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PLAINTIFF'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice of Appeal.

Filed December 22, 1917.

New Jersey Supreme Court.

WILLIAM E. CROSBY, *Plaintiff-Appellant,* *vs.* THE CITY OF EAST ORANGE, *Defendant-Respondent.*	*Case No. 1.* *In Tort.* *Notice of Appeal.*

To Jerome D. Gedney, Esq.,
Attorney for defendant-respondent.

TAKE NOTICE, that the plaintiff-appellant, William E. Crosby, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Yours, etc.,

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

Service of a copy of the within notice is hereby acknowledged this 11th day of December, 1917.

JEROME D. GEDNEY,
Attorney for Defendant-Respondent.

Grounds of Appeal.

Filed December 29, 1917.

New Jersey Court of Errors and Appeals

William E. Crosby, *Plaintiff-Appellant,*	*Case No. 1.*
	In Tort.
vs.	*On Appeal.*
The City of East Orange, *Defendant-Respondent.*	*Grounds of Appeal.*

To Jerome D. Gedney, Esq.,
Attorney for the defendant-respondent.

Take Notice, that the following are the grounds of appeal which the plaintiff-appellant hereby assigns and upon which he will rely at the hearing:

1. Because the Supreme Court determined that the word "permanent" must be taken by the Court as a part of the record.

2. Because the Supreme Court found that the postea in the former proceedings awarded damages for a permanent injury.

3. Because the Supreme Court found that the judgment entered by the plaintiff in the former suit was a bar to any future action.

4. Because the Supreme Court reversed the judgment rendered by the First District Court

of the City of Newark and entered a judgment in favor of the defendant with costs.

Yours, etc.,

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

Service of a copy of the within notice of Grounds of Appeal is hereby acknowledged this 26th day of December, 1917.

JEROME D. GEDNEY,
Attorney for Defendant-Respondent.

Notice of Appeal.

Filed

First District Court of the City of Newark.

WILLIAM E. CROSBY, *Plaintiff,* vs. THE CITY OF EAST ORANGE, a corporation, *Defendant.*	*In Tort.* *Case #1.* *Notice of Appeal.*

To William E. Crosby, or Lum, Tamblyn & Colyer, attorneys of William E. Crosby. Sirs: Take notice that the defendant, City of East Orange, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark rendered in the above stated action on the 13th day of February, 1917.

JEROME D. GEDNEY,
Attorney of Defendant.

Service of the within Notice of Appeal is hereby acknowledged this 20th day of February, 1917.

LUM, TAMBLYN & COLYER,
Attorney of Plaintiff.

State of Demand.

Filed March 27, 1913.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY,
Plaintiff,
vs.
CITY OF EAST ORANGE, a corporation,
Defendant.

State of Demand.

Plaintiff, residing at No. 241 Central avenue, Orange, New Jersey, says:

1. He was at the time of committing the grievances hereinafter complained of and from thence hitherto has been and still is lawfully possessed and seized in fee simple of a certain tract of farm land consisting of about one hundred acres, more or less, situated on Northfield Avenue in the Township of Livingston, Essex County.

2. The said premises have been used for the purposes of gardening, general farming, milk raising and other purposes.

3. Previously to the date of the wrongful acts hereinafter complained of, the plaintiff was entitled to

a. The use of certain wells of water.

b. The use of water from a certain ancient water course flowing along and through his said property, and

c. The use of a great deal of moisture and water in the soil of his said farm.

State of Demand.

4. From time out of mind (a) the said wells had furnished an adequate supply of water for all the purposes of the said farm, and

b. The said stream of water had continued constantly to flow and to supply the plaintiff with all water needed for the various purposes of his property aforesaid, and

c. The amount of moisture and water in the soil aforesaid was sufficient for nourishing and ripening all crops therein planted and sown.

5. The defendant, a body corporate of the State of New Jersey, had prior to the first day of May, nineteen hundred and ten, constructed and did at that date operate and maintain and has since that date operated and maintained at White Oak Ridge and in the Village of Northfield, Essex County, New Jersey, a certain system of twenty or more artesian wells and a certain system of cisterns or reservoirs and a pumping station for the purpose of impounding the said water and pumping, transferring and conveying the same by means of machinery, pumps and pipes into a certain system of water mains of the said defendant.

6. The said defendant has thereby conveyed and distributed and does still convey and distribute the said water away from the said premises whereon the same is obtained for use elsewhere and for distribution and sale thereof to and among private consumers.

7. By means of the said artesian wells, cisterns, reservoirs, pumps, pipes and system of water works, the defendant has since the said first day of May, nineteen hundred and ten, and during all the said time up to the present date

State of Demand.

a. Unlawfully and wrongfully diverted, subtracted, turned and taken divers large quantities of the water of the said wells of the plaintiff away from the farm of the plaintiff, and

b. Large quantities of the water from the said stream away from the farm of plaintiff, and

c. Greatly diminished and abstracted the amount of moisture in the soil of plaintiff's land as aforesaid.

8. On account of the aforesaid acts, plaintiff has not been able, for want of sufficient water, to occupy and enjoy his said farm and premises nor carry on his farming and other operations thereon in so large, economically, extensive and beneficial a manner as he might and otherwise could and would have done, but was thereby deprived during all that time of the use and enjoyment of the water which would have otherwise been furnished to his premises by the said wells and stream and of the moisture and water in the soil of his said land and of the profits, benefits, gains and advantages which he might have and would have otherwise enjoyed and made by carrying on his farming and other operations in the said premises.

Plaintiff demands Five hundred dollars ($500) damages.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Order Appointing Stenographer.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* CITY OF EAST ORANGE, a corporation, *Defendant.*	*In Tort.* *Case #1.*

Upon the application of the defendant, I hereby appoint Alan G. Kennish, a stenographer, to transcribe the proceedings at the trial of the above cause, to take down the testimony therein.

CECIL H. MACMAHON,
Judge.

Agreed State of Case.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

Wednesday, January 10, 1917.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* CITY OF EAST ORANGE, a corporation, *Defendant.*	*In Tort.* *Case No. 1.*

Before Hon. Cecil H. MacMahon, Judge.

For the plaintiff appears Ralph Lum, Esq.

For the defendant appears Jerome D. Gedney, Esq.

Upon application of the defendant the Court appointed Alan G. Kennish, a stenographer, to transcribe the proceedings at the trial of this case and to take down the testimony therein, agreeable to the statute.

ALAN G. KENNISH, stenographer, sworn.

Mr. Lum. I offer in evidence stipulation or agreement dated today and signed by the attorneys for the respective parties.

(Marked Exhibit P-1.)

Mr. Lum. I offer the record, being the state of the case used in the Supreme Court, on the argument of the rule to show cause why there should not be an amendment of the postea and the verdict on a former trial of an action between the parties hereto, being a suit brought on May 25, 1910.

The Court. And the same is admitted in evidence, subject to any objection the attorneys for the parties hereto may desire to raise on the argument of the matter.

(Marked Exhibit P-2.)

Mr. Lum. It is admitted that William E. Crosby, the plaintiff in this action, is the owner of the premises mentioned in the state of demand, and that the operation of the defendant's plant continues as at the time of a former trial between these parties, the said former trial being that mentioned in the record, Exhibit P-2. The period covered by the case now on trial is from May 10, 1910, to March 27, 1913.

Mr. Gedney. I desire to offer in evidence a copy of the bill filed in the Supreme Court in the case above referred to, between the parties to this suit.

(Marked Exhibit D-1.)

Mr. Gedney. I desire also to offer in evidence copy of the judgment entered April 6, 1916, in the New Jersey Supreme Court, in the case in which William E. Crosby was the plaintiff and the City of East Orange, defendant, the same being the judgment entered upon the postea set forth in Exhibit P-2.

(Marked Exhibit D-2.)

Mr. Gedney. I desire to offer in evidence a copy of the opinion of the Court on the defendant's application to amend the postea, which was set forth in Exhibit P-2.

Mr. Lum. I wish to have my right reserved to strike it out subject to its relevancy.

(Marked Exhibit D-3.)

Mr. Lum. Execution has been issued and levied on the judgment recovered in the Supreme Court action and execution has been made by the sheriff of the County of Essex.

Mr. Gedney. This is the judgment entered April 6, 1916, a copy of which is marked Exhibit D-2.

EVIDENCE CLOSED.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* vs. CITY OF EAST ORANGE, a corporation, *Defendant.*	*In Tort.* *Case No. 1.* *State of Case.*

Judgment having been entered in the above stated cause on the 13th day of February, 1917, in favor of the plaintiff and against the defendant for the sum of $229, damages, and $15.29, costs; and the defendant having given notice of appeal from the said judgment to the New Jersey Supreme Court; and application having been made to me by the defendant for the appointment of a stenographer to transcribe the proceedings of said cause and to take down the testimony therein; and I having designated Alan G. Kennish, stenographer, for that purpose, who did transcribe the proceedings at the trial of

said cause and take down testimony therein, agreeable to the statute in such case, made and provided, I do hereby certify the foregoing transcript of the proceedings at the trial of said cause, made by said stenographer as the state of the case, to be used on the hearing of the said appeal.

In Witness Whereof, I have hereunto set my hand this 20th day of February, 1917.

CECIL H. MacMAHON,
Judge of the First District Court
of the City of Newark.

Attest:

Charles R. Baldwin,
Clerk.

(Seal of the Court.)

Exhibit P. 1.

EXHIBIT P-1.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* vs. THE CITY OF EAST ORANGE, a corporation, *Defendant.*	*In Tort.* *Case #1.*

IT IS STIPULATED AND AGREED by and between the parties hereto by their respective attorneys as follows:

1. That the trial of the above case shall be before the Court without a jury.

2. That, for the purposes of this suit only, if the plaintiff is entitled to recover, judgment shall be entered in his favor for $229.

3. That the defendant in the City of East Orange duly adopted, at a special election, held in said city, December 7, 1901, an act entitled, "An Act to enable the city to supply the inhabitants thereof with pure and wholesome water"; and that under said act the defendant constructed its wells and plant at White Oak Ridge, Village of Northville, Essex County, New Jersey; and has since January, 1905, continuously operated the same; and that the said source of supply is the only means of supplying

Exhibit P. 2.

water for the use of the City of East Orange and its inhabitants.

Dated, Newark, N. J., January 10, 1917.

RALPH E. LUM,
Attorney for Plaintiff.

JEROME D. GEDNEY,
Attorney for Defendant,
The City of East Orange.

EXHIBIT P-2.

NEW JERSEY SUPREME COURT.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* THE CITY OF EAST ORANGE, *Defendant.*	*On Rule to Show Cause Why Postea Should Not Be Amended.*

STATE OF CASE.

JEROME D. GEDNEY
Defendant's Attorney.

EDWARD M. COLIE,
ALBERT C. WALL,
Of Counsel.

LUM, TAMBLYN & COLYER,
Plaintiff's Attorneys.

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Exhibit P. 2.

RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* CITY OF EAST ORANGE, *Defendant.*	*Rule to Show Cause Why Postea Should Not Be Amended.*

Application having been made to me to amend the *postea* signed by me in the above stated matter, so that the same shall set forth that the verdict of $2,700, in favor of the plaintiff and against the defendant, was for the permanent injury to the plaintiff's land and premises referred to in the declaration in said cause, hereafter as well as heretofore occasioned by the construction, operation and maintenance of the defendant's artesian wells, cisterns, reservoirs, pumps, pipes and system of water-works, referred to in said declaration.

It is, on this fifth day of April, 1916, on motion of Jerome D. Gedney, Esq., of counsel with the defendant, ORDERED that the plaintiff do show cause before the Supreme Court at the State House in the City of Trenton on the 6th day of June, 1916, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard, why the said *postea* should not be so amended.

And it is FURTHER ORDERED that both plaintiff and defendant have leave to take testimony, on five days' notice, to be used at the hearing of said Rule to Show Cause.

Let the foregoing rule be entered.

FREDERIC ADAMS,
Circuit Court Judge.

Exhibit P. 2.

DECLARATION.

NEW JERSEY SUPREME COURT.

Of the twenty-fifth day of May, nineteen hundred and ten.

ESSEX COUNTY, *ss.*

The City of East Orange and Commonwealth Water and Light Company, the defendants in this suit, corporations of the State of New Jersey, were summoned to answer unto William E. Crosby, the plaintiff therein, in an action in tort, and thereupon the said plaintiff by Sommer, Colby & Whiting, his attorneys, complains for that whereas heretofore and at the time of the committing of the grievances hereinafter mentioned, the defendant, The City of East Orange, was a body corporate of the State of New Jersey, and the defendant, Commonwealth Water and Light Company, was a corporation organized and existing under the laws of the State of New Jersey, and the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto has been and still is, lawfully possessed and seized in fee simple of certain lands and premises with a certain factory, stables and buildings thereon, situate in the Township of Livingston, County of Essex aforesaid, to wit, at Newark, in the county aforesaid, and that by reason thereof before and at the time of the committing of the grievances hereinafter mentioned and from thence hitherto, of right ought to have had and enjoyed and still of right, ought to have and enjoy the benefit and advantage of the said lands and premises as fields, meadows, woods and farm lands in the said Township of Liv-

Exhibit P. 2.

ingston aforesaid, which during all the time aforesaid ought to have been filled with water and moisture and supplied with water and moisture, and which until the committing of the grievances hereinafter mentioned by the said defendants, had time out of mind and of right been filled and supplied with water and moisture, and which still ought to be filled and supplied with water and moisture for the due and proper use and enjoyment of the said lands and premises by the said plaintiff, to wit, at Newark, in the said County of Essex.

Yet the said defendants, well knowing the premises but contriving and intending wrongfully and unjustly to injure and prejudice the said plaintiff in this respect and to deprive him of the use, benefit and advantage of the said fields, meadows, woods, farm lands and buildings thereon and to deprive him of the use, advantage and enjoyment of the said lands and buildings as he had theretofore and of right enjoyed the same, and to injure him in the working and enjoyment of the said farm and woods and buildings which he during all the time aforesaid exercised and enjoyed, and still doth exercise and enjoy, and to put him to great charge and expense, trouble and inconvenience, while the said plaintiff was so possessed of his said lands and premises and so exercised and carried on his farming and manufacturing operations and use of the said lands, woods and buildings thereon, to wit, on the fifteenth day of January, nineteen hundred and five, and on divers other days and times from that day to the commencement of this suit, in the Township of Livingston, in the said county, to wit, at Newark, in the said county, unlawfully, wrongfully and unjustly constructed

Exhibit P. 2.

and erected upon certain premises owned, occupied and leased by the said defendants near and adjacent to the lands and premises of the said plaintiff divers large wells known as artesian wells driven to the earth for a great depth, and erected in the vicinity thereof, pumps and certain cisterns or reservoirs for the impounding of the water raised by pumps through the said artesian wells, which said water from thence was then and there and from thence hitherto hath been and still is pumped, transferred and conveyed by the said defendants by means of machinery, pumps and pipes, into a certain system of water mains of the said defendants and by it distributed and sold to private consumers; and that the said defendant has by means of the said artesian wells, cisterns, reservoirs, pumps, pipes and system of water works for a long space of time, to wit, from the said fifteenth day of January, nineteen hundred and five, hitherto, unlawfully and wrongfully diverted, subtracted, turned and taken divers large quantities of the water out of and from under the surface of the said meadows, fields, woods and farm lands and away from the said lands and premises of the said plaintiff, and by reason thereof the water and moisture under and in the said fields, meadows, farm lands and woods, was insufficient for the necessary and proper uses and purposes thereof. And the said plaintiff thereby for want of sufficient water could not enjoy his said lands and premises, and buildings thereon, or carry on his farming and manufacturing operations thereon, or otherwise use the said lands and buildings in so large, economical, extensive and beneficial a manner as he otherwise might and would have done, but was thereby during all

Exhibit P. 2.

that time deprived of the use and enjoyment of the water and moisture which would otherwise have been in and under the surface of his said lands and premises, and which would have been furnished to his said farm lands, fields, meadows and woods, and was during all the said time deprived of divers benefits, profits, gains and advantages which he otherwise might and would have obtained and enjoyed, by carrying on his farming operations upon or otherwise using the said premises.

And whereas also, before and at the time of the committing of the grievances by the said defendants hereinafter and next mentioned, the said plaintiff was and still is lawfully possessed and seized in fee simple of certain other lands and premises, with a certain factory, stable, and buildings thereon, situate in the Township of Livingston, County of Essex aforesaid, along the surface whereof there used to flow an ancient water course, stream or brook and until the diversion thereof by the defendants hereinafter mentioned has time out of mind, of right run and flowed and been accustomed to run and flow and of right ought to have run and and flowed, and still of right ought to run and flow in great plenty and abundance over and through the said lands and premises of the said plaintiff, and upon and in which said lands there existed divers ancient wells of water and springs, which said wells and springs before and at the time aforesaid and until the diversion thereof by the defendants, hereinafter mentioned, had time out of mind of right run, filled and flowed, and been accustomed to run, fill and flow, and of right ought to have run, filled and flowed, and still of right ought to run, fill and flow in great plenty

Exhibit P. 2.

and abundance over, in and upon the said lands and premises of the said plaintiff, all of which wells, springs and streams ran, filled and flowed for the supplying of the same with water and for the beneficial use of the said lands and for the supplying of the said lands and factories, stables and buildings thereon, with suitable and abundant water for the said buildings, factories and stables and the occupants thereof and the cattle therein, whereby the said plaintiff before and at the time aforesaid and from thence hitherto of right ought to have had and enjoyed and still of right ought to have and enjoy the benefit and advantage of the said springs, wells and streams in the said Township of Livingston, to wit, at the City of Newark, in the County of Essex.

Yet the said defendants well knowing the premises, but contriving and intending wrongfully and unjustly to injure the said plaintiff in this respect and to deprive him of the use, benefit and advantage of the water of the said wells, springs and streams and to deprive him of the full enjoyment and benefit of the said lands and premises as he had theretofore enjoyed the same and of right ought to have done, and to injure him in the working and operation of the same, and to deprive him of the benefits and profits of his said farm buildings, factories and stables and of the business thereon carried on by him and to put him to great charge, trouble, expense and inconvenience while the said plaintiff was so possessed of the said lands and premises with the buildings, factories and stables aforesaid and carried on his said business thereon, to wit, on the fifteenth day of January, nineteen hundred and five, and on divers other days

Exhibit P. 2.

and times between that time and the commencement of this suit wrongfully and unjustly turned, diverted, subtracted and took by means of wells, cisterns, reservoirs, pumps, pipes and machinery, divers large quantities of water of the said wells, streams and springs out of and away from the same and away from the said lands and premises and stopped and prevented by means of dams, wells, cisterns, reservoirs, pumps, pipes and machinery, the water of the said springs and streams from running and flowing along its natural course upon, over and through the said lands and premises of the said plaintiff as it had been accustomed to flow and as it of right ought to have done, and from supplying the lands and premises of the said plaintiff with water for the necessary use, occupation and enjoyment thereof, as the said springs and streams of right ought to have done, and by reason thereof the water of the said wells, springs and streams sufficient for the supplying of the said premises of the plaintiff, during the said time, could not, nor did run or flow upon, over and through the said lands as the same of right ought to have done, and otherwise would have done, and the said plaintiff thereby for want of sufficient water could not, during the said time, use, occupy and enjoy his said lands and premises, and pursue his said business in so large, economical, extensive and beneficial a manner as he might and otherwise could and would have done, but was thereby during all that time deprived of the use and enjoyment of the water which would have otherwise been furnished to his said farm and premises by the said wells, springs and streams, and was also during the said time deprived of divers great benefits,

Exhibit P. 2.

profits, gains and advantages which he otherwise might and would have enjoyed and obtained by carrying on his farming operations and otherwise using the said premises, to wit, at Newark, in the County of Essex, aforesaid.

Wherefore, the said plaintiff says that he is injured and hath sustained damage to the amount of thirty thousand dollars, and therefore he brings his suit, etc.

SOMMER, COLBY & WHITING,
Attorneys for Plaintiff.

PLEAS—General Issue.

CHARGE TO JURY.

(By agreement only such portions of the charge as are pertinent to the question before the Court under this Rule are printed.)

The Court charged the jury as follows:

ADAMS, *J.*

Gentlemen of the Jury. This action is brought by William E. Crosby against the City of East Orange. The declaration, or statement of the plaintiff's case, asserts that the defendant had a legally established pumping station, by which water was drawn from the ground at a point in the Township of Livingston, in which municipality the plaintiff, Mr. Crosby, lived, and where he owned a farm, which was well supplied with water, and that the defendant, in conducting the business of supplying East Orange with water, so operated its pumping station as to deprive the plaintiff of the use, advantage and enjoyment of his lands and buildings as he had before used and enjoyed the same, and to injure him

Exhibit P. 2.

in the working of his farm, and to put him to inconvenience and expense from the 13th day of January, 1905, up to May 10, 1910, the date of the commencement of this action. The plaintiff's declaration says that this injury of which he complains was caused by the abstraction of water by the defendant from lands in the locality where his farm was situated for distribution in East Orange, whereby the yield of water from the wells, streams, springs and soil of which he had therefore had the right of use was reduced, so that his use during the period above mentioned, of a little more than five years—to be exact, five years, four months and twenty-seven days—was impaired in value. This action is brought to recover compensation for this impairment of value of the use of water during this period. You will not, gentlemen, misunderstand the nature of this case. It is not a condemnation proceeding. East Orange has not taken and is not about to take Mr. Crosby's farm. The question, therefore, is not as to the value of his farm, but as to the value of the use of water of which he says that the defendant has deprived him during the period which I mentioned.

You understand, gentlemen, that a man does not own flowing water in the sense in which he owns land. He has no title to the water itself. He may have a right to enjoy the use of it as it goes along. Mr. Crosby complains, not that he has lost the use of this water for good and all, but only intermittently, at times, recurring annually during this period of between five and six years. The later date which I have mentioned—that is, the date of May 10, 1910—is the date of the commencement of this action.

Exhibit P. 2.

Damages later in date than this, if any, are to be claimed, if at all, in some other action.

The law has been declared to be as follows:

> "Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water, or if his wells, springs or streams are thereby materially diminished in flow, or his lands rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses."

This is not my language; it is the language of the Court of Errors, at Trenton, in a case which lawyers know as the Meeker case—a case arising out of facts in this very valley. Applying this legal rule to this case, the situation is this: that while East Orange had a legal right to pump water from this valley, it is under an obligation to pay damages if in so doing it impaired the water rights of landowners.

Previous adjudications in litigation between these parties. Mr. Crosby and the City of East Orange, have decided that liability exists. In other words, it has been decided that the defendant owes the plaintiff something. The purpose of this trial is to determine how much that liability is. I will speak of this again later on. Just now I want to refer to the testimony.

* * *

Mr. Crosby naturally sought the cause of this shortage, and concluded that the pumping accounted for it. East Orange denied liability, and Mr. Crosby, in May, 1910, brought this action to recover compensation for his shortage of water to that date.

* * *

Exhibit P. 2.

The question of liability being, as I have already mentioned, determined in favor of the plaintiff and against the defendant, leaving to be determined by a jury, and that jury is this jury, the question of the amount of damage to which the plaintiff is entitled, this order, I think, can mean only one thing: that East Orange is liable to pay compensation to Mr. Crosby for whatever injury Mr. Crosby can prove to your satisfaction that he suffered from shortage of water within the period named, unless the shortage was occasioned by some act or omission of Mr. Crosby himself or by some merely local condition, like a defect in a pipe or in a pump or the malformation or the silting up of a well. This order of the Supreme Court, as you have noticed, directs that the case be retried on the same rules as to damage, which is the only question we have before us now, which were applied by Judge Adams on the previous trial. It is therefore important to inquire what those rules were.

An examination of the charge in the former case shows that the Court instructed the jury, if they found for the plaintiff, to award him compensation for whatever loss, injury and inconvenience he had, in their opinion, proved that he suffered because of shortage of water during the period covered by the inquiry, and reimbursement for any outlay occasioned by the same cause. The charge in the former case contains also a passage which I will read:

> "A man who is suffering injury, or is threatened with injury, is bound to exercise the prudence of a reasonable man to improve his condition. In order that you may intelligently determine whether Mr. Crosby, in

Exhibit P. 2.

the exercise of due care and prudence for his own welfare, should have deepened his wells or permitted the defendant to deepen them or to make another well, you should put yourselves in the place of Mr. Crosby at that time—the question being as to his prudence, sagacity, good judgment—I say you should put yourselves in the place of Mr. Crosby at that time, with his knowledge of the history of the wells and of the existing situation, and ask yourselves whether he, as a man of ordinary prudence, acting with the information then at his command, should have sought to get more water by that method. This would be only fair to him. It would be unjust to adopt as decisive of this question the testimony of other persons, however expert, given years after, perhaps with fuller knowledge and better judgment than his. If you think that, as a reasonable and prudent man, he should have deepened his wells, or one of them, or should have allowed the defendant to do so, or to dig new wells for him, then, since he did not do so, he was imprudent, and unreasonable, and can recover no damages for any injury which he suffered because of such imprudence and unreasonableness after his rejection of this method of relief. On the other hand, if you think that he was not bound, as a careful and prudent man, to deepen his wells, or one of them, or to get another, then he was free from fault, and this feature of the case will require no further attention."

That was the charge in the former case, and this treatment of the case has received the approval of the Supreme Court, and the Court has

Exhibit P. 2.

directed me to try the case again on the same lines on which I tried it before, and I now charge you in the same terms in which I charged the former jury as to what Mr. Crosby can now claim at your hands. He can recover for nothing which he cannot in this case prove. He can recover for nothing occasioned or permitted by his own act or his own omission. He can recover nothing for shortage of water occasioned by some local condition, such as silting up. If, for example, he had filled up a well, and so stopped the flow of water, he could not recover for shortage thus occasioned. If his well had caved in from the top or filled up from the bottom, he could not recover for shortage thus occasioned. With such reservations as these, his right of action is to recover fair and reasonable compensation for any injury, inconvenience and expense which, in your opinion, he has proved to have resulted from shortage of water during the period named; that is, from January 13, 1905, to May 10, 1910.

* * *

Requests one, two, three, four, five and twenty-seven—I shall not take the time to read them; I shall merely designate them—are founded on the idea that the measure of damage applicable to permanent injury to real property is to be applied in this case; that is, that the measure of damages is the difference between the value of the property before and after the injury. An alternative rule is suggested by request 42, subdivisions *a* and *b*. This request is founded on the idea that the rule applicable to temporary injury to real property, as distinguished from permanent injury, is to be applied in this case; that is, that the measure of damages is the difference in the rental or usable value of the prop-

Exhibit P. 2.

erty before and after the injury. I shall deny these requests because I do not think that these rules were invoked at the other trial.

DEFENDANT'S REQUESTS AND EXCEPTIONS.

Defendant's counsel request the Court to charge the jury as follows:

(1) The measure of damage in this case is the diminished value of the plaintiff's real property occasioned by the construction and operation of the defendant's water works, measured by the difference between the value of the property as unaffected by the construction and operation of the water works of the defendant and its value as affected by the same.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(2) Where real property is permanently injured, the measure of damages for such permanent injury is the difference between the value of the property before and after the injury thereto occasioned by the act or acts of the defendant, but where such damage can be made good by restoration, the measure of damage is the reasonable cost of such restoration, provided that cost is less than the proved diminution in the value of the real property by reason of the permanent injury.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Exhibit P. 2.

(3) Where real property is permanently injured, the burden is upon the plaintiff to show the diminution in the value of the real property by reason of such injury, or to show the reasonable cost of restoration, and in default of proof of either, he is entitled to only nominal damages.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

POSTEA.

Afterwards, that is to say, on the 30th day of March, 1916, at a Circuit Court, of the Supreme Court held at Newark, in and for the County of Essex, before the Honorable Frederic Adams, a Circuit Court judge, according to the statute in such case made and provided, came as well the within named William E. Crosby as the within named City of East Orange, by their attorneys within named, and the jurors of the jury being summoned to try the said issue also came, to try the truth of the matters within contained, being elected, tried and being duly sworn on their oath and affirmation, say—that the said the City of East Orange is guilty of the wrongs above laid to its charge, in manner and form as the said William E. Crosby complained against it, and they do assess the damages of the said William E. Crosby over and above his costs and charges, at the sum of twenty-seven hundred dollars permanent.

FREDERIC ADAMS,
Circuit Court Judge.

Exhibit P. 2.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WILLIAM E. CROSBY,
Plaintiff,

vs.

THE CITY OF EAST ORANGE,
Defendant.

Transcript of testimony taken in the above entitled cause, pursuant to notice, before Nicholas W. Bindseil, a Supreme Court Commissioner, at the Court House, Newark, New Jersey, on Friday, May 12th, 1916, at 3 P. M.

Appearances—

Mr. Jerome D. Gedney and Mr. Edward M. Colie for defendant.

Mr. Ralph E. Lum for plaintiff.

It is stipulated and agreed by and between the attorneys for the respective parties that testimony of the witnesses may be taken down in shorthand by the Commissioner and afterwards reduced to typewriting, the signatures of the witnesses to their said testimony being waived.

GEORGE W. JOERSCHKE, sworn on behalf of defendant, testified as follows:

Direct examination by Mr. Gedney.

Q Mr. Joerschke, were you in court on the day a verdict was returned in the case of Crosby against East Orange, in the New Jersey Supreme Court, Essex Circuit? A I was in court as clerk on Thursday, March 30, 1916. My record

Exhibit P. 2.

shows that the jury in the case of William E. Crosby *v.* City of East Orange retired at 12:37 P. M., and rendered a verdict at 4:50 P. M.

Q Were you in court when the verdict was rendered? A Yes, I was.

Q You made a record of the verdict in the clerk's minutes? A This is the book in which the original record of the proceedings in court is entered by me.

Mr. Lum. I enter an objection here to this evidence, on the ground that it is an effort to destroy or impeach a verdict of the jury, and also object to these proceedings on the ground that they are irregular, defective and void.

Q What is the record? A My record shows a verdict in favor of the plaintiff against the defendant for $2,700, permanent.

Q Were you in court when the verdict was delivered? A Yes, sir.

Q Who delivered the verdict of the jury? A The foreman, Edward Jacobus.

Q In announcing the verdict of the jury what did he say, to the best of your recollection?

Mr. Lum. I renew my objection on the ground previously stated.

A My recollection is he said—he must have said $2,700, permanent, because I wrote it that way, by order of Judge Adams.

Q Do you recall that while the foreman was announcing the verdict, the Court interrupted him and said: "We are only concerned with the amount of the verdict," or words to that effect? A No, sir, I do not. I don't say he didn't say it, but I don't recall that he said that.

Exhibit P. 2.

Q And that he said in substance, "We are only concerned with the amount of the verdict?" A No, I don't remember that, Mr. Gedney.

Cross examination by Mr. Lum.

Q The jury was not polled, Mr. Joerschke? A No.

Q And you don't recall that any one was present at the time from Lum, Tamblyn & Colyer's office, do you? A To the best of my recollection Mr. Gedney was the only counsel in the case who was there.

Re-direct by Mr. Gedney.

Q Was Mr. MacLauchlan in court when the verdict was announced? A I don't think so; I am not sure about that; I think Mr. MacLauchlan can tell you about that; I don't think he was there.

JOHN MacLAUCHLAN, sworn on behalf of defendant, testifies as follows:

Direct examination by Mr. Gedney.

Q You are one of the official stenographers in the Essex County Circuit Court? A I am official stenographer to the Essex Circuit Court.

Q Did you report the case of Crosby against East Orange, tried before Judge Adams and a jury in this circuit in the month of March, 1916? A With another stenographer assisting me, I did.

Q Were you in court when the jury was charged and retired to consider their verdict? A I was.

Q Do you recall at about what hour that was? A My memory is that it was shortly before the usual recess hour, which is one o'clock.

Exhibit P. 2.

Q Were you called into the court room after that, Mr. MacLauchlan? A I was, twice.

Q What was the occasion of the first call to come back to the court room? A A desire expressed by the jury for further instructions, or further reading of testimony.

Q And do you recall about what time that was? A Roughly, I should say between three and four o'clock.

Q And then you went from the court room? A I left the court room.

Q Were you again called? A I was again called, I should think, somewhere about five o'clock.

Q When you returned to the court room at about five o'clock on this thirtieth of March, was the judge on the bench? A The judge was on the bench.

Q And was the jury in the room? A The jury was in the room.

Q What was the position of the jury in the room? A They were arranged around the clerk's desk and the counsel table, all standing.

Q In the manner such as they are when they deliver a verdict? A Exactly.

Q Do you recall what was the first said when you returned on this last occasion and took your seat? A Having looked at my notes this afternoon, I can say.

Q You have your notes to refresh your memory? A I say, having looked at them this afternoon. I can say now.

Q What was said? A Judge Adams said, "Now, Mr. Gedney."

Q Then what was next said? A To say that, I will have to look at my notes.

Q Please refer to your notes to refresh your recollection. A I am looking at my original

Exhibit P. 2.

notes; Mr. Gedney said, "It appears that in announcing the verdict the foreman said, 'We have found in favor of the plaintiff and against the defendant in the sum of $2,700 for permanent damages,' or words to that effect. I do not recall whether he said 'permanent' or 'permanent damages.' "

Q What was next said? A The Court said, "I will ask the clerk what it was." And Mr. Joerschke, the clerk, then said, "The foreman said '$2,700' and used the word 'permanent.' " Then Mr. Gedney said, "I will say that, then. I would like to ask what was meant by the word 'permanent.' " And the Court then said, "Mr. Foreman, you hear the question. What have you to say?" The foreman said, "Why, your Honor, that meant no future damages from that source." The Court then said, "That is all, gentlemen."

Q And the jury was dismissed? A I presume the usual course was taken, because I have nothing further on my notes. In fact, I know nothing out of the usual order took place.

Q Is not that the form which the Court uses in dismissing the jury, when he says, "That is all?" A Yes. I think anyone else could say that as well as I.

Q The Court said that? A Yes.

Q And the jury did, as a matter of fact, retire? A Yes, the jury dispersed.

Cross examination by Mr. Lum.

Q No one was present from Lum, Tamblyn & Colyer's office that you saw at the time, was there, Mr. MacLauchlan? A According to my recollection, Mr. Gedney was the only lawyer connected with the case who was in the court room.

Exhibit P. 2.

Q And you heard nothing of any direction or notice given to the counsel for the plaintiff to be present, did you? A Not at all.

JEROME D. GEDNEY, sworn for defendant, on his oath testifies as follows:

Direct examination by Mr. Colie.

Q You were the attorney in the case of Crosby against East Orange? A Yes.

Q Were you present in court at the time the jury came in with its verdict? A I was, on March 30, 1916.

Q Will you please state what took place at that time in your presence and in the presence of the Court and while the jury were rendering their verdict and afterward, while they were there before the Court assembled? A When the foreman announced the verdict—

Mr. Lum. I object to this on the ground that it is an effort to impeach and destroy a verdict of the jury, irregular and incompetent.

A (Continuing.) When the foreman announced the verdict, he used the word "permanent;" just exactly what words were said by him, I don't recall, because the judge interrupted him and stopped him by saying substantially this, "We are not concerned with anything but the amount;" whereupon I addressed the Court and said that I would like to inquire what was meant by the verdict and by the word "permanent." The Court then asked if the jurors were all in the room, and being told they were, the Court sent for Mr. MacLauchlan, the stenographer, and at that juncture Juror No. 11 spoke up and said, "We mean that East Orange is

Exhibit P. 2.

not to pay any more damages." The Court said, "We will wait until Mr. MacLauchlan comes in," and when Mr. MacLauchlan came in, the further proceeding was as he testified to.

Q The jury all being there? A The jury all being there.

Cross examination by Mr. Lum.

Q No one from our office was present, Mr. Gedney? A No.

Q And no one was sent for and no notice given to us of these interesting proceedings? A No notice was given to me either, but I simply happened to be there; it was an absolute coincidence.

Re-direct by Mr. Colie.

Q There was a stipulation entered into between you and Lum, Tamblyn & Colyer, dated December 13, 1915, being Exhibit D. 4 in the trial of the case of Crosby against East Orange at the last trial?

Mr. Lum. I object to this as irrelevant, incompetent and immaterial, and on the ground that this was offered in evidence and became an exhibit and is part of the record, and that all of the record must go up on this rule, or else none of it, and that this defendant may not select sections of this record which it considers most favorable for it, on which to base arguments.

A Yes.

Q Please read it.

Mr. Lum. Same objection.

A "It is stipulated and agreed by and between the parties hereto, by their respective at-

Exhibit P. 2.

torneys, that upon the trial of this cause the following facts are and will be admitted:

"(1) That prior to the first day of January, 1905, the act entitled 'An Act to enable cities to supply the inhabitants thereof with pure and wholesome water,' approved April 21, 1876, (Comp. Statutes of New Jersey, p. 823) was duly adopted by the defendant, The City of East Orange.

"(2) That the plaintiff does not and will not claim damages for loss of profits of the business formerly carried on by him on the property in question. Dec. 13, 1915."

JOHN W. SMITH, sworn for plaintiff, on his oath testifies as follows:

Direct examination by Mr. Lum.

Q Were you one of the jurors in the case of Crosby against East Orange tried last March? A Yes, sir.

Q Do you recall that the jury took the case under deliberation? A Yes.

Q Were you in the jury room all the time the case was under consideration? A Yes.

Q Do you know what verdict the jury agreed upon? A Yes.

Q What verdict?

Mr. Gedney. I object to that on the ground that the verdict as delivered by the foreman is the verdict of the jury.

A $2,700 damages.

Q Was any limitation or condition as to the verdict discussed in the jury room?

Mr. Gedney. Same objection, and on the further ground that the discussion is not evidence.

Q Was the word "permanent" used in the jury room by the jurors in their deliberations?

Exhibit P. 2.

Mr. Gedney. I object to that on the same ground.

A I didn't hear it.

Cross examination by Mr. Gedney.

Q You were in court when the verdict was announced? A Yes.

Q You heard the foreman use the word "permanent" when he announced the verdict? A Yes.

Q You stood there and remained silent? A Sure.

Q You didn't suggest that that wasn't the verdict of the jury? A I didn't say a word.

Q And you also were in court when Mr. MacLauchlan, the official stenographer, came in after the verdict had been rendered and heard the question put by me to the foreman as follows: "It appears that in announcing the verdict the foreman said, 'We have found in favor of the plaintiff and against the defendant in the sum of $2,700 for permanent damages,' or words to that effect. I do not recall whether he said 'permanent' or 'permanent damages.' I would like to ask what was meant by the word 'permanent.'" You heard me ask that after the verdict was rendered? A Yes.

Q And you heard the foreman say, "Why, your Honor, that meant no future damages from that source," and you made no objection? A No.

Q Or statement to the contrary? A No.

Q And yet you say that that wasn't the verdict that you agreed to? A I do.

Q Why didn't you speak when the verdict was rendered and why didn't you speak when the foreman was called upon to explain the

meaning of the verdict, when you knew he was announcing something that was contrary to what you had agreed to? A I didn't think I had authority to speak.

Q Don't you know that one of the other jurors spoke up? A No.

Q After the verdict was rendered? A Before the Court, you mean?

Q Before the Court. A No; I don't remember that.

Q Don't you remember No. 11 speaking up after the Judge had sent for the stenographer; just after the foreman had given the verdict and when I went up to speak to the Judge, to ask permission to interrogate the foreman as to the meaning of the verdict, don't you recall that one of the other jurors spoke up? A No.

Q No. 11, I think; Mr. Delaney? A No.

Q You don't recall that? A No.

Q Do you mean to say that the question as to whether or not there should be future suits and future damages awarded to Mr. Crosby was not considered in the jury room? A I do.

Q Not a word said about that? A Not a word.

Q Was there any period of time mentioned at all which was to be covered by the damages which you were considering? A Not that I recall.

Q Never considered anything in regard to it at all? A No.

Q Did you consider the damage to his property, the permanent value of his property?

Mr. Lum. I object to this on the ground that it is not within the scope of the direct examination; I object also on the further ground that it is not within the scope of the

Exhibit P. 2.

issues in the suit, and that this, consequently, is an effort to impeach or destroy a verdict of the jury, and evidence of that kind is inadmissible under our decisions.

A No.

Q Was not that discussed in the jury room? A The value of his property?

Q Yes; the damage to the property? A Yes.

Q The diminished value of his property by reason of the pumping? A Yes.

Q Isn't that, as a matter of fact, what the damages were based on, the diminished value of his property by reason of the pumping? A To explain all that I would have to talk some.

Q Can't you answer that question? A I understand I was to come down here to tell what—

Q I don't care what you came down here to say; I want an answer to this question. A What is the question?

Q Isn't that, as a matter of fact, what the damages were based on, the diminished value of his property by reason of the pumping? A I would say yes.

Q You didn't limit the damages to any particular period of time? A No.

Q (*By Mr. Lum.*) You attempted to follow the instructions of the Court as to damages as you understood them? A Yes.

Mr. Gedney. I object to that last question on the ground that it calls for a conclusion.

Exhibit P. 2.

PETER M. WILLIAMS, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Lum.

Q You were one of the jurors in the case of Crosby against East Orange, tried last March? A I was.

Q Do you remember that the jury deliberated upon this verdict? A I do.

Q Were you in the jury room all the time? A I was.

Q What verdict did the jury agree upon? A $2,700.

Q Were there any strings or limitations imposed upon it? A No.

Q Will you tell us whether or not the question of damages being permanent was discussed in the jury room while you were present? A They were not, to my knowledge.

Q Then I understand the jury agreed upon a verdict of $2,700 without condition or limitations? A They did.

Cross examination by Mr. Gedney.

Q You were in court when the foreman delivered the verdict? A I was.

Q You heard him say that it was permanent? A I did.

Q And you made no objection? A I did not.

Q You didn't ask the Court to be permitted to say that you didn't agree to such a verdict? A I did not.

Q You were also in court after the verdict was delivered, when the foreman was called upon to explain what he meant? A I was.

Q You heard the explanation? A I did.

Exhibit P. 2.

Q You heard him say that what was meant was that there was to be no future damages from that source? A I did.

Q You didn't then ask the Court for permission to speak? A I did not.

Q Or make any objection to the verdict as rendered by the foreman? A I did not.

Q You heard Mr. Smith give his testimony just now? A I did.

Q And you heard him say that the amount of damages as found by the jury were based upon the diminished value of the property of the plaintiff by reason of the pumping? A I did.

Q Is that a fact? A Not as far as I am concerned, altogether; that was taken into consideration, as far as my personal opinion went.

Q The damages were based on that as well as other things? A As well as other things.

Q (*By Mr. Lum.*) The inconvenience to which he was put was an element taken into consideration? A That was one of the main features in my decision.

WILLIAM H. JONES, sworn on behalf of plaintiff, on his oath, testifies as follows:

Direct examination by Mr. Lum.

Q You were one of the jury in the case of Crosby against East Orange? A Yes.

Q You were present in the jury room all the time during the deliberations? A Yes.

Q Do you recall the verdict the jury agreed upon? A Yes, sir.

Q What was it? A $2,700.

Q Were there any limitations or conditions imposed on the verdict in your hearing? A The word "permanent" was not used.

Exhibit P. 2.

Q When did you first hear that word used? A I heard it when we were filing out of the room, going upstairs.

Q Was that the first time you heard it mentioned? A Yes.

Q Will you tell us whether or not the jury took the matter of inconvenience into consideration? A Yes, sir, and decreased valuation of his property.

Q Will you tell us whether or not you attempted to arrive at a verdict in accordance with the charge of the Court?

Mr. Gedney. I object to that; it calls for a conclusion and not for a matter of fact.

A Why, yes.

Cross examination by Mr. Gedney.

Q You also were in court when the verdict of the jury was announced by the foreman? A Yes.

Q And you heard him say that this was for permanent damages, or words to that effect? A Yes.

Q And you didn't ask the Court to correct that, or you didn't object to it in any way? A No, sir.

Q And you also stood silent when the foreman was called upon shortly after to explain what he meant, and when he said, "Why, your Honor, that meant no future damages from that source," you made no objection whatever? A No, sir.

Q And you didn't ask permission to correct that, if that was incorrect? A No, sir.

Q Whatever else was considered by you in arriving at that verdict, you based it on the diminished value of Mr. Crosby's property by

Exhibit P. 2.

reason of the pumping, just as Mr. Smith, the other juror, said? A Yes.

It is stipulated and agreed that Juror No. 11, Mr. Delaney, if called as a witness, would testify that he agreed to bring in a verdict in favor of the plaintiff and against the defendant for the sum of $2,700, only on the agreement that this should be permanent damages.

Mr. Lum. This stipulation is agreed to subject to my objection that the evidence is incompetent, irrelevant and immaterial, and as irregular and illegal, being an effort to impeach and destroy a verdict of the jury.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } *ss.*

I HEREBY CERTIFY that the foregoing testimony was taken, pursuant to notice, before me as Supreme Court Commissioner, at the Court House, Newark, New Jersey, on Friday, May 12th, 1916, at 3 P. M., in the presence of Mr. Jerome D. Gedney and Mr. Edward M. Colie for defendant, and Mr. Ralph E. Lum for plaintiff; that it was stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witnesses should be taken down by me in shorthand and afterwards reduced to typewriting, the signatures of the witnesses to their said testimony being waived, and I further certify that the foregoing is a true and correct transcript of my shorthand notes of the testimony of the witnesses given before me.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey.

Dated May 15th, 1915.

Exhibit D. 1.

EXHIBIT D-1.

PLEA.

Filed July 6, 1910.

NEW JERSEY SUPREME COURT.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* THE CITY OF EAST ORANGE, Impleaded, etc., *Defendant.*	*In Tort.* *Plea.*

And the said The City of East Orange, by Jerome D. Gedney, as attorney, comes and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, in manner and form as the said William E. Crosby, the plaintiff, hath above thereof complained against it.

And of this, it, the said The City of East Orange, puts itself upon the country, etc.

JEROME D. GEDNEY,
Attorney of Defendant.

A true copy:

WM. C. GEBHARDT,
Clerk.

Exhibit D. 2.

EXHIBIT D-2.

POSTEA.

NEW JERSEY SUPREME COURT.

William E. Crosby,	*In Tort.*
vs.	
The City of East Orange.	*On Postea.*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand seven hundred dollars besides costs to be taxed *nisi.*

Entered April 6, 1916.

On motion of

LUM, TAMBLYN & COLYER,
Attorneys.

A true copy:

Wm. C. Gebhardt,
Clerk.

Exhibit D. 3.

EXHIBIT D-3.

OPINION.

Filed November 9, 1916.

NEW JERSEY SUPREME COURT.

June Term, 1916.

WILLIAM E. CROSBY, *vs.* THE CITY OF EAST ORANGE.	*On Rule to Show Cause.*

Argued June 7, 1916; decided November 9, 1916.

Before Justices Garrison, Parker and Bergen.

For the rule: Jerome D. Gedney, Esq.; Albert C. Wall, Esq.; Edward M. Colie, Esq.

Contra, Ralph E. Lum, Esq.

Per Curiam: (For information of counsel.)

The rule to show cause is confined to the amendment of the postea, with respect to the verdict, which assesses the damages of the plaintiff "at the sum of twenty-seven hundred dollars permanent." The amendment sought is "that the award of $2,700 is for the permanent injury to the plaintiff's lands and premises hereafter as well as heretofore occasioned by the construction, operation, &c., of the defendant's wells, &c., or equivalent words."

We think that the amendment should be denied. If the verdict has this meaning the amendment is unnecessary; if it has not such meaning the amendment is unlawful.

The question whether the verdict should stand in view of the charge of the trial Court is not before us on this rule.

The rule to show cause is discharged with costs.

Findings of Law Requested by Defendant.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* vs. CITY OF EAST ORANGE, *Defendant.*	*Case #1.* *Findings of Law Requested by the Defendant.*

N. B. The words "act of 1876" in the following requests refer to the act entitled "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water," approved April 21, 1876, and the amendments thereof and supplements thereto.

The Court is requested to find severally:

1. That the plant and wells of the defendant were erected and are maintained and operated lawfully under the act of 1876.

2. That under the act of 1876, the taking of the water, the abstraction of which is complained of in the suit in the Supreme Court between the same parties, in relation to the same land, was not a trespass.

3. That under the act of 1876, the taking of the water, the abstraction of which is complained of in the suit in the Supreme Court between the same parties, in relation to the same land, could be lawfully done without compensation *first* made.

4. That the liability of the plaintiff to respond in damages for the injury done by the

abstraction of the water complained of in the suit in the Supreme Court was the same as if the proceeding was to award the plaintiff his damages for such abstraction of the water under the proceedings provided for by Section 3 of the act of 1876.

5. That the measure of damages under the proceedings provided by Section 3 of the act of 1876 was the measure of damages the plaintiff could recover in a suit at law brought by the plaintiff against the defendant for damages suffered by the operation of the plant and wells of the defendant, constructed under the act of 1876.

6. That the damages of the plaintiff, whether admeasured under the provisions of Section 3 of the act of 1876, or in a suit at law, are a unit and cover the permanent damages to his property occasioned by the maintenance and operation of the plant and wells of the defendant in the manner complained of.

7. That the only rule for the admeasurement of damages for injury of the character complained of in this suit is found in Section 3 of the act of 1876.

8. That the damages recoverable by a land owner for injuries done to his land by the maintenance and operation of a water plant erected under the authority of the act of 1876, provided for by the award of commissioners, as set forth in Section 3 of said act, are the permanent damages to the property of the owner and not temporary damages.

9. That successive suits will not lie for damages to land by the maintenance and operation of a water plant erected, maintained and operated under the provisions of the act of 1876.

Findings of Law Requested by Defendant.

10. That the plaintiff, having recovered a judgment in the suit brought by him, in the Supreme Court, against the defendant, for the damages resulting to his land (being the same land involved in this suit), by reason of the said plant and wells of the defendant operated in the same manner as complained of in this suit, that judgment is a bar to this action brought after the institution of the suit in the Supreme Court.

11. That the judgment in the case in the Supreme Court between the same parties, in evidence in this cause, entered on the Postea, in evidence in this cause, is a bar to this action.

12. That the plaintiff by entering judgment on the Postea signed in the action in the Supreme Court, in evidence in this cause, and issuing execution thereon, adopted that judgment as a judgment for permanent damages and that judgment is a bar to this suit.

13. That the issuance of the execution, upon the judgment referred to in request No. 12, the levy thereunder, and the satisfaction thereof, each constituted a separate act of adoption on the part of the plaintiff in both suits, of the judgment in the Supreme Court as a judgment for permanent damages and operates as a bar to this action.

14. That Section 3 of the act of 1876, by its special provision limiting the damages to the period of within three years from the time the damage was done, makes the judgment in the Supreme Court between these parties entered on April 6, 1916, a bar to this subsequent action.

15. That the plaintiff is not entitled to recover because he has failed to show any injury

to his land during the period covered by the present action.

16. That the plaintiff is not entitled to recover in this action because he has failed to show that he was the occupier of the land during the period covered by the state of demand.

17. That the present action is barred by the limitation in Section 3 of the act of 1876.

18. That the present action is barred by the judgment entered in the Supreme Court on April 6, 1916.

19. That the judgment entered in the Supreme Court between the parties hereto in the suit brought May 25, 1905, was for permanent damages to the plaintiff's property by reason of the maintenance and operation of the plaintiff's plant and wells referred to in this case.

20. That the defendant is entitled to judgment in this cause.

JEROME D. GEDNEY,
Attorney of Defendant.

Findings of Fact Requested by Defendant.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* *vs.* CITY OF EAST ORANGE, *Defendant.*	*Case No. 1.* *Findings of Fact Requested by the Defendant.*

The Court is requested to find severally:

1. That the plant and wells of the defendant, at White Oak Ridge, Essex County, New Jersey, referred to in the state of demand, were erected and are maintained and operated by virtue of the act of the Legislature, approved April 21, 1876, entitled "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water," and the amendments thereof and supplements thereto, said act being adopted at a special election held in said city on December 7, 1901.

2. That said plant and wells have been operated continuously since January, 1905.

3. That said source of supply is the only means of supplying water for the use of the City of East Orange and its inhabitants.

4. That the lands and premises of the plaintiff referred to in the state of demand filed herein are the same lands and premises referred to in the declaration in the case between this plaintiff and this defendant brought in the Supreme Court on May 25, 1910, the record in which

suit in the Supreme Court is in evidence in this cause.

5. That the plant and wells of the defendant referred to in the state of demand filed herein are the same plant and wells referred to in the declaration in the case between this plaintiff and this defendant brought in the Supreme Court on May 25, 1910, the record in which suit in the Supreme Court is in evidence in this cause.

6. That in said suit in the Supreme Court, the Postea as signed, recited that the jury found for the plaintiff and did "assess the damages of said William E. Crosby over and above his costs and charges at the sum of $2,700 permanent."

7. That in open court at the time of rendering said verdict the foreman of the jury in answer to the question, "What is meant by the word 'permanent'?", replied, "Why, your Honor, we mean no future damages from that source."

8. That judgment in said cause in the Supreme Court was entered on said Postea in favor of the plaintiff on April 6, 1916, for $2,700 besides costs to be taxed.

9. That execution has been issued and levied on the judgment recovered in the Supreme Court action and execution has been made by the sheriff of the County of Essex.

10. That there is no evidence in this cause that the plaintiff was the occupier of the lands and premises referred to in his state of demand in this cause during the period mentioned in said state of demand.

11. That the operation of the defendant's plant and wells continues as at the time of the former trial between the parties, the former trial being the trial of the issue in the Supreme

Court of this State in the action brought on May 25, 1910.

12. That more than three years had elapsed, between the date at which it is alleged, in the declaration filed in the cause in the Supreme Court between the same parties, begun May 25, 1910, that the defendant, by the operation of its plant and wells, injured the plaintiff's land (the land being the same in that suit and this suit), and the earliest date named in the demand filed in this suit, from which date the plaintiff therein demands damages for injuries to his land by the operation of the plant and wells of the defendant.

JEROME D. GEDNEY,
Attorney of Defendant.

Findings.

FIRST DISTRICT COURT.

CROSBY,

vs.

EAST ORANGE.

This suit is brought to recover damages for the interception by the defendant with wells, pumps, &c., of percolating water, which otherwise would have reached the plaintiff's land.

It has been stipulated by the parties:

"3. That the defendant in the City of East Orange duly adopted at a special election held in said city December 7, 1901, an act entitled 'An act to enable cities to supply the inhabitants thereof with pure and wholesome water; and that under said act the defendant constructed its wells and plant at White Oak Ridge, Village of Northfield, Essex County, New Jersey, and has since January, 1905, continuously operated the same; and that the said source of supply is the only means of supplying water for the use of the City of East Orange and its inhabitants.' The stipulation is marked P. 1.

The case was tried without a jury.

The defendant has handed up twenty requests for findings of law, marked D. R. b.

I decline to find as requested by the defendant on matters of law.

The defendant has handed up twelve requests for findings of fact, marked D. R. f. Of these requests the first three are covered by the stipulation.

Findings.

As to the fourth, fifth, ninth, tenth, eleventh and twelfth requests for findings of fact, I do find as requested.

As to the sixth and seventh request I decline to find as requested.

As to the eighth request for a finding of fact, I decline to find further than that a judgment was entered in the Supreme Court, on April 6, 1916, against The City of East Orange and in favor of William E. Crosby, who are the parties to this suit, for $2,700 damages besides costs to be taxed.

I further find that the plaintiff was the owner of the lands alleged to have been damaged, by the defendant, by the interception of percolating water, which would have reached plaintiff's land, but for such interception, during the period set forth in the demand; that the defendant is guilty of such interception and the plaintiff has suffered damage.

Judgment for plaintiff for amount stipulated.

Record of Judgment.

Copy of Clerk's Docket.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

WILLIAM E. CROSBY, *Plaintiff,* vs. THE CITY OF EAST ORANGE, a corporation, *Defendant.*	Summons, $2.10 Mileage, .24 List, fee 1.50 Att's fee, 11.45 Total cost $15.29

A summons in the above stated cause was issued on the twenty-seventh day of March, 1913, returnable on the third day of April, 1913, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed his state of demand March 27, 1913.

The summons was served and returned as follows:

I served the within summons March 29, 1913, on J. F. Boyle, he being the secretary to the Mayor of said city, by reading it to him and giving him a copy thereof.

JOHN McNELLEN,
Sergeant-at-Arms First District Court.

April 3, 1913.

This cause was adjourned to April 10, 17; May 15, 29; June 12; July 10; August 12, 26; September 2, 16.

September 16, 1913.

This cause was adjourned to 23, October 7, 14, 21, 28; November 11, 18; December 2, 6; January 15, 20; March 3, 31.

March 31, 1914.

This cause was adjourned to April 14, 28; May 12, 26; June 9, 23, 30; August 4, 18; September 1, 8, 15, 29.

September 29, 1914.

This cause was adjourned to October 27, November 24, December 22, January 19, February 16, March 16, April 13, May 11.

May 11, 1915.

This cause was adjourned to June 8, 22; July 6, 29; September 3, 14; October 14, November 11, December 9, January 4, February 1, March 7.

March 7, 1915.

Not moved.

December 7, 1916.

Notice filed setting case for trial December 21.

December 21, 1916.

This cause was adjourned to January 4, 10.

January 10, 1917.

The plaintiff and the defendant appearing, the cause was tried.

Stipulation as to facts filed. No witnesses sworn and Court reserved decision.

The evidence being closed, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of two hundred twenty-nine dollars, damages with costs whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of two hundred twenty-nine dollars damages with costs.

First District Court of the City of Newark, in the County of Essex and State of New Jersey.

I, the subscriber, do hereby certify that the foregoing transcript is a true copy of the record

and proceedings in the case of William E. Crosby *v.* The City of East Orange, held in the First District Court of the City of Newark, in the County of Essex and State of New Jersey, entered upon page #39910 in the First District Court Docket #91.

In Witness Whereof, I, Charles R. Baldwin, clerk of said Court at Newark, aforesaid, have hereto set [seal] my hand and the seal of said Court this first day of March, A. D. Nineteen Hundred and Seventeen.

CHARLES R. BALDWIN,
Clerk.

Grounds of Appeal.

Filed.

New Jersey Supreme Court.

WILLIAM E. CROSBY,
Plaintiff,
vs.
CITY OF EAST ORANGE,
Defendant.

Case No. 1.
On Appeal.

The appellant here specifies the following determinations and directions of the District Court with respect to which it is dissatisfied to point of law:

1. Because under the evidence in this case, the judgment should have been for the defendant.

2. Because the District Court refused to find the sixth request for findings of fact of defendant.

3. Because the District Court refused to find the eighth request for findings of fact of defendant.

4. Because the findings of the District Court, that the lands of the plaintiff were damaged by the defendant, is not supported by any evidence.

5. Because the judgment is illegal and void.

6. Because the judgment of the District Court should have been in favor of the defendant and against the plaintiff.

7. Because the District Court refused to find each of the findings of law requested by the defendant and #1-20, both numbers inclusive.

JEROME D. GEDNEY,
Attorney for Defendant.

Opinion.

Filed November 19, 1917.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1917.

WILLIAM E. CROSBY,
Plaintiff-Appellant,

vs.

THE CITY OF EAST ORANGE,
Defendant-Respondent.

Submitted July 5, 1917; Decided November 19, 1917.

On appeal from the First District Court of the City of Newark.

Before Justices Trenchard and Minturn.

For the appellant, Jerome D. Gedney and Edward M. Colie.

For the appellee, Lum, Tamblyn & Colyer.

Per Curiam:

This is an appeal from a judgment of the First District Court of Newark in favor of the plaintiff.

This action is a second suit brought by the plaintiff, Crosby, against the City of East Orange to recover damages to his real property by the abstraction of waters of percolation therefrom, notwithstanding that *permanent* damages have been heretofore awarded him in a suit in the Supreme Court for injury to the same property by the abstraction of waters of percolation therefrom, by the operation in the same manner of the same water plant.

The record in the action brought in the Supreme Court above referred to was introduced in evidence. It shows that the action ultimately resulted in a verdict by the jury in favor of the plaintiff and an assessment of damages over and above his costs and charges "at the sum of twenty-seven hundred dollars permanent." This is set forth in the Postea.

This verdict, so announced, and the Postea thereon are in full force and effect. An application was made to the Supreme Court to amplify the language of the Postea and the Supreme Court refused to change the verdict set forth in the Postea as signed.

The plaintiff made no application to set aside this verdict as rendered or the Postea as signed; on the contrary he entered judgment thereon and has issued execution to enforce the judgment and has collected the same. All the foregoing matters are admitted or stipulated or proved in the record now before this court. The court must now deal with this record and declare its effect in the present case. The word "permanent" must be taken by the court as a part of the record. Its significance in actions for injuries is perfectly well settled. The Postea awards the damages for a permanent injury and it is too fundamental to require discussion, that a verdict between the same parties for permanent injuries to land, is a bar to any future action by the owner of that land for injuries arising to the same land from the same cause.

The judgment below will be reversed and a judgment entered in favor of the defendant, with costs.

Rule for Judgment.

Entered December 7, 1917.

NEW JERSEY SUPREME COURT.

WILLIAM E. CROSBY, *Plaintiff and Appellee,* *vs.* THE CITY OF EAST ORANGE, *Defendant and Appellant.*	*On Appeal.* *Case No. 1.* *Rule for Judgment.*

An appeal having been taken from the judgment of the First District Court of the City of Newark, entered therein on January 10, 1917, wherein and whereby the said court rendered judgment in favor of the said plaintiff and against the said defendant in the sum of $229.00 damages with costs, and the court having heard the argument of counsel and duly considered the the same:

It is ordered that the said judgment of the First District Court of the City of Newark be and the same is hereby reversed and that judgment in said action be and it is hereby entered in favor of the said defendant and against the said plaintiff with costs, and that said record be remitted to the court below.

Rule actually entered December 7, 1917.

On motion of

GEDNEY, McBRIDE & GEDNEY,
Attorneys for Defendant.

A true copy

WM. C. GEBHARDT,
Clerk.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

William E. Crosby, *Plaintiff-Appellant,* *vs.* The City of East Orange, *Defendant-Respondent.*	*In Tort.* *Case No. 1.* *On Appeal from Supreme Court.*

Brief for Plaintiff-Appellant.

This is an appeal from the judgment of the Supreme Court in favor of the defendant-respondent, which reverses a judgment of First District Court of Newark in favor of the plaintiff-appellant. The action was a second suit brought by Crosby against East Orange to recover damages by reason of the continuing injury through the abstraction by the defendant of underground percolating waters which were intercepted and taken from the plaintiff. Attention is called to the State of Demand, which is set up in the Book, pages 2-4. The eighth section charges that on account of the acts of the defendant "plaintiff has not been able for want of sufficient water to occupy his farm and premises nor carry on his farming and other operations thereon in so large, economical, extensive and beneficial manner as he might and otherwise could and would have done, but was thereby deprived during all that time of the use and enjoyment of the water which would have otherwise been furnished to his premises by the said wells and stream and of the moisture and water in the soil in the said land and of

the profits, benefits, gains and advantages which he might have and would have otherwise enjoyed and might now be carrying on his farming and other operations in the premises." This was not, in other words, as seemed to be assumed in the court below, an action to recover damages to real estate.

Suit in the District Court sought to recover damages for a period from May 1, 1910, to March 27, 1913. The trial was had before the court without a jury and the proceedings are within a narrow compass. Exhibit P. 1, page 10, fixed the amount of the damages in the event of the plaintiff being entitled to recovery and set forth the act under which the defendant operated. It was stipulated that the plaintiff was the owner of the premises mentioned in the State of Demand and that the operation of the defendant's plant continued as at the time of a former trial between the same parties (page 7, line 10). A record which had been used in a former case was then admitted, subject to objections to be made on the argument (P. 2, pages 11-42). From this a *prima facie* case was made out, entitling the plaintiff to a recovery, and the stipulation fixed the amount of that recovery. The defense merely offered its plea in the former case, D. 1 copy of the judgment, page 44, D. 2, and a copy of the opinion of the Supreme Court, D. 3, page 45. Right was reserved to the plaintiff to strike these out. It was admitted that execution had been issued and recovery made in the former judgment, which was entered April 6, 1916, a copy of which was marked D. 2. The District Court thereupon entered judgment in favor of the plaintiff and against the defendant in the stipulated sum.

The defendant's attorney requested the District Court to make certain findings, and they are set forth, page 53 of the record. The sixth, seventh and eighth requests for findings of fact by the defendant are set forth in the record, page 51, lines 13-27, and they were refused by the court except that it found "that a judgment was entered in the Supreme Court on April 6, 1916, against the City of East Orange and in favor of William E. Crosby, who are the parties to this suit, for twenty-seven hundred dollars ($2,700), besides costs to be taxed" (page 54, line 12). There is then no finding of fact with reference to any postea in any other proceedings and there can be no reason why there should be such a finding of fact because on the argument before the District Court consideration of the postea was objected to and we then urged and now urge that the postea is not a matter of consideration in this issue in any way.

The law with reference to the right of the plaintiff to recover for the diversion of underground percolating waters is clearly established in *Meeker* v. *East Orange,* 48 Vroom, 623. Based on the law as declared in that case, the trial in the first suit before Judge Adams resulted in a verdict in favor of the plaintiff for twenty-seven hundred dollars ($2,700). That, we respectfully insist, is the only fact with reference to the former trial found by the District Court, and accordingly the only matter now open for consideration on that record by this court.

If, however, it should be held otherwise and the postea which was a part of Exhibit P. 2, page 27, could be considered, it would appear that at the end of the postea was added the word "permanent." If this was to be given any consideration, the court would presumably

refer to the testimony returned as a part of P. 2, pages 28-42. From this it would appear that some of the jurymen meant that there were to be "no further damages from that source" (page 32, line 20), whatever they might mean by that. Other jurymen heard of no limitation or conditions as to the verdict, that the word "permanent" was never used in the jury room by the jurors in their deliberation (page 35, line 30), examination of Juror Smith, page 35, line 35; testimony of Juror Williams, page 39, line 15; of Juror Jones, page 40, line 40, etc.

But aside from any such consideration it is clearly illusory to maintain that the former judgment could act as a bar or estoppel in the present suit.

The former Judgment Is Not an Estoppel.

The only possible effect that the former judgment can have is through its making the issue in the present case *res adjudicata.*

When the question arises as to the effect of a former judgment it has been rightly determined that the court will look at the record or judgment roll in the former case, will examine the pleadings, the charge of the court and the judgment to determine what was the issue tried.

> "Inquiry must always be as to the point or question actually litigated and determined in the original action."
>
> *Schlistra* v. *Van Denheuvel,* 90 Atl., 1056, at 1058.

In fact, parol evidence is admissible to ascertain whether the facts in controversy have been so determined as to settle the rights of the parties in the second suit.

Steam Packing Co. v. *Sickles,* U. S., 333.

The plea of a former judgment works as an estoppel only as to those matters capable of being controverted between the parties at the time of the proceedings in the former action.

Mershon v. *Williams,* 63 N. J. L., 398.
Hoffmeier v. *Frost,* 83 N. J. L., 358.
Paterson v. *Baker,* 51 N. J. Eq., 49.
Clark Thread Co. v. *William Clark Co.,* 55 N. J. Eq., 658.

The record, then, as shown in P. 2 at page 14, sets forth a declaration in which the plaintiff Crosby sought from the defendant East Orange damages for a continuing trespass by the diversion of underground percolating water from the farm, wells and streams of the plaintiff *from January 15th, 1905, and on divers other days and times from that time to the commencement of the suit.* That suit was commenced on May 25th, 1910.

Other counts sought damages for injuries to well, business, deprivation of profits, gains and advantages *was for the same period of time.*

Coming, then, to the charge of the Court, page 20, we find Judge Adams laying down the rule of law applicable to the case and the measure of damages to be applied.

The jury was expressly told that the period covered was from the 13th day of January, 1905, up to May 10th, 1910, page 21, line 3.

He said further:

"This action is brought to recover compensation for this impairment of value of the use of water during this period. You will not, gentlemen, misunderstand the nature of this case. It is not a condemnation proceeding. East Orange has not taken

and is not about to take Mr. Crosby's farm. The question, therefore, is not as to the value of his farm, but as to the value of the use of water of which he says that the defendant has deprived him during the period which I mentioned."

Page 21, lines 17 to 30.

Continuing, the record says:

"Mr. Crosby complains, not that he has lost the use of this water for good and all, but only intermittently, at times, recurring annually during this period of between five and six years. The later date which I have mentioned—that is, the date of May 10, 1910—is the date of the commencement of this action."

Damages later in date than this, if any, are to be claimed, if at all, in some other action.

Page 22, line 2, etc.

The Court then refers to the law as applied in the Meeker case, and says:

"That while East Orange had a legal right to pump water from this valley, it is under an obligation to pay damages if in so doing it impaired the water rights of land owners."

The Court then refers to previous litigation between Crosby and East Orange, as a result of which, through an adjudication of the Supreme Court on a rule to show cause it was determined that liability existed, and the case went back for an adjudication solely on the question as to the *quantum* of damages, page 22, line 27, etc.

To make assurance doubly sure, the Court adds:

> "East Orange is liable to pay compensation to Mr. Crosby for whatever injury Mr. Crosby can prove to your satisfaction that he suffered from shortage of water within the period named."
>
> Page 23, line 10, etc.

The Court then refers to the rules adopted on the former trial:

> "With such reservations as these (referring to his own omission, silting of the wells, etc.) his right of action is to recover fair and reasonable compensation for any injury, inconvenience and expense which, in your opinion, he has proved to have resulted from shortage of water during the period named; that is, from January 13, 1905, to May 10, 1910."

The Court then takes up this defendant's Requests to Charge—one, two, three, four, five and twenty-seven being disposed of as inapplicable, being "founded on the idea that the measure of damage applicable to permanent injury to real property is to be applied in this case" (page 25, line 30).

> "I shall deny these requests because I do not think that these rules were invoked at the other trial."
>
> Page 26, line 1.

We then find the postea, page 27, in which after the words "Twenty-seven hundred dollars" appears the word "permanent."

The defendant had at the time no thought that this could act as a bar in any other proceedings as is unequivocally shown by its application immediately after the trial to Judge

Adams for a "rule to show cause why the postea should not be amended so that the same shall set forth that the verdict of $2,700 in favor of the plaintiff and against the defendant was for permanent injury to the plaintiff's land and premises referred to in the declaration in said cause hereafter as well as heretofore occasioned," etc., page 13, line 10, etc.

This rule to show cause was dismissed in a *per curiam* set up as D. 3, page 45, and thereafter judgment was entered as in the form shown on page 44 "for the sum of two thousand seven hundred dollars besides costs to be taxed *nisi.*"

This is the state of the judgment roll with reference to the prior suit, and to us it appears as a grave injustice that the plaintiff should be held to be barred through a judgment being held *res adjudicate* as to an issue which not only was not tried, but which by no means could have been tried.

The opinion of the Supreme Court, page 60, line 32, refers to the former verdict as a bar to any future action by the owner of that land for injuries arising to the same land from the same cause. We would observe that it is the judgment which is a bar, never the verdict; that there had never been any recovery by the owner of the land for injuries arising from the land. If on the former trial the plaintiff had offered evidence as to the value of his property or had sought to produce proof to show the extent of his injury which would arise from a permanent damage, the offer would have been at once overruled. That this was not the issue is shown by the pleadings and is made overwhelmingly clear by the Charge of the Court, and to hold the former judgment *res*

adjudicata now would be to bar the plaintiff on an issue which was not tried or triable.

In the defendant's brief in the court below point was made of the fact that the plaintiff made no application to set aside the verdict or amend the postea, and that accordingly the plaintiff should be estopped. The manifest unfairness of this is apparent at once when we see that the record shows that the defendant did not claim or contend that the one single word of surplusage changed the whole character of the proceedings and made the judgment one for permanent damages, but itself took proceedings to give the postea that effect. Surely if an estoppel is to be raised it should be raised against the defendant who should be bound by its course.

The defendant could, had it deemed that course advisable, have applied and successfully prevailed on a rule to show cause why the verdict should not be set aside as contrary to the charge of the Court. Its reasons for not taking that course will be apparent on examining the records of the Supreme Court, from which it will appear that this plaintiff recovered a former verdict of $6,500 at the hands of another jury. The defendant doubtless considered itself fortunate indeed to get away with so small a verdict as $2,700 for the five years' abstraction.

The recovery in the former suit was for a definitely limited period. This is manifest from the declarations and the charge of the Court, and an examination of the issue is conclusive on the point that no further or greater period could have been covered in the former suit and consequently it could not under any theory be a bar to an action to recover for the continuing damage for a later period. The second suit

seeks to recover for a period running from the date in May at which the first suit ended to March 1913.

The defendant seems throughout to have assumed that its position was a more favored one by reason of the fact that its plant was operated by virtue of an act of the Legislature that its water works were a "lawful and permanent structure." The claim of the plaintiff in the present case does not arise out of any structural defect of the defendant's plant, but this Court has said in the Meeker case that the diversion of underground waters, producing just such an injury as this plaintiff has suffered from this defendant is an actionable wrong.

Throughout its brief the defendant regards this as a suit for injury done to "real estate," and the cases of *McGuire* v. *Grant,* 1 Dutch, 356; *Manda* v. *Orange,* 77 N. J. L., 285, etc., are cited. These decisions, in the first place, have no application whatever to the present situation. In the second place, they could be given no consideration whatsoever in this case at this time.

In the first suit of *Crosby* v. *East Orange* all of these grounds of contention were urged at great length. This will appear from the examination of the records on file in the Supreme Court and the Court of Errors and Appeals, for this case is now in this Court for the second time and has been to the Supreme Court five times. On a Rule to Show Cause the Supreme Court previously has sustained the verdict as to liability, but sent the case back for a determination as to the amount of damages and directed that the case should be tried as to that feature by the rules laid down by Judge Adams in the record before it. Surely that was the

time for this defendant to review the measure of damages and not in this indirect method at this stage of the proceedings.

No Question as to the Measure of Damages Can now Be Raised.

This present case shows that the plaintiff was possessed of its land as of the time of the former trial, that the defendant continued its operations as when the former judgment was rendered against it. On that state of facts without more the plaintiff must be entitled to some recovery. This might have been nominal damages except for the desire of both parties to save a mass of testimony, which resulted in the stipulation P. 1, that for the purpose of this suit, the plaintiff, if entitled to recover, should have judgment for a definite sum agreed upon (page 10, line 22).

The law determining the present case is settled in Meeker v. East Orange, and not in the Lehigh Valley Railroad Co. v. McFarlan, 43 N. J. L., 605.

A large part of the defendant's brief is occupied with a consideration of the rule of damages.

As we have previously argued, the stipulation covers this completely in the present case. The facts merely established the plaintiff's right to a recovery, and the stipulation fixed the amount.

But under no theory and by no consideration could the Lehigh Valley Railroad Company case be applicable. It is to be observed, in the first place, that the Lehigh Valley Railroad Company was operating under "the Morris Conal & Banking Company's charter," which was granted in

1824, that is, several years before the Constitution of 1844. That case turned entirely upon the construction to be given to that particular charter. Such a charter could not be granted; such powers could not be given after the Constitution of 1844. That company had a right *by its charter* to appropriate waters, etc., without compensation first made.

It seems to us absurd to argue from that to the Act of 1876, Compiled Statutes, page 823.

Moreover, this Act of 1876 has no application whatever to the present case under any point of view. The first section gives any city the right to take real and personal estate as may be necessary and useful *in the manner* hereinafter provided. Section two then provides for a situation to arise "in case of any disagreement between the city and the owner as to the amount of compensation to be paid." There was no such situation in the present litigation. The defendant denied its liabilty. There was never any effort to fix an amount of compensation, and consequently there never was any disagreement, but in case of disagreement the second section looked to an application to the Circuit Court for proceedings such as have never been invoked by either of the parties before this Court, but to make the defendant's argument more fantastical we need only refer to Section three, which provides for a report to be confirmed by the Court and "*thereupon the said city shall become seized absolutely and in fee of said real and personal estate.*" Of course there has never been any application as contemplated by this act nor any report to be confirmed, and how this act can be seriously insisted upon as applicable is difficult for us to see. For instance, could it be suggested that

this defendant claimed to be entitled to the fee of the plaintiff's property because of a single word in a postea, entirely irrelevant and inconsequential as to any issue ever tried or triable between these parties? No issue of condemnation, no question of the value of the plaintiff's property, no suggestion of a charter and taking the property permanently has ever been suggested until we arrive at the advanced stage of the defendant's brief.

The charter of the Canal & Banking Company was such that its taking of property was not "a legal wrong;" that the abstraction by this defendant of the plaintiff's water is a legal wrong, is a matter of *stare decisis* since the Meeker case.

At page 611 of the McFarlan case reference is made to the damages as a finality and not as arising from time to time. Contrast with this the charge of Judge Adams before referred to. In the McFarlan case the rights of McFarlan were by the railroad company "permanently appropriated and the damages sustained were a unit." (Page 613.)

If the matter were one open to argument under the present state of the record we would find a closer analogy to the present situation in the opinion of this Court in *Dickinson* v. *D., L. & W. Railroad Co.*, 100 Atl., 203. The railroad, just as the water company, was "legally established," to use the phrase of the defendant's brief. The railroad was, in fact, operating upon its own land, to which it owned the fee, but it was continuously disregarding the right of the plaintiff, and hence was a continuous wrongdoer until the right of the plaintiff was eliminated, a thing which could not be done by a single loose word in a verdict, but must be

established in a legal manner and in proceedings in which evidence germane to that issue may be introduced and considered.

The defendant says that to permit the plaintiff to recover in the present suit would be to enable him to again collect for the same cause of action and would violate both legal and equitable principles.

This argument is absolutely disposed of by reference to the declaration in the originial suit and the state of demand in the second suit, which starts on the day in which the first suit leaves off; the careful charge of the Court in the first case limiting the issue to the use of the plaintiff's land; to its deprivation of water during the period covered by the first suit only and by the exclusion of all other evidence.

Based upon what evidence, if we are to invoke a doctrine equitable, as suggested by the defendant, could it have been possible for the jury in the first case to have determined permanent damages for the plaintiff? It had and could have had under no theory evidence before it from which it could make even a guess as to such a figure. If the defendant conceived that the verdict of $2,700 was not in accordance with the judge's charge, its rights were clear and it could have had that verdict set aside. Its only other remedy would have been a motion in the Court in which the verdict was rendered, to have the pleadings moulded, to have conformed to the verdict; that is, to have shifted the whole issue to conform to a single word in a postea, an effort which would surely have proved abortive.

In the present suit the defendant seeks to take advantage of all these moves it failed to make.

The District Court properly refused to consider the postea in the former case.

Consideration of that postea was not necessary to the decision of the issue before the District Court.

The Court had before it the pleadings, the charge of the Court which determined the issue and a judgment which contained no limitations or qualifications. It had before it all facts which showed a continuance of the condition as at the former trial, definitely entitling the plaintiff to a recovery and a further stipulation agreeing upon the amount.

The defendant contends below that the plaintiff failed because he did not prove that he was in occupation of the land permanently. This was not an issue. It was not a matter relevant to anything except the quantum of damage and as has been said before that was covered by a stipulation.

If the postea in the former trial was a matter for consideration the word "permanent" would be regarded as mere surplusage and disregarded.

See *Frank* v. *Seymour,* 88 Pac. Rep., 561.
Southern Ry. Co. v. *Oliver,* 58 S. E., 244;
29 Amer. & Eng. Enc. of Law, 1026.
Strickland v. *Hutchinson,* 51 S. E., 348.
Geer v. *Thompson,* 62 S. E., 500.
Parkinson v. *McQuaid,* 11 N. W., 682.

In *D., L. & W. Railroad Co.* v. *Toffey,* 38 N. J. L., 9 Vr., 525, this Court held that the verdict was faulty and could be amended. If the postea was to be considered we would at this time seek to have this Court amend it as faulty, for

under the pleadings, issue and charge no other view is permissible and it could accordingly be amended by striking out the word "permanent."

In *State* v. *Marinelli*, 62 N. J. L., 739, the Court held that if the verdict of the jury did not determine the issue of fact presented for trial, a final judgment rendered on such a verdict is erroneous. The former judgment, however, is not subject to attack. Accordingly it cannot be declared erroneous, and accordingly it must be held that the judgment determines the issue of fact presented for trial. That judgment contains no limitations. We repeat again that it is the judgment, not the verdict, which is of prime consideration on the question of estoppel and *res adjudicata.*

We contend, then, in conclusion, from the opinion as set forth in the Dickinson case that it is plain that if the defendant's contention is sound the plaintiff "has not received and now never can receive full compensation for the damage done."

Surely a postea or a verdict has no weight, importance or effect except in the very case in which it is rendered. It can never be considered collaterally; it was not considered by the District Court and the District Court's findings of fact expressly excluded it from consideration so that it is indeed not before this Court.

We repeat then that the issue tried in the first case was the plaintiff's right to recover for a definite and specific time. The present suit is for a later period, for a cause of action which had not accrued at the time the other judgment was rendered and which could accordingly under no circumstances have been barred.

We respectfully urge that the judgment of the Supreme Court be set aside and the judgment of the District Court affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

William E. Crosby, *Plaintiff-Appellant,* *vs.* The City of East Orange, *Defendant-Respondent.*	*In Tort.* *Case No. 1.* *On Appeal from Supreme Court.*

Answering Brief of the City of East Orange to the Brief of Plaintiff-Appellant.

This is an appeal from the judgment of the Supreme Court in favor of the City of East Orange, defendant-respondent, reversing a judgment of the First District Court of Newark, in favor of Crosby, the plaintiff-appellant. The suit in the First District Court was a *second* suit brought by the plaintiff Crosby against the City of East Orange, to recover damages for the alleged abstraction of waters under and on a farm owned by him, situated on Northfield Avenue, Town of Livingston, Essex County, by reason of the construction, operation and maintaining of the pumping station and wells of the City of East Orange, at White Oak Ridge, Northfield, Essex County, New Jersey.

The defense was that Crosby, prior to the bringing of the suit in the First District Court of Newark, had brought a suit in the Supreme Court for injuries to the *self same* land owned by Crosby, alleged to have been caused by the construction, operation and maintenance of the *self same* pumping station and wells of the City of East Orange, operated in the *self same* man-

ner in which they were operated at the time of the institution of the suit in the Supreme Court and prior thereto, from the time of the construction of said pumping station and wells; and that in the trial of said cause in the Supreme Court, at the Essex Circuit, prior to the trial of the suit in the First District Court, had recovered a verdict for $2,700 and costs as his "permanent" damages and had entered judgment on the postea so setting forth the verdict and had collected that judgment by execution.

The essential facts shown in the record are as follows:

1. "That the defendant in the City of East Orange duly adopted, at a special election, held in said city, December 7, 1901, an act entitled, 'An Act to enable the city to supply the inhabitants thereof with pure and wholesome water' and that under said act the defendant constructed its wells and plant at White Oak Ridge, Village of Northfield, Essex County, New Jersey; and has since January 1905, continuously operated the same; and that the said source of supply is the only means of supplying water for the use of the City of East Orange and its inhabitants." Case, pp. 10-11.

2. The admission by the attorney of the plaintiff that "that William E. Crosby, the plaintiff in this action, is the owner of the premises mentioned in the state of demand, and that the operation of the defendant's plant continues as at a time of a former trial between these parties, the said former trial being that mentioned in the record, Exhibit P. 2. The period covered by the case now on trial is from May 10, 1910, to March 27, 1913." Case, p. 7.

3. The Postea signed in the suit brought in the Supreme Court, is in language, as follows:

"POSTEA.

Afterwards, that is to say, on the 30th day of March, 1916, at a Circuit Court, of the Supreme Court held at Newark, in and for the County of Essex, before the Honorable Frederic Adams, a Circuit Court judge, according to the statute in such case made and provided, came as well the within named William E. Crosby, as the within named City of East Orange, by their attorneys within named, and the jurors of the jury being summoned to try the said issue also came, to try the truth of the matters within contained, being elected, tried and being duly sworn on their oath and affirmation say—that the said the City of East Orange is guilty of the wrongs above laid to its charge, in manner and form as the said William E. Crosby complained against it, and they do assess the damages of the said William E. Crosby over and above his costs and charges, *at the sum of twenty-seven hundred dollars permanent.*

FREDERIC ADAMS,
Circuit Court Judge."

Case, p. 27 (italics ours).

4. The Judgment entered on said postea in the Supreme Court. Case, p. 44.

5. The stipulation of the plaintiff's attorney that "execution has been issued and levied on the judgment recovered in the Supreme Court action and execution has been made by the Sheriff of the County of Essex." Case, p. 8.

The Supreme Court reversed the District Court of Newark and held that Crosby's recovery in the suit in the Supreme Court, as above set forth, instituted prior to the suit in the District Court, was a bar to his recovery in that suit. See Opinion. Case, pp. 59-60.

It is submitted that the judgment of the Supreme Court reversing the judgment of the District Court is correct.

I.

WHERE UNDER THE ESTABLISHED RULES OF LAW THE PLAINTIFF'S DAMAGES ARE A UNIT HE CANNOT SPLIT UP HIS DAMAGES AND BRING SEPARATE SUITS THEREFORE BUT MUST RECOVER ALL HIS DAMAGES IN ONE ACTION AND A JUDGMENT IN ONE ACTION IS A BAR TO SUBSEQUENT SUITS BY HIM FOR DAMAGES.

This doctrine is completely established and is found in all the standard textbooks.

Under the settled law of this State, Crosby's damages were a unit.

In *Loweree* v. *City of Newark,* 9 Vroom, 151, approved in this Court in *Wheeler* v. *Road Board,* 10 Vr. at 297, it is declared to be the law that

> "1. It is not necessary that compensation should precede the actual appropriation of lands for a public use by the state, or by a municipal corporation by state authority. It is sufficient that an adequate remedy is provided, which the party may resort to on his own motion to recover compensation. In this respect there is a dis-

tinction between a taking by a public municipal corporation, and by an individual or private corporation."

This case has been cited and followed in numerous cases in this State and must be taken as settled law, to the effect that where a public corporation, a municipality, is authorized by the Legislature to construct a public work, they can appropriate or damage property by the erection, maintenance and operation of the public work without *first* paying compensation to the party from whom they take or whom they injure.

This Court has settled in *Lehigh Valley R. R. Co.* v. *McFarlan,* 43 N. J. L. 605, that where a *quasi public* corporation *is authorized* by the State to take property *without compensation first made* that the party's only remedy is a resort to an action for damages.

For the convenience of the Court we quote fully from the report of that case both in the Court of Chancery and in this Court, and also from the statute under which the City of East Orange constructed, operated and maintained its said pumping station and wells.

In *Lehigh Valley R. R. Co.* v. *McFarlan,* 43 N. J. L. 605, the facts were that the Morris Canal and Banking Company was authorized by the Legislature to build a canal by the Act of 1824, p. 158. "In 1857 the company renewed the timbers in its dam across the Rockaway river, and placed new flash boards upon it. In 1875 the flash boards were replaced by timbers firmly spiked on the top of the dam, and made part of its permanent structure." McFarlan, the owner of a mill on the Rockaway river above the dam, complained that back water

was cast upon his land by means of this dam and brought his action to recover his damages.

Prior to the decision in 43 N. J. L., p. 605, a bill had been filed in the Court of Chancery to enjoin McFarlan from attempting to abate the dam, and the Court of Errors and Appeals, in *Lehigh Valley R. R. Co.* v. *McFarlan,* 31 N. J. Eq. (4 Stew.), p. 706, held: (See p. 707, last clause of syllabus.)

> "That the company had a right by its charter, to appropriate the waters of the river to its use, for its canal, *without compensation first made* to persons injured; and that, the use of flash-boards for that purpose being lawful, M. had no right to remove them, *but must resort to an action for damages.*" (Italics ours.)

This Court held that this erection of the dam, while it did damage to McFarlan, was not a nuisance, was not abatable; that the taking and injury was lawful and need not be compensated for *before* such taking or damage, but that the party damaged had a constitutional right to recover for the injury done him. It was after this decision in the equity suit, that the action was brought which was decided in this Court in 43 N. J. L. 605.

This Court held that under the company's charter passed before the Constitution of 1844, the company, although a private corporation, had the right to take or injure property without compensation *first made.* The company, therefore, was precisely in the position in which a public or municipal corporation has always been, under the settled law, as declared in *Loweree* v. *Newark, supra.*

The charter of the Morris Canal and Banking Company by Section 6, quite fully quoted in 4

Stewart, at page 724, authorized the corporation to institute proceedings to determine the compensation due an owner for land taken or injured.

Under the Act of 1876, involved in the present case, East Orange had the right to take or injure property without compensation first made. By Section 1, authority is given as follows:

> "That any City within this State, be and it is hereby authorized, in the manner hereinafter provided, to take and convey from such source or sources as may be practicable, into and through said City, such quantity of pure and wholesome water as may be required for domestic and other purposes by the inhabitants residing within the corporate limits of said City * * * said City may, in the name and in behalf of the said City, purchase, take, hold, and enjoy, and convey and dispose of all and such other real and personal estate as may be necessary for the purposes of this Act, and may construct and maintain canals, acqueducts, reservoirs, basins, stand pipes, buildings, machinery and appurtenances of every kind that may be necessary and useful for such purposes."

The other provisions of this section empower the City to acquire the rights of any water company operating in said City.

Section 2 provides as follows:

> "That in case of any disagreement between the said City and the said water company or the owner of any other land or water rights, which may be required for the said purposes or affected by any operation connected therewith, as to the amount of compensation to be paid to the said water com-

pany, or such other owner; * * * the Circuit Court in and for the county wherein said City is situated, shall, on application of either party nominate and appoint three disinterested and competent persons as commissioners to examine the real estate and personal property of the said water company or any other land or water rights and estimate the value thereof, or damages sustained thereby and who shall * * * proceed without delay to make their report thereon and deliver the same to the said Court at the next term thereof, which may be held in the said County."

Section 3 provides that,

"whenever such report shall be confirmed by said Court, the said City shall within two months thereafter in case of no appeal therefrom or from the determination of said appeal pay, or cause to be paid to the said water company or to such other owner (as the case may be) * * * the sum mentioned in said report as the value or damages therefor, in full compensation for the real and personal estate of water company aforesaid, or for any other property so required, or for the damages so sustained, as the case may be; and thereupon the said City shall become seized absolutely and in fee of said real and personal estate, of the said water company or of such other property so required, and shall be thence discharged from all further claims by reason of such damage but no claim shall be made or allowed after the expiration of three years from the time the land is taken, or the damage suffered."

In all *material* respects the situation *in fact* in the case at law between *McFarlan and Lehigh Valley R. R. Co.,* 43 N. J. L. 605, was the same as is shown by the Record, to have existed in the case, in the Supreme Court, between Crosby and the City of East Orange. About this there can be no doubt upon a study of the report of the case found in 43 N. J. L. 605, *seq.*

The Court there held, at p. 607 (bottom):

> "Entry upon and the appropriation of private property to its use by the company is not a trespass. Ejectment will not lie to oust the company from lands on which its canal is constructed, nor are its works liable to abatement as a nuisance to the *water-rights of others,* though compensation has not been made to the owners of lands or water-rights *taken or injured* by the company in the *construction or operation of* its canal."

Further at page 608:

> "While the right of the canal company to enter upon and occupy lands necessary to construct its canal, and to appropriate waters necessary for the erection and *use* of its canal for the purposes of navigation, without compensation first made, is settled by the cases cited, it is equally well settled that the owner of lands taken, or whose *water rights are injured,* is entitled to compensation for the damages sustained."

The Court then proceeds to determine what is the measure of damages where the owner brings an action under such circumstances to recover for *injury to his* water rights.

At page 609 the Court states the controversy:

"The contention of counsel is with respect to the mode by which the owner of lands or water-rights shall seek his remedy."

At page 610 the Court said as follows:

"It is evident that the legislative purpose, as expressed in the twentieth and twenty-seventh sections, was to secure to persons injured in their property-rights, a remedy in conformity with the ordinary rules regulating actions at law, according to the nature and extent of the injury sustained."

The Court said, p. 611:

"If, as has been conclusively adjudged, the company may take and appropriate property to its use without compensation *first made,* and its possession and use thereof be therefore *lawful,* there is no principle of law *regulating actions and pleadings that will sustain an action, the very foundation of which is, that the possession or use of property without such compensation being made is a legal wrong.*"

The Court also said, p. 611:

"The damages are sustained by the owner when his property is appropriated by the company to its use as a finality, and do not arise from time to time, from the occupation or use of it by the company."

At page 613, the Court said:

"In all cases where property, whether it be lands or water rights, has been permanently appropriated by the company to its use, the *damages sustained are a unit, and*

are recoverable as such, and not by piecemeal.''

The Court holds that the recovery in an action for damages must be on the same principle on which compensation would be awarded by commissioners.

At page 614 the Court said:

> ''It is clear, I think, that the action reserved by the charter, to the owner *for damages to his or her water-rights,* lands, tenements or hereditaments, is the means provided for him to obtain an appraisement and recovery of his damages, in case the company does not proceed to obtain an appraisement of them by commissioners. *It will follow, therefor, that the damages recoverable in such action will be the same compensation which is determinable by the award of commissioners—full compensation for the injury done by the appropriation of the owner's property to the company's use; for the property being taken when it is appropriated by the company to its use, the extent of the injury will not depend upon the method adopted to determine the compensation due the owner of it.''* (All italics in the above quotations are ours.)

Lehigh Valley R. R. Co. v. *McFarlan,* 43 N. J. L., 605, therefore decided that the taking by the Morris Canal and Banking Co. was lawful; that the company was bound to make compensation for the injury; *that the damages were a unit, recoverable in one action and not by piecemeal, and that the compensation to be awarded must be measured precisely as if the*

proceeding was one of condemnation under the provisions of the statute.

As stated above, the situation in the case at law between McFarlan and the Lehigh Valley R. R. Co., 43 N. J. L., 605, was in all material respects the same as existed in the case in the Supreme Court between the parties here. That case settled the law applicable to the case in the Supreme Court between the parties here.

In the McFarlan case there was a new trial granted because of the error of the trial judge in leaving it to the jury to determine whether the taking was before or after the Lehigh Valley R. R. Co. "became the lessee of the canal and its works" in 1875 (see p. 616), and further in instructing the jury in substance and effect that mere "verbal protests and denial of the right, without any interruption or obstruction in fact, of the enjoyment of the right, would prevent the acquisition of an easement by adverse user." The report from this point on, discusses the question raised by the error last above referred to.

The law is therefore settled by this Court that where compensation does not have to be made before the taking, as it did not have to be in this case, "the damages sustained are a unit and are recoverable as such and not by piecemeal.

If the law had not been settled by *Lehigh Valley R. R. Co.* v. *McFarlan* that the compensation must be recovered in one action, the provision in the statute, section 3, "that no claim shall be made or allowed after the expiration of three years from the time the land is taken or the damage is suffered" would clearly require that there should be but one recovery for the damage suffered and that a judgment

obtained for such damage would be a bar to a further action for injury to the same property by the same cause.

The judge at the trial of the issue in the Supreme Court case at the Circuit charged the jury that "the defendant had a legally established pumping station." Case, p. 20, l. 30.

Therefore the recovery by Crosby of the verdict in the Supreme Court suit, and the collection of the judgment entered thereon is a full satisfaction of his claim for damages to the land owned by him through abstraction of surface and sub-surface waters occasioned by the construction and operation of the pumping station and wells of the City of East Orange, which were legally constructed and operated.

The brief of the plaintiff-appellant states, page 11, that the law of the present case is settled in *Meeker* v. *East Orange,* 48 Vroom, page 623. All that *Meeker* v. *East Orange* established was the rule declaring the rights of land owners in waters of percolation and giving a right of action for the abstraction thereof. The decision did not in any wise modify the law settled in *Loweree* v. *Newark, supra* and *Lehigh Valley R. R. Co.* v. *McFarlan, supra.*

Again the brief of plaintiff-appellant, at page 13, refers to the case of *Dickinson* v. *D., L. & W. R. R. Co.,* 100 Atl. 203, in this Court, and says "the railroad just as the water company was 'legally established.'"

This statement is misleading and the argument fallacious. The question is not whether the corporation is legally established but whether the structure, the construction and operation or maintenance of which causes the injury, is one which is authorized by law.

The Dickinson case did not deal with a structure erected by a municipality by authority of the State, but, on the contrary, the Court carefully pointed out that the structure erected by the railroad was without authority of law and in itself constituted a nuisance.

Of course, there is the further *radical distinction* between the Dickinson case and the present case that in the Dickinson case the verdict was a general one and not, as here, a verdict for "permanent" damages. The jury here awarded the plaintiff "permanent" damages and he has recovered them by execution on the judgment.

Aside from the cases falling within the doctrine of *Loweree* v. *Newark, supra,* and *Lehigh Valley R. R.* v. *McFarlan, supra,* there are two distinct lines of cases in this State, one applying to injuries considered in law to be of a permanent character, of which the following are instances:

McGuire v. *Grant,* 1 Dutch., p. 356.
Freeman v. *Sayre,* 48 N. J. L., 37.
Manda v. *Orange,* 77 N. J. L., 285; 78 N. J. L., 630.

The other line is the cases in which the injury is considered temporary and these cases are the cases cited in the opinion in *Dickinson* v. *D., L. & W. R. R. Co., supra,* which we have examined. They are all cases where either the injury is periodical and occasional or the outcome of a failure to keep a lawful structure in repair or where the injury is occasioned by a unlawful structure which in contemplation of law is not of a permanent character.

The following is a summary of the cases cited in *Dickinson* v. *D., L. & W. R. R. Co.:*

Delaware & Raritan Canal Co. v. *Wright,* 21 N. J. L 469, was an action brought to recover

damages for overflowing the plaintiff's land "in times of freshet."

Ellsworth v. *Central R. R. Co.,* 34 N. J. L., p. 93, was an action where the only question for the jury to determine was whether the railroad had constructed a way which under "all the circumstances of the case, satisfied the statutory requirements" which was, to construct and keep in repair, good and sufficient bridges or passages over the said railroad.

Brewster v. *Sussex R. R. Co.,* 40 N. J. L., p. 57, related to the failure of the railroad to provide a way for the plaintiff and the Court held that the situation presented one in which the company might "in the future perform that duty," and therefore was not one for the assessment of permanent damages. It involved no question of a *lawful* permanent structure. The action was not based upon a continuance of a *lawful* structure, but was to recover damages for a failure to perform a statutory duty which the Court held they might perform at any time. If it had appeared in the case that the railroad had so fixed itself that it was impossible ever to perform the duty toward the plaintiff, then under the reasoning of that case there would be a permanent injury for which a single recovery would be had.

Hatfield v. *Central R. R. Co.,* 33 N. J. L. at p. 252. The report discloses that this suit involved a situation where "the railroad track was put in this street and has since been continued there *unlawfully,* the defendant having taken no steps to legalize it under the powers given them in their charter." This was a case of an unlawful trespass in a public street which was subject to abatement at any time.

Collins v. *Langan,* 58 N. J. L. 6, was a case where a Street Commissioner without authority put materials in a street, thereby raising its surface. The Court held that under those facts, "it could not be assumed" that the grade of the street had been permanently elevated. The Court said, page 7, that the defendant "was a mere trespasser, the consequence, of course, being that the act done by him was illegal and was not possessed of any quality which would impart to it the character of a permanent condition."

Church of the Holy Communion v. *Paterson R. R.,* 66 N. J. L. p. 218, at page 232, of the opinion, it appears that the action was brought for failure to properly construct a wall protecting the church. The statement of the opinion is "The wall gave evidence of deterioration shortly after it was built, and its incapacity to answer the purpose which it was designed to fulfill was demonstrated as early as 1886." The damage arose from its failure to perform a particular act, failure to construct a wall.

Ackerman v. *Nutley,* 70 N. J. L. 438, involved the illegal filling in of earth on a street in front of the plaintiff's land, the action being without warrant of law. The injury was considered not permanent in accordance with the general rule of law.

II.

IN THIS CASE THE VERDICT WHICH IS SET FORTH IN THE POSTEA ON WHICH JUDGMENT WAS ENTERED WAS A VERDICT FOR "PERMANENT" DAMAGES.

Independent of the rule established by Loweree v. *Newark, supra, and Lehigh Valley R. R. Co.* v. *McFarlan, supra, the postea in the Su-*

preme Court suit and the judgment entered thereon, which are in the Record and are in evidence in the present case, bar the plaintiff's right of recovery in this suit, in the First District Court of Newark.

This judgment has been collected by the plaintiff by execution and stands unchallenged by any proceeding in the Supreme Court suit in which it was entered.

It cannot be attacked collaterally, the statement in the postea is that the jury assessed the damages of the plaintiff "at the sum of $2,700 permanent." The Court has before it a record. The word "permanent" must be taken by this Court as a part of the record. Its significance in actions for damages is perfectly well settled. The postea awards damages for a permanent injury and it is too fundamental to require discussion that a verdict between the same parties for permanent injuries to lands is a bar to any further action by the owner of that land for injuries arising to the *same land* from the *same cause.*

It is upon the verdict of the jury as set forth in the postea that the judgment rests. The verdict of the jury as recorded in the postea cannot be changed, except by the Court in which the verdict was rendered or by a Court in direct review and there no change can be made in substance.

Tidd, *p. 713, says:

> "The Court has no authority to amend or alter the verdict actually found by the jury in point of substance."

See, to the same effect:

> Archbold's Practice, Vol. 2, p. 241; 1st Am. Ed.

The verdict of the jury is inviolable, in substance, even on a direct attack in the cause and in the Court in which it was rendered.

Viners' Abr. Vol. 16, p. 464, says:

> "Although the verdict given be prejudicial to the plaintiff as he conceives, *yet he ought to bring in the postea.* For he must abide by the trial, *tho it may prove prejudicial unto him,* that if he will not enter the verdict the defendant may, 2 L. P. R. 337, Tit. Postea."

In *Garland* v. *Scoones,* 2 Esp., 684, Lord Kenyon ruled that the mere production of the postea without the judgment was sufficient to establish the demand to the extent of the sum endorsed as the verdict in the case.

Lilly's Abridgment, page 422, declares that no amendment of the postea can be made after it is filed "for then it is a Record of the Court and may not be altered."

In *Huffer* v. *Allen,* L. R., p. 14, where A having issued a writ of summons against B specially endorsed for 28£, B without appearing to the writ paid 10£ to A on account of the debt. A afterwards under the common law procedure Act 1852, Sec. 27, signed judgment for default of appearance for the full amount of 28£ and costs and issued a Ca. Sa. endorsed for that amount under which B was arrested and paid the sum demanded. B having brought an action against A for maliciously and without probable cause signing judgment and issuing execution: It was held that whilst the judgment stood for the full amount it has estopped the plaintiff from denying the correctness of the judgment or of the execution.

Chief Baron Kelly, at page 17, laid down the rule in the following language:

> "Our judgment must be for the defendants, I say so with regret, because no doubt if the act of the defendants was knowingly done, that is, if they knew that the debt was reduced below 28£ at the time of signing judgment, their act was highly unjustifiable. But we must here determine the legal question, which is, whether the previous judgment which is in contemplation of law the act of the Court, estops the plaintiff from bringing this action, the first step in which is to impeach that record. It is a simple and unanswerable argument against its maintenance, *that it is not competent for either party to an action to aver anything either expressing or importing a contradiction to the record which, while it stands, is as between them an evidence of uncontrollable verity.*" (Italics ours.)

The foregoing being the rule in relation to a postea this Court cannot, especially in a collateral proceeding, strike the word "permanent" from the Postea and so change it. The word "permanent" in connection with the word "damages" has a definite significance.

The cases cited in the plaintiff-appellant's brief on page 15 on examination will be found to be only cases in a direct proceeding attacking the Postea or on a direct appeal.

The decision of the Supreme Court herein was based upon the Postea, as a part of the judgment record, which was in evidence before the District Court as a fact in this case.

III.

AN ERROR OF THE TRIAL JUDGE CANNOT BE A GROUND OF COLLATERAL ATTACK UPON A JUDGMENT ENTERED UPON THE VERICT OF A JURY ON A POSTEA.

This was the settled common law and is the law of this State.

See *McCahill* v. *Equitable Life Insurance Soc.*, 11 C. E. Green, at p. 536 (Court of Errors and Appeals), where it was held that a judgment of a superior court could not be impeached collaterally even for want of jurisdiction of the parties. Chief Justice Beasley, at aforesaid page, said:

> "In 1 Inst. 260, Lord Coke says: 'The rolls, being the records or memorials of the judges of the courts of record, import in them *such incontrollable credit and verity as they admit of no averment, plea or proof to the contrary* and if such record be alleged and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, there should never be any end of controversies.' A long series of cases is in accord with this statement and illustrates the rule in many varied aspects."

He then proceeds to quote both English and American leading cases that establish the doctrine. (Italics ours.)

At the trial of the case in the Supreme Court, Essex Circuit, the judge in his charge, Case, p. 20, said, ll. 28-30, "The declaration or statement of the plaintiff's case asserts that the plaintiff had a *legally established* pumping station &c."

and the case was submitted to the jury on that proposition. (Italics ours.)

In point of fact, there was a stipulation in the case which read as follows:

"(1) That prior to the first day of January, 1905, the act entitled 'An Act to enable cities to supply the inhabitants thereof with pure and wholesome water' approved April 21, 1876. (Comp. Statutes of New Jersey, p. 823), was duly adopted by the defendant, the City of East Orange." (Case, p. 35, l. 2, *seq.*)

The trial judge refused to charge the jury as requested by the defendant's counsel that the damages were for permanent injury to the property, p. 10 *seq.* and charged the jury that they were to award temporary damages from the time of the construction of the pumping station and wells up to the date of the bringing of the suit.

Further it is to be remembered that it is admitted in this Record (case, p. 7), "that William E. Crosby, the plaintiff, in this action is the owner of the premises mentioned in the State of Demand, and that the operation of defendant's plant continues as it did at the time of a former trial between these parties," the said former trial being that mentioned in the Record, Exhibit P. 2.

It follows that under the doctrine of the McCahill case, *supra,* the Postea cannot be modified or changed upon this collateral attack and the judgment entered thereon awarding "permanent" damages must be taken as a verity and it bars the present action.

As already said there is not the slightest authority for any power in the Court to construe this Postea and the judgment entered thereon other than one for permanent damages and as a bar to the suit.

IV.

THE DAMAGES ARE NO PART OF THE ISSUE IN A CASE.

The issue in the case in the Supreme Court was guilty or not guilty of abstracting the water on or under Crosby's property. The trial judge charged the jury that the City of East Orange had legally established and was operating its pumping station and wells. The sole issue was whether they were abstracting the water on and under Crosby's property. The case was tried on behalf of the defendant on the theory that it was not abstracting such water and that if it was the plaintiff should recover damages once for all. The plaintiff tried the case on the theory that the City of East Orange was abstracting the water and that he would only recover temporary damages.

Damages are only incidental to the finding of the issue of fact and must follow as a measure of the injury upon the establishment of the fact of liability. In this case the issue was the fact of abstracting the water on and under Crosby's property. The clause stating the grievance under the old forms of pleading never ran *in futuro*. They were laid, according to the precedents, from the date of the injury "thence hitherto" or from the date of the injury "unto the commencement of this action." The measure of damages is dependent upon that which caused the injury, as it is proved to operate as a permanent or temporary cause. In the Supreme Court case, the judge submitted the case to the jury on a statement of facts admitted, which, under the settled law of this state, required the finding of a verdict for permanent damages, and such verdict was

actually found. The *ad damnum* clause prayed damages generally. Under the issue as to whether the defendant did or did not abstract the water on Crosby's property, the plaintiff could have tried, and must be taken as having tried, every question that could be litigated in that action under that issue, and could have put in any proof on the subject of damages he saw fit.

> "If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."
>
> *Black on Judgments,* Sec. 625.

It is manifest that a verdict for permanent damages could not have been rendered without determining the issue on which such damages must rest.

When the trial court submitted to the jury the question of. abstraction, together with a statement of the admitted fact that the City of East Orange legally established and maintained its pumping station and wells, it presented to the jury an issue which, under the law, required the jury to find a verdict for permanent damages.

The jury found a verdict for permanent damages on the basis of the admitted fact that the pumping station and wells of East Orange were legally established and maintained and were, therefore, a permanent cause of injury entitling plaintiff to permanent damages.

The brief of Crosby, plaintiff-appellant, shows a clear misapprehension of the nature of the action in the Supreme Court. It says (brief, p.

2), that the Supreme Court in this case considered the action to be one to recover damages to real estate. The Supreme Court in its opinion in this case was manifestly correct, for whether under the old form of pleading the action is "in trespass" or "on the case" in both the action is based on interference with the water in or upon real property, as an injury to real property. See Chitty Pleading, Vol. 2, page 786 *seq.*, where the forms of declarations are grouped under the title "Torts to Real Property Incorporeal," also pages 863 *seq.* Whether it be a question of the abstraction of surface water or sub-surface water the action rests upon the theory that the water is an appurtenance to the real property and an action can be based thereon only as working damage to one in possession of, or the owner of, real property.

In a collateral proceeding under the settled rules the verdict, postea and judgment thereon must be taken as having settled all questions which the jury might have settled in order to have reached the verdict rendered.

V.

EVEN IF THE DOCTRINE LAID DOWN IN *LOWEREE* v. *NEWARK AND LEHIGH VALLEY R. R. CO.* v. *McFARLAN,* DID NOT APPLY AND REQUIRE A VERDICT FOR PERMANENT DAMAGES, THE PLAINTIFF IS NOW ESTOPPED FROM CLAIMING THAT THE JUDGMENT UPON THE POSTEA IN THE SUPREME COURT ACTION BETWEEN THE PARTIES IS NOT A BAR TO THE PRESENT ACTION.

1. The plaintiff did not move to set aside the verdict on the ground that it was contrary to the

judge's charge on the measure of damages, but on the contrary entered judgment on that postea, and enforced the same by execution.

The verdict of the jury being in accord with the law as to the measure of damages, the plaintiff on this appeal cannot collaterally attack the verdict because not in accord with the charge of the Trial Court. The plaintiff had his election to set aside the verdict or to accept it—and he exercised such privilege by entering judgment on the postea, and collecting same by execution.

It is a clear case of estoppel in *pais*.

It would be manifestly unjust to permit the plaintiff to thus adopt a judgment of a jury, awarding permanent damages, and then allow him to make successive recoveries thereafter.

2. The verdict was in accord with the theory upon which the defendant tried the cause, and its requests to charge, and therefore, the defendant would not have been heard to challenge the verdict, on an application to set it aside because contrary to the judge's charge on the measure of damages.

We respectfully submit that the judgment of the Supreme Court ought to be affirmed.

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