NEW JERSEY SUPREME COURT.

Between

JERUSHA B. ROGERS,
Plaintiff,

AND

SUSAN M. WARRINGTON,
Defendant,

ACTION AT LAW.

NOTICE OF APPEAL.

To George M. Hillman, Esq., Attorney for Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the order entered in this cause on the 9th day of September, 1916, and from the whole of the judgment entered in this cause on the 6th day of October, 1916.

KAIGHN & WOLVERTON,
Attorneys for Appelant.

SUPREME COURT OF NEW JERSEY,

BURLINGTON COUNTY.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN M. WARRINGTON,
Defendant.

COMPLAINT.

Plaintiff, who resides in Moorestown, in the Township of Chester, County of Burlington and State of New Jersey, demands of Susan N. Warrington, the defendant herein, the possession of all that certain tract of land, with the appurtenances, situate in Moorestown, in the Township of Chester, County of Burlington, and State of New Jersey, bounded and described as follows, viz:

Beginning at a stone in the northerly side of the public road leading from Moorestown to Haddonfield, corner to a lot of land conveyed by Jerusha B. Rogers to Robert G. Porch, and runs thence (1) along the line of the same south twenty-nine degrees and fifty-five minutes east three hundred and eighty-two and eight-tenths feet to a stake, corner to land formerly of Seth Lippincott, now of Esther Strawbridge Brophy, thence (2) along the line of the same south sixty-six degrees and fifteen minutes west fifty-seven and two hundredths feet, to a stake, corner to land formerly of Michael Duble, now of Sutton, thence (3) along the line of said Sutton's land north thirty-two degrees and thirty minutes west three hundred and eighty-two and eight-tenths feet to a stake or stone in the north side of said public road, leading from Moorestown to Haddonfield, thence (4) along the same north sixty-six degrees and fifteen minutes east fifty-six and thirty-six hundredths feet to the place of beginning. Be the contents what it may.

Being a part of the same premises which Walter E. Hunt, Executor of Elizabeth Evans, deceased, conveyed to the said Jerusha B. Rogers, by deed dated July 6, 1887, and recorded in the Clerk's office of Burlington County in Book P11 of deeds, folio 602, etc.

And the plaintiff says that her right to the possession of the same accrued on the sixth day of July, eighteen hundred and eighty-seven, and that the defendant wrongfully deprives her of the possession thereof to her damage one thousand dollars.

G. M. HILLMAN,
Attorney of Plaintiff.

SUPREME COURT OF NEW JERSEY.

BURLINGTON COUNTY.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN N. WARRINGTON,
Defendant.

ACTION AT LAW.
ANSWER.

Defendant, who resides in Moorestown, in the county of Burlington, State of New Jersey, says that:

She defends this action as to a part of the premises claimed in the complaint, to wit, that portion thereof within the lines of Main street occupied by a public drinking fountain for man and beast, erected by consent of the municipal authorities, as to which part she denies the truth of the matters contained in the complaint.

SECOND DEFENSE.

The part above indicated is within the bounds of a public street, and the use made thereof is within the public easement.

THIRD DEFENSE.

The right to the free and exclusive use and possession of the part above indicated is in a third party, to wit, the public municipal authorities having jurisdiction over that portion of the street.

KAIGHN & WOLVERTON,
Attorneys for Defendant.

SUPREME COURT OF NEW JERSEY.
BURLINGTON COUNTY.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN N. WARRINGTON,
Defendant.

ACTION AT LAW.
REPLY.

Plaintiff denies every allegation in the answer.

G. M. HILLMAN,
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY CIRCUIT.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN N. WARRINGTON,
Defendant.

ACTION AT LAW.

Appearances:

For the Plaintiff, G. M. HILLMAN, ESQ.
For the Defendant, KAIGHN & WOLVERTON, ESQS.

BEFORE CARROW, J., WITHOUT A JURY.

THE CASE FOR THE PLAINTIFF.

Mr. Hillman: May it please the Court, this is an action of ejectment brought by Jerusha B. Rogers, of

Moorestown, against Susan N. Warrington, of the same place. The plaintiff is the owner of a lot of land on which is erected her residence on the south side of the main street or the road leading from Moorestown to Haddonfield, in Moorestown. The deed for Mrs. Rogers' property extends clear across the public road to the northerly line of the highway, so that she is the owner of the entire street in front of her property. The defendant, Susan N. Warrington, caused to be erected a drinking fountain or watering trough for horses within the bounds of the highway between the wagon road and the sidewalk on the property, the fee of which is owned by Mrs. Rogers.

The Court: Between the sidewalk and the center of the street?

Mr. Hillman: Well, it was practically what you might call the ditch or the gutter, between the wagon road and the sidewalk, and when she did it, or started to do it, Mrs. Rogers protested, and she agreed to remove it, but afterward she went ahead and finished it, and this action is brought to recover—

The Court: Why, it is right on the corner, is it?

Mr. Hillman: You see there are two roads there, if the Court please; it is what we call the forks of the road; one road goes to Camden, the old Camden turnpike road, the road on which the trolley tracks are; the other road goes to Haddonfield.

The Court: Is that the Perkins' corner? That is the old Perkins' corner?

Mr. Hillman: Yes.

The Court: Now, who owns that property now?

Mr. Hillman: Mrs. Jerusha B. Rogers owns the property upon which this fountain is erected, owns the greater part of it; I think a part of it is on somebody else, but I think the greater part of it is on her ground.

The Court: Does the Court understand that the property—

Mr. Kaighn: I think the Judge might be a little misled. He said he owns that property; now, the Perkins' property is still owned by Perkins, but this Rogers' property is at right angles to the property on the south side of the street, the fountain being on the north side of the street.

The Court: Well, is it over on the Strawbridge side?

Mr. Hillman: No; Strawbridge never owned that; it is on the north side of the road.

Mr. Kaighn: That is a peculiar circumstance, all the title deeds there run to the north side of the road; instead of extending to the middle of the road they extend to the north side of the road, the title line in the deed. It is a very peculiar situation; instead of running to the middle they overlap.

The Court: Is there any disputed question of fact in this case?

Mr. Wolverton: I can state what our defence is. I thought it was almost entirely a question of law and we could agree on it, on a statement of facts. Our defence is, if the Court please, that this drinking fountain is erected within the lines of the public street by the consent of the municipal authorities and that it is a drinking fountain used for man and beast, and that it is entirely within the use of the public street.

The Court: Well, that does not go to the—— That goes to your right.

Mr. Wolverton: Yes, I am stating what our defence is under our answer; the only question which is raised, it seems to me. We disclaim as to the property which the plaintiff alleges in her complaint, with the exception of that part which is actually covered by this drinking fountain, which is within the public road.

The Court: They claim this is an additional servitude, do they?

Mr. Wolverton: I presume that would have to be their claim in order to succeed in this action.

The Court: Is this a Circuit case or a Supreme Court Case?

Mr. Hillman: Supreme Court.

Mr. Wolverton: It would seem to me, therefore, unless Mr. Hillman has some different view of the case than I have, that it ought to be a matter that could very readily be agreed to on the facts.

Mr. Hillman: As Mr. Wolveton says, that is my understanding of it. There was something said—I undertook to make a stipulation of facts, but Mr. Wolverton had something in that about the consent of the Township Committee or the Board of Freeholders having been given. I don't think it would make any difference.

Mr. Wolverton: We had proof of that.

Mr. Hillman: But I had no knowledge of it and I did not care about admitting it.

Mr. Wolverton: We have the minutes here to prove it.

The Court: Well, why don't you agree on your facts; then let me deal with the legal end of it?

Mr. Wolverton: I am perfectly willing to.

Mr. Hillman: My position is this with regard to the consent of the Township Committee or the Board of Freeholders; I don't want to be understood as consenting or admitting that any consent which they gave was efficacious. I contend that they had no right to give any consent.

The Court: Well, that is law.

Mr. Hillman: And merely admitting they gave consent might be construed into an admission that they were in possession of title which gave them the right to give such permission. Now, if Mr. Kaighn or Mr. Wolverton say that the Township Committee of Chester Township, or the Board of Chosen Freeholders of Burlington County, gave Miss Warrington the right to put this fountain there, I am perfectly willing to admit that fact for what it is worth.

Mr. Wolverton: Well, we have the minutes here.

Mr. Hillman: Your word is as good to me as the minutes.

The Court: Well, gentlemen, you ought to agree on the facts.

Mr. Wolverton: Well, the facts I submitted, which I thought were all right, were these—if Mr. Hillman has any addition to make to them or any additional facts to make or any which he wishes to strike out, I will be very

glad to confer with him on that subject now, but I think that stipulation there raises the question and does not prejudice his case in any way. As I conceive it, it is entirely a question, as the Court has already indicated, as to whether this is an additional servitude.

The Court: Well, placed there by direction and authority of the Board of Chosen Freeholders?

Mr. Wolverton: Well, make it by authority.

The Court: By permission?

Mr. Wolverton: It was; we have the minutes to show it.

The Court: It seems to me there is some confusion between direction and permission.

Mr. Wolverton: By permission and authority.

Mr. Hillman: Well, that is all right. If the Court please, there is one thing I had in mind to introduce: I don't want the Court to think that the plaintiff in this case is merely captious. I could show that the presence of this fountain there was an annoyance to her, a nuisance to her; I don't know that it is necessary to do that.

The Court: Well, let her come to the stand if you want to; I am willing to receive anything, but there is no use in taking a whole lot of testimony about things that are not disputed.

JERUSHA B. ROGERS, sworn.

By Mr. Hillman:

Ques. Mrs. Rogers, where do you live?

Ans. I live in Moorestown, New Jersey, Burlington County, Township of Chester.

Ques. Are you the widow of Benjamin Rogers, deceased?

Ans. I am.

Ques. Mrs. Rogers, what part of Moorestown do you live in?

Ans. The south end of it, right at the forks of the Haddonfield and Camden Road, right at the junction; right opposite to this fountain, exactly.

Ques. Is your house on the south side of Main Street?

Ans. It is.

Ques. And when was this fountain erected there, Mrs. Rogers?

Ans. Last winter, and the horses drank out of it the 20th day of March; the first horse drank out of it the 20th day of March.

Ques. Of the present year?

Ans. Yes,—no, last year.

Ques. Well, 1915; yes?

Ans. 1915.

Ques. Now, Mrs. Rogers, was that fountain used during the past summer?

Ans. Yes.

Ques. And how far is that from your house?

Ans. Just across the road, right exactly in front of my front door.

Ques. Now, what effect did you notice from that fountain during the summer?

Ans. Many days we had to close the door; there was a lady there spending the day one day and she said, "My——

Ques. Never mind what she said.

Ans. It was very offensive.

Ques. What was offensive?

Ans. About this——

Mr. Wolverton: I object to the statement of this other witness.

Mr. Hillman: Yes; well, I asked her what was offensive.

Mr. Wolverton: Well, are the words "very offensive," her words or the words of the other witness?

The Witness: My words is that it was very offensive; we often had to close the doors.

By the Court:

Ques. How do you mean?

Ans. When sixteen teams comes up sometimes and waters at the trough right in front of you or wait until one team gets out of the way for the other, wouldn't it sometimes be very objectionable, the smell? Then often wakened up in the morning by the teams stopping there, three or four o'clock in the morning, and then can't get to sleep any more. Why, I am sure it was very objectionable to have it there right so close to your front door.

By the Court:

Ques. How close was it to your front door?

Ans. Just the width of the road, but I just don't know.

Ques. You say there was a stopping place for farm—

Ans. Yes, for teams.

Ques. For watering farm teams?

Ans. Yes; and for other teams that comes along.

Ques. Every day?

Ans. Every day, Sundays and all; sometimes a whole lot of gypsies come along there and stand with their horses and water them.

By Mr. Hillman:

Ques: Mrs. Rogers, did you ever give permission to anybody to erect this fountain?

Ans. I never did; I objected to it all I could.

Ques. Did you ever receive any compensation for its being put there?

Ans. No; not a cent.

Ques. From whom did you buy the property where you live?

Ans. Walter Hunt, executor of Elizabeth Evans' estate.

Ques. About when did you buy that?

Ans. About twenty-eight years ago.

Ques. Have you been in possession of it ever since?

Ans. I have.

Ques. Did you receive a deed for it?

Ans. I did.

Ques. I show you a deed, Walter E. Hunt, executor of Elizabeth Evans, to Jerusha B. Evans, dated July 6, 1887, and recorded in the Clerk's office of Burlington county on August 11, 1887, in Book P-11 of Deeds, folio 602, &c., and ask you if that is the deed that you received?

Ans. It is.

Ques. Are you the owner of the premises upon which this fountain is erected?

Ans. I am.

Ques. That was embraced in this deed?

Ans. Yes.

The Court: Why didn't you go into the Court of Chancery for an injunction?

Mr. Hillman: Because, if the Court please, it seemed to me that an action of ejectment was our proper remedy. In the case of French vs. Robb and Starr vs. City of Camden—

The Court: Well, go ahead.

Cross-examination.

By Mr. Wolverton.

Ques. Mrs. Rogers, you live on the side of the street opposite from this fountain, don't you?

Ans. I do.

Ques. So far as the property lines are concerned, this fountain could not have been removed further away from you than it has been, could it?

Ans. Why, yes; it could have been removed on the other point up at Second street.

Ques. But your idea is that it should have been put some place else?

Ans. Yes; that is my idea about it, instead of on my property.

Ques. So that as far as the erection of it is concerned, your objection is not to the fact that it is a fountain, but to the fact of where it is?

Ans. Yes, where it is.

Ques. So you feel for that reason that the fountain is a perfectly proper thing in itself?

Ans. If they put it where somebody else wants it, but not where somebody don't want it.

Ques. So that your objection then is not to the fountain or its necessity for use; it is only as to its location; is that right?

Ans. Yes; on me.

Ques. As I understand it, this fountain is located right at the forks of the road?

Ans. Yes.

Ques. And one of those roads leads into—goes from Mount Holly to Moorestown, does it?

Ans. Yes.

Ques. And then when it gets to the fork of these roads it divides, doesn't it, and one road goes to Camden and the other road goes on to Haddonfield, Woodbury and Salem, doesn't it?

Ans. Yes.

Ques. Which is known as the old King's Highway, isn't it?

Ans. Yes.

Ques. So that these two roads, as I understand, are well-travelled?

Ans. Yes.

Ques. And from the convenient standpoint, except as to the inconvenience to you, you would say that the fountain was well located, wouldn't you, from that fact?

Ans. No; not being right where it is; it could be located some other place.

Ques. Now, your house sets back from the street?

Ans. No, right on the street; right close to the street.

Ques. Well, it is a ways back from the sidewalk, isn't it?

Ans. Well, not very far.

Ques. Well, how far?

Ans. I don't know how many feet it is.

Ques. Can you point out here in the room about how far?

Ans. Oh, ten or twelve feet; not more than that, anyhow.

Ques. And how wide is the sidewalk?

Ans. I don't know; couldn't tell you. Never measured it.

Ques. Well, about how wide?

Ans. Well, ordinary sidewalks like there are all along the town there; I don't know, ten or twelve feet.

The Court: Is this matter of any importance?

Mr. Wolverton: I want to show how far away it is from the fountain.

The Court: Isn't it an abstract question?

Mr. Hillman: In my opinion it is. I object to this question.

Mr. Wolverton: Except that the testimony that is now being taken before the Court, as I understand, is on the question of any damage to this woman. My conception of the case is that it is so entirely within the easement of the street that she has no right to complain, even though it might put her to some little inconvenience; the fact that it is within the public easement is sufficient to justify its existence.

The Court: I think the abstract question is involved, that is, whether the municipality possessed the power—certainly an individual wouldn't—of authorizing the establishment of this drinking place, watering place.

Mr. Wolverton: Well, if the Court should come to the conclusion that they did not have, then the question of damages, I suppose, would be considered?

The Court: Are you seeking damages?

Mr. Hillman: No, I just want—

The Court: If he is not seeking damages, then the question that the Court has raised governs it entirely. The question is whether a municipality possesses any power over the highway except the user of the public.

Mr. Hillman: That is it. Are you through, Mr. Wolverton?

Mr. Wolverton: On the Court's statement of your demand that you are not applying for damages, I am. That is the purpose of my examination of this witness, because I understood that was your purpose.

Mr. Hillman: Yes, of course, I am only asking for nominal damages.

The Court: Six cents, you mean?

Mr. Hillman: Yes, I want the possession.

Mr. Wolverton: Under those circumstances there is no further necessity—

The Court: Are the facts all agreed?

Mr. Wolverton: They are as far as we are concerned.

Mr. Hillman: I just want to know about this consent. I don't know whether—was this consent given before it was put up or afterward?

Mr. Kaighn: Before.

Mr. Hillman: Both the Freeholders and—

Mr. Kaighn: Yes, application was made before the fountain was started and plans were even submitted and approved, and in the minutes the plan of the fountain, giving the number of the catalogue and everything, is stated.

Mr. Hillman: Mr. Wolverton's stipulation says, "was placed there by permission and authority." I want the word "authority" out; just by permission.

Mr. Wolverton: I cannot concede that.

Mr. Kaighn: We are in a position to show authority was—

The Court: What is the objection?

Mr. Hillman: I don't want to be put in the position of conceding that the Board of Freeholders or the Township of Chester has any authority on that proposition.

The Court: I don't see that you are; the Court has got to decide whether these municipalities possess the requisite power.

Mr. Hillman: Yes, simply as municipal bodies. They may say they had a grant for this property. If that is the understanding of it, that you do not consent that the Board of Freeholders or the Township of Chester had any grant for this property—

Mr. Kaighn: No, by virtue of their being a Township they gave the authority.

Mr. Hillman: That is all right.

Mr. Kaighn: Now, if they hadn't the power, why, that is another matter.

The Court: Well, Mrs. Rogers, I guess you are relieved from any further testimony. I will hear you gentlemen in argument now; then I want you to send me briefs. It is a nice question of law and I am sure that intelligent and industrious lawyers like you are will furnish me with all the cases. I think Mr. Hillman has the burden.

(After argument by counsel).

This question is a legal one, a pure question of law, whether or not this fountain is an additional servititude. Do you desire to say anything further, Mr. Wolverton?

Mr. Wolverton: No, sir; except if the Court wishes I could present what authorities I have; I have already referred to them.

The Court: I should be very glad to have counsel submit me their authorities on this question and any further comments that they desire to make. The case, I will say, has been very well presented and very well argued on both sides, very well, indeed; so much so that the Court is quite up in the air over the question. I will have to think it out. It involves a property right—that is all there is to it. Has the property right of the plaintiff been invaded? That is the question and the only question in this case. I haven't the slightest doubt but what Miss Warrington was actuated by the very highest motives of consideration for the public, but whether she had a right to do what she did under the circumstances is a serious question; it is a debatable question, a doubtful question. Well, send in your briefs; I will not be able to take them up very soon, because I go to Mays Landing to-night for three weeks, beginning the term to-morrow, but I will take it up and study it just as soon as I get a chance, gentlemen.

Miss Warrington: May I say just a few words? The very beginning of this thing was about fifteen or sixteen years ago when I was possessed with the idea of putting up a fountain. I hunted up what I thought then was the owner and I found Mr. and Mrs. Rogers. I never thought until lately—well, I will say five years ago—people told me, "Why, if the township owns anything or has any say, it is in the middle of the road." Well, that seemed to be proper, if they did. Well, so I wrote to them and said: "Gentlemen, don't decide right away, but think the matter over and let me know what I can do; will you give me the land—only a few feet of ground, and water," never dreaming it would be opposed by anybody. I did all the business, the printed matter had my own name signed to it, everybody knew about it, and I had no objectors. Well, then the trolley pole we couldn't get moved for a long while. My nephew in Germantown sent me word by his wife one

day, "I know how to get that pole moved; I know the trolley company and I will get them to do it." Immediately they said, "We will move that pole." So you see everything seemed to look toward the right; nothing seemed to look toward the wrong, and I hadn't the least idea of asking a privilege nor I hadn't the least feeling that I ought not to do it. But the fountain must stay there, that is certain, it must stay there if it takes all the money I possess, which is only my savings. In the other case they said, "Oh, you can put up two or three fountains." I said, "You don't know that; I saved all the money which I had." That is all I want to say.

The Court: Well, the Court is very glad to hear you and the matter will be very carefully considered.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

JERUSHA B. ROGERS, Plaintiff,
vs.
SUSAN N. WARRINGTON, Defendant.

ACTION AT LAW.
STIPULATIONS.
AGREED STATE OF FACTS.

The parties to this cause, plaintiff and defendant, by their several attorneys, hereby agree that the following are admitted to be facts, and shall constitute a special case argued between the parties, without trial, and shall be argued and submitted to the determination of the Honorable Howard Carrow, Judge of the Circuit Court, upon said facts, the right to direct the case into a special verdict and to take any other steps that may be advisable, for purpose of review, and the right to review the judgment thereon by appeal, writ of errors, or other appropriate proceeding, being reserved to each party, plaintiff and defendant.

FACTS ADMITTED.

Within the bounds of the land described in the answer, being that portion of the land for which the defendant defends, there is constructed a public drinking fountain, used generally and every day by the traveling public for man and beast. It is supplied by water from the public water works and at the public expense. The land in question is located within the bounds of a county road within the Township of Chester, in the County of Burlington, and the fountain was placed there by permission and authority of the Board of Chosen Freeholders of the County of Burlington, and of the Township Committee, of the Township of Chester, in the County of Burlington.

G. M. HILLMAN,
Attorney for Plaintiff.
KAIGHN & WOLVERTON,
Attorneys for Defendant.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN N. WARRINGTON,
Defendant.

MOTION FOR VERDICT IN FAVOR OF DEFENDANT.

1. Ejectment is not a proper remedy to recover possession where the property alleged to be invaded consists of a public street.

2. There is no exclusive occupation and the use that is being made of the public street complained of is not inconsistent with the public use, and that the public is not thereby excluded from the street or from this part of the street; therefore, there is no disseizen or ouster.

3. To authorize an action of ejectment against an individual, he must be in possession, exercising ownership and claiming title, and his possession must be exclusive of the public.

4. The appropriation must be unreasonable and it must be for a purpose wholly foreign to the easement or servitude.

5. To sustain the action of ejectment, the occupation of land by the defendant must be wholly inconsistent with the public easement.

6. The plaintiff's right of ejectment depends upon the use that is being made of the street. It is true that the plaintiff possesses the fee, but her rights therein are subject to the public easement, and there is no right of possession unless there is a use made of the said street different from that which is included in the public use. So long as the use made of said street does not impose an additional servitude, the plaintiff has no right of ejectment. If such use is without authority of the proper authorities, the remedy would be by the public in proceedings on the ground of a nuisance.

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

JERUSHA B. ROGERS, Plaintiff, vs. SUSAN N. WARRINGTON, Defendant.	ACTION AT LAW. NOTICE.

To Messrs. Kaighn and Wolverton, Attorneys of Defendant:

GENTLEMEN: Please take notice, that I will make application to the Honorable Howard Carrow, Judge of the Burlington County Circuit Court, to whom the above cause was referred, at the Court House in the City of Camden, New Jersey, on Saturday, September 2, 1916, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard, for an order permitting the taking of additional testimony in said cause.

Dated August 23, 1916.

Your obedient servant,
G. M. HILLMAN,
Attorney of Plaintiff.

On September 2, 1916, the above application was adjourned until September 9, 1916, and on the hearing on that date objection to the making of such an order was made on behalf of the defendant on the following grounds, viz.:

"If the Court please, this case was tried before this Court without a jury. The matter resolving itself into a question of law, it was agreed by counsel to submit a stipulation of facts, accompanied by briefs of the respective counsel, so that this Court might determine the question of law involved. It seems to me, and wisely so, that after a stipulation of facts has been agreed to and

signed by the respective counsels, as it was in this case, in the presence of the Court, and briefs submitted so that the Court might determine the question of law involved, that if additional testimony were allowed to be presented after such stipulation of facts, there could be no end to such controversy; that counsel before signing a stipulation of facts must know and expect the consequences, and therefore must abide by such a stipulation of facts. In my judgment the Court should not permit any additional testimony by either the plaintiff or the defendant, and the case should rest on the facts as presented in the signed stipulation."

After argument, the Court made an order permitting the plaintiff to take additional testimony.

NEW JERSEY SUPREME COURT.

JERUSHA B. ROGERS, Plaintiff, vs. SUSAN N. WARRINGTON, Defendant.	ACTION AT LAW. ORDER TO TAKE ADDITIONAL TESTIMONY.

Plaintiff having made application for leave to take additional testimony and due notice of the motion having been given to the attorneys of the defendant, and on good cause being shown, it is, on this ninth day of September, A. D. 1916, ordered that the plaintiff be permitted to take additional testimony in said cause, the same to be taken at the Court House, in the City of Camden, on Saturday, the twenty-third day of September, A. D. 1916, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard.

HOWARD CARROW,
Judge.

NEW JERSEY SUPREME COURT,

BURLINGTON COUNTY.

JERUSHA B. ROGERS,
Plaintiff,
vs.
SUSAN N. WARRINGTON,
Defendant.
} ACTION AT LAW.

Camden, N. J., September 23, 1916.

Testimony before HON. HOWARD CARROW, Judge.

Appearances:

For Plaintiff, GEORGE M. HILLMAN, ESQ.

For Defendant, MESSRS. KAIGHN & WOLVERTON.

Mr. Wolverton: If the Court please, I wish to have noted upon the record the fact that, respecting the defendant, we object to the taking of any testimony in this proceeding by virtue of the order which I understand your Honor made some two weeks since; and the reason that we object to it is the fact that this case was submitted to your Honor upon a stipulation of facts which was agreed to by the respective counsel as covering the issue. In view of that fact it seems to me it would be highly improper to permit the plaintiff or defendant to add to or take from that stipulation of facts without an agreement upon the part of the respective counsel; that in view of the fact that it is a case submitted upon agreement it to my mind precludes the Court from changing those facts. If the stipulation is to stand it stands by virtue of the agreement; if the stipulation is changed then the agreement between counsel is of no force or no effect. And I desire that this objection shall be noted upon the record, and if the Court

will permit, the objection to be considered as going to each question and all of the testimony that is presented by the plaintiff under the order which the Court has made.

The Court: Well, do I understand that you want to withdraw; if the Court receives this evidence, you want to withdraw from the stipulation?

Mr. Wolverton: I feel this way about it, if the Court please: that so far as the testimony is concerned, we are in the dark as to what it is the purpose of the plaintiff to introduce in the way of testimony under this order. The order merely gives him the right to take additional testimony. For that reason I could not answer the Court directly except by saying that at the present status of the case, at least, I must insist upon my objection, for the reason that the order is so broad that I am unable to answer the Court intelligently, not knowing the facts which it is the purpose of the plaintiff to introduce.

Mr. Hillman: If your Honor please, when we were here two weeks ago it was stated that we desired to offer testimony showing the exact nature of the alleged resolutions passed by the Board of Freeholders of the County of Burlington and the Township Committee of the Township of Chester. Now when we first tried this case your Honor will remember after one witness had been examined counsel for the defendant asked that the stipulation be signed and agreed to and that stipulation provided or set forth that this fountain had been erected by the authority and the permission of the Board of Freeholders and the Township Committee. I stated at that time that I did not know that such resolutions had been passed and did not know what they were. Mr. Wolverton here in the presence of the Court said that he had the clerks here and that those resolutions appeared upon the minutes; and I told him that if he said so I would accept

his statement and signed that stipulation. That appears upon the stenographer's notes. Now I find by investigation that the minutes of the Board of Freeholders of the Township Committee do not show any such resolution in such broad terms as counsel stated at that time. So that I think that aside from the right of the Court to take testimony in order that the truth of the matter may be properly presented, that I was imposed upon when I signed that stipulation.

Mr. Wolverton: If the Court please, I desire to refute the statement of Mr. Hillman to the effect that he was imposed upon. I have here a stenographic report of the proceedings at that time and I do not believe that it is upon the construction that he was imposed upon. The minutes were here and he had the right to look at them himself if he had any doubt as to what statement I made at that time. In addition to that I might also say that subsequent to that case being agreed upon we submitted that statement of fact, his brief was submitted to the Court, my brief was submitted in reply to that and his brief was submitted in reply to mine; and two months or three months after the final brief had gone in, this question is raised for the first time. And for that reason I feel that he is absolutely unjustified in making the statement that he has, and if there is any question about it I would just ask the privilege of introducing all the testimony that was taken at that time before your Honor which led up to the stipulation of facts.

The Court: I think it is a matter resting in the discretion of the Court and the Court is not inclined to reject any evidence that will throw any light upon this situation. Go ahead.

Mr. Wolverton: The Court understands that I object?

The Court: I understand that you object, yes.

SAMUEL E. JONES, sworn for plaintiff.

Direct examination.

By Mr. Hillman:

Ques. Mr. Jones, where do you live?
Ans. Moorestown.
Ques. New Jersey?
Ans. Yes, sir.
Ques. Are you Township Clerk of the Township of Chester?
Ans. I am.
Ques. Moorestown is in the Township of Chester?
Ans. It is.
Ques. How long have you been Township Clerk?
Ans. Eight years the 31st of next December.
Ques. Continuously?
Ans. Yes, sir.
Ques. And you have the minutes of the Township Committee?
Ans. I have.
Ques. Is the book which you have there that minute book?
Ans. Yes.
Ques. That contains all the minutes of the Township Committee from what time?
Ans. January 1, 1913, to the present time.
Ques. Have you examined those minutes to see if there is any resolution in them or any reference therein to a drinking fountain or watering trough erected at the junction of the Camden and Haddonfield road and the Moorestown and Camden road, in Moorestown?
Ans. I have.
Ques. Will you kindly read the first reference to that in those minutes?
Ans. The first one was on February 17, 1914: "Request received from Susan Warrington for a drinking

trough at forks of road. Same was on motion referred to the Road Committee."

Ques. What is the next reference?

Ans. The next reference is March 9, 1914. "On motion the Clerk was instructed to write Susan Warrington that permission had been secured to place drinking trough for animals at the intersection of Main Street and Camden Avenue and requesting her to submit plan of trough."

Ques. What is the next reference?

Ans. The next is March 30, 1914. "Permission having been secured from resident freeholder John C. Dudley, for a drinking fountain at the intersection of Haddonfield road and Main Street, Clerk was on motion instructed to notify Susan Warrington to proceed with the erection of the same, provided that no expense is incurred by the township in so doing, and that the plan of fountain 877 K, catalogue K, Mott's drinking fountain, as submitted by her, has been accepted by the committee . . ."

Ques. Do the minutes contain any other reference to this drinking fountain?

Ans. Yes, one. September 14, 1914. "On motion, letter received from George M. Hillman in regard to fountain at forks of road was referred to the township attorney with power to act."

Ques. Any other reference to the same?

Ans. No, sir; I have found no other.

Ques. Mr. Jones, you know where this drinking fountain is?

Ans. I do.

Ques. Frequently seen it?

Ans. Frequently.

Ques. And just where is it erected?

Ans. Well, I don't know as I can hardly explain to you.

Mr. Wolverton: The Court understands my objection? I desire it to be considered as applying to the whole line of testimony.

The Court: Yes, I understand that you object to all the testimony.

Ans. The main street is met by Camden Avenue on the right and the Haddonfield road on the left, forming the forks. There is quite a little space, you might say, where those three streets join, and this fountain is right in that space. The property comes up nearly to the fountain, room to go around the fountain between the property that is in the corner and the intersection.

Ques. It is between the sidewalk and the roadway, the driveway?

Ans. Well, yes, it would have to be the sidewalk.

Ques. It is between the sidewalk and the roadway where the horses and automobiles go?

Ans. Well, I don't just understand you. As you come down Main Street you come down Camden Avenue on the right and go to Haddonfield Avenue on the left, it is between the two roadways.

Ques. Is that a township road or a county road?

Ans. A county road.

Ques. What kind of a fountain is it?

Mr. Wolverton: If the Court please, I wish to interpose the further objection there that this witness is not qualified to testify whether it is a county road or township road. That is not the proper proof.

Mr. Hillman: He is the Township Clerk.

The Court: Well, I think it is a matter of common knowledge.

By the Court:

Ques. Which is the county road?

Ans. All three.

Ques. They are all county roads?

Ans. Yes, sir.

Ques. All right.

By Mr. Hillman:

Ques. What kind of a fountain is this?

Ans. Well, it is a concrete fountain, round. Right attractive looking fountain?

Ques. All concrete?

Ans. Yes, sir; I think so, except parts that have to be of iron, for pipe connections and so forth.

Ques. The bowl base, what is that made of?

Ans. I think it is made of concrete. I never examined it closely but it appeared to me, just glancing at it, that it is of concrete; bricked around with cement around it.

Mr. Hillman: I offer in evidence that minute book.

The Court: Let it be admitted.

By the Court:

Ques. Do the minutes show that the Board of Freeholders took any action, or was it the committee that took action upon Mrs. Warrington's request?

Ans. The committee requested of John Dudley, who gave them verbal permission. We had no written permission from him.

Ques. The Township Committee never took any action, did it—the whole committee, or did it?

Ans. Now I don't just understand your Honor.

Ques. I guess I am wrong.

Ans. I don't just understand your question.

HARRY HAWKINS, JR., sworn for plaintiff.

Direct examination.

By Hr. Hillman:

Ques. Mr. Hawkins, where do you live?

Mr. Wolverton: I object to the testimony of this witness for the reasons already given.

Ans. Mt. Holly.

Ques. You are Clerk of the Board of Freeholders of the County of Burlington?

Ans. I am.

Ques How long have you been clerk?

Ans. Since January 1, 1912.

Ques. Do you keep the minutes of the Board of Freeholders?

Ans. I do.

Ques. Have you with you the minute book?

Ans. I have.

Ques. Is that the minute book in your hands?

Ans. Yes, sir.

Ques. When does that start?

Ans. January 1, 1913; January 6, 1913, to be proper.

Ques. Mr. Hawkins, have you looked through that book to see if it contains any reference to a drinking fountain erected by Susan N. Warrington, at the forks of the road leading from Moorestown to Camden, and the road leading from Moorestown to Haddonfield, in Moorestown, in the Township of Chester?

Ans. Not just the way you put the question. I find the name of Susan N. Warrington mentioned here, but not the road which your specify.

Ques. Will you refer to that resolution in your minutes?

Ans. Resolution of May 6, 1914, "Resolution by John C. Dudley: 'Be it resolved by the Board of Chosen Freeholders of the County of Burlington that the fountain to be presented by Susan N. Warrington in the name of the Humane Society to Chester Township, without expense to Burlington County, is heartily approved of.'"

Ques. Is there any other resolution in the minutes?

Ans. I find nothing else; no, sir.

Ques. You do not find that the Board of Freeholders ever took any other action with regard to this fountain?

Ans. None at all.

Hr. Hillman: I offer the minutes of the Board of Freeholders in evidence.

Mr. Wolverton: I object to this testimony being considered in connection with the stipulation already presented to the Court.

Mr. Hillman: In view of what has been said here I would not mind having the colloquy between Mr. Wolverton and myself on the previous occasion read here.

The Court: Well, they already appear in the record, do they not, Mr. Wolverton?

Mr. Hillman: What you have read there is a transcript of Mr. Berry's notes?

Mr. Wolverton: Yes, a transcript of Mr. Berry's notes.

The Court: The only reason the Court allowed the case to be opened for the reception of other proof was that Mr. Hillman represented that he discovered that he made a mistake in stipulating that the fountain was erected by authority, either of the Board of Freeholders or of the Township Committee, and I took the ground that it was the duty of the Court to find out the truth, whatever it was. I indicated to you some time ago, Mr. Wolverton, that I wanted you to submit to me such references to the statute as you could find that favor your side of the case.

Mr. Wolverton: Yes, sir.

The Court: Are you prepared to submit it?

Mr. Wolverton: Not this morning; no, sir. I think in the brief I have already submitted that I set forth our position, and I doubt if there would be any additional statutory law that I could present to the Court. It is my impression that I did present to you all that I knew of at that time, and I suppose the Court is as familiar as I am with the municipal law of this State, which you never know when you have it all or when you have not; and I will make a further search in connection with the Court's request, and endeavor to make sure that I have touched everything that was possible from that standpoint. But I certainly would like to present to the Court whatever statutory law there is on the subject.

The Court: I would like to hear argument upon the case as it now stands before me. In the first place I would like you to say whether these facts have changed the situation in any way.

Mr. Wolverton: I believe the position I have taken in my brief, so far as the defendant is concerned, entitles us to a dismissal of the action.

The Court: No, but you do not seem to answer the question. Does this additional proof that has been offered here this morning change the case in that way?

Mr. Wolverton: It all depends on what construction your Honor places upon the several minutes and resolutions that have been presented. As I said in my opening, that I came absolutely without any knowledge as to the extent of the testimony that was to be presented, and I have not given that any further consideration at this particular moment. I feel from the standpoint of the defendant that whether there was any authority or not, that with the view that I have presented in my brief the defendant should prevail just the same.

The Court: I will dispose of the matter then, gentlemen, shortly.

NEW JERSEY SUPREME COURT.

JERUSHA B. ROGERS,

vs.

SUSAN N. WARRINGTON.

JUDGMENT RECORD.
IN EJECTMENT.
ON POSTEA, &C.
G. M. HILLMAN,
Attorney.

Susan N. Warrington, the defendant in this case, was summoned to answer unto Jerusha B. Rogers, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued May 1, 1915.)

Plaintiff, who resides in Moorestown, in the Township of Chester, County of Burlington and State of New Jersey, demands of Susan N. Warrington, the defendant herein, the possession of all that certain tract of land, with the appurtenances, situate in Moorestown, in the township of Chester, County of Burlington and State of New Jersey, bounded and described as follows, viz:

Beginning at a stone in the northerly side of the public road leading from Moorestown to Haddonfield, corner to a lot of land, conveyed by Jerusha B. Rogers to Robert G. Porch, and runs thence (1) along the line of the same, south twenty-nine degrees and fifty-five minutes east, three hundred and eighty-two and eight-tenths feet to a stake, corner to land formerly of Seth Lippincott, now of Esther Strawbridge Brophy; thence (2) along the line of the same south sixty-six degrees and fifteen minutes west fifty-seven and two hundredths feet to a stake corner to land formerly of Michael Duble, now of Sutton; thence (3) along the line of said Sutton's land, north thirty-two degrees and thirty minutes west, three hundred and eighty-two and eight-tenths feet to a stake or stone in the north side of the said public road, leading from Moorestown to Haddonfield; thence (4) along the

same, north sixty-six degrees and fifteen minutes east, fifty-six and thirty-six hundredths feet to the place of beginning, be the contents what it may.

Being a part of the same premises which Walter E. Hunt, Executor of Elizabeth Evans, deceased, conveyed to the said Jerusha B. Rogers, by deed dated July 6, 1887, and recorded in the Clerk's Office of Burlington County in Book P11 of deeds, folio 602, &c.

And the plaintiff says that her right to the possession of the same accrued on the sixth day of July, eighteen hundred and eighty-seven, and that the defendant wrongfully deprives her of the possession thereof, to her damage one thousand dollars.

G. M. HILLMAN,
Attorney of Plaintiff.

(Filed May 11, 1915.)

Defendant, who resides in Moorestown, in the County of Burlington, State of New Jersey, says that:

She defends this action as to a part of the premises claimed in the complaint, to wit, that portion thereof within the lines of Main Street occupied by a public drinking fountain for man and beast, erected by consent of the municipal authorities, as to which part she denies the truth of the matters contained in the complaint.

Second Defense: The part above indicated is within the bounds of a public street and the use made thereof is within the public easement.

Third Defense: The right to the free and exclusive use and possession of the part above indicated is in a third party, to wit, the public municipal authorities having jurisdiction over that portion of the street.

KAIGHN & WOLVERTON,
Attorneys for Defendant.

(Filed May 21, 1915.)

Plaintiff denies every allegation in the answer.

G. M. HILLMAN,
Attorney of Plaintiff.

(Filed June 9, 1915.)

This case was tried before Judge Howard Carrow, without a jury, at the Burlington County Circuit, on January 10, 1916, and September 23, 1916.

After hearing the evidence and counsel for plaintiff and defendant, the Court found as follows:

1. The statements in plaintiff's complaint are supported by the evidence.

2. The Court rules that the drinking fountain mentioned in the first defense of defendant's answer is a servitude additional to that of the public easement, upon that portion of the premises described in plaintiff's complaint, of which defendant by her said answer admits the exclusive possession, and for which she defends.

3. The Court rules that the defendant had no legal right to thus appropriate that portion of the said premises.

4. The Court rules that the plaintiff is entitled to recover the possession of that portion of the premises for which defendant defends, as aforesaid.

5. The Court finds the defendant guilty with respect to the portion of land for which defendant defends.

6. The damages of the plaintiff against the defendant are assessed at six cents ($0.06).

And it further appearing that the defendant did not defend as to the residue of the premises claimed in the complaint:

$0.06
51.78
———
$51.84

Whereupon it is adjudged that the plaintiff recover of the defendant all of the premises mentioned and described in the complaint, together with the sum of six cents damages and costs, which have been taxed at the sum of fifty-one dollars and seventy-eight cents, making in the whole the sum of fifty-one dollars and eighty-four cents.

Judgment entered October 6, 1916.

WM. S. GUMMERE, C. J.

Exception is noted for the defendant for the refusal of the Court to find the defendant not guilty as requested by defendant.

HOWARD CARROW,
Circuit Judge.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JERUSHA B. ROGERS, Plaintiff and Respondent, vs. SUSAN M. WARRINGTON, Defendant and Appellant.	ON APPEAL FROM NEW JERSEY SUPREME COURT. GROUNDS OF APPEAL.

The appellant having appealed from the order entered in this cause in the New Jersey Supreme Court, on September 9, 1916, and from the whole of the judgment entered in said cause in the Court aforesaid on October 6, 1916, states the following grounds of appeal:

1. Because the Court erred in granting permission to the plaintiff, notwithstanding the objections of defendant, to take additional testimony in said cause, as provided for in the order of September 9, 1916, after the plaintiff and defendant had entered into a stipulation of facts, and which, by agreement of said parties, was to constitute the facts upon which said cause was to be argued and determined by said Court, without a jury.

2. Because the Supreme Court erred in giving judgment for the plaintiff, Jerusha B. Rogers.

3. Because by the law of the land the judgment of the Court should have been for the defendant, Susan M. Warrington.

4. Because the Judge before whom said cause was tried found that the statements in plaintiff's complaint were supported by the evidence.

5. Because said Judge ruled that the drinking fountain mentioned in the first defense of defendant's answer is

a servitude additional to that of the public easement, upon that portion of the premises described in plaintiff's complaint which is occupied by it, as set forth in the issue joined between the parties aforesaid.

6. Because said Judge ruled that the defendant had no legal right to appropriate that portion of the said premises as was occupied by said public drinking fountain.

7. Because said Judge refused to find, as requested by defendant so to do, that the part as to which defense was made was within the bounds of a public street and the use made thereof within the public easement.

8. Because said Judge refused to find, as requested by defendant so to do, that the right to the free and exclusive use and possession of the part to which defense is made is in a third party, to wit, the public municipal authorities having jurisdiction over that portion of the street.

9. Because said Judge ruled that the plaintiff is entitled to recover the possession of that portion of the premises for which defendant defends, as aforesaid.

10. Because said Judge found the defendant guilty with respect to the portion of land for which defendant defends.

11. Because said Judge refused to find for the defendant as requested by the defendant so to do.

12. Because said Judge assessed the damages of the plaintiff over and above its costs and charges to six cents.

KAIGHN & WOLVERTON,
Attorneys for Appellant.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Jerusha B. Rogers,
Plaintiff and Respondent,

vs.

Susan N. Warrington,
Defendant and Appellant.

Action at Law.

BRIEF OF PLAINTIFF AND RESPONDENT.

This was an action in ejectment brought in the New Jersey Supreme Court to recover possession of certain lands in Moorestown, Chester Township, Burlington County, New Jersey. The case was tried before Honorable Howard Carrow, Circuit Court Judge, without a jury. Judgment was rendered for plaintiff for the possession of the premises and six cents damages. From this judgment defendant appeals. Twelve grounds of appeal are given (pages 38 and 39, State of Case). The first ground refers to the action of the trial Judge in permitting plaintiff to reopen her case and submit additional testi-

mony. The other eleven relate to the propriety of the judgment. The correctness of the judgment itself will first be considered. Plaintiff was the owner of a lot of land upon which her dwelling house was erected situate on the south side of Main Street in Moorestown, New Jersey. She was likewise the owner of the public highway in front of this lot. Defendant erected a public drinking fountain or watering trough in this highway, on a portion of the same, the fee of which was owned by plaintiff. She brought this suit to recover the portion of the highway thus appropriated by defendant by the erection of the fountain or watering trough. There is no dispute as to these facts nor as to the legal rights of plaintiff. Defendant resisted plaintiff's demand upon the ground that the premises so appropriated and occupied by defendant are within the bounds of the public highway and the use of the same made by defendant was within the public easement; that the free and exclusive use and possession of the premises was in the public authorities having jurisdiction over the highway and that the fountain was placed where it was by permission of such authorities.

The answer of the defendant (page 4, State of Case) was by force of the statute, an admission that she was in possession of the premises for which she defended, or that she claimed title thereto. Compiled Statutes of New Jersey, volume 2, page 2056, paragraph 13.

The plaintiff's title to the fee of the premises in question being conceded and it likewise being admitted that the defendant had erected this watering trough on plaintiff's premises, the right of plaintiff to recover is clear and such right is not defeated by the fact that the premises on which the fountain was

erected is within the limits of the public highway, and ejectment is the appropriate remedy.

"The owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same." *Wright vs. Carter,* 3 Dutch, 76; *Starr vs. Camden Atlantic Railroad Company,* 4 Zab. 592; *French vs. Robb,* 38 Vr. 260; *Bork vs. United N. J. R. R. and Canal Company,* 41 Vr. 268; *Moore vs. Camden and Trenton Railway Company,* 44 Vr. 599; *Johanson vs. Atlantic City Railroad Company,* 44 Vr. 767.

The fact that the land in question is within the boundaries of the public highway affords defendant no justifications and constitutes no defense. Because the lands are a part of the public street it does not give to defendant the right to appropriate same to her own use, for any purpose whatsoever other than to pass over the same. "That a public highway is "a mere easement, and that the owner of the soil "over which it passes has by the law of this state, "as well as by the law of England and of most of "the states of the Union, a right to an action of "trespass against any person who interferes with it "for any other purpose but to use or repair it as "a highway is too well established to require a "reference to authorities." *Starr vs. Camden Atlantic Railway Co.,* 4 Zab. 592. "The owner of the "soil upon which there is a highway retains the "full possession of it, subject only to the easement. "He may fell trees upon it, cut the grass or de-"pasture it. *He may have his action for digging "the ground there. He may maintain trespass "against one who builds upon it.* Or for the exclu-"sive appropriation of it, and an action of eject-"ment will lie for it." *Ibid,* 598. "The owner of "the land over which a public highway runs is en-

"titled to every use of it, and of all above and below "its surface which is not inconsistent with the free "use of it as a highway for the passage of all "good citizens over it. Lord Mansfield, in Good "Title vs. Alker, 1 Burr. 133, quoting from 1 Roll. "Abr. 392, B. Pl. 1, 2, says, that the King has nothing "but the passage for himself and his people, but "the free hold and all profits belong to the owner "of the soil." *Wuesthoff vs. Seymour,* 7 C. E. Green, 66-70. "The only limitation of the right of "the owner of the soil of the highway to the use "of the same is that such use shall not interfere "with the free passage of the public over it." *Ibid,* 70. In the case of *Good Title vs. Alker and Ellis,* 1 Burr, 133, this being an action of ejectment by the owner of the soil of a highway against one who had erected a market house in said highway, Lord Mansfield, on page 144, said: "He claims the land, and "the tenants in possession of it defend themselves "by saying that they have erected a nuisance upon "it. Now, it would be a strange thing if this should "be a good defense against the owner recovering his "land." "When the Sovereign imposes a public "highway upon the land of an individual the title "of the former is not extinguished, but is so qualified "that it can only be enjoyed subject to that ease- "ment, the former proprietor still retains his exclu- "sive right in all mines, quarries, springs of water, "timber and earth for every purpose not incompat- "ible with the public right of way." *Johnson vs. Hathway,* 15 Johnson's Reports, N. Y. 447-453. "The "general principle is that when land is acquired "by the public for one particular use no additional "burden can be superadded without compensation "to the land owner." *State vs. Laverack,* 5 Vr. 201.

"In Wright vs. Carter, 3 Dutch, 76, ejectment was "brought by the owner of the fee in a highway, "among other things, because of the erection of "a toll house in the highway on his land. The "Supreme Court held that the toll house was not a "survitude additional to the public easement of way, "but upon that point the Court of Errors and Ap- "peals, without opinion, reversed the decision. The "effect of the reversal being to establish the right of "the plaintiff in ejectment to recover, subject to "the easement of way, against the appropriation "of the land to a purpose not within the limits of "the easement." *Burnett vs. Crane*, 27 Vr. 285-288.

Defendant further alleged by way of defense that she erected the drinking fountain in question "by "permission of the municipal authorities having "control of the highways." This was admitted by plaintiff in the stipulation of facts (page 21, State of Case) but such admission was a mistake, it was withdrawn and the actual facts in the matter were subsequently shown by uncontradicted testimony (pages 28 to 33, State of Case) from which it appeared that no such permission was given. The circumstances surrounding the making of the stipulation will be discussed later.

It appears that the highway in question is a county road (testimony of Samuel E. Jones, State of Case, page 30, lines 19 to 35, page 31, line 1) therefore, any permission to be effective must have been given by the board of freeholders of the county of Burlington. That body passed a resolution on May 6, 1914, as follows: "Be it resolved by the board of chosen "freeholders of the county of Burlington, that the "fountain to be presented by Susan N. Warrington "in the name of the Humane Society to Chester

"Township without expense to Burlington County "is heartily approved of." (State of Case, page 32, lines 30 to 35.) That the board of freeholders by the adoption of this resolution failed to confer upon defendant the permission which she claims, is too obvious to require any argument. And this is the only action that the board of freeholders ever took in the matter. (State of Case, page 32, line 37, page 33, line 1.) The resolution gave no permission, but simply expressed approval of a gift to Chester Township. Whether the approval was of the gift or of the fact that it was to be without expense to the county does not appear. Although the road in question was a county road and the township committee of Chester Township had no jurisdiction in the matter, yet if it had, no action which it took amounted to the granting to defendant of the privilege which she claims. No ordinance was passed by it. No resolution adopted. The minutes of the township committee show the following entry under date of March 30, 1914: "Permission having been "secured from resident freeholder, John C. Dudley, "for a drinking fountain at the intersection of Had- "donfield Road and Main Street, clerk was on mo- "tion, instructed to notify Susan Warrington to pro- "ceed with the erection of the same provided that "no expense is incurred by the township in so do- "ing." (State of Case, page 29, lines 10 to 17.) This minute recites that permission had been secured from "John C. Dudley." Mr. Dudley as one of the board of freeholders could not grant any such permission and the only resolution on the subject adopted by the board of freeholders was passed on May 6, 1914, more than a month after this action by the township committee. The most which the action of the township committee and board of freeholders

accomplished was possibly to protect defendant from prosecution for obstructing the public highway.

The township committee did not assume to exercise authority itself in the matter nor to give any permission. It merely instructed its clerk on March 9, 1914, to notify defendant (page 29, lines 4 to 8) "that permission had been secured." Not that permission was given by it, but that permission had been secured. And while the clerk was instructed by the committee on March 30, 1914, to notify defendant to proceed to erect the fountain, the resolution so directing the clerk, was prefaced by the statement that "permission had been secured." The township committee, therefore, instead of assuming to grant permission, merely delivered a message (which message was untrue) that permission had been granted by some one else.

Even if the board of freeholders and the township committee had both granted defendant express permission to erect the fountain in question, it would not have been a justification to her to do so, as against plaintiff. Such permission would have been imposing upon the lands of plaintiff included in the highway an additional servitude which could not have been done by either municipality, without compensation to the plaintiff as owner. She never received any compensation, neither did she ever have any notice of such contemplated action. (State of Case, page 13, lines 1 to 8.) "It is one of "the most important of the privileges of the citizens "of this state that their property cannot be taken "even when required by the public convenience with-"out just compensation." *State vs. Laverick,* 5 Vr. 201-203. "The true rule is that land taken by the pub-"lic for a particular use cannot be applied under "such sequistration to any other use to the detriment

"of the land owner. This is the only rule which will "adequately protect the constitutional rights of the "citizen. To permit land taken for one purpose and "for which the land owner has been compensated, to "be applied to another additional purpose for which "he has received no compensation would be a mere "evasion of the spirit of the fundamental law of "the state." *Ibid,* 205.

This case of *State vs. Laverick,* 5 Vr. 201, seems almost identical with the one in question. In that case, one Frederick Meller was selling produce from his wagon placed in a public street or highway in Paterson, in front of the property of Laverick. Laverick being the owner of the fee of the street. Laverick objected to Meller's action, and in an attempt to stop him from so selling, committed an assault and battery upon him, for which he was indicted. Upon the trial, a verdict of guilty was rendered by direction of the Court, who suspended sentence to obtain the advisory opinion of the Supreme Court upon the legal questions raised on the trial. Meller attempted to justify his action in so selling from his wagon, because the city of Paterson by ordinance had duly established certain market limits embracing the street in front of Laverick's property. This action of the city authorities was attempted to be justified because of the provisions of the charter of the city of Paterson which conferred upon the municipal government, the right to prescribe and locate certain streets of the city to be used as a public market. The Supreme Court in an opinion delivered by Chief Justice Beasley, held that the municipal authorities had no right to confer upon any one the right to conduct a public market on the public streets without the consent of the owner of the fee of such street; that the legislature even had no

authority to confer upon the municipality any such power, therefore, the man who was selling from his wagon was a nuisance and Laverick had a right to remove such nuisance peaceably. Now, if Mellor had no right to conduct a market on the public highway without the consent of the owner of the fee, neither had the defendant in this case the right to maintain a watering trough or drinking fountain on the highway without such consent, even if the municipal authorities had given her permission. If the municipal authorities had no right to give permission to conduct a market, neither has any municipality authority to give the defendant the right to maintain the drinking fountain. It is no justification to say that the drinking fountain may be a public convenience. The only convenience which it would be is that it affords teamsters an opportunity to provide drinking water for their horses. The maintenance of a market on the public street would be a convenience in that it would afford persons a convenient opportunity of procuring meats, vegetables, &c. The maintenance of a market was not justified, neither can the maintenance of a drinking fountain be justified.

In the case of *McDonald vs. Newark,* 15 Stewart, 136, the authorities permitted hucksters to occupy one of the streets for the purpose of their business. The Court, on page 138, said: "In the case in hand, "the use of the streets for a market place is, under "the circumstances, a public nuisance, * * * * nor "does the grant by the officers of the city, of per-"mission so to use the street legalize such use."

"In the absence of any statutory authorization to "the municipality, the latter has no power to au-"thorize obstructions which would otherwise be un-"lawful." *Amer. & Eng. Enc. of Law,* 2nd ed.

volume 15, page 496; *Attorney-General vs. Hershon,* 3 C. E. Green, 410; *McDonald vs. Newark,* 15 Stewart, 136; *Burlington vs. P. R. R. Co.,* 11 Dick. 259; *M. E. Church vs. Hoboken,* 4 Vr. 13-19; *Hoboken Land & Improvement Co. vs. Hoboken,* 6 Vr. 205; *State vs. Laverick,* 5 Vr. 201. The question has on several occasions been raised as to the right of street railway companies to lay their tracks upon the public highways without making additional compensation to the owners of the fee thereof, and while the Courts have held that no additional compensation need be made, it has always been upon the theory as stated in *Citizens, &c., Coach Company vs. Camden Horse Railroad Co.,* 6 Stewart, 267-275, that the burden imposed upon the land owners by the laying of such tracks is identical in kind and no greater in degree than was originally imposed on the land when the highway was opened. The land was originally taken as a highway to afford the public the right of passage. The laying of tracks and the running thereon of street cars, is simply an improved means of transportation and passage and consequently within the servitude originally imposed upon the lands and for which compensation was made. The fact has always been emphasized that the laying of such tracks was not an exclusive appropriation of a part of the highway, in that vehicles other than the cars of such street railway companies could also use the tracks. But the Courts of New Jersey have always decided against the right of steam railroad companies to lay their tracks upon public highways, without additional compensation, because from the nature of the rails used by steam railway companies, and the use made by them of such tracks, other vehicles could not use the tracks and consequently such use by the

steam railroads would be an exclusive appropriation by them of a portion of the highway and the imposition of an additional servitude on the owners of the fee of such highway. It was upon this ground that the decision of the Court of Chancery in the case of *Halsey vs. Rapid Transit Street Railway Co.*, 2 Dick. 380, was based.

"All the cases which dealt with the *status* of "street horse railroads and their successors electric "railways, using public highways longitudinally, "have been based on the theory that these uses of "the highway are within those for which the land "was originally taken by the public for a highway; "that the movement of street railway cars on their "tracks in the highway is only a modification of the "public use to which the highway was originally "devoted." *Camden, &c., Railway Co. vs. United States Cast Iron, &c., Co.*, 2 Robbins, 279-290. "That "easement includes the right to use the street for "purposes of passage by the public and, therefore, "to employ any means directly conducive to that end "which do not substantially interfere with the cus- "tomary use of the streets by any portion of the pub- "lic or the recognized rights of the abutting own- "ers." *Kennely vs. Jersey City*, 28 Vr. 293-294.

But the right of telephone companies to use highways for the purpose of erecting poles and stringing wires without the consent of the abutting property owners has been denied. *Nicoll vs. Telephone Co.*, 33 Vr. 733; *Paterson Railway Co. vs. Grundy*, 6 Dick. 213-225. Likewise the use of such highways by electric lighting companies without such consent save so far as is necessary to carry out contracts with municipalities for lighting the streets. *French vs. Robb*, 260; *Dolton vs. Public Service Electric Co.*, 13 Buch. 560; *Thropp vs. Public Service Electric*

Co., 13 Buch. 564; *Andreas vs. Gas & Electric Co.,* 16 Dick. 69.

The case of *Levy vs. Elizabeth,* 50 Vr. 456, was cited by defendant in the trial below as sustaining the position that the municipal authorities had the right to grant defendant the permission, which she claimed they had, to erect the watering trough. A careful reading of the decision in that case, however, shows that it is not directly in point, nor does it indicate the adoption by our Courts of the principle sought to be established by defendant. That case was the review upon *certiorari* of the action of the city council of Elizabeth in passing an ordinance granting permission to the "Society for the Prevention of Cruelty to Animals" to erect drinking fountains in the streets of that city. The Supreme Court decided that the city council had the power to pass such ordinance, because as pointed out by Justice Minturn the 31st section of the charter of the city of Elizabeth conferred upon the council power "to preserve the aqueducts in said city, and to make "and regulate wells, pumps, and cisterns in the pub- "lic streets and squares." The Court decided that the power to pass the resolution under review was conferred by the legislature in this charter provision and that the action by the city council was regular in other respects. It was upon this point that the case was decided. There is a vast difference between the powers of city governments over the streets in cities and the powers of township or county governments over the roads within their limits. The decision in this case speaks of *city* streets and *city* highways rather than streets and highways in general. This distinction is observed in the case of *Kennely vs. Jersey City,* 28 Vr. 293-294. In the case of *Levy vs. Elizabeth,* the owners of the fee

of the street do not appear to have been parties to the proceeding. The whole contention having been as to whether such drinking fountain obstructed the street. The remarks on page 458 are *obiter dictum,* or at least have no application to highways other than city streets, and the case was decided because the legislature had specially granted to the city council the power exercised by it. But there is no pretence that the township committee of Chester Township or the board of chosen freeholders of Burlington County had any such authority conferred upon them by the legislature. Their power over the public highway in question was merely the ordinary right to keep and preserve the same as a passageway for the public and in the exercise of such rights the municipalities are confined strictly to the maintenance of the street. *Winter vs. Paterson,* 4 Zab. 524. Decision of the Courts of other states are of little value upon this subject. As was said by Justice Dixon, speaking for this Court in the case of *Nicoll vs. Telephone Co.,* 33 Vr. 733-736: "We deem it unnecessary to discuss the views of "Courts in other jurisdictions—they are irrecon- "cilable." And especially are the decisions of the Courts of Indiana from which counsel quoted at length in the trial below, not in accord with those in New Jersey. *Ibid.* The same view is also expressed in *Dolton vs. Public Service Electric Co.,* 13 Buch. 560-563.

The fact that the drinking fountain was intended for public use makes no difference. In the case of *French vs. Robb,* 38 Vr. 260, a distinction was made between the erection of poles for public lighting and private lighting. Public lighting meaning the lighting of the public highways and streets, and private lighting for lighting houses and other build-

ings. The distinction observed in this case, however, was because the legislature (P. L. 1894, page 477) had specially given electric light companies the right to occupy the public highways of townships with poles and wires for the purpose of lighting such highways, but no such right had been conferred with regard to furnishing electric lights for private consumers. Therefore, the Court held that in as much as the corporation had no legislative grant of the right to erect poles for the purpose of furnishing electricity for private lighting, *i. e.*, lighting houses in the highways, it could not so erect them without the consent of the owners of the fee thereof, although the corporation had the right by express statutory provision to so erect the poles without such consent for the public lighting, *i. e.*, lighting the highways. The term, public lighting, as used in this case, refers to lighting the highways. The distinction between public and private lighting had been made by the legislature. The Court did not assume to take away the rights of the individual owners, because by so doing more people might be benefited. Such argument is the argument of convenience and has never prevailed in this state in cases of this sort. At the trial below, counsel for defendant argued that the township committee had authority to give the permission claimed because of the statute authorizing township committees to make contracts with persons to construct and maintain drinking troughs along the public highways for a certain annual compensation (Compiled Statute of N. J., page 5589, section 33a). This legislation, however, shows the contrary. If township committees had authority to erect drinking fountains, why were they thus empowered to so contract with individuals? The fact that the township committee is authorized to con-

tract with persons to erect watering troughs presupposes that such persons have the right to erect them. The plain inference to be drawn from this legislation is that the legislature recognized the fact that township committees had no authority to erect watering troughs alongside the roads, therefore, it authorized them to arrange for their erection and maintenance with the only persons who had such right, viz.: the owners of the premises abutting upon highways. If defendant's contention be correct, an enterprising individual might construct watering troughs at various parts of the town, irrespective of the wishes of the owners of the property in front of which the same are located, and collect from the township committee the sum of two dollars for each of them. Because the township committee is given the power to contract with a person to maintain a watering trough along the road it does not confer upon it the power to grant to any citizen the permission to erect and maintain such watering trough upon the lands of another. Because the township committee has the right to contract with persons to furnish gravel for the repair of its roads, it has not the power to confer upon an individual the right to dig gravel from the land of another without his consent and furnish it to the township. Furthermore, the very existence of this statute is an argument against defendant's contention because by virtue of that law plaintiff had a right to erect a watering trough on this particular ground and arrange with the township committee for the annual compensation to her for the same. The erection of a drinking fountain by defendant appropriated the ground of plaintiff and prevented her from erecting and maintaining a watering trough there herself, and worked a special injury to her. Nor does

the fact that authority is given the township committee to obtain a supply of water for the inhabitants thereof (Compiled Statute of N. J., page 5599, section 65) avail defendant. The township is not by this statute authorized to take property for public use without compensation. *Andreas vs. Gas & Electric Co.*, 16 Dick. 69-76. It is hardly necessary, however, to consider the question as to whether under the law of New Jersey the board of freeholders or the township committee had the right to grant defendant permission to erect the drinking fountain where she did, because as appears by the testimony already quoted (pages 28 to 31, State of Case) neither body ever did as a matter of fact grant such permission.

The right of plaintiff cannot be defeated on the ground that her objection is captious or based upon sentiment. The erection of the drinking fountain where it is works a special injury to her. The noise of the horses and their drivers while watering is annoying to her and the foul odors arising from the excrements from the horses around the drinking trough were so unpleasant as to compel her in warm weather, to keep the front door of her residence closed, and to prevent her from using her front porch. Thus depriving her of the ordinary use and enjoyment of her property. (State of Case, pages 11 and 12.) Even in cases where it has been decided that street railway companies could lawfully use the public highways, it has been held that such tracks must not interfere unnecessarily with the rights of the abutting land owners in the highways in front of their premises. *Roebling vs. Trenton Passenger Railway Co.*, 29 Vr. 666-676; *Budd vs. Camden Horse Railway Co.*, 41 Vr. 782-783. Furthermore, the action of defendant was a special in-

vasion of the rights of plaintiff. Assuming that the public authorities had the right to grant any one permission to erect a drinking fountain at this particular place, plaintiff had primarily the right to so erect it, and to obtain whatever honor or gratitude as a public benefactor, which might result therefrom. She had the right to determine as to the style and pattern of the drinking fountain. The defendant has erected a memorial to herself upon plaintiff's ground, thereby preventing plaintiff from erecting one to herself at that place, if she desired; and depriving her of one of the rights and advantages incident to her ownership of the soil. Plaintiff would have the right as such owner, if it could be done without obstructing the highway as a means of passage, to erect a statue or other ornament or to plant trees or flowers there, but the presence of the fountain erected by the defendant deprives plaintiff of the exercise and enjoyment of that right. If it be conceded that the municipality has the right to permit the erection in the public highway of a drinking fountain, statue or monument, there must also be the consent of the owner of the fee of the land whereon the same is to be erected. Such owner has the right to determine as to what monument or whose statue shall be erected; also whether a monument or a statue or a hitching post or a fountain or a tree or a flower bed shall occupy the space. A man of French descent would probably object to the erection on his property of a statue in honor of Prince Bismark. A public spirited citizen of New York State, some years ago, erected a monument to the memory of Major Andre. It is quite conceivable that the erection of such a monument would conflict with the notions of propriety held by many American citizens. One man would prefer that a monu-

ment be erected rather than a drinking fountain. Surely the owner of the fee is the proper and only person to decide these questions, and the appropriation of his land for any of these purposes, without his consent and agreeably to his wsihes is a clear invasion of his property rights. But it matters not whether plaintiff's objection be based upon sentiment alone or even upon caprice, if her right is admitted she is entitled to it. The maxim *"de minimis non curat lex"* is never applied to the positive and wrongful invasion of another's property. *Wartman vs. Swindell,* 25 Vr. 589. That the drinking fountain is a convenience to the traveling public is of no consequence. It will not be seriously urged that a hitching post may be erected in front of the property of one against his wish, simply because it may be a convenience to a certain portion of the traveling public. A place where gasoline may be purchased for automobiles, a machine shop for the repair of automobiles, a blacksmith shop or a harnessmaker's shop might at all times be an accommodation to the traveling public but that fact does not justify their erection on the property of one without his consent.

It must also be borne in mind that the drinking fountain in question is erected by an individual, not by a corporation or body having a permanent existence. In the natural course of events defendant will pass away. Her rights in the premises in question will pass to some one else. There is no assurance that the drinking fountain will be maintained. It may become dilapidated, useless and more especially offensive. The judgment of the Court in favor of the plaintiff was in accordance with the testimony and the law of the state and should be affirmed. It works no hardship to defendant, she may place the drinking fountain in front of her own premises.

With regard to the first ground of appeal concerning the action of the trial Court in permitting additional testimony, the objections of defendant to the taking of such additional testimony was based upon the ground that counsel for plaintiff and defendant had already entered into a stipulation concerning the matters to which the additional testimony related. The stipulation is found on page 21, State of Case. It was signed in open court as a result of statements then made by defendant's attorney to the attorney for plaintiff (State of Case, pages 8, 9 & 10). Defendant's attorney stated that he had in court the clerk of the board of freeholders and the clerk of Chester Township with their minute books. Which minute books he declared would show that these two bodies had granted defendant permission for the erection of the watering trough. Plaintiff's attorney expressly stated that he had no knowledge of these facts but signed the stipulation upon the personal assurance of defendant's counsel that the facts were as stated. The subsequent testimony offered was simply the contents of these minute books. If they contained no more than defendant's attorney had asserted they did, defendant was certainly not injured. If the contents of said minute books was different from what defendant's attorney had stated, and she was thereby injured, it was because her attorneys had attempted by deception to impose upon plaintiff and it does not become defendant to complain that she was frustrated in an attempt to impose upon the Court as well as plaintiff's attorney. The permitting of additional testimony was clearly within the discretion of the Court. It is the duty of the Court to see that the *truth* is presented and not to exclude it because of mistake or fraud.

It is respectfully submitted, therefore, that the plaintiff being concededly the owner of the premises in question; defendant having without plaintiff's consent appropriated to her own use a portion of the same and erected thereon a drinking fountain without any permission or authority from the municipal authorities (such municipal authorities having no power to grant such permission) the judgment of the trial Court was correct and should be affirmed.

Respectfully submitted,

G. M. HILLMAN,
Attorney of Plaintiff and Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JERUSHA B. ROGERS, Plaintiff and Respondent, vs. SUSAN N. WARRINGTON, Defendant and Appellant.	ACTION AT LAW. BRIEF OF APPELLANT.

FACTS.

This is an action of ejectment to recover possession of a certain parcel of land situate in Moorestown, Chester Township, Burlington County. Included within the boundaries of the lot described in the complaint, there is a public road or street. The defendant defends only as to a part, to wit: "That portion thereof within the lines of Main Street occupied by a public drinking fountain for man and beast, erected by the consent of the municipal authorities."

GROUNDS OF DEFENSE (Page 4.)

The grounds of defense set up by the defendant's answer are as follows:

(a) The part above mentioned is within the bounds of a public street, and the use made thereof is within the public easement.

(b) The right to the free and exclusive use and possession of the part above indicated is in a third party, to wit, the public municipal authorities having jurisdiction over that portion of the street.

STIPULATION OF FACTS (Page 21.)

"The parties to this cause, plaintiff and defendant, by their several attorneys, hereby agree that the following are admitted to be facts, and shall constitute a special case argued between the parties, without trial, and shall be argued and submitted to the determination of the Honorable Howard Carrow, Judge of the Circuit Court, upon said facts, the right to direct the case into a special verdict and to take any other steps that may be advisable, for purpose of review, and the right to review the judgment thereon by appeal, writ of errors, or other appropriate proceedings, being reserved to each party, plaintiff and defendant."

FACTS ADMITTED.

"Within the bounds of the land described in the answer, being that portion of the land for which the defendant defends, there is constructed a public drinking fountain, used generally and every day by the traveling public for man and beast. It is supplied by water from the public water-works and at the public expense. The land in question is located within the bounds of a county road within the Township of Chester in the County of Burlington, and the fountain was placed there by permission and authority of the Board of Chosen Freeholders of the County of Burlington, and of the Township Committee of the Township of Chester in the County of Burlington."

Upon the hearing in the above matter held before Hon. Howard Carrow, Judge of the Burlington County Circuit

Court, without a jury, on behalf of the defendant, a motion was made for a verdict in favor of defendant, upon the following grounds: (page 22)

"1. Ejectment is not a proper remedy to recover possession where the property alleged to be invaded consists of a public street.

"2. There is no exclusive occupation and the use that is being made of the public street complained of is not inconsistent with the public use, and that the public is not thereby excluded from the street or from this part of the street; therefore, there is no disseizen or ouster.

"3. To authorize an action of ejectment against an individual, he must be in possession, exercising ownership and claiming title and his possession must be exclusive of the public.

"4. The appropriation must be unreasonable and it must be for a purpose wholly foreign to the easement or servitude.

"5. To sustain the action of ejectment, the occupation of land by the defendant must be wholly inconsistent with the public easement.

"6. The plaintiff's right of ejectment depends upon the use that is being made of the street. It is true that the plaintiff possesses the fee, but her rights therein are subject to the public easement, and there is no right of possession unless there is a use made of the said street different from that which is included in the public use. So long as the use made of said street does not impose an additional servitude, the plaintiff has no right of ejectment. If such use is without authority of the proper authorities, the remedy would be by the public in proceeding on the ground of a nuisance."

Upon the conclusion of said hearing, the Court requested briefs to be submitted from the respective parties,

and accordingly a brief was submitted by the plaintiff and an answering brief filed by the defendant. A considerable time after said briefs had been submitted to the Court an application was made by the attorney for the plaintiff for an order permitting the taking of additional testimony in said case (page 23). In accordance with said notice the matter was heard by said Court on the ninth day of September, 1916, at which time the defendant objected to the taking of additional testimony on the following grounds, namely: (page 23)

"If the Court please, this case was tried before this Court without a jury. The matter resolving itself into a question of law, it was agreed by counsel to submit a stipulation of facts, accompanied by briefs of the respective counsel, so that this Court might determine the question of law involved. It seems to me, and wisely so, that after a stipulation of facts has been agreed to and signed by the respective counsels, as it was in this case, in the presence of the Court, and briefs submitted so that the Court might determine the question of law involved, that if additional testimony were allowed to be presented after such stipulation of facts, there could be no end to such controversy; that counsel before signing a stipulation of facts must know and expect the consequences, and therefore must abide by such a stipulation of facts. In my judgment the Court should not permit any additional testimony by either the plaintiff or the defendant, and the case should rest on the facts as presented in the signed stipulation."

Notwithstanding the objection made as aforesaid, the Court made an order permitting the plaintiff to take additional testimony (page 24), in accordance with which testimony was taken.

After the taking of said testimony, the conclusions of the Court were filed in the form of a memo. reading as follows:

"Carrow, J.: I find that the drinking fountain in question is a servitude additional to that of the public easement upon that portion of the *locus in quo* for which defendant by her answer admits exclusive possession.

"I also find that defendant had no legal right to thus appropriate said land. Plaintiff is therefore entitled to recover the possession of the portion of the *locus in quo* already indicated."

In accordance with such conclusions, an order was thereupon filed, in favor of plaintiff (page 37). From this order the defendant has appealed for the several reasons set forth in the grounds of appeal. (Page 38.)

BRIEF.

It appearing by the admission of facts (page 21) that the fountain in question was erected by defendant by authority of the Board of Chosen Freeholders of Burlington County and the Township Committee of the Township of Chester, in the County of Burlington, at the side of the road, as a public drinking fountain for man and beast, and that it has been maintained by such municipal authorities since its construction, and used each day by the traveling public, the only question to be determined other than the question of whether the Court erred in permitting the taking of further testimony after a stipulation of facts had been agreed upon and briefs submitted, is whether the use of that portion of the highway for such a purpose is inconsistent with the use for which streets and roads are established?

The plaintiff has based her claims to possession upon the principle that she is the owner of the fee, and that the rights of the public in the highway in question are merely those of passage and re-passage, and that therefore the erection of the fountain in question constitutes an additional burden of servitude upon the land, and from which she is entitled to be relieved.

That the rights of the public in the use that may be made of a highway are not as limited as claimed by the plaintiff, is indicated by the language used by Vice Chancellor Van Fleet in the case of *Halsey vs. Rapid Transit Street Railway Co., 47 New Jersey Equity, 880 (383).* In this case it was claimed that the erection of poles to carry wires for electric street railway purposes imposed a new and additional servitude on the land; in other words, that by the erection of poles the land had been appropriated to a purpose for which the public had no right to use it. The Court said: "The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice Depew, in pronouncing the judgment of the Court of Errors and Appeals, in *Hoboken Land and Improvement Co. vs. Hoboken, 7 Vr., 540, 581,* said: 'With re-

spect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest.' This view was subsequently enforced by the same Court in *Sullivan vs. North Hudson R. R. Co., 22 Vr., 518, 543.* . . . . . It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris and Essex R. R. Co. vs. Newark, 2 Stock., 352, 357.* . . . . . While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the community. The Legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misapprehension of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this State, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of the public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor

when his land was taken; it is simply a user of a right already fully vested in the public, and consequently by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation."

Van Horn vs. Newark Passenger Railway Co., 48 N. J. E., 332.

St. Columba's Church vs. New Jersey Street Railway Co., 70 Atl., 602.

Hoboken Land Co. vs. Hoboken, 36 N. J. L., 544.

In determining what is an additional servitude the Courts have taken into consideration the question whether the contemplated use is in the interest of the public or a mere private use. This distinction was very clearly drawn in the case of *French vs. Robb, 67 N. J. L., 260 (264),* where the Court said: "One of the rights belonging to the corporation is to occupy the streets with poles and wires for public lighting. This right was expressly conferred by the Act of May 22d, 1894 (Pamph. L., p. 477), according to which it may be exercised either directly by the city itself or indirectly through parties contracting with the city, and is not conditioned upon consent of the owner of the soil. *Myers vs. Electric Company, 34 Vroom, 573.*

"So far, therefore, as Robb occupying the streets with poles and other appliances for public lighting and thereby excluding the plaintiff, the ouster was not tortious, and the verdict of not guilty was properly directed.

"No color of right is shown for maintaining an apparatus for private lighting, and as to the wires strung for that purpose the defendant was clearly guilty. The plaintiff urges that the wrongful use of the pole to sus-

tain this wire should be visited with the forfeiture of the entire right, but we find no ground for such condition."

King vs. Russell, 6 B. & C., 566; 108 English Reprint Rep., 560.

Upon the trial of an indictment for a nuisance in a navigable river by erecting and locating staiths there for loading ships with coal, the jury were instructed by the learned Judge to acquit the defendants if they thought that the abridgement of the right of passage caused by these erections was for a public purpose and produced a public benefit, and if the erections were in a reasonable situation and a reasonable space was left for the passage of vessels on the river, and he pointed out to the jury that by means of the staiths coal was supplied at a cheaper rate and in better condition than otherwise could be. Held, that this direction to the jury was proper.

It cannot be successfully claimed that this fountain will interfere with the use of the public road or street, or that it will or can constitute a nuisance. It will not in any way immediately affect the property owned by the plaintiff, as it is located on the far side of the road from her property, and upon the edge thereof, so that it is located at the farthest point possible from her property.

That the use of streets or roads for the purpose of erecting fountains, cisterns, monuments and similar structures is not inconsistent with the use for which streets are established, is more particularly shown by the following case:

In *Roberts vs. Powell, 168 N. Y., 411 (61 N. E., 699),* the Court said: "We think the decision below was clearly right. No other result could be upheld unless we are

prepared to say that every object of this character which is placed in a public street constitutes a nuisance or that a jury would be justified in finding it to be such. It is quite true, as the learned counsel for the plaintiff contends, that every unlawful obstruction placed in a public street which endangers the safety of travellers may be regarded as a nuisance, but the question is, What object will constitute an unlawful or dangerous obstruction? There are some objects which may be placed in or exist in a public street, such as water hydrants, hitching posts, telegraph poles, awning posts or stepping stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. The hitching post, for instance, in front of a private residence, is intended not only for the convenience of the private individual, but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of a street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway. The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purposes. It did not interfere in the least with the use of the roadway or bed of the street, nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk . . . . . The question involved in this class of cases is whether the object

complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises or any one else. We think that the judgment is right, and must be affirmed, with costs."

In *Dougherty vs. Trustees of the Village of Horseheads, 53 N. E., 799 (New York)*, the Court said: "While it is the duty of a municipal corporation to use reasonable care to keep the streets in a safe condition to drive upon, it has the right to devote the sides of the streets to other useful public purposes, provided it leaves an unobstructed driveway of ample width for the passage of teams. It may construct sidewalks of a higher grade and gutters of a lower grade than the driveways, place curbing on the line of the gutters, erect hydrants, and authorize the erection of hitching posts and stepping stones, as well as poles to support the wires of telegraph and telephone lines . . . . . In the case before us a large stone took the place of curbing, in order to keep people from driving over the grass and against the tree. While it was an obstruction, it was a lawful obstruction, the same as a fence, hydrant, or telegraph pole."

In *Lostutter vs. City of Aurora, 126 Ind., 436 (26 N. E., 184)* the Court said: "The immediate question which arises is whether the urban servitude is broad enough to vest in the municipality the right to maintain a well in the street. The rights of a municipality, vested in it as the owner of an urban servitude, authorize it to use a street for many other purposes than that of travel. It is true that its primary character is that of a thoroughfare upon which citizens have a free right to pass and repass, and it is also true that its character as a street cannot be entirely destroyed without compensation to those in-

jured by its destruction. See authorities cited in notes, *pages 662, 663, Elliott, Roads & S.* But, while this is true, it is also true that the use of streets is not confined to that of travel. Pipes for water and for gas may be laid in them, drinking fountains and hydrants may be placed in them, and cisterns may be dug in them. See authorities collected in notes, *Elliott, Roads & S., pages 305, 306.* . . . . . Town pumps have long been in existence, long before Hawthorne's historical pump poured forth its rill, and it cannot be justly said that a municipal corporation is guilty of maintaining a nuisance where it does no more than maintain a pump in one of its streets. It is immaterial whether a well, hydrant, fountain, or the like was dug or erected by a municipal corporation as a part of a general plan of improvement, for a thing of that kind, promotive, as it presumptively is, of public convenience, may be adopted by a municipality and maintained for public use. Kindred cases prove that the general principle here involved has long been recognized."

In *West vs. Bancroft, 32 Vermont, 367,* it appeared that the defendant, as one of the Trustees of the village, had placed in a highway of the town a reservoir for the purpose of retaining water to sprinkle the highway with, whereupon the owner of the fee of the land where said reservoir was placed brought an action against the authorities for so doing. The Court charged the jury that the putting in of the reservoir or cistern by the public authority of the village, for public purposes, within the limits of the public highway within the village, would not constitute a trespass for which the owner of the fee could recover, even though the land might revert to him in case such highway should be discontinued. To this charge the plaintiff excepted, and the

jury returned a verdict for the defendant. The Court (Pierpont, J.) stated, "The only remaining question is as to the right of the public to put a reservoir or cistern into the earth, within the limits of the highway, for the purpose of retaining water to be used in sprinkling the streets and extinguishing fires. There is nothing stated in the bill of exceptions tending to show, either from the place where this cistern was put, or the manner of its construction, that it was likely to interfere with the full and perfect use of the highway by the public, or to produce any special injury to the owner of the adjoining land, and the owners of the revisionary right in the highway; but the case stands upon the bare right of the public to do the act under any circumstances.

"The power of the public over highways is not confined to their use for the sole purpose of travel. Many things may be done therein for the promotion of the public convenience and health, such as laying water pipes, constructing drains and sewers, making reservoirs, and many other acts which the public may require, and when these acts are done by the public authorities in a judicious manner and with proper care, having reference to the rights of adjoining properties and the owners of the fee of the land, if such properties are incidentally affected injuriously thereby, or the owner of the fee sustains a technical damage, the law furnishes no remedy therefor.

"All those acts which tend to facilitate travel and add to the ease, comfort and convenience of the traveler, or his beasts, whether it be by cutting down the hills, filling the ravines, paving the roads, erecting watering troughs, or sprinkling the streets, are acts which it is proper and often necessary for the public to do. And

in a village containing as numerous and active a population as St. Johnsbury, no other one of these acts, perhaps, would add so much to the comfort of the passers on the highway, as well as all the inhabitants of such village, as that of sprinkling the streets; and such act, instead of infringing on the rights of the reversioner, can hardly be said to approach that uncertain line constituting the true boundary between the rights of the public and the owner of the fee in the highway. Judgment affirmed."

In *Tompkins vs. Hodgson, 2 Hun., 146,* the Trustees of the village of Whiteplains had authorized the erection of a soldiers' monument in one of the public streets. Action was brought by the plaintiff, claiming that the structure is for a new purpose foreign to the right of the public in the highway and that it is a nuisance and a trespass as regards the plaintiff's property and residence, and asking that defendants be compelled to remove the monument and that they be restrained from continuing the same on plaintiff's land on said highway. The Court held, "The chief question is, have the trustees of the village, who have the control of the streets for public use, the power to make this use of the highway? When it is considered that highways are public for other purposes than travelling, for shade trees and sidewalks, by legislative enactment, and for sewers, lamps, gas and water pipes, public wells and cisterns, and that those uses are in harmony with the uses of a public highway when they do not obstruct travel, the further conclusion will readily be reached, that the law will sanction the erection of a work of art, such as an ornamental statue, without thereby trespassing in any respect on the rights of the owner of the soil, who holds strictly subordinate to public use.

"Statues of men, and in commemoration of great public events, are now considered as the legitimate belongings of public places; the statue of Franklin is in Printing-House Square, directly on a highway, in New York City, and the statues of Washington and Lincoln are on the public street, at the South of Union Square, in that city. Cities, both ancient and modern, in the old world, give abundant proof that statues, ornamental temples, obelisks, pillars and columns, have long been considered legitimate objects of public approval and admiration, and they are neither to be hid in a corner, nor placed where they cannot be seen. New discoveries make new uses, and telegraph poles run on highways all over the land.

"The streets of a populous city or village may be appropriated to other purposes than a mere place of passage; they may be used and appropriated for the promotion of the health, trade, commerce and convenience of the public, and it may be added, for any public use which is consistent and in harmony with their use as public highways."

In *Kelsey vs. King, 32 Barbour, 410 (416)*, it was held: "There are certain powers and privileges incident to the right of way by which it may be well to notice. They may be classed generally as those which are necessary to the perfect enjoyment of the right to pass and repass. There is the right to dig the soil and use the material and timber for the repair of the road. It is evident that as mankind progresses in physical and material improvements, these incidental privileges must increase and be generally enlarged. The mere right to pass and repass upon the surface of the ground would not fulfill the conditions of a highway at the present time. . . .

. . . These privileges incidental to the use of a highway must expand and multiply in regard to the streets and avenues of cities. The right to sink wells and cisterns has been freely exercised, and has not, as I am aware of, ever been disputed. Large and copious streams of water flowing through every street and into every house have now become a prime necessity in every healthy and habitable city. No one doubts the right of the corporate authorities to lay down the mains and pipes for this purpose in the public street without compensation to the owners of the fee. So it is with gas pipes, distributed over the entire city. A complete and comprehensive system of sewerage also becomes a necessity under such circumstances."

In *Savage vs. City of Salem, 31 Pacific Reporter, 832 (Oregon)*, the Court said: "As a general rule, it has been said that 'public highways belong, from side to side, and end to end, to the public,' *(State vs. Berdetta, 73 Ind., 185; Elliott, Roads & S., 478)* and hence any unauthorized, permanent erection or structure which materially encroaches upon a public street or highway, and impedes or interferes with travel, is a nuisance *per se*, and may be abated as such, notwithstanding ample space is left for passage by the public. But it now seems settled that municipal authorities which possess, under their charters, general control over the streets, have the power and may authorize and render lawful obstructions and erections therein for a public purpose, which otherwise would be deemed nuisances, on the ground that such erections or structures are merely putting the street to a new and improved use, as demanded and required by the necessities of the time and the modern conveniences and ap-

pliances. It is upon this principle that the right to grant franchises authorizing the use of the streets for water and gas pipes, for the construction and operation of street railways, the erection of water hydrants and lamp posts, of telegraph, telephone, electric-light and railway poles and similar structures, is maintained and now generally recognized and upheld by the courts. . . . . It follows, then, that the water tanks in question, having been erected by plaintiff by the authority and permission of the defendant, at the place designated and selected by its agent, and under his supervision, they cannot be held to be public nuisances *per se,* if they were erected and maintained for public, and not private, purposes, and this depends upon whether sprinkling the streets of a municipality is a public purpose, or, in other words, a business in which the corporation itself may lawfully engage. There seems to be scarcely room for two opinions upon this point, so unquestionable is it that street sprinkling is a public purpose."

The placing of the drinking fountain in question in the public street with the consent of the public authorities and the maintenance of it thereafter by the public authorities constituted the placing and maintenance of said fountain the act of the public rather than that of the individual who is the defendant in this action. This principle is very clearly set forth in the case of *Wallace vs. Canandaigua, 117 N. Y. Sup., 912:*

"The trustees of the village of Canandaigua were requested by Dr. Burrell, the superintendent of the Brigham Hall Sanitarium, in that village, to permit him to place a boulder at the intersection of Thad Chapin and Bristol streets, to be marked as a monument in com-

memoration of the march of General Sullivan and his army through that region in the year 1779, and a resolution was passed granting Dr. Burrell the permission solicited, and a committee of the trustees was appointed to see to it that the proposed monument was suitably placed. Dr. Burrell, at his own expense, caused to be removed from a field near by a large boulder, measuring four and one-half feet high and nine feet two inches in length, to the triangular grass plot at the intersection of these streets over which the beaten path made by carriages did not pass. . . . . .

"The erection of a suitable monument by a municipal corporation in a public place, so situated as not to interfere with the free and reasonable use of the highway by the public, is not a purpresture or unlawful invasion of the public highway. *(Tompkins vs. Hodgson, 2 Hun., 146.)* This boulder was not placed in the highway by the village of Canandaigua. It was done by a public-spirited gentleman at his own expense; but the village authorities formally consented to and approved of his plan, and for the purpose of this motion I have considered the placing of the boulder there as the act of the village board."

The principle upon which the above cases have been decided has been very clearly enunciated and emphatically adopted in a case of our own State, which, though afterwards reversed *(81 N. J. L., 643)* on another ground, seems to be directly in point with this case on the question which has been raised here as to whether a public drinking fountain is within the use of a public street. In *Levy vs. Elizabeth, 79 N. J. Law, 457*, we find by the opinion of the Court the following:

Minturn, J.: "The 'Elizabeth District Society for the Prevention of Cruelty to Animals' applied to the Common Council of Elizabeth for permission to locate two

drinking fountains in the public streets of that city. The application, after consideration by the Councilmanic committee, was reported upon favorably, and a resolution granting the application was recommended to the Council for adoption; which resolution designated the locations at which the fountains were to be placed. The resolution was unanimously adopted by the Council, and the prosecutors now attack it upon five grounds, all of which may be generalized as an attack in the first instance upon the power to pass the resolution, and secondly, as a denial, that the power, if it exist, was exercised in a legal manner.

"We think the power to pass the resolution *sub judice* was amply conferred by the Legislature in these charter provisions. The general trend of authority, based doubtless upon the theory that where the streets of a city have been committed to the care of the municipality by any generic language such as has been employed in this case, is that their general use and improvement in the interest of public convenience, comfort and even aesthetic taste, is a matter of municipal discretion which will not be interfered with, in the absence of a clear abuse of that discretion, so long as the use is not inconsistent with the public right of a clear invasion of a private right. It is upon this theory that streets are cleared of obstructing wagons lying idle; that sheds are removed from over sidewalks, and venders' stands are ejected; and that statues, memorial shafts and the like are erected, and floral patches are planted upon city highways in the public interest. *(Tomlin vs. Cape May, 34 Vroom, 429; Budd vs. Camden Horse Railroad Co., 16 Dick. Ch. Rep., 543; Halsey vs. Rapid Transit Railway Co., 2 Id., 380; Robert vs. Powell, 168 N. Y., 411; Blair vs. Chicago, 201 U. S., 400.)*

"The test of unreasonable use really is whether the street, by the proposed action, is to be devoted to a purpose inconsistent with its public use as a street. *(Tomp-*

kins vs. Hodgson, 2 Hun., 146; State ex rel. vs. Cincinnati Gas Co., 18 Ohio St., 262; 28 Cyc., and cases cited.)

"We do not find in this case that the erection of these foundations in accordance with this resolution is inconsistent with the rights of the public in the street; but that such use may be considered from the standpoint of the humanitarian spirit which induced the gift, and which may be said to be in line with the growing demands of an enlightened public policy, rather than as a purpresture or an unlawful invasion of the highway. *(Wallace vs. Canandaigua, 117 N. Y. Sup., 912; Tompkins vs. Hodgson, supra.")*

Not only is the erection of the fountain in question justified by the above cited cases which unquestionably hold that a public drinking fountain imposes no additional burden or servitude and is certainly within the use of a public road, but, in addition thereto, the fullest authority over the streets and public places of the township, and the regulations thereof, has been delegated to the municipal authorities, and the right to erect this fountain for the public good was specially authorized and permitted, not only by the Township Committee, but also by the Board of Chosen Freeholders of the county. But the right to erect and maintain public fountains or troughs does not depend alone upon the principles enunciated in the above mentioned cases, nor even upon the general supervision and control of streets and highways vested in the Township Committee and Board of Freeholders, but general authority is given to the Township Committee to obtain a supply of water for the inhabitants thereof (*C. S., p. 5599*) and more particularly direct authority is given (*C. S., p. 5589*) to the Township Committee to provide public water troughs for the use of the public, as follows:

"The Township Committee of any township in this State may pay to any person or persons constructing and maintaining troughs supplied with running water along the roadside and easy of access to the traveling public, the sum of three dollars for each trough so maintained and supplied or to any person maintaining such trough, which may be supplied by a pump or well in the immediate vicinity, the sum of two dollars, but in no case shall there be maintained in any year, or paid for, more than five of such troughs, nor shall any trough be maintained at public expense which may be used in connection with a public inn or tavern."

As the power is given to the Township Committee to "pay to any person or persons constructing and maintaining troughs supplied with running water along the roadside and easy of access," it certainly cannot be held that the Township Committee did not have authority to authorize the erection of the trough or fountain for such purpose, especially when it was without cost to the public, as in this case, and it would be almost ridiculous to contend that they could not permit the erection of a fountain for such purpose and supply the water themselves, when they have the right to pay others for doing so.

A municipality holding the streets and having the power to regulate and control them in trust for the public can do anything with them that is not inconsistent with the use for which streets are established. Drinking troughs being objects which subserve the use of the streets, cannot be considered obstructions to them, although some portion of their space may be occupied. While they may be termed obstructions in one sense, they are nevertheless such obstructions as serve a useful purpose and are not inconsistent with, but are a necessary

incident to the objects for which streets are made and established.

We therefore submit that as the erection of public drinking fountains is clearly within the use of a public highway, adding to the convenience of the travelers thereon, and as the public authorities had the unquestioned right to erect fountains for such purpose, that there can be no question of their right to permit public-spirited citizens to perform for them without cost that which they had a right to do themselves, and especially in view of the fact that after the erection of the fountain in question it was accepted by said township, as indicated by their maintaining it with water from the public water supply.

We respectfully urge that the plaintiff cannot maintain this action of ejectment for the following reasons:

1. The title of the plaintiff to the highway in question is subject to the public easement, therefore this action cannot be maintained, because it has not been shown that the defendant has taken exclusive possession of it, nor is she exercising ownership thereof or claiming title thereto, nor has she taken any action or done anything imposing upon it any burden inconsistent with the public easement.

Westlake vs. Kech, 31 N. E., 321.
Adams vs. Saratoga, &c., R. Co., 11 Barb., 414.
Redfield vs. Utica & Syracuse R. R., 25 Barb., 54.
New Jersey cases already cited.

In *Adams vs. Saratoga R. R. Co.,* the Court held: "An action of ejectment is a possessory action, and can be maintained only by the party who has a subsisting interest

in the premises claimed, or of some share, interest or portion thereof. The plaintiff has no such right, until he first shows that the whole purpose has ceased for which the dedication was made, and the ultimate fee remains in him. This the plaintiff failed to show."

In *Redfield vs. Utica & Syracuse R. R.,* the Court said: "To authorize an action of ejectment against an individual, he must be in possession, exercising ownership and claiming title, and his possession must be exclusive of the public."

2. There has been no disseizin or ouster which is essential in an action of ejectment.

Newell, on Ejectment 1, p. 31: "Ejectment is a remedy designed to redress wrongs amounting to a disseizin or an ouster. The action will not lie for a mere trespass on land. The plaintiff must furnish proof of an eviction. There must be some usurpation of dominion over the property, for an ouster is a wrong that carries with it a change of possession."

3. To sustain the action of ejectment, the occupation of land by defendant must be wholly inconsistent with the public easement.

The plaintiff's right of ejectment depends upon the use that is being made of the street. It is true that the plaintiff possesses the fee, but her rights therein are subject to the public easement, and there is no right of possession unless there is a use made of the said street different from that which is included in the public use; so long as the use made of said street does not impose an additional servitude, the plaintiff has no right of ejectment.

4. If it should be contended that notwithstanding the fact that the public fountain might be considered within the public use, nevertheless the defendant had not sufficient authority for its erection, yet even this contention would not entitle the plaintiff to recover; first, because permission was granted; and second, because if it had not been granted the remedy would be by indictment and not by ejectment.

In the case of *Van Horne vs. The Newark Passenger Railway Co., 48 N. J. Equity, 332 (335)*, the Court held: "Now, if a horse railway is laid in a highway without legislative authority, what is the situation? The easement of the public, without the public's consent, is interfered with. Nothing is taken from the owner of the fee. The act is simply the creation of a public nuisance."

The remedy against such a nuisance is by indictment, or, in a proper case, by suit in equity instituted by the Attorney General.

5. The defendant has done nothing more than erect at her own cost for the use of the public a drinking fountain for man and beast, and, since the erection of which it has been maintained by the Township of Chester by supplying water from the public supply, therefore the use and occupancy thereof since its erection has been by the public and not by this defendant, and in no way, therefore, can it be considered that there has been that exclusive occupation by defendant as would sustain a charge of disseizin or ouster of the public.

6. Plaintiff must prevail on the strength of her own title, and as it appears that the land in question is sub-

ject to a public easement, she is not entitled to judgment.

Meyers vs. Conover, 65 N. J. L., 187.
Mylan vs. Meeker, 28 N. J. L., 274.
Jennings vs. Bunbam, 56 N. J. L., 289.

In conclusion, it is suggested that no charge whatever has been made that the fountain is an obstruction in the road or in any way impedes travel thereon; and that it is a recognized convenience to the public is best attested by the fact that both the Township Committee and the Board of Freeholders have authorized its existence, and since its erection it has been supplied with water from the public water supply of Chester Township; and the good judgment of the Township Committee and the Board of Freeholders in granting their approval for its erection at the point selected it seems cannot be successfully attacked, when it is realized that the location of the fountain is at the forks of roads leading to four county-seats, namely, Mount Holly, Camden, Woodbury and Salem. This fact alone is sufficient to emphasize its importance at the place selected.

Respectfully submitted,
KAIGHN & WOLVERTON,
Attorneys for Defendant.

Chas. A. Wolverton
Of Counsel