

# New Jersey Court of Errors. 1

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ELIAS C. TALMAGE and ZOPHER O.  
TALMAGE,

Plaintiffs in Error,

*vs.*

JANE DAVENPORT,  
Defendant in Error.

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In Error to the Morris Circuit Court.—Re-  
turnable March Term, 1864.

This was an action on the case tried at the Morris Circuit Court, at the Term of January, A. D. 1864, before Justice Vredenburgh. A verdict was rendered for the plaintiff for \$ 2

The declaration contained originally two counts, claiming a private right of way in the plaintiff across the lands of the defendants.

The first count was as follows :

“ Whereas, the said plaintiff, before and at the time of  
“ the committing of the grievances by the said defendants,  
“ as hereinafter next mentioned, was, and from thence  
“ hitherto hath been and still is lawfully possessed of three  
“ certain tracts of land, with the appurtenances, situate and  
“ being in the township of Jefferson, in the said county of

- 3 " Morris, being lots or tracts numbered or designated as  
 " lots numbers two, three, and six, in the partition of the  
 " lands and real estate of Abraham L. Davenport, de-  
 " ceased, among his heirs at law, which three lots or tracts  
 " in said partition were allotted or set off in severalty—lot  
 " number two to Richard R. Davenport and the said plain-  
 " tiff, lot number three to Abraham Davenport and Cathe-  
 " rine his wife, and lot number six to Isaac Davenport and  
 " Letitia his wife. And by reason thereof, the said plain-  
 " tiff during all the time aforesaid ought to have had,  
 " ands till of right ought to have a certain way from  
 4 " a certain public way passing in front of and near to  
 " the dwelling house of the said plaintiff, also situate  
 " in the said township of Jefferson, in which during all  
 " that time the said plaintiff then resided and now resides,  
 " unto, into, through, and over a certain close in the town-  
 " ship aforesaid, designated as lot number seven (7) in the  
 " said partition, and from and out of the said last mentioned  
 " close unto, into, through, and over the said close of the  
 " said plaintiff in the township aforesaid, designated in said  
 " partition as lot number six (6), and from and out of the  
 " said last mentioned close unto, into, through, and over a  
 5 " certain other close in the township aforesaid, designated  
 " in said partition as lot number five (5), and from and out  
 " of the said last mentioned close unto, into, through, and  
 " over a certain other close in the township aforesaid, des-  
 " igned in said partition as lot number four (4), and from  
 " and out of the said last mentioned close unto, into,  
 " through, and over the said close of the said plaintiff, in  
 " the township aforesaid, designated in said partition as lot  
 " number three (3), unto and into the said close in the pos-  
 " session of the said plaintiff, situate in the township afore-  
 6 " said, designated in said partition as lot number two (2),  
 " and so back again from the said last mentioned close  
 " unto, and into, through, over, and along the said closes,  
 " respectively, designated as lots numbers three, four, five,  
 " six, and seven, and from and out of the said close desig-  
 " nated as lot number seven (7), into the said public high-  
 " way, passing in front of the said plaintiff's said dwelling  
 " house, for herself and her servants, as well on foot as on  
 " horseback, and with her horses, cattle, carts, wagons, and

" other carriages, to go, return, pass, and repass, every 7  
 " year, and at all times of the year, at her and their free  
 " will and pleasure as to the said lots or closes respectively  
 " designated as lots numbers two, three, and six, in the  
 " said partition, with the appurtenances, of the said plaintiff  
 " belonging and appertaining. Yet the said defendants,  
 " well knowing the premises, but wrongfully and unjustly,  
 " continuing, and intending to injure the said plaintiff in  
 " that behalf, and to deprive her of the use and benefit of  
 " her said way whilst the said plaintiff was so possessed of  
 " her said close, designated as lots numbers two, three, and  
 " six, as aforesaid, to wit: on the twelfth day of March, 8  
 " eighteen hundred and sixty-two, and on divers other  
 " days and times between that day and the day of the com-  
 " mencement of this suit, at the township of Jefferson, in  
 " the said county of Morris, wrongfully and injuriously  
 " ploughed, broke up, and otherwise made unfit for use or  
 " travel the said way of the said plaintiff," &c.

Second count—

" And whereas, also, the said plaintiff before and at the 9  
 " time of the committing of the grievances hereinafter  
 " mentioned was, and from thence hitherto has been and  
 " still is lawfully possessed of three other closes, with the  
 " appurtenances, situate in the township of Jefferson, in  
 " the county aforesaid, and by reason thereof the said  
 " plaintiff, during all the time aforesaid, ought to have had,  
 " and still of right ought to have a certain way from the  
 " common public highway which passes between the plain-  
 " tiff's dwelling house in which she now dwells, and in  
 " which she dwelt during all the time aforesaid, in the 10  
 " township aforesaid, and the barn of the said plaintiff  
 " nearly opposite to and near to the said plaintiff's said  
 " dwelling house, unto, into, through, and over a certain  
 " close in the township aforesaid, designated in the parti-  
 " tion of the lands of Abraham L. Davenport, deceased,  
 " among his heirs at law as lot number seven (7), and unto,  
 " into, through, and over the said close of the said plaintiff  
 " designated as number six, and unto, into, through, and  
 " over a certain other close in the said partition designated

- 11 “ as lot number five; and unto, into, through and over a  
 “ certain other close in the said partition designated as lot  
 “ number four; and from thence unto and into the said  
 “ close of the said plaintiff in said partition designated as  
 “ lot number three, and so back again from the said lot  
 “ number three unto, into, through, and over the said lots  
 “ numbers four, five, six, and seven, unto and into the said  
 “ last mentioned common and public highway, for herself  
 “ and her servants, as well on foot as on horseback, and  
 “ with horses, cattle, carts, wagons, and other carriages, to  
 12 “ go, return, pass, and repass, every year, and at all times  
 “ of the year, at her and their free will and pleasure. Yet  
 “ the said defendants well knowing,” &c.

Third count was for the interruption of a drift way across defendants' lands.

Fourth count was for the interruption of a by-road across the defendants' lands.

The third and fourth counts were added, by permission of the Court, during the progress of the trial, against defendant's objection.

At the trial the following bills of exception were sealed :

#### MORRIS CIRCUIT COURT.

13	JANE DAVENPORT, <i>vs.</i> ELIAS C. TALMAGE and ZOPHER O. TALMAGE.	}	In Case.—Bill of Exceptions.
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This cause came on to be tried on the \_\_\_\_\_ day of  
 January, in the year of our Lord one thousand eight hun-  
 dred and sixty-four, before Hon. Peter Vredenburg, Judge  
 of said Circuit Court, held at Morristown, in and for said  
 county of Morris, on the issues joined between the parties  
 above named, and a jury duly empaneled and sworn to try

said issues (*pro ut* the pleadings in said cause); and there- 14  
upon the said plaintiff, in support of the issue joined as  
aforesaid, offered, first, an agreement between Isaac L.  
Davenport, Samuel M. Merrit and wife, Abraham Davenport  
and wife, Richard R. Davenport and wife, S. J. Howell  
and wife, Elias C. Talmage and wife, Mary Conger, and  
Mary Davenport, widow of Abraham L. Davenport, dated  
January first, A. D. 1844. Agreement under seal ac-  
knowledged and recorded *pro ut* the same.

The plaintiff then offered in evidence a deed from Isaac  
L. Davenport and wife to Richard R. Davenport, dated 15  
March 15th, 1845, recorded in Book F 4, 109, for lot No.  
6; and also a deed from Abraham Davenport and wife to  
Richard R. Davenport, dated April 13th, A. D. 1845, re-  
corded in Book F 4, 557, for lot No. 3; also, the will of  
Richard R. Davenport, recorded in Book H of Wills, 337,  
dated December 9th, 1861, proved March 12th, 1862.  
Richard R. Davenport, by his last will and testament, gave  
his property to his wife, Jane Davenport, and his son jointly,  
till he arrives at the age of twenty-one years.

The plaintiff then offered—

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*Horace Chamberlain* as a witness, who testified as fol-  
lows: I live in Jefferson Township, four or five miles from  
Mrs. Davenport's; formerly I lived nearer; I have known  
the Davenport property from twenty to twenty-five years;  
my father used to own adjoining land; my father's land  
joined the eleventh line, where Mrs. Davenport's buildings  
now stand; there were forty-six acres in the tract; father  
sold seven acres to Richard R. Davenport, and he built on 17  
it; it must be twenty or twenty-five years ago that Richard  
R. Davenport began to live there; I ran it out in 1842,  
but he had lived there six or seven years before that, and  
before he got a deed from father; I am acquainted with  
the northwest corner of the Davenport property—it is a  
stump; the land on the northeast side of the main tract is  
owned by Lewis Chamberlain; I made this map; I was on  
the ground; the northwest line is north  $63\frac{1}{2}^{\circ}$  west at com-  
mencement of the road in front of the house; the whole  
line is fourteen chains long between the eleventh and twelfth

18 corners of the whole tract ; I went all around the road, beginning by the house ; I began at a point where the outside line of the whole tract intersects the road ; I did not survey that line ; I ran (1), north  $10\frac{1}{2}$  E. four chains and sixty-one links ; (2), north  $5\frac{1}{2}$  west one chain and sixty-one links, which brought me to the road passing down to Milton ; the (10) course of the whole tract is due north ten chains ; I began my survey in the (11) line of the whole tract nine chains and twenty-seven from the white-oak stump at the northwest corner and ran—

- 19 (1) south  $9^{\circ}$ , west 3 chains and 57 links along the road ;  
 (2) south  $27\frac{1}{2}$ , west 10 chains and 52 links ;  
 (3) south  $25\frac{3}{4}$ , west 25 “ 60 “  
 (4) south 69, east 9 “ 79 “  
 (5) north  $26\frac{3}{4}$ , east 14 “ 73 “  
 (6) north  $40\frac{1}{2}$ , east 1 “ 78 “  
 (7) north 29, east 1 “ 25 “  
 (8) north  $47\frac{1}{2}$ , east 1 “ 55 “  
 (9) north  $36\frac{3}{4}$ , east 3 “ 36 “  
 (10) north 18, east 12 “ 23 “  
 20 (11) north  $10\frac{1}{2}$ , east 4 “ 61 “  
 (12) north  $5\frac{1}{2}$ , west 1 “ 61 “ to the public road, there five chains and two links to the beginning corner ; the road on the south between the two roads on the map continues ; I have known the upper road, I think, for twenty years and upwards ; I cannot recollect the time when there was not any road there ; the map is a fair representation of A. L. Davenport's property, which was divided ; the land on the west of Davenport's property is owned by a man of the name of Kane ; I understand the land on the south or southwest is owned by the same man ;  
 21 and also on the southwest till it strikes Lewis Chamberlain's line ; there is an old fence along the west road ; the east end of lots Nos. 6 and 7 and 5 is wild ; the cultivated part of lot No. 6 lies between the roads ; the westerly part of lot No. 6 is meadow ; the westerly part of lot No. 3 is part meadow, if not the whole ; west part of lot No. 2 is wild land ; I made my survey September 9th, A. D. 1862.

Being *cross-examined*, he said : I never surveyed Lewis

Chamberlain's land ; I did not run the eighth line of the Davenport tract ; I put it on my map without running it ; I extended the first line I mentioned of fourteen chains, five chains and two links further along the road, that being the whole length of the line, and there connected the end of that line with the stone which was shown to me as the eighth corner of the Davenport tract, and found the distance to be about right ; I did not notice whether the course was right or not. 22

*Direct examination* resumed : Such of the outside lines as I ran were run by the Davenport survey ; the corner at the southerly end of the eighth course of the Davenport tract was shown to me by Thomas K. Norman, who said it had been shown to him by Elias C. Talmage ; that corner is east of the road. 23

*Susan Davenport* was then offered as a witness on the part of the plaintiff, who testified as follows : I am a daughter of Richard R. Davenport ; father died two years ago last December ; we have lived where we do now ever since I can remember ; I am in my thirty-first year ; I can just remember grandfather ; I don't remember noticing the road in his lifetime ; my father used the road for farming—for getting hay and grain ; he has taken cattle across, but generally went around when he took the cattle to pasture ; the lower road has been there ten or twelve years ; Elias C. Talmage and my father made it ; uncle Elias made most of it ; he never used to have any bars till last summer a year ago ; he put the bars on the line adjoining lot No. 6 ; also, on the line of the Merrit lot ; he did it about the middle of May ; my mother has had control of the farm since father's death ; Zopher Talmage came and forbid us using the west road, April 10th, 1862 ; he said he had unpleasant news ; he said he came to tell her his father forbid her using this road ; mother said she would not know how to get along without it ; she asked what damage it did ; he said none, only a trespasser ; mother called Mr. Jennings and Mr. Headly to examine the lower road ; mother was sending manure to the Isaac lot on the 10th of April, 1862 ; next they put a stone wall at the entrance of 24 25

- 26 the west road—they took the bars away ; Elias and Zopher built the wall ; they ploughed up the road just the width of it ; they did not plough the rest of the field ; we had the wall taken away, and used the road ; they ploughed up the road again, and sowed buckwheat ; he came to see mother in May, and brought Mr. Dickerson with him ; he said he had learned we had a right to use the road ; he had papers in his house to that effect, but he did not know it till recently ; he was glad she had removed the stones from the road ; he said father must have known it ; he wanted
- 27 to shove the road a little further up, so as to straighten it ; he said he was glad she had removed the stones—she was perfectly right ; mother said she supposed she could do it, if it would make the matter any better ; he fixed a place for the bars before he asked mother to consent to it, and he asked mother whether she would have bars or a gate—he would put up either ; she said bars, and he put them in and took some stones out of the new piece of road ; this was in May, 1862 ; we used the road a few times, and then the boy, working for mother, was driving the team, and Zopher stopped him and whipped him ; he refused to go
- 28 again ; we sent to uncle Thomas to go through with Charley, and he came with Mr. Cassimor ; Elias said the first man that came over in the road would have a bloody head ; Charley had the team with him at that time ; Zopher said he would split the first one down that came on the ground ; uncle Elias came a few days before and said that he had learned that mother had no right there, because she did not live on the Davenport property ; we did not use the road after they stopped Charles and uncle Thomas from going through ; we wanted to get hay from lot No. 6 ;
- 29 the road was public from grandfather's a ways, and then ran down the mountain ; the road branched off into the Isaac lot, and then there was a path across to the upper road in the Meritt lot ; the upper road is most suitable for our land ; the east road cannot be used in winter, on account of snow ; part of it is wet, part of it is hilly ; the land rises from the west and descends to the east ; father continued to use the west road after the east road was made ; there were obstructions placed in it ten or twelve years ago.

Being *cross-examined* she said: I don't know as father 30  
 ever asked permission to use this road; I do not think  
 uncle Elias said anything about our using the new road un-  
 til the dispute was settled; before the division of the land  
 we used to go along the road from grandfather's to the bars,  
 and then went into the Isaac lot; the road was across the  
 Isaac lot, and then a path across the Merrit lot.

Being *re-examined* she said: I think the fence was there  
 before the road was built—just where it is now.

*Cross-examined*: No fence at the beginning of the road; 31  
 the lands were open from the common; the old road did  
 run across the Isaac lot, or nearly so; it was used to get  
 things off from the land; I have been away from home a  
 considerable part of the time for the last ten years.

*Frances Davenport*, a witness called by the plaintiff,  
 testified as follows: I am twenty-one years of age; I have  
 lived at home—I lived at home the time my father died,  
 and continued to do so till January, A. D. 1863; I lived at  
 home before his death; father used the road for farming,  
 for taking hay, grain and manure across; he used it as long 32  
 ago as I can remember; that was the principal farm road;  
 he used it at all seasons; Zopher came to our house the  
 10th of April, 1862; he said he had unpleasant news; his  
 father told him to come and forbid our using the road;  
 mother sent for Mr. Jennings and Mr. Headley to come  
 and look at the east road; they came; part of the way  
 along the west road there is a fence, and part of the way a  
 stone row; the fence is on the east side of the road; they  
 stoned up the mouth of the west road; Charley was taking  
 manure across at the time; mother hired Charley; Elias 33  
 came afterwards, and said we had a right to go over the  
 road, and had done right in doing so; he asked mother to  
 go a little further up; he said he had the papers in his own  
 house to show it; he said father did right; he supposed  
 father knew it all the time, but he did not; he put in bars  
 and fixed the road, and mother used it; after this he  
 ploughed up the whole field, and the road, too; he stopped  
 Charles from going across; uncle Thomas and Charles were

34 going across to get hay from the Isaac lot, and the defendant stopped them; uncle Elias had an axe, and Zopher had an axe and an ox goad; we had to draw the hay out through the corn, and could not use the road any more that summer; in father's lifetime the cattle were driven through on the westerly road sometimes; when there was grass or grain on the Merritt lot the cattle were driven round by the easterly road.

Being *cross-examined*, she said: When there was anything in the Merritt lot we drove the cattle around the  
35 other road.

*Joseph W. Headly*, a witness called by the plaintiff, testified as follows: I am forty years old; I have known the Davenport property for twenty-three years; I crossed it then; I went down the west road; I went across to a coal-ing job on lot No. 1; there was a road there then; it was a wagon road, and looked like an old road.

The plaintiff then, by her counsel, asked leave of the  
36 Court to amend the declaration by adding counts for drift-way and by way; to which defendant's counsel objected. The objection being overruled by the Court, and the plaintiff allowed to amend her declaration, the defendants, by their counsel, excepted to both as to the form of the counts and the allowance of the amendment, and prayed that the said exception might be sealed, and it is sealed accordingly.

P. VREDENBURGH. [Seal.]

*Joseph W. Headly* continued: I was over the west road  
37 twenty-three years ago; after that I passed over it frequently; I went to frolics on R. R. Davenport's lots twenty-three years ago; I went to lot No. 1 most every time I went that way; it was a road that had been used; I did not follow it till we came to any public road; I went to some of the lots; it ran out to another lane leading from the house; it leads out to Fichter's, and from there you can go to Hurdtown; I did not follow the road further than to lot No. 1 twenty-three years ago; I went out on this road to John Waer's about twelve years ago; I have seen

Richard draw manure over the west road once, till he came 38  
 to his first lot ; when we went to frolics, we went on foot ;  
 I was called there by Mrs. Davenport, in April, 1862 ; Mr.  
 Jennings was with me ; I saw the west road there ; I think  
 it was ploughed up ; she had not got her manure out then ;  
 we looked at the lower road ; it was drifted with snow  
 from two to five feet deep ; could not get through with a  
 wagon ; there was no snow on the west road ; she could not  
 cart manure out at that time on that road ; she asked me to  
 examine to see if she could travel it ; there was no way,  
 except the west road, by which she could get out her 39  
 manure ; I was there again in May, between the first and  
 tenth ; there had been a stone wall at the mouth of the  
 road, but it was thrown out ; the new road had been fixed ;  
 the east road, at the lower corner, was a little wet, and  
 very hilly ; cannot take one half a load over it ; the first  
 time I saw that road was eight or nine years ago, and there  
 were stumps in it yet ; the upper road is necessary to the  
 plaintiffs' land ; the value of her lots would be lessened  
 one-third if she had to take the outside road.

Being *cross-examined*, said : I never went over the road 40  
 in a wagon ; I mean the upper road ; I never saw anyone  
 go across in a wagon but R. R. Davenport, and he was  
 drawing manure ; I do not know to which lot he was draw-  
 ing it ; I do not think it would diminish the value of Mr.  
 Talmage's land to continue to use the westerly road ; I  
 think it is almost as useful to him as to Mrs. Davenport ;  
 Richard was about midway of the Isaac lot when I saw  
 him drawing manure.

*Mahlon Jennings*, a witness called by the plaintiff, testi- 41  
 fied as follows : I knew A. L. Davenport in his lifetime ; I  
 am fifty years old, and have always lived near the Daven-  
 port property ; there was a road across his lot twenty-five  
 years ago ; I do not remember when the west road was not  
 there ; I have travelled it frequently to Waer's, and Fich-  
 ter's, and Longwood ; I think I travelled it in old Mr. Da-  
 venport's lifetime ; I went as assessor ; I went on horseback  
 once ; I generally went on foot ; there was a wagon track  
 there when I first knew the road ; it looked like an old road

- 42 then ; it went all the way through the Davenport property ; I think I travelled it when there were no bars at the far end, and also when there were bars or gates at both ends of the road ; I do not remember a gate opposite Richard's house ; I remember a gate at the west end locked ; it was ten or twelve years ago ; I never saw it locked but once ; the road is of great value to Mrs. Davenport ; it would make fifteen or twenty dollars difference to me a year ; it runs right through the centre of the farm ; it is not an inconvenience to Mr. Talmage ; I think it is an advantage to him ; after Abram L. Davenport's death, Richard used
- 43 this road ; I never found any interruption to the using the road but once ; have known R. R. Davenport to go across to frolics ; I never saw a wagon on that road ; people go over it on foot ; I was there in April, 1862, at Mrs. Davenport's request ; at that time she could not use the east road at all ; I saw the new road five or six years ago for the first time ; in going from the old man's to Richard's, I used to go along the public road aways, and then across Richard's first lot to the old road, and so on to Richard's house ; the most westerly of the three roads was not made in
- 44 April, 1862, when I was there ; there were two roads there ; was there again in May, and they had made the most westerly of the three ; the road, twenty-four years ago, looked as if it was used for farm purposes ; I could see wheel cuts ; it looked like an old road ; I could not say, from its appearance, whether it had been used by anybody but the Davenport family ; I always thought it was a farm road, used for the accommodation of the farm.

- Frederick W. Fichter*, a witness called by plaintiff, testified as follows ; I am fifty-seven years old ; I knew A. L.
- 45 Davenport and his property ; have known it for thirty-five, perhaps thirty-seven years ; I lived near it ; I owned one half of the Davenport property until about ten years ago ; I knew a road that went down across that property and came out by Richard's house ; I have known it for thirty-five years ; when I first knew it it looked like an old road ; there were three bars on it, made to put up and down ; it led out to public roads, one going to Hurdtown and one to Longwood ; it was used for carting logs and timber ; we

entered it by Richard's house ; the timber was carted from 46  
 land northwest of Richard's house ; it was not got from the  
 Davenport property ; but I have not known so much of it  
 for the last fifteen years ; it was used, when I first knew it,  
 for carting coal ; there was a fence on one side of it ; I  
 have used the road for carting logs from the swamp behind  
 the land ; the road was used by the public generally ; I  
 think my workmen used it ; no one denied my right ; I  
 have known people to use the road on foot and horseback ;  
 I don't know of anyone going over the road with wagons ;  
 some ten years ago I was over the property ; I went the 47  
 old road ; they told me there was a new road east of the  
 fence ; I was not owner of the Davenport property at the  
 time I used the road ; I did not ask permission ; I was a  
 team driver ; the man I worked for told me to go there ; I  
 used it as any public road ; it would be better for both  
 parties to use this road.

Being *cross examined* said : I drove on that road within  
 fifteen years the last time ; I carted coal on it to Russia  
 Forge ; I used that road between fifteen and thirty five 48  
 years ago frequently, sometimes once, twice and three  
 times a week ; I saw other drivers use this road ; I saw  
 people cart hay on it from the meadow land on the Daven-  
 port place ; it was my common route to Russia ; the road  
 from old Mr. Davenport's to Richard's ran to a little orch-  
 ard in lot No. 6 ; I don't know but it ran to the Merritt  
 lot ; Abraham L. Davenport was a lunatic about nine  
 months or a year before he died ; I was his guardian.

*Thomas K. Norman*, a witness called by the plaintiff,  
 testified as follows : I have known the Davenport property 49  
 for thirty two years ; I live three miles from it ; it had the  
 appearance of a wood road when I first knew it ; that is  
 the most I know of it ; there was a fence along one side of  
 it ; I used to go across on foot to Uncle Brom's ; I never  
 sent any coal across ; I never saw any teams cross ; I only  
 travelled it on foot ; you could follow the road to Fichter's ;  
 I did it frequently ; I think there were bars across it when  
 I first knew it ; the road did not end at the end of the  
 Davenport property ; it went all the way through the

50 woods till you get to Fichter's; I cannot say that I ever saw Richard use this road; I was at Mrs. Davenport's in July, 1862; she sent for me to see about getting some hay out; the defendants were there; I asked them to let her go and get her hay; Elias said that the first man who came across would get a bloody head; Zopher sat on a rock; he said nothing at first; Talmage never pointed out to me his corner; he said it was a stone heap set up near a birch tree; he pointed to the tree; we were a few rods  
51 from it; it was east of the road some twenty-five or thirty paces; he did not mention any particular spot; the north-west corner is the only one Elias took me to and showed me; I was with Chamberlain when he made the survey; he went to the corner near the birch tree and found a stone corner there; Chamberlain measured from that corner; we also went to the other corner which Elias had showed to me, and Chamberlain measured from that.

*John Waer*, a witness called by the plaintiff, testified as follows: I am fifty years old; I have known the Davenport property for thirty-five or thirty-eight years; part of the  
52 time I lived within half a mile from the property; I have known the westerly road for thirty-five years; it had the appearance of an old road then; I don't know as I saw teams on the road; I have walked over it myself, always, in going to Milton or to Richard Davenport's; A. L. Davenport used it; I don't know as I ever saw Richard use the road clear through but once; I saw him come over it when he gathered buckwheat; he then travelled the road; I staid in the barn; I could see him coming; there were bars and a fence on the road when I first knew it;  
53 there was a fence on the east side of the road; I never knew of anyone's being interrupted in the use of the road in the old man's lifetime; I helped Richard draw rye one day; he did not go the whole length of the road; he went down by the Isaac lot and then across into the Merritt lot in the road.

*Mrs. Jane Davenport*, the plaintiff, testified as follows: I was married thirty years ago; we lived on the old gentleman's place immediately after we were married; the road

was there then and has been there ever since ; my husband 54  
 and Mr. Talmage's tenants travelled it, and others that  
 had occasion did so ; we used to travel the road to go to  
 Fitcher's and Waer's, in the old man's lifetime, and after-  
 wards we took the same road to go to Hurdstown ; after the  
 old man's death, Richard used the road occasionally ; there  
 was no difficulty about it ; there never was a year that we  
 did not use it ; I cannot work some lots without this road ;  
 there is no way so convenient as this ; when I was first for-  
 bidden to use it by the defendant, I wanted to cart some  
 manure to the Isaac lot. 55

Being *cross-examined*, she said : I have seen persons cross  
 the upper road within twenty years ; Mr. Wright, a tenant  
 of Talmage, went to visit Fichter and went that way ;  
 Richard used to take cattle on the east side of the whole  
 tract when there were crops on the lots ; when there were  
 no crops there, he drove them over this road ; Mr. Van-  
 natta was at Richard's house June 1st, 1862, to advise with  
 him about the road ; after A. L. Davenport's death my  
 husband used the road seven, eight, or nine years, without 56  
 any difficulty ; then there was difficulty with Mr. Talmage ;  
 it was soon after Mr. Vannatta's visit ; he continued to use  
 it ; Talmage drew some stones in the way and my husband  
 threw them out.

The plaintiff having rested her evidence, the defend-  
 ants, by their counsel, moved to overrule all evidence of a  
 by-road or drift way, which motion was denied, and the  
 defendants prayed a bill of exceptions, and that it might  
 be sealed, and it was sealed accordingly.

P. VREDENBURGH. [SEAL.]

57

The defendants, by their counsel, then opened their cause  
 to the Court and jury, and offered in evidence a deed from  
 Samuel M. Merritt and wife to Elias C. Talmage, for lot  
 No. 7, dated May 10th, 1845 ; recorded May 20th, 1845,  
 in Book F 4, of Deeds, page 335. *Pro ut* the same.

Also, a deed from S. J. Howell and wife to Elias C. Tal-  
 mage, for lot No. 5, dated recorded  
 Book F 4, page *Pro ut* the same.

- 58 Also, a deed from Mary Conger to Eltas C. Talmage, for lot No. 4, dated \_\_\_\_\_ recorded in Book G 4, page \_\_\_\_\_ *Pro ut* the same.

*Zopher O. Talmage*, a witness for defendants, testified as follows: I worked on the place for Fichter just before grandfather died, in the spring of 1843; I knew the most western of the three roads, from a little boy till after the property was divided; grandfather used that road; I never saw Richard use the road claimed by the plaintiff without  
59 my permission; he asked it of me; he generally asked me once or twice a year; I gave him permission to use the road; when he wanted to use the road he came and got permission; when Richard was coming from the Isaac lot with rye, and Mr. Waer was with him, father stopped him, and they agreed that he should finish getting his rye and then take the easterly road; that was July 29th, 1852; I had father to work for me by the day at the time.

Being *cross-examined*, he said: John Waer was present;  
60 we went to work, and Richard went on; the agreement was made then that he should abandon the road after drawing grain, and perhaps his hay—I cannot say; I think the agreement was that he could take his hay also; I cannot say how Richard got along the next three years; I was not there; I cannot say whether he used it till 1859 or not; I don't know whether he used it in the summer of 1859 or not; in the spring of 1859 he asked the privilege of drawing hay from the little meadow, and I suppose he did it; he said, Zopher, what would the damage be if I should draw my hay over the westerly road? I said, I guessed  
61 nothing, and I suppose he did it; I believe I did say to Mrs. Davenport that I had unpleasant news for her; it was unpleasant for me to carry such news to her; she was a woman, and I had great respect for her; I helped to put in the bars to straighten the road; the new road had been made before that.

*William Talmage*, a witness for the defendants, testified as follows: I am thirty-nine years old; I live at Hopewell Forge; I moved on the property in November, 1855; I

lived there two years and a half; Richard used the easterly road principally; I never knew him to use the other without permission; he got it of me; I recollect of three times; once to draw a stack of hay across the meadow—that was in February or March, 1856; the next summer to draw three loads of hay, and the third time he got permission was to draw some wood. 62

Being *Cross-examined*, he said: The hay he drew in 1856 was on the Abraham and Richard lots Nos. 2 and 3; he asked permission to draw a stack of hay through the west end of the Merrit lot; the hay drawn in the summer of 1856 was on the Isaac lot; in the spring of 1857 I ploughed up the road for buckwheat; Richard's daughter was by when he asked permission to go over the road; she was at work for me at that time; her name was Mary Wright; he asked permission to draw the hay over the Merritt lot; I speak of the stack of hay. 63

*Re-examined*, he said: He (Richard) drew wood and hay over the road; in 1858 he told me he had drawn wood, and said if I had been there he should have asked permission; he said he supposed it made no difference; he found no fault with me for ploughing up the road. 64

Again *cross-examined*, he said: The wood was cut on the Isaac lot; I was there; I went to cut corn; I saw one load drawn; there was perhaps an acre cut off.

*James Talmage*, a witness for defendants, testified: I am thirty-four years old; I live at Woodstock; I lived on the Davenport property in 1852; I worked the place on shares with my father; I helped make the road in 1852; I heard Richard say that the lawyer said that he could not use the west road unless Mr. Talmage was willing; that was said in my house. 65

Being *cross examined*, he said: I am past thirty-four years old; I am quite deaf; I have been so for thirteen years; Richard said he had a lawyer, and Albert Sanbrough was with him, and they told him he could not use

66 the west road ; I helped make the easterly road ; Richard did not help make it.

*Re-examined* by defendants, he said : I helped move some fence on the east road ; we moved it on the field further three or four paces ; I think we made it pretty much straight.

67 *Elias C. Talmage*, one of the defendants, testified : On the 29th day of July, 1852, Richard attempted to cross the upper road ; I had made the new road and asked him to use it ; I stopped him ; after we got cool, so as to talk, he told me that if I would let him drive two more loads, he would take the other road, and he did so ; I never knew of his using the west road after that ; we were on the best of terms after that as long as he lived ; Isaac Davenport lived at Sparta at the time of the partition ; Abraham lived on lot No. 5, not far from the homestead ; Isaac could have got to his land by the public road, and so could Abraham ; the road from the dwelling house on the Davenport property, as marked on this map, leads down the mountain to  
68 Longwood ; it intersects the road leading from Richard's about one-half or three-quarters of a mile down ; the fence along the east road I moved so as to throw the road outside of the field ; I have run that eighth line of the Davenport tract ; it is not where Mr. Chamberlain has laid it down on his map ; it is entirely east of the road ; the road is all on  
69 the Davenport tract.

Being *cross-examined*, he said : Waer was with Richard when the agreement was made to substitute the east road ; I say I never knew Richard to use the west road after that ;  
69 you can go from Mrs. Davenport's house to the Isaac lot by the public road.

Defendants having rested, the plaintiff offered the following rebutting evidence :

*John Waer* recalled, said : I helped Richard get rye in 1852 ; I was there when Talmage forbid Richard going over the west road ; he (Richard) came down through the

Isaac lot to the line of the Merritt lot, and Talmage forbid him going further; Richard drove on; Talmage struck the oxen, Richard struck Talmage, then they clinched and had quite a fight; after they got over their pet, Talmage proposed to Richard to use the road till after harvest, and then make a new one and live in friendship; I did not hear Richard say he would give it up; he said several times he would be damned if he would ever give up that road; after he got cooled off he said he wanted to live on good terms with all his neighbors; he did not agree to quit using the road after that season; they talked awhile after that, but I don't know what was said; I did not stay any longer; I went on; I don't know as I ever saw Richard use the road after that. 70 71

*Cross-examined*, he said: I went on with Richard to the barn.

*Charles Cassimer* testified: I worked for Richard; I went there two years ago last spring; I worked there one summer and in the fall before he died; he died in the fall; we used the road for farming purposes; we did not ask permission of anyone to use it; we used it considerable; we had oats in the Isaac lot in 1861; I never knew of any obstructions while Richard was well and about. 72

*Miss Susan Davenport* recalled: Elias never told me we could take either one or the other of the roads; he told me father had abandoned the old road; the fence was not moved on the east road; there are some trees outside of the fence; I never heard of such a thing as my father's asking permission to drive across the west road; I have known of his asking permission a few times to drive across the lots outside of the road. 73

*Mrs. Jane Davenport* recalled: I am certain the road is put outside of where the fence used to be; it was a new fence made after the property was divided; when the east road drifted up Richard used the old road; he said he would not use the new one; I never heard or knew of my husband asking permission to use the west road.

74 Thereupon the Court charged the jury :

That the claim of the plaintiff of a right to cross the defendant's land was made on two grounds :

1st. A private right of way ; and

2d. The existence of a by-road across the lands of the defendant Elias C. Talmage. That a claim to a private right of way could be sustained in this State on three grounds—

75 1st. Prescription.

2d. Grant.

3d. Necessity.

That there was no evidence in the cause on which the plaintiff could claim such right of way by prescription, and that the agreement for partition offered in evidence by the plaintiff did not grant or convey any right of way to any of the parties, but was a simple agreement for partition, and that if after the partition the several parties could reach the lots respectively assigned and set off to them from the public high way, without crossing the lands of the others, they were bound to do so, and had no way over said lands by necessity.

76

That the existence of a right of way by necessity, must be determined by the position of the several lots, and of the owners thereof, at the time the partition was made. That it appeared by the evidence of the plaintiff that at the time she was interrupted she was carting manure from her residence, which was not on the Davenport property, over lot No. 7, belonging to the defendant Elias C. Talmage, to lot No. 6, now belonging to the plaintiff, and her right to sustain her action must be determined with reference to that fact, that if Abraham L. Davenport, to whom lot No. 6 was set off by the partition, could at the time of the partition, get to his lot by the public highway, as appeared from the evidence, he had no right of way across the defendant's lands by necessity, though he might have in that way reached his own lands more conveniently,

77

and that if any right of way by necessity existed in the owner of lot No. 6, it was only the right to cross the lands of the defendants to the nearest public highway, not to the house of said Davenport, or his assignee, the plaintiff. 78

The Court further charges the jury, that it was for them to say, under the evidence, whether there was any public highway, by which the plaintiff could get to her lands; if there was, she had no right of way across the lands of the defendant by necessity.

The Court further instructed the jury as to the existence of a by-road; that our laws nowhere expressly define what a by-road is; that the Court could not decide as a question of law, whether this was a by-road or not; it could only be decided by the facts and circumstances detailed in the evidence; that it was the province of the jury, and theirs only, to decide on these facts, and to determine from the facts and evidence, whether this was a by-road or not. 79

The defendants, by their counsel, thereupon excepted to the charge of the Court respecting the existence of a by-road, and asked the Court to charge the jury that the evidence was not sufficient in law to establish the existence of a by-road, but the Court declined so to charge. 80

The counsel of the defendants further asked the Court to instruct the jury, what in law constituted a by-road in this State, and what evidence was necessary to establish the existence of such a road, but the Court refused to do so.

To each of which refusals the defendants, by their counsel, excepted and prayed a bill of exceptions, and that it might be sealed, and it was sealed accordingly.

P. VREDENBURGH. [SEAL.]

- 81 *Copy of the Agreement for Partition of Lands among the heirs of Abram L. Davenport, decd.*

ISAAC L. DAVENPORT and WIFE, Samuel M. Merrit and Wife, Richard R. Davenport and Wife, Abraham Davenport and Wife, Stephen J. Howell and Wife, Elias C. Talmage and Wife, Mary Conger, and Mary Davenport.	}	Agreement, 1st January, 1844, for the partition of lands of Abraham L. Davenport, deceased, among his heirs-at-law.  Recorded Book D 4, pages 649, &c.
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- 82 This agreement, after describing the lands of which Abraham L. Davenport died seized, provides that Mahlon L. Dickerson, John Hardy, and Gilman T. Cumings shall cause a survey of the lands, and make partition of them among the parties to the agreement, by lot.

The only part of this agreement bearing on the question in controversy is the following :

- 83 “ Every of said parties, severally by and for themselves, “ their heirs, executors and administrators only, doth covenant and grant to, and with every other of the said “ parties, their heirs, executors and administrators, shall “ by and for the space of seven years next ensuing the date “ of this indenture, as far as the law will permit and suffer, “ at the reasonable request, costs and charges in the law, “ of such of the said parties as shall desire the same, do “ and acknowledge, or suffer to be done, all and every “ such other and reasonable act and acts, thing and things, “ deed and deeds, or otherwise, as shall, by such party or “ parties, or their counsel learned, be reasonably devised “ or advised, for the better and more perfect assurance of “ the said several portions, allotments, and things in this “ indenture contained, according to the true intent and “ meaning of all the said parties; and that every of the “ said parties, their heirs and assigns, shall and may forever hereafter enter into, have, hold, occupy, and enjoy “ their several portions and allotments, acquitted and discharged, or otherwise sufficiently saved, harmless against “ the let, suit, trouble, hindrance, denial, or interruption of

"any person or persons lawfully claiming, or to claim any 85  
 "estate, right, title, trust, or interest, at law or in equity,  
 "of, in, or out of the same, or any part thereof."

After a covenant on the part of the widow of said Abraham L. Davenport to relinquish her dower in said lands, the agreement proceeds as follows :

"And it is agreed further, by and between the said  
 "parties, that if it shall hereafter happen that if any of the  
 "said lands and premises shall by due order and course of  
 "law or equity, without fraud or covin, be recovered and 86  
 "lawfully evicted, so that it cannot be held and enjoyed  
 "according to the said partition and allotment, and the  
 "true intent of all the said parties, that then and in such  
 "case the rest of said parties, and their heirs and assigns,  
 "shall and will recompense and satisfy, at their equal costs  
 "and charges, unto the party so evicted so much as the  
 "value of the land so evicted shall amount unto. And  
 "that it shall be lawful to and for the said parties, their  
 "heirs and assigns, to have free ingress, egress, and re- 87  
 "gress in, from, and to all the lands before mentioned to  
 "be divided and severed, and every and any part or par-  
 "cel thereof, where their allotment or share may fall or  
 "happen to be by virtue of this indenture.

"In witness whereof, the parties have hereunto set their  
 "hands and seals," &c.

Signed and sealed by all the parties.

### NEW JERSEY COURT OF ERRORS.

ELIAS C. TALMAGE and ZOPHER O.

TALMAGE,

Plaintiffs in Error,

vs.

JANE DAVENPORT,

Defendant in Error.

88

In Error to the  
 Morris Circuit  
 Court.

The said plaintiffs in error, by Theodore Little, their attorney, assign the following errors in the proceedings of

89 the said Circuit Court as reasons for the reversal of the said judgment :

*First.*—Because the said Circuit Court, while the said cause was being tried, after the jury had been sworn and part of the plaintiff's witnesses had been examined, permitted the plaintiff to add to her declaration new counts, changing very materially the nature of the issue between the parties.

90 *Second.*—Because the said Court refused, on the motion of the defendants, after the plaintiff had rested her cause, to overrule the evidence which she had offered in reference to the existence of a by-road or drift-way across the lands of the defendants.

*Third.*—Because the said Court refused, on the motion of the defendants' counsel, to charge the jury that the evidence in the cause was not sufficient in law to establish the existence of a by-road across the defendant's lands.

91 *Fourth.*—Because the said Court refused, on the motion of the defendants' counsel, to charge the jury what in law constitutes a by-road in this State, and what evidence was necessary to establish the existence of such by-road.

92 *Fifth.*—Because the said Court charged the jury that it was their province, and theirs only, to decide upon the facts and circumstances detailed in the evidence whether or not there was a by-road across the defendant's lands, and refused to give the jury any instruction as to what constituted a by-road in this State, or what evidence was necessary to create such road.

*Sixth.*—Because the said proceedings are in various other respects illegal and prejudicial to the rights of the defendants.

THEODORE LITTLE,  
Attorney of Plaintiffs in Error.