? A. The depth of the frost.

Q. Are they bad at any other season of the year except when the frost is coming out? A. They are soft, but not so as to mire.

30 Q. When is that? A. After a heavy rain they are a little soft.

Q. Generally they are pretty good? A. As a general thing.

Defendant's attorney also called as a witness Henry Serviss.

Henry Serviss, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. What is your occupation? A. Farmer.

Q. Where do you live? A. East Brunswick.

Q. On the line of this turnpike? A. Yes, sir.

Q. How many years? A. Fourteen years.

Q. Do you remember the road before it was a pike?

A. Yes, sir.

Q. You live on what portion of the road? A. Right at the first corner of the Washington road.

Q. That is where Stults turns off to go to Washing-10 ton? A. Yes, sir.

Q. Did you ever have anything to do with the work on this road? A. I did.

Q. Who did you work for? A. For Mr. Jernee.

Q. On what part of the road did you work? A. From Mrs. Tanner's to McLaury's farm.

Q. What work did you do on the road? A. Ploughed and scooped.

Q. What other men were working there with you?

A. Mr. Spratford, Mr. George Hatter, and Mr. McLaury 20 sent some man, and Mr. Jernee would fetch a man up from Old Bridge once in awhile.

Q. What was the direction of Mr. Jernee? A. To form it as wide as we could get it.

Q. Up to any particular width? A. He wanted it thirty-two feet if he could get it.

Q. And if you could not get it? A. To let it go.

Q. This thirty-two feet was to be from what place to what place? A. From outside of ditch to outside of ditch.

30

Q. In your forming this road, did you measure it?

A. No, sir.

Q. What did you go by? A. Went by the road.

Q. You did not measure it at all? A. No, sir; we had measured it before the pike was taken; I knew exactly where the stakes stood.

Q. Did you put it according to stakes? A. No, sir.

Q. Why didn't you make it according to stakes? A. The fences were in the way.

Q. After you had made the road, did you have anything to do with the graveling of it? A. No, sir.

Q. Did you see the gravel after it was put on? A. I did.

Q. How wide did they gravel it? A. They dropped the loads one right after the other, and spread it out about five feet two inches, and about nine feet long.

Q. Over what part of the road? A. The whole of it.

Q. From Tanner's to New Brunswick? A. Yes, sir.

10 Q. Do you know how deep they graveled it? A. Somewhere about four inches in the centre.

Q. What time of the year was it when it was completed? A. About 1871—it was back of that I worked.

Q. How was the road after it was completed—in good weather? A. About like other roads.

Q. In bad weather how was it? A. As bad as other roads.

Q. After the road was finished, could one wagon pass another, going in the same direction, if the front wagon
20 did not turn out? A. In the narrow places they could not.

Q. How is it at the present time? A. They cannot pass a man going along with a load of hay yet in a narrow place.

Q. You were present at the time the road was measured by your nephew, David Serviss? A. Yes, sir.

Q. You saw the measurements taken and heard them called off? A. Yes.

Q. Between Mrs. Tanner's and New Brunswick, is
30 there thirty-two feet of travelable road for wagons? A. There might be in one or two places, but not on the pike.

Q. In those one or two places that you speak of, where would they have to go? A. Go out in the gutter.

Q. Can wagons travel in the gutters all the way? A. No, sir.

Q. Can they most of the way, without upsetting? A. I will say about one part.

Q. That is, how much do you mean? A. I will give

them half the turnpike that they can travel in the gutter, and half they cannot.

Q. I forgot to ask you if you ever upset on this road yourself? A. I have.

Q. When and where? A. The horse saw a little bunch of hay in the road, and he went off the bank and put me out.

Q. Where was that? A. On the other side of Shedden's.

Q. Before you get to Mrs. Tanner's? A. Yes, sir; up-10
set me and Harry French.

Q. Have you seen any other upset? A. I have.

Q. How many? A. One.

Q. When was that? A. About four years ago.

Q. Where was it? A. Right where Mrs. Tice has rails laid along the pike, about fifty yards from my house.

Q. Who went over there, and how did it happen? A. I don't know who they were; I did not go out to see; they got out and righted up the wagon and went off. 20

Q. What kind of a wagon? A. A buggy.

Q. Do you know how they came to upset? A. No, sir.

Q. Have you known any unfortunates to get mired in that turnpike? A. I have.

Q. How often? A. I have known four or five this year.

Q. Without going into details, who have you known?

A. Charles Cormick, Alfred Stults, a lager beer wagon, and a man who had a load of goods—furniture—coming this way. 30

Q. Was it you that saw the drug store man mired?

A. I saw him upset—I didn't see him upset, but I came up and saw him picking up the bottles.

Q. Where was that? A. That was by Mrs. McClure's.

Q. It was beyond Newmeyer's? A. Yes, there by the gully.

Q. That was how long ago? A. About two years ago.

Q. Was there any railing where he went over? A. No, sir.

Q. Has there been any railing put there since? A. No, sir.

Q. Is there any railing along that road anywhere? A. No, sir.

Q. These men that you have spoken of as miring this year, how deep did they go down? A. So deep they could not get out, some of them.

Q. Charles Cormick, did he get out? A. After unloading his boards.

10 Q. Alfred Stults, what did he do? A. Some one had to help him out.

Q. The lager beer wagon? A. They helped him out.

Q. How big a load did he have on? A. A pretty good load.

Q. And the furniture man? A. I did not go down by him; I saw him from my house; a lot of people came there and helped him out.

Q. Have you seen them mire on the road previous to this year? A. I saw one last year.

20 Cross-examination by Mr. Schenck—

Q. You have known this turnpike for several— A. Yes, sir, and knew the road before they got it.

Q. During the greater part of the year during this time how did you find the condition of that turnpike?

A. Sometimes good and sometimes bad.

Q. When were the times when it was bad? A. When it would rain.

Q. Any other times? A. I suppose when the ground would be soft from the frost coming out.

30 Q. You say the road is bad when it rains and in the spring when the frost comes out; at all other times is it good? A. When other roads are good, that is good.

Q. At other times is it a good road? A. It is a good road when dry.

Q. That don't answer the question; is it good at other times than the spring or after a rain? A. A good road when it was dry weather.

Q. Is that the best answer you can give? A. Yes, sir.

Q. Did you know anything about the graveling? A.

I saw it dumped right along by my house and all along the road.

Q. By whom? A. By my team; by Charles Elkins' teams.

Q. When was that? A. It must have been about 1872 or 1873.

By Mr. Strong —

Q. How has this turnpike been this spring, compared with other roads in the township? A. About like the rest of them. 10

By Mr. Schenck—

Q. How do you mean, about like the rest of them?
A. When they are good that is good, and when the others are bad that is bad.

Defendant's attorney also called as a witness John Newmeyer.

John Newmeyer, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. Do you live on the line of this road? A. Yes, sir, 20 three-quarters of a mile; where the Swan tavern used to be.

Q. That is before you get to Mrs. Tanner's? A. Yes, sir.

Q. How long have you lived there? A. Twenty-seven years.

Q. Do you remember the building of this turnpike?
A. Yes, sir.

Q. At the time it was building, how was the gravel put on? A. All I saw was one load right ahead of the 30 other.

Q. For how many wagon tracks? A. Just one wagon track.

Q. Have you helped people out of the mud in that road? A. Yes, sir.

[Whereupon defendant's attorney offered to prove by this witness especial instances when he had assisted persons out of the mire in said road in the spring of A. D. 1885, and insisted that the same would be competent and legal evidence in the cause, as showing, in part, the condition of said turnpike ever since its construction, continuously.]

[And thereupon plaintiff's attorney objected to such offered evidence, and insisted that the same was incompetent and illegal.]

[But his honor the judge held the said offered evidence incompetent and illegal, and refused to allow it to be made to the jury. To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. S.]

Q. From the time of the construction of that road to the present time, how has it been in the spring of the year in spots? A. Every spring, bad.

Q. How has that road been in the spring of the year, compared with other roads in the neighborhood? A. Some of the roads that go up to Spottswood and around there are better than where I live.

Cross-examination by Mr. Schenck—

Q. What other roads are better than the turnpike? A. The road that leads to Spottswood and Jamesburg.

Q. What other one? A. I don't know of any other; I don't go any except those two roads.

Q. How is that Spottswood and Jamesburg roads better than this turnpike; in what respect is it better? A. It is not so miry.

Q. When do you speak of? A. In the spring, or when there is there is three or four days' rain.

Q. Do you speak now of the whole of the road, or particular parts of it? A. In particular parts.

Q. When are those parts bad? A. In the spring and after heavy rains.

Q. In the spring when the frost comes out of the ground? A. Yes, sir.

Q. And after three or four days rain? A. Yes.

Q. Generally the road is good, isn't it? A. Now, yes.

Q. Generally it is good, isn't it, at nearly all seasons of the year? A. Except after heavy rains.

Q. Other times it is good? A. Yes, sir.

Q. How long have you traveled the turnpike? A. Ever since it has been a turnpike.

Q. Do you pass through the toll-gate? A. I pass sometimes; I don't come to New Brunswick very often. 10

Q. You don't go through either gate? A. No.

Q. You travel between gates? A. Yes.

And plaintiff's attorney asked witness the following question—

Q. When you did pass through the toll-gate, did you pay toll?

[Whereupon defendant's attorney objected to said question, and insisted that it was incompetent and illegal, because it was not proper cross-examination, and because his payment, if made, could not affect defendant.]

[And thereupon plaintiff's attorney insisted that it was a competent and legal question.]

[But his honor the judge held said question to be competent and legal, and directed the witness to answer it. To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

Whereupon witness answered as follows—

A. Yes, sir.

30

And defendant's attorney also called as a witness Saxton Newmeyer.

Saxton Newmeyer, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. You are a son of John Newmeyer? A. Yes, sir.

Q. And live with your father? A. Yes, sir.

Q. How many years have you known this turnpike?

A. Ever since I can remember.

Q. How old are you? A. Twenty-eight.

Q. How has that road been in the spring of the year ever since you have known it? A. When the weather was dry the road was good, and when it was wet or the frost coming out, it was bad.

10 Q. That was ever since you have known it? A. Yes, sir.

Q. Are there any bad spots in the road near your house? A. Yes, sir.

Q. Which side of the house? A. Both sides.

Q. About how long are they, how continuous? A. I never measured them, I could not say exactly.

[Whereupon defendant's attorney offered to prove by this witness specific instances where he had helped persons out of the mire in said turnpike road in A. D. 1885, 20 and in previous years since its alleged completion, and insisted that such proof would be competent and legal evidence in the cause, as showing an improper construction of said turnpike originally, and its continuous condition therefrom.]

[And thereupon plaintiff's attorney objected to such offered evidence and insisted that the same was incompetent and illegal.]

[But his honor the judge held said offered evidence incompetent and illegal and refused to allow it to be made 30 to the jury.]

[To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

Cross-examination—

Q. What is the character of the soil there where these bad spots are? A. Clay loam.

Q. Springy bottom? A. Yes, sir.

Q. The water oozes up from underneath? A. Yes, sir.

Q. What is the lay of the land—is it flat and level?
 A. It is rather low.

Defendant's attorney also called as a witness, Richard Serviss.

Richard Serviss called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. Where do you reside? A. Near Hardenburgh's corner, about half a mile from there.

Q. Do you reside on the line of this turnpike? A. No, 10
 sir, about half a mile off.

Q. How long have you lived there? A. Since 1853.

Q. You the county collector? A. I am.

Q. You travel over the road frequently from your house to this city? A. Yes.

Q. About how often on an average? A. Some weeks every day in the week.

Q. For how long have you been doing that? A. Two years, now.

Q. Prior to that how often on an average did you travel 20
 over the road? A. Sometimes three or four times a week.

Q. You have known this road how long, prior to its being a turnpike? A. For forty years.

Q. Have you ever been road-master or overseer of the road? A. Yes, sir.

Q. How long have you been a road-master or overseer on the road? A. I think I was not road-master of that particular road, only two years; I was elected in 1850
 and 1851. 30

Q. How many years have you been a road-master in your own township? A. Probably thirty-eight years; I was elected, I think, before I was of age, and have been road-master every year except two.

Q. Have you known of anybody else since the road has been a turnpike, constructing a portion of that road?
 A. Mr. Christian, right by his house in front of it, for

his own convenience, graveled it there, so that it made a good hard road that never breaks through.

Q. When did he gravel there? A. I think he has put it on at two or three times.

Q. Do you remember what years? A. No; I could not tell.

Q. Was it before or after this road was a turnpike? A. Since the road was a turnpike; he did not own the property before it was a turnpike.

10 Q. For how long a distance did he gravel there by his house? A. That I could not say; it may be forty or fifty yards.

Q. Prior to his graveling that place, how was it? A. In the spring of the year it would go through the same as the other parts of the road.

Q. After Mr. Christian completed it, how was it? A. It has been very good; after he first graveled it, it broke through the first year, and then he gave it another coat of gravel, and it has been very good since.

20 Q. Has it broken up since? A. No, sir.

Q. Just at the end of the place where Mr. Christian graveled, is there or not a bad spot in the road? A. At both ends there are bad spots.

Q. Is there any reason why those bad spots cannot be made good?

[Objected to.] [Sustained.]

Q. Was this piece of ground at Mr. Christian's made a good road before he made it? A. Not a good road; no, sir.

30 Q. Was the piece of road at each end of Mr. Christian's road made a good road when it was constructed by the turnpike company? A. Not so but what it goes through.

Q. Has it been made so from that time to this, so that it don't go through? A. No, sir; that is, in bad weather.

Q. In good weather, how is the turnpike? A. Good, then.

Q. Such weather as to-day? A. Certainly; it is dry.

Q. In bad weather, how is that turnpike? A. In wet
40 weather it is bad; whenever it is wet enough to soften

the clay—the bottom of the road is clay—it is a bad piece of ground to make a road unless you put plenty of gravel on, and as soon as it becomes wet it mixes up; the bed of the road is good brick clay.

Q. Did you see the construction of this road when it was being made? A. I did.

Q. You traveled over it then? A. Yes.

Q. Quite frequently? A. Yes, sir.

Q. How much gravel did they put on? A. That I could not tell. 10

Q. How wide a space did they gravel? A. The width of the wagon.

Q. Do you know how thick the gravel was? A. They dropped a load and then another right at the end of it.

Q. In your opinion, as a practical road overseer, did they gravel that road in the bad places with enough gravel? A. No, sir.

Q. Have they from that time to this? A. No, sir.

Q. Is there any reason why that road cannot be drained? 20

[Objected to as assuming that it is not drained.]

Q. Is there any reason why that bad spot on the top of Vandevender's hill cannot be drained? A. No, sir.

Q. How is the slope of the ground? A. It falls each way.

Q. After that road was constructed, have you ever experienced difficulty in passing other wagons on the road? A. In a great many places; in many places, if you got behind a wagon that is going the same way that you were, you cannot haul out and pass them, you have to watch for an opportunity; it is better than when it was first formed up, for then it was dangerous to undertake to do it, unless you had a good place that you know you could get by.

Q. Is there any of that trouble now? A. There are some places yet, if a man is driving the same way you are, and you want to get ahead.

Cross-examination by Mr. Schenck—

Q. Will you tell us where there is such a place as that

on the road where, with a wagon ahead, you cannot pass on either side with perfect facility? A. There is no place on the road that you cannot pass, if a man pulls out and lets you pass.

Q. I want you to tell where there is such a place on the road? A. There is a place the other side of Henry Serviss', beyond his house.

Q. How far beyond his house? A. About half way between his house and the next house.

10 Q. Whose is the next house? A. William Serviss'.

Q. Where is there another? A. Between there and John Newmeyer's.

Q. What distance between? A. About half way.

Q. Any other? A. There is a place along this side of McClure's, if a man remained right in the road driving the same way you are, you could not pull out and go by.

Q. How far this side of McClure's? A. It runs nearly from McClure's to Newmeyer's.

Q. Any other? A. Those are the worst places.

20 Q. Is there any other place than those? A. There is a small streak of it there at White's, along by that gutter.

Q. Is that all? A. That is all, I think.

Q. You have travelled over this turnpike ever since its construction? A. Yes, sir.

Q. You are a stockholder? A. Yes.

Q. And have not paid toll by reason of being a stockholder? A. No, sir.

Q. That exempts you? A. I have never paid toll since I owned the stock; before that I paid toll.

30 Q. That was when? A. Six or seven years ago.

Q. Prior to six or seven years ago you had paid toll regularly? A. Yes, I think there was one year that I bought commutation tickets.

Defendant's attorney also called as a witness Seaman T. Christian.

Seaman T. Christian, recalled on behalf of the defendant—

By Mr. Strong—

Q. You live on the line of this turnpike? A. Yes, sir.

Q. How long have you lived there? A. Six years.

Q. And during that time you have known the turnpike? A. Yes, sir.

Q. What has been the condition of portions of that turnpike, compared with other roads in the neighborhood, while you have lived there? A. It is about the worst road you could find, some parts of it. 10

Q. Why? A. Well, on account of its being miry.

Q. Any other reason? A. Some other roads are better soil than that; that is one reason why it would be worse sometimes.

Q. Have you constructed any portion of that road yourself since it has been a turnpike? A. I made a portion of it in front of my building.

Q. How long a portion? A. Somewhere about ninety feet, or from seventy-five to one hundred feet.

Q. Do you mean feet or yards? A. Yards; I mean 20 seventy-five to one hundred yards.

Q. When did you construct that road, what year? A. I don't know what year, exactly.

Q. How did you make it? A. By carting gravel in it; I carted some stone and broke up when Mr. Herbert was working on the road, to show him how he could make it hard; that was only on a piece, but the rest of it I did with clear gravel and loam.

Q. That was Biddle Herbert? A. Yes; he was superintending it. 30

Q. At that time did you and Herbert have conversation about the proper construction of the road? A. Yes.

Q. Can you tell us what was said? A. No, I don't know that I can.

Q. Was there any fault found about the construction of the road by anybody? A. I have always found fault with it, ever since it has been made.

Q. To whom? A. To Mr. Herbert, Mr. Disbrow, Mr. Peterson and others; I do not remember any others, but to them particularly I have grumbled about it. 40

Defendant's attorney also asked witness the following question:

Q. What did they say in response to your complaints?

[Whereupon plaintiff's attorney objected, and insisted that said question was incompetent and illegal.]

[And thereupon defendant's attorney insisted that the same was competent and legal; to show the turnpike company's admissions that its road was improperly built, and offered to prove by witness that the persons
10 referred to then requested witness to keep quiet and the turnpike company would make the turnpike a good road.]

[But his honor the judge held said question and offered evidence illegal, and refused to allow the same to be answered or to go to the jury.] [To which ruling defendant's attorney prayed an exception, and it was sealed accordingly]

E. W. SCUDDER. [L. s.]

Q. After you had constructed your road in the way in
20 which you have spoken, how did that road stand the weather? A. Good.

Q. Does it break up in the spring, like the rest of them? A. No, sir.

Q. At each end of the piece that you had constructed, how is the road in wet weather? A. This spring and spring before it, at the end a horse would go down; the other end went down last spring, and this spring the horses went through when within eight or ten feet of the road that I graveled; I have never seen it go down
30 where I graveled.

Q. How many years ago? A. I put some on last fall—I done it twice—four or five years ago I did it.

Q. Have they ever shut the gates on you for refusing to pay toll? A. Yes, sir.

Q. When was that? A. That was when the turnpike was first made—I think twelve years ago.

Q. What did you do? A. I said: "Are you taking toll this morning?" and he said, "Yes." I said, "I am not paying anything when I can't trot with a light wagon

over this road; I am not going to pay toll;" and I got out and opened the gate, and when I came back I did not stop for the toll-gate at all.

Q. Was there a pole across the road? A. Yes, sir.

Q. What did you do? A. Went right through.

Q. Run the pole down? A. Yes, sir.

Q. After that what did you do? A. They did not do anything nor I either.

Q. Did they charge you toll after that? A. I always paid toll when I thought it was tollable, at that time, 10 before I made any arrangement.

Cross-examination by Mr. Schenck—

Q. Did you pay for passing through the toll-gate up to the period of which you have spoken, when they stopped you? A. I went through more than that once; whenever the turnpike was so I could trot along with a light wagon I have never refused to pay; whenever I could not do that, but had to walk my horses through the mud, I refused to pay.

Q. What season of the year was it when you had to 20 walk your horses through the mud? A. Sometimes in the winter.

Q. After a storm? A. Yes; it is always good when it is dry and frozen hard.

Q. I asked you if it was after a heavy storm? A. I don't remember anything about storms; I am talking about the condition of the turnpike; I didn't say anything about storms; I said when they were wet.

Q. What caused the wet—was it a storm? A. I should think so—rain would make it wet. 30

Q. Then it was after a rain storm? A. I suppose it was.

Q. Was it in the spring of the year when the frost was coming out of the ground? A. Sometimes it was in January—frost comes out in January, sometimes.

Q. Then it was when frost was coming out of the ground? A. When the frost was coming out, or when it was wet.

By Mr. Strong—

Q. At those times when you drove through this gate without paying, was there anything said about complaining to the managers of the road? A. They were going to report me to Mr. Herbert; that is what I wanted them to do.

Q. They told you so? A. Yes, and that is what I wanted.

Q. What did you say to them about it? A. I didn't say anything more than I have said here—they said they would report me, and I said go ahead and do it.

Defendant's attorney also called as a witness Charles Bissett.

Charles Bissett, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Strong—

Q. You live on the line of this turnpike? A. Yes, sir.

Q. How long have you lived there? A. More or less all my life.

Q. Before it was a pike? A. Yes, sir.

Q. You remember the fact of the construction of the road? A. Yes, sir.

Q. Have you ever driven along the road and attempted to pass a person driving in front of you, after it was a turnpike? A. Yes, sir.

Q. How long ago was that about? A. There have been several times.

Q. What did you do? A. I have turned out and undertook to go by, and I would come back again until I could get their attention, and get them to let me go by.

Q. You had to pull back? A. I did, rather than to run the risk of turning over.

Q. Is it possible at the present time, at all places of that road between New Brunswick and Tanner's, to pass a man going in the same direction if he keeps in the

road, with perfect safety? A. I think not; in some some places it is better than it used to be, though.

Cross-examination by Mr. Schenck—

Q. Traveled it at all times of the year? A. Yes, sir; more or less; this spring I would not send my teams until the roads were good.

Q. That was in the spring when the frost was coming out? A. Yes, sir; or in the winter when the road was bad.

Q. That was the time when all the roads were notoriously bad, and farmers, as a rule, do not cart? A. No, sir; I do not whenever the frost is coming out.

Q. Do you not know that to be the rule among farmers? A. Yes, sir; but I didn't know that it was a rule on turn-pikes.

Q. Did you ever have any trouble, except in the spring when the frost was coming out of the ground? A. No more than turning out for vehicles; I have been in the mud pretty bad.

Q. That was during wet times? A. Yes; in the spring. 20

Q. At all other times you never had any difficulty in traveling? A. No, sir; not when the roads were good.

Defendant rests.

And thereupon plaintiff's attorney called in rebuttal the following witnesses—

Daniel McLaury, called on behalf of the plaintiff, being duly sworn testified as follows—

By Mr. Schenck—

Q. You formerly lived and owned property along the line of this turnpike? A. Owned property on the turn-30 pike and lived within the corporation of New Brunswick.

Q. Is that the place that has been designated here as the McLaury place along the line of the road? A. Yes.

Q. Did you own that place at the time of the construction of this turnpike? A. Yes, sir.

Q. Did you take any part in the construction, in furnishing the gravel, or otherwise? A. Not in furnishing the gravel; but my men helped do a good deal of work at times; I did not work on it myself.

Q. But you sent your men? A. Yes, sir; and a team.

Q. Do you remember what season of the year it was, and what year?

[Objected to as not rebuttal.]

[Objection overruled.] [Exception.]

10 A. Most of the work was done in the fall.

Q. What year? A. I can't give you the year positively; I think about 1869 or 1870.

Plaintiff's attorney called as a witness in rebuttal—

Andrew J. Disbrow, recalled on behalf of the plaintiff.

By Mr. Schenck—

Q. Has your attention been called during the progress of the trial, to the spots which have been called bad spots in this road, and which has been characterized as having been so since its construction? A. Yes, sir.

20 Q. Are you familiar with the ground at those points? A. Yes, sir.

Q. Tell what efforts were made, if any, in the beginning in the construction of that road, to remedy the difficulty arising from the nature and character of the soil at those spots?

[Whereupon defendant's attorney objected to said question as not proper rebuttal, and insisted that said question was for that and other reasons incompetent and illegal.]

30 [And thereupon plaintiff's attorney insisted that it was competent and legal.]

[But his honor the judge held said question competent and legal as rebuttal, and that witness should answer it.]

[To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

Whereupon witness answered said question as follows—

A. Being aware of the nature of the soil, of course you might say, we put more gravel there than anywhere else on those spots in places.

[Mr. Schenck, plaintiff's attorney, then made the following offer: Mr. Serviss and Blue testified to certain points—giving the distance by chains and links—that there were certain spots in that road where it was less than sixteen feet wide inside of gutters. Now, I offer to 10 show that they are in error, willful or otherwise, and that at those points the road is over sixteen feet wide.]

[Whereupon defendant's attorney objected to the admission of any such evidence as not proper rebuttal, and insisted that the same was, for that reason, incompetent and illegal.]

[And thereupon plaintiff's attorney insisted that such evidence was competent and legal.]

[But his honor the judge held such evidence competent and legal as rebuttal, and admitted the same to the 20 jury.]

[To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

Whereupon said evidence was admitted as follows—

Q. Was your attention called to the eight places indicated by David Serviss and Mr. Blue, where this turnpike road between New Brunswick and Tanner's corner was less than sixteen feet in width, the traveled part, first at Henry Serviss', at eighty-five chains from the be- 30 ginning? A. Yes, sir.

Q. I want you to state whether you measured at that point and with what you measured, with what accuracy you measured, who was with you at the time, and when you made the measurements? A. I made the measurement on Monday morning last, with George W. De Voe, Mr. Daniel Smith and Mr. William Lewis.

Q. State what you measured with and the result? A.

We measured with my steel brazed chain links; I will say here there may be a few links difference in the starting point, but—

[Objected to.]

The Court—You are limited to the single points that they referred to.

Q. Where did you measure from? A. The measurement is from the extreme points of the hard surface.

Q. What was the width? A. Sixteen feet; we drove 10 a stake at each end of it to prevent any mistake; I think some of them have been removed since then.

Q. You drove stakes there? A. We did, sixteen feet apart, and left them there.

Q. At that point? A. Yes, sir.

Q. From what points on each side? A. From the face of the hard surface, what we understand in the language of the charter, the face of the road, where there was a hard surface of gravel or stone or something else.

Q. Had that whole space been graveled? A. I am 20 not sure about that; we measured from the face of the edge of the road.

Q. Exactly sixteen feet? A. That is where we drove the stake; we found soft spots beyond that.

[Objected to, as the witness has stated that he could not tell within a few links of that point.]

Q. This measurement was made last Monday? A. Yes, sir.

Q. Were those stakes at that point, when you took the jury there yesterday? A. Most of them were.

30 Q. At this particular point? A. Yes, sir, they were there.

Q. How accurately did you make your measurements? A. As carefully as we could measure.

Q. Do you say it was accurate? A. I do.

Q. Now go to the next point; along the line of the same lands, one hundred and eighty-seven chains from the beginning? A. Yes, sir, we measured across the road there, sixteen feet, and drove a stake at each end of the sixteen feet.

Q. Were those stakes there yesterday? A. I think so.

Q. From what point to what point? A. From the edge of the face of the road, to the other edge of the face of the road.

Q. What you call the face of the road, you mean the gravel? A. Yes, sir, gravel or hard substance.

Q. You say you drove stakes sixteen feet apart at those two points; were those the extreme limits of the hard traveled road? A. I think not; in several instances it is not; but I want it to be distinctly understood that 10 these stakes were all driven not less than sixteen feet apart.

Q. At these two points, was the road in fact wider than sixteen feet? A. It may be wider; I drove the stakes at sixteen feet, in some places an inch or two over, never less, and I did not designate which of those stakes were more than sixteen feet, but I drove them all on the face of the road where it is hard, and sixteen feet apart.

Q. The third point is along William Serviss' land, two hundred and two chains and twenty links from the be- 20 ginning; did you measure at that point? A. Yes, sir.

Q. Give the result? A. Precisely as in the other cases, sixteen feet of hard road.

Q. The fourth point north of McClure's house, two hundred and twenty nine chains from the beginning; what was the width there? A. Sixteen feet.

Q. Do you mean that the traveled road was sixteen feet, or that you drove stakes at sixteen feet? A. I drove stakes at sixteen feet; I have told you two or three times some of those places are wider than sixteen 30 feet where the traveled road is.

Q. But you drove them to indicate that they were at least sixteen feet of traveled road? A. Yes.

Q. The fifth point is at Shedden's, two hundred and forty-eight chains from the beginning? A. There we done the same.

Q. The sixth point, Mrs. Tanner's, two hundred and fifty-four chains? A. We found sixteen feet of space and put the stakes there.

Q. The seventh point, still Mrs. Tanner's, two hundred and sixty chains, what was the result? A. Sixteen feet.

Q. The eighth point, still Mrs. Tanner's, two hundred and sixty-three chains and forty links; what did you find there? A. Sixteen feet; their measurement calls for eleven and one-half; those are the measurements we made, and how they were made.

Q. It was said that the gravel that had been put there originally was eleven and one-half feet, but the gravel
10 was seventeen and one-half feet? A. Perhaps it is seventeen feet where it was traveled, but we only put the stakes at sixteen feet.

Q. I call your attention to the testimony of Mr. Blue, who says that road was originally only eleven and one-half feet at that point, and the gravel had been spread to seventeen and one-half; what is your knowledge on that subject? A. My knowledge of that is there is a slight hollow there, but there is all of sixteen feet
20 in width there, where the gravel was originally put; we were careful to dig it up to see where the grass was growing when we first measured it.

Q. The fresh gravel that has been put there, what is the location of that as to the gravel which was originally put there in the construction of the road, whether it is in the same place? A. I think there is some extended out further at the end of this sixteen feet where the grass is; there is plenty of gravel outside of the sixteen feet.

Cross-examination by Mr. Strong—

30 Q. What is that paper you have in your hand? A. It is an alleged copy of the testimony.

Q. You made your measurements according to the information given to you in this paper? Yes, sir.

Q. That is in Senator Schenck's handwriting? A. It looks like it.

Q. He gave it to you? A. I think not.

Q. You have no doubt of it, have you? A. The writing looks like Mr. Schenck's; the pencil is not in his writing.

Q. In whose handwriting is the pencil figures and words? A. I am not sure about.

Q. Whose do you think?

[Objected to.]

A. I have no knowledge, any more than what I get from that paper.

By the Court—

Q. What do you mean by having no knowledge? A. I mean I did not hear the testimony; I was not here, and it was handed to me. 10

By Mr. Strong—

Q. There is a memorandum here, and I would like to know in whose handwriting it is—never mind I will let it stand as it is—where did you take your first measurement by Henry Serviss? A. We took the measurement from Mrs. Tanner's first.

Q. How did you get your place to make your measurement at Mrs. Tanner's? A. From the distance indicated there.

Q. The distance calls for two hundred and sixty-three 20 chains and forty links from the beginning—did you measure two hundred and sixty-three chains and forty links from the beginning? A. I did.

Q. Before you took this measure? A. No, I did not measure it that day; I had the distance as measured by me down to the corner of her house, and I took one from the other.

Q. Then you did not measure two hundred and sixty-three chains and forty links from the beginning, to see where to measure? A. No, sir. 30

Q. Did you do that in any of these measurements? A. I measured it all in the same way.

Q. The eighth measurement, that is the one by Mrs. Tanner's, calls for a measurement across the road at two hundred and sixty-three chains and forty links from the mile-post at Weston's mill—did you take any such measurement to measure across the road? A. I don't know where the mile-post is, particularly; we started from

Weston's mill and measured down to Mrs. Tanner's house.

Q. When? A. Some years ago.

Q. Did you do it since this suit? A. No.

Q. Did you measure from the beginning two hundred and sixty chains since this trial? A. I did not measure any of them; let me tell you—in the year 1800 the first road was laid from New Brunswick down to Weston's mill and so on, and in 1813 they moved the road-stone
10 down to Weston's mill, and from there commenced to run it to Old Bridge, and by both these measurements of 1800 and 1813, agree with my own; that I made myself.

Q. You made your measurements, based on the measurements of 1800 and 1813? A. And my own.

Q. When did you make your own? A. I don't remember the year.

Q. Have you measured the length of the road in five years? A. No, sir.

20 Q. Have you measured the length of that road in ten years? A. About that.

Q. Have you measured inside of ten years? A. Don't ask me any more.

Q. I am going to ask you? A. Well, I can't tell you; I think it is about ten years ago.

Q. And you are giving your measurements across the road, on this point, on the basis of a ten years' old arrangement? A. Partly.

Q. What else? A. The survey of the road in 1800
30 and 1813.

Q. Then you are making your measurement across the road on a survey made in 1800 and 1813, and a measurement made ten years ago? A. Yes, sir.

Q. And you consider that accurate? A. Yes, sir.

[At this point defendant's counsel moved to strike out the testimony of this witness, on the ground that his measurements were to be at precisely the points where the witnesses for the defendant measured, and he has stated that he did not do that; that his measurements
40 are based on calculations made from measurements in

1800, 1813, and ten years ago, and witness could not say but what he was a few links out of the way on his starting point.]

[Whereupon plaintiff's attorney resisted said motion, and insisted that said evidence was competent and legal.]

[But his honor the judge held said evidence competent and legal, and refused to strike the same out, and allowed the same to go before the jury.]

[To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.] 10

E. W. SCUDDER. [L. s.]

[Plaintiff's attorney also called as a witness in rebuttal *George W. De Voe*, who testified generally to the same matters testified to by Andrew J. Disbrow in rebuttal, and in corroboration thereof.]

[Whereupon defendant's attorney objected thereto on same grounds as stated in his objections to said Disbrow's evidence last given.]

[But his honor the judge ruled thereon as he had on said Disbrow's evidence on the said objections made 20 thereto.]

[To which ruling of his honor defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

Plaintiff rested in rebuttal.

And after the plaintiff had closed its evidence in rebuttal, defendant's attorney recalled as a witness in rebuttal *David Serviss*, whom defendant's attorney questioned as follows—

Q. Have you seen those stakes which Disbrow and De 30 Voe testified about?

[Whereupon plaintiff's attorney objected to said question and the line of examination indicated thereby, and insisted that the same was incompetent and illegal.]

[And thereupon defendant's attorney insisted that the same was legal, and offered to examine said witness as to the location of said stakes, and to show by him that

they were not placed as testified to by Disbrow and De Voe.]

[But his honor the judge held said question and line of examination incompetent and illegal, and refused to allow the same.]

[To which ruling defendant's attorney prayed an exception, and it was sealed accordingly.]

E. W. SCUDDER. [L. s.]

[The evidence, hereinbefore set forth, comprises all 10 evidence in the case relating to the construction of the turnpike by plaintiff; also all evidence relating to the contract or arrangement respecting tolls between the parties, and also all evidence in reference to any waiver of defences or acquiescence by defendant in the construction of said turnpike, or from which the same might be found.]

E. W. SCUDDER.

And thereupon after the evidence in the case had been concluded, and both parties had finally rested the 20 cause, his honor the judge proceeded to charge the jury as follows—

JUDGE'S CHARGE.

Gentlemen of the Jury—The defendant, Rachel Stults, is the owner of a line of stages running between New Brunswick and Little Washington, in this county; and the plaintiffs have sued her to recover toll for driving on their turnpike, between Tanner's Corner and New Brunswick. Prior to October 1st, 1879, the defendant used the road and paid at rates agreed upon, or the 30 regular tolls. Being in arrear the gates were closed, and regular rates were paid for a while, when it appears Mr. Christian negotiated a commutation rate of \$65 per year, payable monthly. Mr. Stults testifies that it was limited to one year. Mr. J. Biddle Herbert, who acted for the company, says that it was not limited in time. Mr. Christian does not speak definitely as to the duration of

the time, but testifies as to the arrangement which he made. Under this arrangement payments were made at the rate of \$5.40 or \$5.42 per month, until the payments amounted to \$52.92. A note was also given for \$102.92. This was the last payment, and the note was paid at the National Bank of New Jersey, at New Brunswick, leaving, as the plaintiff's claim, a balance due them at the time of the suit, of \$157.08. By the estimate which has been made in your hearing upon the arguments, allowing interest, it is now the sum of \$171.74. 10
It is claimed that this is at the rate of \$65 per year, and if this be so, it is more favorable, according to the testimony of the defendant, than the claim of six cents per each trip. If the plaintiffs are entitled to recover anything, there seems to be, therefore, no objection to the amount, as they have stated it in their claim. That is not controverted. Counsel said he would not object to the amount, if plaintiffs were entitled to recover at all.

The plea of the defendant raises the defence that she is not liable to pay any amount, because the plaintiffs 20
have not constructed their road according to their charter, and that this is a condition precedent to the demand of toll from them. This is based upon the terms of the charter, mainly on sections thirteen, fourteen and eleven. Section thirteen enacts, "That as soon as the said company shall have constructed in a workmanlike manner the said road, according to the several directions in the eleventh section, and the true intent and meaning of this act, it shall and may be lawful for the said company to erect gates or turnpikes across the said road, and de- 30
mand and receive toll for traveling each mile and all fractions over half a mile of said road, not exceeding the following rates." You will notice the expression of the section, "as soon as the company shall have constructed in a workmanlike manner the said road according to the several directions of the eleventh section, and the true intent and meaning of this act." In order to construe that section, we must turn to the eleventh section to see what that section requires. In this eleventh section it is enacted that it shall and may be lawful for 40

the said company to construct and make a turnpike road from Old Bridge, in Middlesex county, to New Brunswick. [Reading section.] The fourteenth section reads thus: "And be it enacted, That before the said company shall receive toll for traveling." [Reading section.]

These are said to be the requirements for construction, and the company having constructed the road according to these directions, in a workmanlike manner, shall be entitled to put up their toll-houses and receive their
 10 toll. The charter then, according to these particulars which have been read, authorizes the construction of this turnpike road; the appropriation of the old road from New Brunswick to Old Bridge to their own use and for the public benefit in the construction and maintenance of this road, and having complied within those terms, they are entitled to collect tolls from all who pass over and take the benefit of that road. They are, therefore, given under legislative authority and legislative restrictions.

20 The expression in the eleventh section, which has been controverted very much in the suit, that the turnpike road shall not be less than thirty-two feet, nor more than fifty feet in width, I interpret in this way: This refers to the entire width of the road; there is no other width given in the act. It, therefore, is the entire width of the road. It was to be constructed on what was originally an old three-rod road. By these terms, as I read them, it was not to exceed that in width; that is, fifty feet, or about three rods, nor be less than thirty-two feet, or
 30 about two rods. This, then, will include the road-bed, the ditches, and the usual support for fences on the side, to make this whole structure, which is called in the act a turnpike. There is no requirement that the road for travel shall be at least thirty-two feet in width. The specifications as to the part, sixteen feet, were intended to insure a good, hard road in the middle at all seasons of the year. That, I think, is the reasonable construction, that it was to be done in a good and workmanlike manner, and of the materials specified in the act. An
 40 exact and absolute compliance with those terms cannot

be required by this act, but a substantial compliance. It is said it was to be done in a good and workmanlike manner; that is, it must be done skilfully and in substantial compliance with all the requirements which are named in this section. The setting of the mile stones and of "rate boards" at the toll-houses are made also in the charter conditions precedent to the charge of toll, and these were to be set up at the toll-gates to be established when the road was tollable.

Then the important question to be determined is, first, 10 was there a substantial compliance with the act in the original construction of the road? If this be so, then the right to demand toll will be established, and it can be continued unless, by section eighteen, the gates are thrown open, upon an application to a judge, as not being tollable. That does not come within this case. The effective way by which they can be defeated in the right of claiming toll would be by the interference of the State to forfeit their charter for breaches of its conditions, and this must be done by proper, regular and 20 direct proceedings.

In order to determine whether the company have built their road by these measurements and according to these requirements, it is not necessary for me to go over the testimony of different witnesses that have been given to us. I need not refer to those measurements. It is only necessary for me to call the attention of the jury to what has been sworn to by these different witnesses generally.

Mr. Disbrow, Mr. DeVoe and others, say that in no place is this road less than sixteen feet in width, with a 30 good graveled surface, and not less than thirty-two feet at any point within the outside of the ditches, and they say it also has a good hard face at all ordinary times and seasons of the year, and except at the break-up in the spring and very wet seasons.

On the other hand, Mr. Serviss and Mr. Isaac N. Blue, who have gone over this road and testified that they have measured it carefully, say in certain places its centre is fourteen, sixteen, seventeen and a-half, and at one place, eleven and a-half feet. This last, they say, is 40

the narrowest point. The difference between these witnesses may be accounted for in this way possibly: Mr. Serviss and Mr. Blue, as I recollect their testimony, did not say that they examined more than the surface; they took the surface examination to determine its width; whereas Mr. Disbrow said they used a crowbar, or something of that kind, to determine where the gravel was, and examined it in that way under the surface. Whether that be so or not, it is for you to determine. It is the
10 explanation given by these witnesses, which may go towards reconciling their testimony. That is a matter for the jury and not for the court. It is a mere suggestion that I throw out in passing.

Witnesses also have been offered to testify as to the manner of forming this road—scooping it out from the ditches into the middle, leaving the centre part of the road not broken up, and depositing gravel along the length of it, putting more, as they say, in places that are called holes, or bad spots, than in other places, making
20 but the one line of gravel, throwing but one load in width. It is said that this has spread in time, and that it now complies, or did comply, with the terms of the charter. Whether this be so or not, it is for the jury to say upon the evidence. We have also heard a great deal of testimony as to the condition at the time the road was constructed and since it was constructed. Facts have been allowed to be given in evidence which will tend to show what was its original condition when finished and when toll was first demanded.

30 As I have already said, the plaintiffs in order to entitle them to take toll, are to do all that reasonable skill and the use of the materials specified in the charter will accomplish, to effect the purpose and satisfy the terms of the act. Of course in considering the construction of this road and the testimony of its present condition, and how it has appeared from the time of its construction down to the present time, the jury must attend to what has been said in reference to the action of frost at certain seasons of the year; the nature of the soil upon which
40 the road was constructed and the springs and other

things that would affect its maintenance and continuance in good condition. For all those things an allowance should be made, and a reasonable limit put to the requirements of the act. The testimony of the condition of the road subsequent to the construction in 1871 and 1872, is only relevant in the suit so far as it tends to show how the road was constructed in reference to the demands of the charter. Repairing and maintaining it, after it is completed, are conditions subsequent, not precedent. Conditions subsequent like these, are provided for in section eighteenth; authorizing the gates to be thrown open whenever the road is not tollable. It is easy to be understood, that the road originally may have been made good, and through the ordinary wear or neglect, may have become different, and in this way the road might not be tollable. The legislature has provided for that by saying that the road may be thrown open, and if they abandon it, the State may come in and take away their franchise.

The first question, then, for the jury to determine, as I have endeavored to state, is this: Whether the road was originally constructed according to these precedent requirements of the charter, which were essential before they could take toll. The next question to which I direct your attention is this: If the road was not built and constructed substantially according to the section of the charter referred to, then it is for your consideration whether the conditions have been in any way waived or released by any act on the part of the defendant? Under the authority of *The State v. Godwinsville and Paterson Macadamized Road Co.*, reported in *15 Vroom, 496*, I shall charge you there has not been any legislative grant changing these conditions, or releasing the plaintiffs from their performance; and that this is necessary to release the plaintiffs from their performance as to the public generally. That is, the legislature having prescribed these prerequisites for tolling the road, no one but the legislature can change these requirements as to the public. Whether the defendant may waive them as to herself, is another question. This does not decide the

question as to the liability of the defendant, for if the road was made tollable prior to the time this toll in suit accrued, or if the defendant has done any act to waive or estop her defence, then this action will be maintainable still. It is insisted that this she has done, by one act in particular; that on or about October 1st, 1879, a bargain was made between the plaintiffs and the defendant for the commutation of tolls, at a rate of \$65 per year. It is contended that this was an admission of
10 the defendant, that the plaintiffs had the right to receive tolls for the use of their road, and having used the road under the agreement, she is obliged to pay the tolls which she has thus agreed to pay. It is not said in the argument, or in the testimony, that the plaintiffs deceived or misrepresented the facts to her agent or her husband, who was acting for her. She had, by her agents, used the road for a long time and knew all of its alleged defects. She had made payments from time to time as the testimony shows, and this commutation was
20 agreed upon and settled with full knowledge of all the facts, and by the interposition of Mr. Christian, who acted as a friend of these parties. Now, where the parties make a settlement of disputed matters between them, the policy of the law has always been to sustain such settlement, and oblige the parties to perform them in good faith. During the continuance of this contract, it was conclusive between the parties, for it appears as I have stated, to have been made in good faith and for a good consideration; that is, the settlement of a dispute
30 between the parties as to the right to charge toll and the amount to be paid, in consideration of the constant use of it by the defendant with her stages. It would be an act of injustice to say that the plaintiffs should open their gates and allow the defendants to pass without charging each time for toll for the time agreed upon, and permit her, at her will, to repudiate the contract and refuse payment of the amount agreed upon. The company gave up the right claimed under their charter, to shut the gates and demand a fixed amount of toll at
40 each passage, and consented to receive a smaller sum,

and, having adhered to their bargain and given up their claim, the defendant must perform her part of it. She cannot contest their right to toll when she has received the benefit of the contract upon her part. This, it seems to me, does not stand upon the doctrine of estoppel, to which reference has been made in the argument of counsel, but upon a contract, the arrangement which was made between the parties, and the true interpretation and effect of this contract as between them. Nor does it stand upon the voluntary or involuntary nature of pay-10 ments that were made. The question is not that, but whether, with a full understanding of all the facts, these parties made an arrangement in good faith? It appears by the testimony that the toll was paid by the defendant for a year, and, to that extent, the contract was fulfilled on her part. The plaintiffs insist that it continued after the year, both by the indefinite time of the arrangement and by the continued user of the defendant, after the year, without any notice of termination. If there was a fixed time, one year, as is testified on the part of the de-20 fendants, then the contract was ended between the parties, and they were restored to their original rights. If not, if the contract continued and the defendant went on using the road, the gate being thrown open to her with that understanding, then the presumption of fact would be that the terms of that agreement were still existing and carried on between the parties, and would be continued until some notice was given that the arrangement was concluded. That would be the ordinary pre-30 sumption of fact. It is said this did actually continue in this way, by the gates being thrown open and being used by the defendant without any notice of termination. It was so understood by the turnpike company, and, as they contend, was understood by her, according to her acts, until July 3d, 1884, when notice was given that payments would not be made of toll any more, and the gate was closed.

[Suit was brought on October 4th.]

From that time (July 3, 1884,) on, it appears that the defendant went outside of the toll-gate in passing, and 40

in that way refused to pay any toll, either to carry on this arrangement which had been previously made, or to pay any tolls under the charter. The purpose was to bring them to the question which has been discussed before you, their right to claim toll under any circumstance, outside of the agreement, as they say, for a special term. The defendant, however, continued to use this turnpike, and the jury must decide from the facts what were the terms of the user, and whether the plain-
10 tiffs are entitled to recover. Her responsibility is not changed by the fact that near the toll-gate her stages were turned off the turnpike into Clancy's field, and went around the toll-gate. The law is, if a traveler travels a turnpike until he comes near the gate, and then turns aside and goes around to avoid payment of toll, and enter on it again after he has passed the toll-gate, and travels beyond it, he will be liable to pay the tolls due at the gate which has been thus shunned. The claim, then, of the plaintiffs is, that the defendant must
20 pay under her agreement, at the rate \$65 per year, because the arrangement has been continued by the acts and acquiescence of both parties. She, on the contrary, says the primary objections to the road continue, and she therefore insists she is entitled to her original right to contest the recovery of tolls from her.

You must, therefore, determine whether the facts warrant the plaintiff's recovery on the original contention that the road was properly constructed in the beginning according to the charter, and therefore the right of re-
30 covery exists independent of the contract.

The defendant is not prevented from raising the question, because she and others have for years used the turnpike and paid toll, though there is a strong presumption of fact, from this long acquiescence, by her act, that it was constructed according to the charter; nor is she prevented from setting up this defence in this action, because the State might at any time inter-
40 neve and deprive this company of its charter for non-compliance with conditions precedent or any other violation of its terms. The presumption of fact to which

I have alluded, that the long user of this road, by this defendant and others and their silence during that time comes from this, that from this long period of 1871 or 1872, when they put up the gates and demanded tolls, that they have been kept there and tolls collected, and the defendant and the public generally appear to have acquiesced in their claim. This is not conclusive, not so as to estop the defence which has been set up, but it is a strong fact in the case that the company has claimed that the road has been tollable and the defend-10
dant and others have paid their tolls, admitting their right to collect them. If it were otherwise, and the plaintiffs were usurpers in exacting tolls before they were entitled to them, then they could have been deprived of their franchise by the State, or if the defendant, from their exactions had been injuriously affected by their imposition and by the illegal construction of the road, she could have challenged their rights in the courts, as they have now done, before this time.

The defendant then, as I have said, cannot stand in 20
the position of an ignorant or involuntary or deceived toll-payer, until the time when this action was brought and she must defend upon the legal right to charge tolls which have been paid for years, without interposing any legal defence up to this time.

The general position on the part of the plaintiffs is, that they have done all that their charter requires them to do reasonably, as conditions precedent and they are entitled to have these tolls from the defendant. The defendant says the road is not, and never has been made 30
according to the charter and that she is not bound to pay any toll for passage over it, and that she is in no way concluded or estopped by acquiescence or by any arrangement that has been made between them.

My effort has been to bring your minds as closely as possible to the real controversy between these parties and what must decide the point in dispute.

But before the delivery of said charge the said defend-

ant, by her attorney, requested his honor the judge to charge the jury—

That the road required by plaintiffs' charter to be at least thirty-two feet wide, was the actual road-bed that could be traveled by teams and conveyances with safety.

That it did not mean the distance between fences, and did not include ditches, where ditches could not safely be traveled.

But his honor the judge declined to charge as above requested, but charged the jury upon the point in his said charge as follows:

“The expression in the eleventh section (of the charter) which has been controverted very much in the suit that the turnpike road shall not be less than thirty-two feet nor more than fifty feet in width, I interpret in this way: This refers to the entire width of the road; there is no other width given in the act. It therefore is the entire width of the road. It was to be constructed on what was originally an old three-rod road. By these terms, as I read them, it was not to exceed that in width, that is, fifty feet, or about three rods, nor to be less than thirty-two feet, or about two rods. This, then, will include the road-bed, the ditches, and the usual support for fences on the side to make this whole structure, which is called in the act a turnpike. There is no requirement that the road for travel shall be at least thirty-two feet in width.”

To which refusal to charge as requested, and to said charge as actually given instead, the said defendant's attorney prayed an exception and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

And defendant's attorney then also requested his honor the judge to charge the jury—

That the sixteen feet of road-bed required by plaintiff's charter to be made solid, firm and even, must be made so as to be solid, firm and even all the year round—spring-time included.

And that if the turnpike company could not make

it so with gravel they should have made it so with something else.

But his honor the judge declined so to charge, and instead charged the jury as follows:

"The specifications as to the part sixteen feet were intended to insure a good hard road in the middle at all seasons of the year. What I think is the reasonable construction is that it was to be done in a good and workmanlike manner and of the materials specified in the act. An exact and absolute compliance with those terms cannot be required by this act, but a substantial compliance. It is said it was to be done in a good and workmanlike manner; that is, it must be done skillfully and in substantial compliance with all the requirements which are named in this section, (section eleven of charter.) 10

"As I have already said, the plaintiffs, in order to entitle them to take toll, are to do all that reasonable skill and the use of the materials specified in the charter will accomplish to effect the purpose and satisfy the terms of the act. 20

"Of course in considering the construction of this road, and the testimony of its present condition, and how it has appeared from the time of its construction down to the present time, the jury must attend to what has been said in reference to the action of frost at certain seasons of the year; the nature of the soil upon which the road was constructed, and the springs and other things that would affect its maintenance and continuance in good condition. 30

"For all those things an allowance should be made, and a reasonable limit put to the requirements of the act."

To which refusal to charge as requested, and to so much of said charge given instead, was held that an allowance should be made in its construction for the action of frost on the road, the nature of the soil, springs and other things that would affect it—defendant's attorney prayed an exception, and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

And defendant's attorney then also requested his honor the judge to charge the jury—

That upon the evidence the defendant had not waived any of the defences by her set up in this suit.

And further, as a separate request—

That if the jury should believe from the evidence that defendant made such arrangement as the plaintiff claimed respecting tolls—she did not thereby waive or lose her right to set up the defences which she raised in this suit.

10 And further, as a separate request—

That plaintiff could not recover in the suit until it should have proved to the jury's satisfaction that it had constructed so much of its turnpike as extends from Weston's mills to Mrs. Tanner's, according to its charter, as set forth in the act of 1869.

But his honor the judge declined to charge as requested in either of said requests, but instead charged the jury upon the matters embraced therein, as follows:

“The first question then for the jury to determine, as I
20 have endeavored to state, is this—whether the road was originally constructed according to these precedent requirements of the charter, which were essential before they could take toll. The next question to which I direct your attention is this: if the road was not built and constructed substantially according to the section of the charter referred to, then it is for your consideration whether the conditions have been in any way waived or released by any act on the part of the defendant. Under the authority of the State and the Godwinsville
30 and Patterson Macadamized Road Company, reported in 15th Vroom, 496, I shall charge you there has not been any legislative grant changing these conditions or releasing the plaintiffs from their performance; and that this is necessary to release the plaintiff from their performance as to the public generally. That is, the legislature having prescribed these pre-requisites for tolling the road, no one but the legislature can change these requirements as to the public. Whether the defendant may waive them as to herself, is another question.
40 This does not decide the question as to the liability of

the defendant, for if the road was made tollable prior to the time this toll in suit accrued, or if the defendant has done any act to waive, or estop her defence, then this action will be maintainable still.

"It is insisted that this she has done by one act in particular.

"That on or about October 1st, 1879, a bargain was made between the plaintiff and the defendant for the commutation of toll, at the rate of \$65 per year. It is contended that this was an admission of the defendant,¹⁰ that the plaintiffs had the right to receive tolls for the use of their road, and having used the road under the agreement, she is obliged to pay the tolls which she has thus agreed to pay. It is not said in the agreement or in the testimony, that the plaintiffs deceived or misrepresented the facts to her agent or her husband, who was acting for her. She had, by her agents, used the road for a long time, and knew all of its alleged defects. She had made payments from time to time as the testimony shows, and this commutation was agreed upon²⁰ and settled with full knowledge of all the facts and by the interposition of Mr. Christian, who acted as a friend of these parties. Now, where the parties make a settlement of disputed matters between them, the policy of the law has always been to sustain such settlement and oblige the parties to perform them in good faith. During the continuance of this contract, it was conclusive between the parties, for it appears, as I have stated, to have been made in good faith and for a good consideration; that is the settlement of a dispute between the³⁰ parties as to the right to charge toll and the amount to be paid in consideration of the constant use of it by the defendant with her stages. It would be an act of injustice to say that the plaintiffs should open their gates and allow the defendants to pass without charging each time for toll for the time agreed upon, and permit her at her will to repudiate the contract and refuse payment of the amount agreed upon. The company gave up the right claimed under their charter, to shut the gates and demand a fixed amount of toll at each pass-⁴⁰

to yield all right of easement and to be bound for ever

age and consented to receive a smaller sum, and having adhered to their bargain and giving up their claim, the defendant must perform her part of it. She cannot contest their right to toll when she has received the benefit of the contract upon her part. This, it seems to me, does not stand upon the doctrine of estoppel to which reference has been made in the argument of counsel, but upon a contract, the arrangement which was made between the parties and the true interpretation and effect of this contract as between them. Nor does it stand upon the voluntary or involuntary nature of payments that were made. The question is not that, but whether, with a full understanding of all the facts, these parties made an arrangement in good faith.

“It appears by the testimony that the toll was paid by the defendant for a year, and, to that extent, the contract was fulfilled on her part. The plaintiffs insist that it continued after the year, both by the indefinite time of the arrangement and by the continued user of the defendant after the year without any notice of termination. If there was a fixed time, one year, as is testified on the part of the defendants, then the contract was ended between the parties, and they were restored to their original rights. If not, if the contract continued, and the defendant went on using the road, the gate being thrown open to her with that understanding, then the presumption of fact would be that the terms of that agreement were still existing and carried on between the parties, and would be continued until some notice was given that the arrangement was concluded. That would be the ordinary presumption of fact. It is said this did actually continue in this way by the gates being thrown open and being used by the defendant without any notice of the It was so understood by the turnpike company, and, as they contend, was understood by her, according to her acts, until July 3d, 1884, when notice was given that payments would not be made of toll any more, and the gate was closed.

“(Suit was brought on October 4th.)

40 “From that time (July 3, 1884,) it appears that the de-

defendant went outside of the toll-gate in passing, and in that way refused to pay any toll, either to carry on this arrangement which had been made previously, or to pay any tolls under the charter.

"The purpose was to bring them to the question which has been discussed before you—their right to claim toll under any circumstance outside of the agreement, as they say, for a special term. The defendant, however, continued to use this turnpike, and the jury must decide from the facts what were the terms of user, and whether 10 the plaintiffs are entitled to recover."

To which refusals of his honor the judge to charge as requested, and to so much of said charge given instead as was contrary to said requests, and as related to the force and effect of any agreement for tolls, defendant's attorney prayed an exception, and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

And defendant's attorney then also requested his honor the judge to charge the jury— 20

That the burden of proof was on the plaintiff, and it must prove to the jury's satisfaction that it had constructed its turnpike from Weston's mills to Mrs. Tanner's before the suit was brought, thirty-two feet wide at least in its road-bed, sixteen feet of such road-bed faced or bedded with stone, gravel or other hard substance, so as to make a solid, firm and even road; and that whenever railings were required at the side of the road-bed by its charter, it had so constructed them there— otherwise plaintiff could not recover, and the jury 30 should find for defendant.

But his honor the judge declined so to charge, and instead charged the jury as set forth in the preceding exceptions to his charge.

To which refusal to charge as requested, and to the charge as given instead, defendant's attorney prayed an exception, and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

And his honor the judge in his said charge to the jury, also charged them as follows:

"You must therefore determine whether the facts warrant the plaintiff's recovery on the original contention that the road was properly constructed in the beginning according to the charter, and therefore the right of recovery exists independent of the contract.

"The defendant is not prevented from raising the question because she and others have for years used the
10 turnpike road and paid toll, though there is a strong presumption of fact from this long acquiescence by her act that it was constructed according to the charter.

"The presumption of fact to which I have alluded, that the long user of this road by this defendant and others, and their silence during that time, comes from this, that from this long period of 1871 or 1872, when they put up the gates and demanded tolls, that they have been kept there and tolls collected, and the defendant and the public generally appear to have acquiesced in their
20 claim.

"This is not conclusive, not so as to estop the defence which has been set up, but it is a strong fact in the case that the company has claimed that the road has been tollable, and the defendant and others have paid their tolls, admitting their right to collect them.

"If it were otherwise, and the plaintiffs were usurpers in exacting tolls before they were entitled to them, then they could have been deprived of their franchise by the State, or if the defendant from their exactions had been
30 injuriously affected by their imposition and by the illegal construction of the road, she could have challenged their rights in the courts as they have now done, before this time."

Whereupon defendant's attorney prayed an exception to so much of said charge given as related to any presumption of fact from the use of road and payment of tolls or from acquiescence by the defendant or others or the public, and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

And his honor the judge further charged the jury as follows—

“The defendant, then, as I have said, cannot stand in the position of an ignorant or involuntary or deceived toll-payer until the time when this action was brought, and she must depend upon the legal right to charge tolls which have been paid for years without interposing any legal defence up to this time.”

Whereupon defendant’s attorney prayed an exception to so much of said charge as held that defendant could not stand as an involuntary toll-payer, and it was sealed accordingly.

E. W. SCUDDER. [L. s.]

Assignment of Errors.

[Filed August 25, 1885.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Rachel Stults, v. The East Brunswick and New Brunswick Turnpike Company.	}	In Error. Assignment of Errors.	20
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And now, at this day, in this court, comes the said Rachel Stults, defendant below and now plaintiff in error, by Woodbridge Strong & Sons, her attorneys, and say that in the record and proceeding aforesaid, and also in the matters contained in said bill of exceptions, and in giving the verdict and judgment aforesaid—there is manifest error in this, to wit:

1. That the court, at the trial of the cause before the jury, (against defendant’s objection and exception taken), allowed J. Biddle Herbert, a witness for plaintiff, to testify generally as to the date of completion of plaintiff’s

alleged turnpike, when there was no evidence in the cause to show that it had been properly completed.

2. That said court, at said trial, (against defendant's objection and exception taken), allowed J. Biddle Herbert, a witness for plaintiff, to testify as to a contract for tolls over said road at a reduced rate between plaintiff and defendant, when there was no evidence in the cause to show a proper performance of the conditions precedent upon which the plaintiff's right to take or demand
10 tolls depended.

3. That said court, at said trial, (against defendant's objection and exception taken), allowed R. D. Conover, a witness for plaintiff, to testify generally that plaintiff's alleged turnpike had been constructed in a workman-like manner, when he had no sufficient knowledge as to its construction.

4. That said court, at said trial, (against said defendant's objection and exception taken to such refusal), refused to allow Alfred Stults, a witness for defendant, and
20 her agent, to testify as to his statement made to Seaman T. Christian, that defendant refused any longer to pay tolls to plaintiff for the use of said road under any contract for a reduced rate of tolls; which statement was competent as a notification to plaintiff through Christian its agent, and as a statement of what witness did with the intent to so notify plaintiff.

5. That said court, at said trial, (against defendant's objection and exception taken to such refusal), refused to allow said witness Stults to testify as to a conversa-
30 tion had by him with J. Biddle Herbert prior to the contract for reduced tolls; which conversation between said witness, representing defendant, and said Herbert, representing plaintiff, was competent, as showing the understanding upon which the agreement aforesaid for reduced tolls over plaintiff's road was afterward made.

6. That said court, at said trial, (against defendants objection and exception taken to such refusal), refused to allow John Newmeyer, a witness for defendant, to testify as to special instances where he had helped persons
40 out of the mire in plaintiff's said road in the spring of

A. D. 1885; which evidence was competent as a part of the defendant's evidence to show an original improper construction of said turnpike which had never been remedied down to date.

7. That said court, at said trial, (against defendant's objection and exception taken), on the cross-examination of said witness Newmeyer by plaintiff's attorney, allowed said witness to testify that he paid tolls at plaintiff's toll-gate for passing over its alleged turnpike; which testimony was not proper cross examination, and which 10 payments could not bind defendant or affect her in law, although evidence as to them tended to prejudice her case before the jury.

8. That said court, at said trial, (against defendant's objection and exception taken to such refusal), refused to allow Saxton Newmeyer, a witness for defendant, to testify as to special instances where he had helped persons out of the mire in plaintiff's alleged turnpike in A. D. 1885, and in previous years since its alleged completion; which evidence was competent as a part of the defendant's 20 evidence to show an original improper construction of said road, and that said road had never been properly constructed.

9. That said court, at said trial, (against defendant's objection and exception taken to such refusal), refused to allow Seaman T. Christian, a witness for defendant, to testify as to complaints made by him to J. Biddle Herbert, Andrew J. Disbrow and George W. Peterson, respecting the construction of said alleged turnpike road, and as to their requests in response thereto that he 30 would keep quiet, and plaintiff would construct a good turnpike; which testimony was competent to show admissions by plaintiff as to improper construction of said turnpike, inasmuch as said persons were officers and agents of said plaintiff with authority to act for it.

10. That said court, at said trial, (against defendant's objection and exception taken), allowed Andrew J. Disbrow, a witness for plaintiff recalled in rebuttal, to testify as to efforts made to properly construct said turnpike, and to remedy bad places in its construction; which 40

testimony was wholly incompetent as testimony in rebuttal.

11. That said court, at said trial, (against defendant's objections and exceptions taken), allowed the said witness Disbrow and another witness, George W. DeVoe, both recalled for plaintiff in said rebuttal, to testify in contradiction of certain measurements of the width of said alleged turnpike, testified to by certain of defendant's witnesses in original contradiction of evidence as to
10 measurements given by said Disbrow and DeVoe on behalf of plaintiff, before it rested its case; which testimony was wholly incompetent as testimony in rebuttal and amounted to a mere reiteration of the original testimony of said witnesses thereupon.

12. That said court, at said trial, (against defendant's objections and exceptions taken to such refusal), after said Disbrow and DeVoe had failed to show in their testimony given in so-called rebuttal, that their said re-measurements were made at the same places where
20 defendant's witnesses measured—refused to grant defendant's motion on that account, to strike out their said rebuttal evidence as to measurements; but allowed the same to remain before the jury for their consideration.

13. That said court, at said trial, (against defendant's objection and exception taken to such refusal), after said Disbrow and DeVoe, recalled as witnesses in rebuttal for plaintiff, had then, for the first time, testified to driving certain stakes in said turnpike, at certain distances, to indicate their re-measurements of its width, refused to
30 allow David Serviss, a witness offered by defendant for that purpose, to testify in re-rebuttal that said stakes were not placed as testified to, or to contradict the evidence in relation thereto given by Disbrow and DeVoe.

14. That said court, at said trial, refused to charge the jury that the plaintiff's charter required its turnpike to be thirty-two feet wide in its travelable road-bed or portion.

15. That said court, at said trial, charged the jury that the entire structure, including road-bed, ditches and
40 ditch banks up to fences, need only be thirty-two feet

wide in all under said charter; and that there was no requirement that the road for travel should be thirty-two feet in width.

16. That said court, at said trial, refused to charge the jury, without qualification, that the sixteen feet wide of road-bed required by plaintiff's charter to be made solid, firm and even, must be made so at all times and seasons; but qualified his said charge on that point by instructing the jury that, in considering the construction of said turnpike, they should attend to the evidence as to the action of frost on the road at certain seasons, the nature of the soil where the road was constructed, and the springs and other things that would affect it—and that for all these things an allowance should be made. 10

17. That said court, at said trial, refused to charge the jury that, upon the evidence in the case, the defendant had not waived any of the defences by her set up in the suit.

18. That said court, at said trial, refused to charge the jury that if they believed from the evidence that defendant made such arrangement respecting tolls as plaintiff claimed, she did not thereby waive or lose her right to set up the defences which she had raised in the suit. 20

19. That said court, at said trial, refused to charge the jury that the plaintiff could not recover in the suit until it should have proved to their satisfaction that it had constructed so much of its turnpike as extends from Weston's mill to Mrs. Tanner's, according to its charter, as set forth in the act of 1869.

20. That said court, at said trial, charged the jury that, even if the turnpike had not been built according to its charter, defendant could by her acts estop herself from questioning in this suit the construction of its turnpike by plaintiff, or waive her right to question it. 30

21. That said court, at said trial, charged the jury that during the continuance of the contract testified to between defendant and plaintiff, for the payment of reduced tolls by defendant over plaintiff's turnpike in commuting with her stages, such contract was conclusive between them as a settlement of a dispute between the 40

parties as to the right to charge tolls, and the amount to be paid in consideration of the contract use of said turnpike by the defendant with her stages; and that during the continuance of such contract defendant could not question the construction of said turnpike, even if it were not constructed according to plaintiff's charter.

22. That said court, at said trial, charged the jury that said contract for commutation of tolls was a settlement of a dispute between the parties as to plaintiff's right to
10 charge tolls over said turnpike; when there was no evidence to that effect, and no claim of such settlement, or that defendant had waived her right object to or question the construction of said turnpike, was presented by the pleadings in the cause.

23. That said court, at said trial, charged the jury that said contract for commutation of tolls was in settlement of a dispute between the parties as to plaintiff's right to charge tolls over said turnpike, and that during its continuance, defendant was precluded from questioning the
20 construction of said turnpike; when said commutation contract, if so made, and to quiet defendant's objections, was illegal and void.

24. That said court, at said trial, refused to charge the jury that plaintiff must prove that it had constructed its turnpike from Weston's mill to Mrs. Tanner's, (Hardenburgh's corner,) before suit brought; thirty-two feet wide in its road-bed, sixteen feet of such road-bed in width faced or bedded with stone, gravel or hard substance, so as to make a solid, firm and even road; and that when-
30 ever railings were required at the sides of the road-bed by its charter, it had so constructed them there—otherwise plaintiff could not recover, and the jury should find for defendant,

25. That said court, at said trial, charged the jury that from the fact that defendant and others had for years used the turnpike and paid toll, there was a strong presumption of fact that the turnpike was constructed accordidg to plaintiff's charter; and that this presumption of fact arose from an acquiescence by defendant and

the public generally in plaintiff's claim of a right to take tolls.

26. That said court, at said trial, charged the jury that defendant in this suit, could not stand as an involuntary toll-payer on said turnpike.

27. That the verdict of the jury and judgment thereon, are against law.

27. That said verdict and judgment, are against the evidence in the case.

29. That said verdict and judgment, should have been 10 for defendant below, instead of for plaintiff.

Therefore the said Rachel Stults, plaintiff in error, prays that the judgment aforesaid, by reason of the aforesaid errors and of the errors appearing in the record and proceedings aforesaid, be reversed, annulled and for nothing holden, and that she may be restored to all things which she has lost by said judgment; and that the defendant in error, may rejoin to the said errors, &c.

WOODBIDGE STRONG & SONS,

Attorneys for and of Counsel with Plaintiff in Error. 20

Joinder in Error.

[Filed September 9, 1885.]

And hereupon the said The East Brunswick and New Brunswick Turnpike Company, by Abraham V. Schenck, their attorney, come into court here and say, that there is no error either in the record and proceedings aforesaid, or in the giving the judgment aforesaid; and they pray that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error; and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

ABM. V. SCHENCK,

Attorney for and of Counsel with Defendants in Error.

