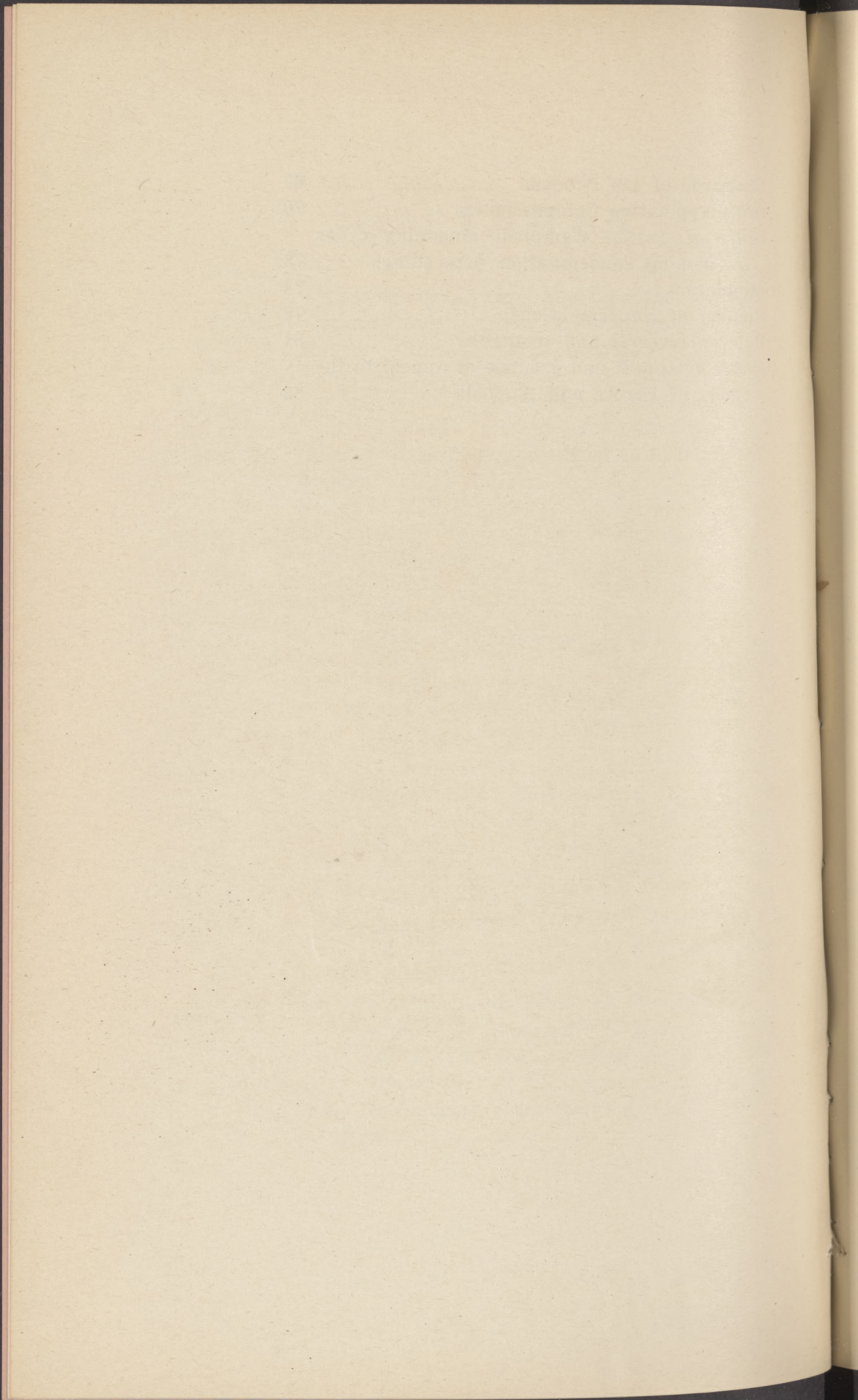


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**NOTICE OF APPEAL AND GROUNDS
OF APPEAL.**

(Filed July 26, 1930.)

BERGEN COUNTY CIRCUIT COURT.

William H. Dean and Evange- line E. Dean,	}	Action at Law	
Plaintiffs,		Notice of Appeal	
v.		and Grounds	
The Borough of Park Ridge, Defendant.	}		10

To Messrs. Hart & Vanderwart, Attorneys of
Plaintiffs, William H. Dean and Evangeline
E. Dean:

Take Notice that the defendant, Borough of
Park Ridge, hereby appeals to the New Jersey
Supreme Court from the whole of the judgment
entered in this cause on the following grounds, 20
to wit:

1. Because the Court erroneously struck out
the answer of the defendant.
2. Because the Court erroneously struck out
the whole defense of the defendant.
3. Because the Court erroneously ordered final
judgment in favor of the plaintiffs, and against
the defendant.
4. Because the Court erroneously struck out
the defendant's first separate defense. 30
5. Because the Court erroneously struck out
the defendant's second separate defense.

Notice of Appeal and Grounds of Appeal

6. Because the Court erroneously struck out the defendant's third separate defense.

Respectfully yours,

MACKAY AND MACKAY,

Attorneys for Defendant,

Borough of Park Ridge.

10

20

30

Summons

(Filed January 19, 1929.)

The State of New Jersey

To The Borough of Park Ridge.

You are summoned to answer the
annexed complaint of William H. Dean
(L.S.) and Evangeline E. Dean, in an action
at law in the Bergen County Circuit
Court;

10

And Take Notice that unless you file your answer to said complaint with the Clerk of the Bergen County Circuit Court, at Hackensack, within twenty days after service upon you of this summons and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, Edwin C. Caffrey, Esquire, Judge of the said Court, at Hackensack, this 7th day of January, 1929.

JAMES W. MERCER, 20
Clerk.

HART & VANDERWART,
Attorneys for Plaintiffs.

COMPLAINT.

(Filed January 19, 1929)

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange- line E. Dean,	Plaintiffs,	} Action at Law Complaint
v.		
10 The Borough of Park Ridge, Defendant.		

The plaintiffs residing in the Borough of Park Ridge, County of Bergen, and State of New Jersey, for complaint against the Borough of Park Ridge, a municipal corporation of the County of Bergen aforesaid, say:

1. The plaintiffs are and were at the times herein named the owners of real estate situate in the Borough of Park Ridge, County of Bergen and State of New Jersey, and more particularly described as follows:

Beginning at the northwesterly corner thereof at a spike in the northeasterly corner of the abutment at the Northeast corner of the private bridge of William H. Dean over the Pascack Brook, situate southerly and near Grant Avenue and running thence (1) north fifty-three degrees forty-seven minutes ($53^{\circ} 47'$) east along what is known as the eighteen foot line, eleven and eighty hundredths (11.80) feet; (2) south sixty-two degrees and forty-nine minutes ($62^{\circ} 49'$) east, twenty-nine and sixty hundredths (29.60 feet; (3) south forty-

Complaint

five degrees forty-four minutes ($45^{\circ} 44'$) east, thirty-five and forty-five hundredths (35.45) feet; (4) south fifty-one degrees forty minutes ($51^{\circ} 40'$), east, sixty-five and sixty hundredths (65.60) feet; (5) south forty-two degrees forty minutes ($42^{\circ} 40'$) east, forty-eight and seventy hundredths (48.70) feet; (6) south eighty-one degrees and thirty-two minutes ($81^{\circ} 32'$) east twenty-seven and sixty-five hundredths (27.65) feet; (7) south four 10
 degrees twenty-three minutes ($4^{\circ} 23'$) south four degrees twenty-three minutes ($4^{\circ} 23'$) west, thirty-seven and sixty hundredths (37.60) feet; (8) south sixty-six degrees forty-five minutes ($66^{\circ} 45'$) east one hundred fifteen and eighty-five hundredths (115.85) feet; (9) south seventy-two degrees three minutes ($72^{\circ} 03'$) east, thirty and ninety hundredths (30.90) feet; (10) south twenty-four degrees forty-seven minutes ($24^{\circ} 47'$) east, crossing the Pascack Brook, sixty-seven and twenty-hundredths (67.20) feet to the southerly bank thereof; 20
 (11) south eighty degrees thirty-five minutes forty seconds ($80^{\circ} 35' 40''$) west, thirty-two and seventy-nine hundredths (32.79) feet; (12) north eighty-nine degrees forty-nine minutes ($89^{\circ} 49'$) west, eighty-two and seventy-two hundredths (82.72) feet; (13) north seventy-four degrees twenty-eight minutes fifteen seconds west, forty-nine and eighty-eight hundredths (49.88) feet; (14) north forty-six degrees forty-six minutes 30
 thirty seconds ($46^{\circ} 46' 30''$) west, one hundred fourteen and fifteen hundredths (114.15) feet; (15) north fifty-five degrees thirteen minutes ($55^{\circ} 13'$) west, forty-four and twenty-six hundredths (44.26) feet; (16) north eighty-five de-

Complaint

grees thirty-seven minutes thirty seconds (85° 37' 30") west, thirty-nine and fifty-six hundredths (39.56) feet; (17) north thirty-three degrees seventeen minutes (33° 17') west, forty-two and eighty-one hundredths (42.81) feet; (18) north eleven degrees three minutes (11° 03'), east, sixty-one and fifty-five hundredths (61.55) feet; (19) north two degrees thirty minutes thirty seconds (2° 30' 30") west, twenty-one (21) feet; (20) north sixty-eight degrees fifty-five minutes thirty seconds (68° 55' 30") west, six (6) feet to the southeasterly abutment of said bridge; (21) north ten degrees fifty-six minutes (10° 56') east, thirty-two and fifteen hundredths (32.15) feet to the place of beginning.

Courses 11, 12 and 13 being along the southerly banks of the Pascack Brook aforesaid.

Containing 0.843 acres.

2. The Borough of Park Ridge on the 9th day of April, 1927, and under the title "In the Matter of the Application of the Borough of Park Ridge for the Appointment of Three Commissioners to Fix the Compensation to be Paid for Certain Lands of William H. Dean, Evangeline E. Dean, et als, Situate in said Borough of Park Ridge, Bergen County, New Jersey, to be Taken and Condemned for Public Use," caused commissioners in condemnation to be appointed for the purpose of condemning said real estate for municipal purposes. These proceedings were instituted and conducted under the authority vested in the Borough of Park Ridge by an Act entitled, "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for pub-

Complaint

lic use (Revision of 1900)" approved March 20, 1900, and the acts supplementary thereto and amendatory thereof.

3. These commissioners duly qualified, heard the evidence upon the subject of their work and on the fifth day of July, 1927, reported their findings of the value of the lands hereinabove described and damages, etc., all as directed in the said action, awarding to your petitioners the sum 10 of \$9,900. A true copy of said report is attached hereto, made part hereof and marked Exhibit "A." This report was filed in the Office of the Clerk of the County of Bergen on the 5th day of July, 1927.

4. Thereafter the said Borough of Park Ridge have used the said premises so sought to be condemned for the purpose for which they were condemned and for at least the period beginning July 5, 1927 until the present time.

5. Plaintiffs have demanded payment of the 20 said award of \$9,900 and the defendant has refused and neglected to pay the same.

6. Plaintiffs are damaged and ask damages against the Borough of Park Ridge, the defendant, in the sum of \$9,900 with costs of suit.

HART & VANDERWART,
Attorneys of Plaintiffs.

Complaint

SCHEDULE "A."

10	In the Matter of the Application of The Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of William H. Dean, Evangeline E. Dean, situate in said Bor- ough of Park Ridge, Bergen County, New Jersey, to be taken and condemned for public use.	Report of Com- missioners
-----------	---	--------------------------------------

20 We, William Conklin, James A. Romeyn and
Fred Fountain, Commissioners appointed by His
Honor, Charles W. Parker, one of the Justices of
the Supreme Court of the State of New Jersey, on
the application of the Borough of Park Ridge of
the County of Bergen, made in writing by petition
to the said Justice to examine and appraise the
lands and real estate and assess the damages
which the owners of said land and real estate
(which said owners are hereinafter named and
30 which land is condemned as hereinafter de-
scribed,) have sustained or will sustain by reason
of the taking of said lands and real estate and oc-
cupancy thereof by said petitioner for the purpose
of enlarging the water supply system of the said
petitioner situated in the Borough of Park Ridge,
Bergen County, New Jersey, and whatever we, as

Complaint
Schedule "A"

the said Commissioners, are by law authorized and required to do under said order, having first taken an oath faithfully and impartially to examine the matter in question and to make a true report according to the best of our skill and understanding, and it having been duly proved to our satisfaction that William H. Dean and Evangeline E. Dean, the owners of the said lands, have been duly notified 10
by at least sixty days' notice in writing in the manner directed by the order of the said Supreme Court Justice, bearing date the ninth day of April, that said Commissioners had fixed Friday, the sixth day of May, 1927, at ten o'clock in the forenoon at the Court House, Hackensack, New Jersey, and said Commissioners having held a further hearing in said matter on the thirteenth day of May, 1927, at ten o'clock in the forenoon at the Council Room of the Borough of Park Ridge, Railroad Avenue, Park Ridge, New Jersey, to ap- 20
praise said lands and real estate and to make an impartial estimate and assessment of the damages to be sustained by the taking and occupancy by the said Borough of Park Ridge for the purposes aforesaid; and

The said Borough of Park Ridge, the petitioner, and the owners of the said lands having been represented before us at the time and place aforesaid, we did meet and examine said lands, a description of which is contained in the said petition and is hereafter embodied in this report; and 30
having heard the said owners of said lands as well as the petitioner, and having fully examined and appraised said lands and fully considered all that was offered before use by the respective parties.
Now, after a full hearing in all said matters

Complaint

pertaining thereto, we have made a just and equitable appraisement of all said tracts of lands and real estate (except as hereinafter specified) and an estimate and assessment of the damages the owners thereof will respectively sustain by the taking of said lands and real estate; and in making such estimate and assessment of damages we have taken into account the benefits, if any, conferred by the improvement of the remainder of the lots or tracts of land partly taken; and we do appraise the said lands, and assess the damages to which said respective owners are entitled, and which they have sustained by reason of the taking and occupancy of the same by the said Borough of Park Ridge, taking into account the benefits, if any, conferred by the improvement on the remainder of any lot, or tract of land partly taken, and we do report, as follows:

20

TRACT NO. 1.

We do award that the said Borough of Park Ridge pay to William H. Dean and Evangeline E. Dean, for the lands taken and described as follows:

All that certain lot, tract or parcel of land and premises situate, lying and being in the Borough of Park Ridge, Bergen County, New Jersey,

Beginning at the northwesterly corner thereof
 30 at a spike in the northeasterly corner of the abutment at the northeast corner of the private bridge of William H. Dean over the Pascack Brook, situate southerly and near Grant Avenue and running thence (1) north fifty-three degrees forty-seven minutes (53° 47') east along what is known

Complaint

as the eighteen foot line, eleven and eighty-hundredths (11.80) feet; (2) south sixty-two degrees and forty-nine minutes ($62^{\circ} 49'$) east, twenty-nine and sixty hundredths (29.60) feet; (3) south forty-five degrees forty-four minutes ($45^{\circ} 44'$) east, thirty-five and forty-five hundredths (35.45) feet; (4) south fifty-one degrees forty minutes ($51^{\circ} 40'$) east, sixty five and sixty hundredths (65.60) feet; (5) south forty-two degrees forty minutes ($42^{\circ} 40'$) east, forty eight and seventy hundredths (48.70) feet; (6) south eighty-one degrees thirty-two minutes ($81^{\circ} 32'$) east, twenty-seven and sixty five hundredths (27.65) feet; (7) south four degrees twenty-three minutes ($4^{\circ} 23'$) west, thirty-seven and sixty hundredths (37.60) feet; (8) south sixty-six degrees forty-five minutes ($66^{\circ} 45'$) east one hundred fifteen and eighty-five hundredths (115.85) feet; (9) south seventy-two degrees three minutes ($72^{\circ} 03'$) east, thirty and ninety hundredths (30.90) feet; (10) south twenty-four degrees forty-seven minutes ($24^{\circ} 47'$) east, crossing the Pascack Brook, sixty-seven and twenty-hundredths (67.20) feet to the southerly bank thereof; (11) south eighty degrees thirty-five minutes forty seconds ($80^{\circ} 35' 40''$) west, thirty-two and seventy-nine hundredths (32.79) feet; (12) north eighty-nine degrees forty-nine minutes ($80^{\circ} 49'$) west, eighty-two and seventy-two hundredths (82.72) feet; (13) north seventy-four degrees twenty-eight minutes fifteen seconds west, forty-nine and eighty-eight hundredths (49.88) feet; (14) north forty-six degrees forty-six minutes thirty seconds ($46^{\circ} 46' 30''$) west, one hundred fourteen and fifteen hundredths (114.15) feet;

Complaint

(15) north fifty-five degrees thirteen minutes (55° 13') west forty-four and twenty-six hundredths (44.26) feet; (16) north eighty-five degrees thirty-seven minutes thirty seconds (85° 37' 30") west, thirty-nine and fifty-six hundredths (39.56) feet; (17) north thirty-three degrees seventeen minutes (33° 17') west, forty-two and eighty-one hundredths (42.81) feet; (18) north
 10 eleven degrees three minutes (11° 03') east, sixty-one and fifty-five hundredths (61.55) feet; (19) north two degrees thirty minutes thirty seconds (2° 30' 30") west, twenty-one (21) feet; (20) north sixty-eight degrees fifty-five minutes thirty seconds (68° 55' 30") west, six (6) feet to the southeasterly abutment of said bridge; (21) north ten degrees fifty-six minutes (10° 56') east, thirty-two and fifteen hundredths (32.15) feet to the place of beginning.

20 Courses 11, 12 and 13 being along the southerly banks of the Pascack Brook aforesaid.

Containing 0.843 acres.

the sum of Nine Thousand Nine Hundred no/100 Dollars, as the value of the said lands and damages thereto as aforesaid, everything having been taken into consideration as the statute provides in arriving at such sum.

Respectfully submitted,

WM. CONKLIN

FRED M. FOUNTAIN

JAMES A. ROMEYN

Commissioners of Assessment.

Notice of Motion to Strike Out Complaint

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange-
line E. Dean,

Plaintiffs,

vs.

The Borough of Park Ridge,
Defendant.

Action at Law
Notice to Strike
out Complaint.

10

To the above-named plaintiffs or Messrs. Hart and Vanderwart, their attorneys:

Please Take Notice that on Friday, February 1, 1929 at ten o'clock in the forenoon or as soon thereafter as the same may be heard, we shall apply to the Hon. Edwin C. Caffrey, Judge of the Bergen County Circuit Court, at the Court House in Hackensack, for an order to strike out the complaint upon the following grounds:

20

1. Said complaint does not set forth a cause of action against the Borough of Park Ridge because the alleged report of the commissioners was not filed within the time directed by the Supreme Court Justice.

2. Because the plaintiff's, through their duly authorized attorneys appeared when the order was entered by the Supreme Court Justice, whereby the alleged proceedings in condemnation were abandoned.

30

Notice of Motion to Strike Out Complaint

Annexed hereto is a copy of the order of the Supreme Court Justice abandoning the proceedings.

Yours respectfully,

MACKAY AND MACKAY,
Attorneys of Defendant.

10

20

30

Order Denying Motion to Strike Out Complaint

(Filed December 21, 1929)

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange- line E. Dean, Plaintiffs, vs. The Borough of Park Ridge, Defendant.	}	Action at Law On Motion to Strike out Com- plaint, Order	10
--	---	---	----

This matter coming on to be heard in the presence of Howard Mackay, Esquire, of Mackay and Mackay; attorneys of the defendant, and Archibald C. Hart, Esquire, of Hart and Vanderwart, attorneys of the plaintiff, and the Court having heard the arguments of respective counsel,

It is, on this 17th day of December, 1929 Ordered that the motion of the defendant to strike out the complaint of the plaintiff be denied. 20

EDWIN C. CAFFREY.

Answer

(Filed February 5, 1930.)

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange- line E. Dean,	Plaintiffs,	} Action at Law Answer
vs.		
10 The Borough of Park Ridge, Defendant.	Defendant.	

The defendant, a municipal corporation of the County of Bergen, answering the complaint in the above-entitled cause, says:

1. Defendant neither admits nor denies the allegations set forth in paragraph one but leaves the plaintiffs to their proof of ownership, and as to the particular description begs leave to refer to
- 20 the respective deeds of conveyance for the same as they may appear of record in the Bergen County Clerk's office.
2. Defendant admits paragraph two.
3. Defendant admits that the report of the Commissioners was filed in the office of the Clerk of the County of Bergen on July 5th, 1927, but as to the other allegations in said paragraph, defendant leaves plaintiffs to their proof.
4. Paragraph four is denied.
- 30 5. Defendant admits that plaintiffs demanded payment and that defendant has refused to pay the same for the reason that the condemnation

Answer

proceedings were irregular and after the making of the report by the Commissioners, the proceedings were abandoned by the defendant.

FIRST SEPARATE DEFENSE

Defendant denies that it is indebted to the plaintiffs in any sum of money whatsoever.

SECOND SEPARATE DEFENSE

Defendant alleges that the condemnation proceedings referred to in the complaint are of no force or effect and not binding upon the defendant for the reason that the report of the Commissioners was not filed within the time directed by the statute nor within the time allotted in the order made by the Supreme Court Justice. 10

THIRD SEPARATE DEFENSE

Defendant alleges that the condemnation proceedings referred to in the complaint are of no force and effect for the reason that the same were abandoned by the defendant by appropriate proceedings, in accordance with the statute in such case made and provided. 20

MACKAY & MACKAY,

Attorneys for the Defendant.

Notice of Motion to Strike Out Answer

(Filed July 11, 1930.)

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange- line E. Dean, vs. The Borough of Park Ridge, Defendant.	}	Action at Law. Notice of Motion to Strike Out Answer and Affidavits.
Plaintiffs,		

To Mackay and Mackay, Esqs., Attorneys of
 Defendant, or to whom it may concern:

Sirs:

20 Take Notice that we will apply to his Honor,
 Edwin C. Caffrey, holding the Circuit Court for the
 County of Bergen, at the Court House, Hacken-
 sack, New Jersey, on Friday, the 2nd day of May,
 1930, at ten o'clock in the forenoon, or as soon
 thereafter as Counsel may be heard, for an order
 striking out the answer filed by you in the above
 action, on the ground that the allegations con-
 tained in the same are untrue in fact, untenable,
 and disclose no proper defense to the action, and
 shall support our motion by affidavits hereto at-
 tached.

And we will, upon the motion use affidavits and
 exhibits attached hereto.

30

Yours, etc.,

HART & VANDERWART,
 Attorneys of Plaintiffs.

To

MACKAY & MACKAY, ESQS.,
 Attorneys of Defendant.

*Affidavit of William A. Dean***AFFIDAVITS IN SUPPORT OF PLAINTIFF'S
APPLICATION TO STRIKE OUT ANSWER.****Affidavit of William H. Dean**

(Filed July 11, 1930.)

State of New Jersey, }
County of Bergen } ss.

William H. Dean, being duly sworn on his oath, 10
says:

1. I am one of the plaintiffs in the above entitled action.

2. I resided very close to the property shown upon the attached blue print marked Schedule "A." It was part of my home park and I have seen it every day that I have been at home for more than fifteen years last past. My wife, Evangeline E. Dean, and I are the owners in entirety of plot "1." W. H. Dean Company, of which I 20
am the major stockholder and president, is the owner of plot "2."

3. Some years ago the Borough of Park Ridge rented these properties from me and paid me \$300 rental per annum for these. The leases expired and I allowed the Borough to continue, understanding, of course, that I would receive compensation. Since the condemnation proceedings referred to in this action, the Borough of Park Ridge has used the premises, both plots "1" and 30
"2" in precisely the same manner as they did dur-

Affidavit of William A. Dean

ing the leasehold period and after that. There has been no change in the use for at least twenty years. I believe that there is no defense to this action.

WILLIAM H. DEAN.

Sworn and subscribed to before me
this 8th day of April, 1930.

BERTHA H. SCHUMANN,

10

Notary Public of New Jersey.

*Affidavit of Archibald C. Hart***Affidavit of Archibald C. Hart.**

(Filed July 11, 1930.)

State of New Jersey, }
County of Bergen, } ss.

Archibald C. Hart, being duly sworn on his oath, says:

1. I am a member of the firm of Hart and Vanderwart, the attorneys of the plaintiffs in this action, and have been personally in charge of and am familiar with the matters contained in this affidavit. 10

2. On the 9th day of April, 1927, and thereafter until the consummation of the condemnation proceedings hereinafter described, the plaintiffs herein, William H. Dean and Evangeline E. Dean, were the owners in entirety of premises situated in the Borough of Park Ridge, Bergen County, New Jersey, and which are shown on a map, copy of which is attached hereto, encircled in red, and marked plot "1." The map is attached hereto, marked Schedule "A" and is made a part hereof. W. H. Dean Company is a corporation of the State of New Jersey, capital stock of which is largely owned by the plaintiff herein, William H. Dean, and at the time aforesaid was the owner of premises situated in the Borough of Park Ridge, Bergen County, New Jersey, and which are shown on a map, copy of which is attached hereto, encircled in red, and marked plot "2." 20 30

3. On the 22nd day of June, 1925, and at the regular meeting of the Mayor and Council of the Borough of Park Ridge, an ordinance was intro-

Affidavit of Archibald C. Hart

duced entitled as follows: "An Ordinance to acquire by purchase, gift or condemnation certain lands for use in connection with the water supply system in the Borough of Park Ridge, Bergen County, New Jersey, and to provide for the cost thereof." This ordinance was first read at that time, and on the 13th day of July, 1925, and over the written objection of the plaintiff, William H.

10 Dean, the ordinance was enacted. This ordinance provided for the acquisition of the premises hereinbefore described, marked plots "1" and "2" on the attached map, Scheduled "A."

4. I am informed and believe that after the passage of that ordinance and the later consideration of the written objection of the aforesaid William H. Dean, another ordinance bearing the same title and having the same purpose was introduced and later enacted by the Borough of
20 Park Ridge.

5. After the enactment of the second ordinance, the Borough of Park Ridge, through its attorneys Mackay and Mackay, petitioned the Honorable Charles W. Parker, a Justice of the Supreme Court of the State of New Jersey, for the appointment of commissioners to condemn plots "1" and "2" for the purposes of the ordinance. At this point, the proceedings were necessarily divided into two parts, one for the condemnation of
30 plot "1" and the other for the condemnation of plot "2." They became two proceedings.

6. Condemnation commissioners were appointed in these proceedings by Justice Parker, the same commissioners being appointed for both. They

Affidavit of Archibald C. Hart

were Messrs. William Conklin, James A. Romeyn, and Fred M. Fountain.

7. From the time of the appointment of these commissioners, the two condemnation proceedings were heard and considered as one by the commissioners. This continued so until the making of the reports of the commissioners.

8. The order appointing the commissioners was dated April 9, 1927, and the commissioners were required to file their report on or before May 31, 1927. The commissioners adjudged in favor of the plaintiffs herein, the owners of plot "1" an allowance of \$9900 and for the W. H. Dean Company, the owners of plot "2" an allowance of \$100. They prepared and executed their report and this report, I am informed and believe, was prepared by the firm of Mackay and Mackay at the direction of the commissioners, was executed by the commissioners and retained by the firm of Mackay and Mackay for filing.

9. The said firm of Mackay and Mackay filed a separate report in each case on the 5th day of July, 1927, making the awards aforesaid. Finding that they had not filed the reports of the commissioners within the time required by the order appointing the commissioners, Mr. George Mackay, of the firm of Mackay and Mackay (he having handled the proceedings for the said firm) told me that the situation meant much embarrassment to him before his clients and asked me whether I would consent for the defendant in both cases to consider the reports in both cases filed as of time. The report so far as plot "2" is concerned was

Affidavit of Archibald C. Hart

highly unjust to my clients. The report so far as plot "1" is concerned was favorable and just. I told Mr. George Mackay that the difficulty that I was confronted with was the strict statutory requirements, but I was anxious to save him embarrassment before his client and would do all I could. I advised, however, that he and I appear before Justice Parker and discuss the subject with him. This was by my letter of June 24, 1927, a copy of which is hereto attached, marked Schedule "B" and made a part hereof. I do not definitely recall now the date of our presenting the subject to Justice Parker. I believe it was Monday, June 27, 1927. In any event, and solely for the purpose of relieving Mackay and Mackay from embarrassment before their clients, and also considering, as we had, both of these condemnation proceedings as one proceeding, separated only because the properties were owned in different names, I signed a consent with Mackay and Mackay, a true copy of which is hereto attached, marked Schedule "C" and made a part hereof. The stipulations in both cases were verbatim and they were filed by Mackay and Mackay in the two cases on June 29, 1927, whereupon the Borough of Park Ridge, the defendant herein, became indebted to the plaintiffs herein in the sum of \$9,900 and to W. H. Dean Company in the sum of \$100.

10. W. H. Dean Company immediately appealed from the award of the commissioners in the case of W. H. Dean Company to the Bergen County Circuit Court. Mackay and Mackay represented the Borough of Park Ridge in the proceedings

Affidavit of Archibald C. Hart

and a jury in that Court awarded W. H. Dean Company \$3,750 as condemnees of plot "2." This amount with costs was thereafter paid to W. H. Dean Company by the Borough of Park Ridge. At no time was there introduced in this proceeding any word of the non-filing of the reports of the commissioners within the time designated as heretofore appears.

11. In the case of plot "1" owned by the plaintiffs herein, however, the said Mackay and Mackay, representing the Borough of Park Ridge, and about July 13, 1927, for the first time, informed me that at a meeting of the Mayor and Council on Monday night, July 11, 1927, it was decided that they would proceed to abandon the condemnation proceedings concerning plot "1." This was in spite of the fact that the whole transaction was within one ordinance. On July 13, 1927, I received a letter from the Borough Clerk of the Borough of Park Ridge, a true copy of which is hereto attached, marked Schedule "D" and made a part hereof. I answered on July 14, 1927, that I could not consent to the abandonment of one part of the land involved in the transaction. 10 20

12. The report of the commissioners was filed on July 5, 1927, and, under the Statute, the condemnors probably had until July 25, 1927, to complete any abandonment proceedings which they might have undertaken. July 25, 1927, was a Monday. On Saturday, the 23rd day of July, 1927, Mr. George Mackay, representing Mackay and Mackay, and I, representing Hart and Vanderbilt, appeared before Justice Campbell who was 30

Affidavit of Archibald C. Hart

sitting to hear motions for Justice Parker. This was following an attempt to abandon the proceedings involving plot "1" and for the purpose of fixing fees. Justice Campbell heard the application for the fixation of fees and at the close of it, the order not having been completed and being obliged to leave to meet another engagement, I did not see the order. A long time thereafter, I was
10 shown the order which was signed at that time. Attached hereto is a true copy of it, marked Schedule "E," and made a part hereof.

13. An extended period of time was passed in which efforts were being made to adjust the differences between the parties involved. It appearing finally that no adjustment could be reached, I instituted the above entitled action for the purpose of recovering the award allowed by the commissioners to the plaintiffs herein for the premises.

20 14. A motion to strike out the complaint was then made. The defendant urged for striking upon two grounds, as follows:

"1. Said complaint does not set forth a cause of action against the Borough of Park Ridge because the alleged report of the commissioners was not filed within the time directed by the Supreme Court Justice.

30 "2. Because the plaintiffs, through their duly authorized attorneys, appeared when the order was entered by the Supreme Court Justice, whereby the alleged proceedings in condemnation were abandoned."

Affidavit of Archibald C. Hart

Mr. Howard Mackay, of the firm of Mackay and Mackay, appeared on the motion. I showed him the stipulation marked Schedule "C," and asked him whether in the face of that he proposed to press his motion upon the theory that the proceedings had ended with the failure of the commissioners to report within time. He then, after reading the stipulation, said that he believed that he should not do so and would not and this reason was dropped. 10

15. The Court held the motion to strike out under advisement, whereupon I presented to Justice Campbell that the words within the order, marked Schedule "E," "That the proceedings for condemnation in the above entitled cause are hereby abandoned" were beyond the power of the Court to declare. Justice Campbell then executed an amended order striking out those words and that order was filed, whereupon this Court denied the motion to strike out the complaint and the 20 defendants filed an answer to which I respectfully refer. This affidavit is to be used upon a motion to strike out the defenses of the defendant in these proceedings, particularly the second defense, and which again alleged that the condemnation proceedings ended with the failure of the commissioners to report.

16. As to the third separate defense, I have to say that on the 23rd day of July, 1927, when 30 Mr. George Mackay and I appeared before Justice Campbell I pointed out to him the fact that the Eminent Domain Statute required the payment of the moneys allowed by the Justice on the motion

Affidavit of Archibald C. Hart

to fix fees within twenty days from the time of the filing of the report and as a necessary part of the abandonment proceedings, and I told him that inasmuch as we are particularly anxious to have the award stand, and in view of all the delays, errors and other unpleasantnesses of the proceedings, I would require him to pay the amount allowed by the Justice within the twenty day period
10 which at the farthest, would expire the following Monday, the 25th of July, 1927. He answered that the Borough of Park Ridge would not have a meeting until the following week and I then told him that his firm as counsel, or Mayor Alexander of Park Ridge, as an interested person, should advance the amount and pay that immediately or I would be obliged to take advantage of the non-payment. Justice Campbell awarded to Hart and
20 Vanderwart, for their services in the proceedings, \$300, and to the plaintiffs, for their expenses, \$75. These amounts were not paid by the Borough of Park Ridge and on July 12, 1927, they issued two checks for the amounts named, which were sent by them to Mackay and Mackay, and Mackay and Mackay in turn did not mail them to Hart and Vanderwart for themselves and representing the plaintiffs until September 23, 1927. These checks have not been used, and I respectfully present that
30 the statute, so far as the privilege of affording a right of abandonment, has not been strictly followed.

17. The proceedings involving plot "2" were most favorable to the Borough of Park Ridge and

Affidavit of Archibald C. Hart

those involving plot "1" were most favorable to the plaintiffs herein. Mackay and Mackay and I for Hart and Vanderwart always treated both proceedings as one.

ARCHIBALD C. HART

Sworn and subscribed to before me
this 8th day of April, 1930.

BERTHA H. SCHUMANN,

Notary Public of New Jersey.

10

20

30

Affidavit of Archibald C. Hart

SCHEDULE "B."

June 24, 1927.

George W. Mackay, Esq.,
Hackensack, New Jersey.

Dear George:

10 I have the proposed stipulations in the Dean matter, but they do not entirely fill the bill, unless it is clear that we are going to ask the appointment of the same commissioners who will make the same report and that I shall be informed the day of this meeting so that I may file my appeal in time. If that is our understanding, I shall sign the stipulation. I know it is the arrangement between us. Justice Parker is to be here on Monday and if you will have your order ready and this understanding is clear, we may go before him at that time.

20 Best wishes, I am

Very fraternally,

(Signed) A. C. HART.

Affidavit of Archibald C. Hart

SCHEDULE "C."

In the Matter of the Application of The Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean and Evange- line E. Dean, situate in said Borough of Park Ridge, Ber- gen County, New Jersey, to be taken and condemned for public use.	Stipulation	10
--	-------------	----

Before His Honor Charles W. Parker,
Justice of the Supreme Court. 20

Whereas the time expired on the 31st day of May, 1927, for the commissioners of assessment duly appointed by Hon. Charles W. Parker, Justice of the Supreme Court, for the filing of their report in the Bergen County Clerk's office in the above entitled matter.

It is therefore stipulated and agreed between counsel for the Borough of Park Ridge and counsel for William H. Dean and Evangeline E. Dean that the report be filed and that in the event of an appeal being taken in the within cause that neither parties herein will make objection to the 30

Affidavit of Archibald C. Hart

filing of said report and that it will be considered as though it had been filed as of proper time.

Dated, June 29, 1927.

MACKAY AND MACKAY,
Attorneys for Boro. of Park Ridge.
HART AND VANDERWART,
Attorneys for William H. Dean
and Evangeline E. Dean.

10

20

30

Affidavit of Archibald C. Hart

SCHEDULE "D"

July 12th, 1927.

Messrs. A. C. Hart & Vanderwart,
Hackensack, N. J.

Gentlemen:

Re: Lands of Wm. H. Dean and Evangeline E. Dean containing 0.843 acres.

At a regular meeting of the Mayor and Council
held on Monday night, July 11th, 1927, the Mayor
and Council, by resolution, authorized me to notify
William H. Dean and Evangeline E. Dean, and
Messrs. A. C. Hart and Vanderwart their attorneys
that the award made by the Commissioners for the
aforesaid tract of land, to wit containing 0.843
acres, is not acceptable to the said Borough and
that further proceedings in connection with the
said award by the Mayor and Council are hereby
abandoned.

10

20

Very truly yours,

(Signed) JOHN J. COLLINS,

Borough Clerk.

JJC/MK

Affidavit of Archibald C. Hart

SCHEDULE "E."

NEW JERSEY SUPREME COURT.

	In the Matter of the	
10	Application of The Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean and Evangeline E. Dean, situate in said Bor- ough of Park Ridge, Bergen County, New Jersey, to be taken and condemned for public use.	} Order

20

Application being made by Messrs. Mackay & Mackey, attorneys for the petitioner upon notice given to Messrs. A. C. Hart & Vanderwart, attorneys for the defendants in the above entitled cause within twenty days after the filing of the report of the Commissioners of Assessment to abandon the proceedings in the above-entitled cause, before the Honorable Luther A. Campbell, Justice of the Supreme Court at the Court House, Hackensack,

30 New Jersey, on the twenty-third day of July, nineteen hundred and twenty-seven at nine A.M. (Daylight Saving Time), and George W. Mackay appearing for the petitioner and Archibald C. Hart appearing for the defendants William H. Dean and Evangeline E. Dean.

Affidavit of Archibald C. Hart
Schedule "E"

It is on this twenty-third day of July, nineteen hundred and twenty-seven Ordered that the proceedings for condemnation in the above entitled cause are hereby abandoned and that the petitioner is hereby ordered to pay to the defendant the following costs and expenses, to wit:

To Messrs A. C. Hart and Vander-	
wart, counsel fee as attorneys for	10
defendants -----	\$300.00
Witness fees -----	75.00
A. L. Robinson, stenographer's fees	22.00

which said fees are fixed by consent of the respective attorneys herein; and

It Is Further Ordered that the fixing of the fees for the Commissioners of Assessment which are to be paid by the Borough of Park Ridge, shall be postponed until further application be made before the aforementioned Court.

20

L. A. CAMPBELL,
Justice of the Supreme Court.

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

(Filed July 11, 1930.)

BERGEN COUNTY CIRCUIT COURT

10	William H. Dean and Evange- line E. Dean, vs. The Borough of Park Ridge, Plaintiffs, Defendant.	} Affidavit
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State of New Jersey, }
County of Bergen } ss.

George W. Mackay, of full age, being duly sworn according to law, upon his oath deposes and says:

20 1. I am associated with the firm of Mackay & Mackay, the attorneys for the defendant in this action and that I personally, had charge of and am familiar with the matters contained in the foregoing affidavit.

30 2. That on or about the 22nd day of June, 1925, at the regular meeting of the Mayor and Council of the Borough of Park Ridge, an ordinance was introduced entitled as follows: "An ordinance to acquire by purchase, gift or condemnation certain lands for use in connection with the water supply system in the Borough of Park Ridge, Bergen County, New Jersey, and to provide for the cost thereof." This ordinance provided for the acquisition of the premises marked Plot

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

1 and Plot 2 on the attached map, which is made a part hereof and marked Schedule "A."

3. That prior to the introduction of this ordinance the Mayor and Council at various times had endeavored to purchase from the plaintiffs herein Plot 1 as shown on the attached map, marked Schedule "A," consisting of approximately 0.843 of an acre and also Plot 2 consisting of 3.739 acres, 10 owned by the William H. Dean Co., but were unable to agree as to the purchase price of the same.

4. After this date the Mayor and Council adopted another ordinance necessary for the acquiring of Plots 1 and 2 hereinbefore mentioned. By authority of the Mayor and Council of the Borough of Park Ridge, Mackay & Mackay, their attorneys were instructed to commence proceedings in the Supreme Court to acquire the property 20 by condemnation as they were unable to purchase the same from the owners, the William H. Dean Co. and Evangeline E. Dean and William H. Dean.

5. On the 9th day of April, 1927, acting for Mackay & Mackay, I obtained an order appointing Commissioners of Assessment for the purpose of determining the value of the said land and making awards to the owners or other parties interested therein. The proceedings were separate for Plots 1 and 2. The Commissioners were to file their 30 report for each proceeding on or before May 31st, 1927. At the time of the meeting of the Commissioners which was on or about the 5th day of May, 1927, because the two tracts of land were of such a similar nature, the Commissioners agree with Mr. Hart and myself that they would hear the

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

testimony for the both tracts at the same hearing although it was understood and they did make a report for each tract separately. After the Commissioners had held their hearing, I prepared separate reports for them, leaving the awards for each tract to be made by them, blank, so that whatever amount was determined by them, they
10 were to insert. These reports were forwarded to William Conklin, who acted as Chairman for the Commissioners on or about the 18th day of May, 1927 with a letter stating that the Commissioners should sign the said reports and insert the amount of award in each case which they determined and to have the same returned and filed in the Bergen County Clerk's Office on or before the 31st day of May, 1927, which was the last day of the time stated in the order for said Commissioners to
20 file the same.

6. Notwithstanding this and also the fact that I communicated with Mr. Conklin's office in Englewood and Mr. Fountain's office in Hackensack, the reports signed by said Commissioners were not delivered to me at the office of Mackay & Mackay, 238 Main Street, Hackensack, New Jersey, until the morning of June 1st, 1927.

7. After the time for filing the reports had expired I communicated with Mr. Hart the attorney
30 for the owners of this land and informed him that it was too late to file the same. He asked me what I was going to do about the same and I told him that there was nothing else to do but to obtain an order for the appointment of new Commissioners, as the duties of the former Commissioners had ceased. He said to me "We do not want to go all

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

through the same proceedings again, why can't we take the matter up with Justice Parker and see what we can do as to extending the time, as this would save a great deal of time, expense and trouble to all parties concerned." I stated to him that it did not make any difference to me whether or not the reports were filed, as the Borough was only concerned as to the award made by the Commissioners as to Plot 2 which was an award for \$100.00 to the William H. Dean Co. for the tract of 3.739 acres, because the award made for Plot 1 of \$9,900.00 the Borough was informed by me of this amount, considered the same very excessive and therefore decided to reject the award if necessary as they did not need this portion of the property. However, I consented with Mr. Hart to appear before Supreme Court Justice Parker at the Court House in Hackensack, which I believe was sometime in the latter part of June, 1927. At aforesaid time I appeared with Mr. Hart before Supreme Justice Parker and at that time he informed us both that he could do nothing for us in the matter as the time for the filing of the report of the Commissioners had expired. At that time I again told Mr. Hart that the Borough of Park Ridge was not interested in the award for Plot 1 of \$9,900.00 as they considered the same very high and excessive and that it was not at all in proportion in comparison with the award for Plot 2, which property was similar and that the Borough did not want this piece of property. It was my understanding with Mr. Hart that the stipulation would be signed consenting to file the reports as of time, and that no objection would be

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

made to the filing of these reports in the event an appeal by either of the parties was taken. This is borne out by the statement in the latter part of the stipulation marked Schedule "D," a copy of which is hereto annexed and which provides as follows: "It is therefore stipulated and agreed between counsel for the Borough of Park Ridge and
10 counsel for William H. Dean and Evangeline E. Dean that the reports be filed, and that in the event of an appeal being taken in the within cause that neither parties herein will make objection to the filing of said report, and that it will be considered as though it had been filed as of proper time." In view of the fact that no appeal has been taken in this case I do not feel that I am obliged to still be bound by this stipulation. I feel that the intention and the effect it was to have has since
20 ceased.

8. The reports of the Commissioners of Assessment were then filed on July 5th, 1927. Immediately after the filing of the reports of the Commissioners of Assessment I notified the Borough of Park Ridge and at their regular meeting held on July 11th, 1927 a resolution instructing Mackay & Mackay to reject the award by the Commissioners of Assessment for Plot 1, was adopted, a copy of which resolution is hereto attached and marked
30 Schedule "B." Mr. Hart is in error when he says that the amounts allowed under the order signed by Justice Campbell, to wit: \$300.00 counsel fee, \$75.00 for witnesses expenses and \$22.00 for stenographer's fees were paid by the Borough of Park Ridge on July 12, 1927, which were sent to Mack-

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

ay & Mackay, and Mackay & Mackay in turn did not mail them to Hart & Vanderwart until September 23, 1927. The aforesaid checks were not drawn by the Borough of Park Ridge until their meeting of September 12, 1927, and shortly after that date upon receipt of the same from the Borough Clerk we forwarded them to Messrs. Hart & Vanderwart. 10

9. Owing to the fact that this was during the summer and Justice Parker was away on his vacation and there was but twenty days in which to obtain an order to abandon the proceedings, I succeeded in getting Justice Luther A. Campbell to sit at the Court House in Hackensack on July 23rd, 1927 in order that I might have the fees of the counsel, witnesses, etc. fixed, as provided under the statute. At this time Mr. Hart and myself appeared before Justice Campbell. After quite 20 some discussion as to the amount of legal fees he should be allowed, the sum of \$300.00 was fixed as counsel fee, \$75.00 as witnesses fees and \$22.00 for stenographer's fees. At this hearing before Justice Campbell I again told Mr. Hart, as I had previously done several times, that the Borough of Park Ridge did not want Plot 1 as shown on the attached map at the amount of the award of \$9,900.00 as made by the Commissioners as it was excessive and all out of proportion to its value as 30 compared to similar property of 3.739 acres as shown in Plot 2 on the map attached hereto. After fixing the fees I had an order, which I had prepared in blank, and in which I inserted the amounts fixed in accordance with Justice Camp-

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

bell's direction, signed by Justice Campbell and I filed the same in the County Clerk's Office on the morning of July 23rd, 1927. At the same time I also filed a Discharge of Recognizance of Plot 2, according to the statute in such case made and provided. A copy of the above order is attached hereto and marked Schedule "C."

10 10. The action of the Mayor and Council of the Borough of Park Ridge from the time of the award made by the Commissioners of \$9,900.00 as to Plot 1, clearly shows that they did not desire to accept the property as this figure and that they did abandon the proceedings. The checks in accordance with the order signed by Justice Campbell were signed and authorized delivered to Messrs. Hart & Vanderwart, attorneys for William H. Dean and Evangeline E. Dean, in the sum
20 of \$300.00, payable to the order of Messrs. Hart & Vanderwart, for counsel fee; \$75.00 to William H. Dean and E. E. Dean, for witnesses fees and \$22.00 to A. L. Robinson for stenographer's fees. On September 12th, 1927, was the first meeting of the Borough of Park Ridge, at which time it was available to obtain the money. Because of the fact that the Borough of Park Ridge is a municipal corporation not having the money on hand it was necessary for them to borrow money from
30 the bank on a temporary loan note to meet the order of the court.

11. The Borough of Park Ridge abandoned the supposed award made by the Commissioners of Assessment. They have a good defense to this action and it would be a great injustice to the Bor-

*Answering Affidavits of Defendant
Affidavit of George W. Mackay*

ough and its taxpayers if they were unable to assert this as a defense and were obliged to pay the exorbitant sum of \$9,900.00 for this tract of land.

12. Mackay & Mackay are the Borough Attorneys of the Borough of Park Ridge at the present time and have been such since 1924. I am associated with them and attend to all of the legal matters of said Borough for Mackay & Mackay. 10
I have had occasion to visit Park Ridge many times and have visited Plot 1 of the premises in question in this suit, and to the best of my knowledge and belief the Borough of Park Ridge since the lease expired have not used at any time or occupied any part of said premises.

GEORGE M. MACKAY.

Subscribed and sworn to before me
this 30th day of April, 1930.

EDITH ROSENDAHL,

20

Notary Public of N. J.

State of New Jersey, }
County of Bergen, } ss.

E. Vernon Smith, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the Superintendent of the Water Supply System of the Borough of Park Ridge.

2. I am familiar with the premises described and shown as Plot 1, Schedule "A" hereto annexed. 30

3. As part of my duty as Superintendent I am obliged to view the property occupied by the Water System and to the best of my knowledge and belief I know that the Borough of Park Ridge,

*Answering Affidavits of Defendant
Affidavit of E. Vernon Smith*

since the lease between William H. Dean and
Evangeline E. Dean and the Borough for the use
of Plot 1 has expired, that the Borough has not
used or occupied in any manner whatsoever said
Plot 1. The present property which they have
is in all respects adequate to take care of the
water system and the Borough would not in any
10 way have any reason to use or occupy the prem-
ises known as Plot 1.

E. VERNON SMITH.

Subscribed and sworn to before me
this 30th day of April, 1930.

EDITH ROSENDAHL,

Notary Public of N. J.

State of New Jersey, }
County of Bergen, } ss.

20 Howard Mackay being duly sworn according to
law upon his oath deposes and says:

I am one of the attorneys for the defendant. I
have read the affidavit of A. C. Hart, Esq., one of
the attorneys for the plaintiff and particularly
paragraph 14 and that part thereof which recites
that I appeared on a motion to strike out the com-
plaint and that the said A. C. Hart, Esq., showed
me the Stipulation marked Schedule C. My recol-
lection of the argument of the motion to strike out
30 the complaint is that no stipulation was shown to
me by Mr. Hart, but he did mention to me the fact
that there was a stipulation entered into. I did
not see it and I did not rely upon it at the time of
the motion to strike out the complaint; and I in-
sisted on my motion that in view of the order of

*Answering Affidavits of Defendant
Affidavit of Howard Mackay*

Justice Campbell declaring the proceedings abandoned and fixing the fees and costs, that the plaintiff, had not set forth a good cause of action in his complaint. It was after the argument of this motion that the said A. C. Hart then brought the matter before Justice Campbell and had the order modified as set forth in his affidavit. I at no time told Mr. Hart I would abandon any legal defense that the borough had to his alleged cause of action. As a matter of fact, after the modification of the order by Justice Campbell, I filed my answer and Mr. Hart endeavored to have me waive the defense referred to and I wrote him on February 28th, as follows:

Hon. A. C. Hart,
210 Main Street,
Hackensack, N. J.

Dear Prosecutor Hart:

This will acknowledge your letter of February 24th in the matter of Dean vs. Park Ridge. I appreciate your feeling of regard for myself and the other members of the firm. This is mutual, may I assure you and I know you will undoubtedly agree with me that it would be very unethical on my part to willfully waive any defense to an action brought against the Borough of Park Ridge, which at the time of the stipulation referred to in your letter, was not at all contemplated or thought of. Of course, these details I am not thoroughly familiar with because they have taken place between you and George. I therefore think it is only proper that I refer the matter to George to take up with you personally and thrash out. I do not think it

*Answering Affidavits of Defendant
Affidavit of Howard Mackay*

is a matter which concerns my brother, the Judge, for the reason that he is no longer a member of the firm and I do not think he would want to give the matter any consideration.

It is very unfortunate that you feel there has been some misunderstanding, but I personally cannot see why or how I could conscientiously agree
10 to waive a defense in an action against the Borough which might eventually cause them to spend some ten thousand dollars or more. I think you will agree with me on this that it is my duty as their representative to see that their interests are protected to the fullest extent.

However, as I said before, I am turning the matter over to George and instructing him to get in touch with you and go over it in detail so that our friendly relations will continue as heretofore.

20 With kind personal regards, I beg to remain,
Yours very truly,

HM:MFH

The proceedings were undertaken by Mr. George Mackay who is associated with the attorneys for the defendant, and it is plain by my letter aforesaid that I made it very emphatic that I would not waive any defense that the Borough would have to the action. The first time I saw the alleged stipulation was when it was brought to my
30 attention on this application to strike out the answer and in a careful reading of it it appears quite conclusively that it was never intended to waive any defense to an action such as the plaintiff is endeavoring to maintain in this action. It very specifically sets forth that the failure to file the commissioner's report would not be taken advan-

**Answering Affidavits of Defendant
Affidavit of Howard Mackay**

tage of by either party in the event that an appeal was taken. To my knowledge an appeal was taken as to one parcel of land and no objection was raised to the filing of the report out of time at the trial of the said appeal.

Upon reading the affidavits and schedules attached thereto of the attorneys for the plaintiff, it appears quite conclusively that the proceedings 10 were abandoned by the Mayor and Council on July 12th, as shown by Schedule D attached to the plaintiff's affidavits.

HOWARD MACKAY.

Subscribed and sworn to before me
this 28th day of April 1930.

MARTHA F. HELLSTERN,
Notary Public of New Jersey.

SCHEDULE "B"

20

Resolution of the Borough of Park Ridge

Whereas the Borough of Park Ridge made application for the appointment of three commissioners to fix the compensation to be paid for certain lands of William H. Dean and Evangeline E. Dean, situate in the Borough of Park Ridge, Bergen County, New Jersey, consisting of a tract of eight hundred forty-three thousandths (.843) of an acre, for which the Commissioners of Assessment have awarded the sum of Nine Thousand 30 Nine Hundred Dollars (\$9,900.00), which tract is described as follows:

All that certain lot, tract or parcel of land and premises situate, lying and being in the Borough of Park Ridge, Bergen County, New Jersey.

*Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge*

Beginning at the northwesterly corner thereof at a spike in the northeasterly corner of the abutment at the northeast corner of the private bridge of William H. Dean over the Pascack Brook, situate southerly and near Grand Avenue and running thence (1) north fifty-three degrees forty-seven minutes ($53^{\circ} 47'$) east along what is known
 10 as the eighteen foot line, eleven and eighty hundredths (11.80) feet; (2) south sixty-two degrees and forty-nine minutes ($62^{\circ} 49'$) east, twenty-nine and sixty hundredths (29.60) feet; (3) south forty-five degrees forty-four minutes ($45^{\circ} 44'$) east, thirty-five and forty-five hundredths (35.45) feet;
 • (4) south fifty-one degrees forty minutes ($51^{\circ} 40'$) east, sixty-five and sixty hundredths (65.60) feet; (5) south forty-two degrees forty minutes ($42^{\circ} 40'$) east, forty-eight and seventy hundredths
 20 (48.70) feet; (6) south eighty-one degrees thirty-two minutes ($81^{\circ} 32'$) east, twenty-seven and sixty-five hundredths (27.65) feet; (7) south four degrees twenty-three minutes ($4^{\circ} 23'$) west, thirty-seven and sixty hundredths (37.60) feet; (8) south sixty-six degrees forty-five minutes ($66^{\circ} 45'$) east, one hundred fifteen and eighty-five hundredths (115.85) feet; (9) south seventy-two degrees three minutes ($72^{\circ} 03'$) east, thirty and ninety hundredths (30.90) feet; (10) south twenty-four
 30 degrees forty-seven minutes ($24^{\circ} 47'$) east, crossing the Pascack Brook, sixty-seven and twenty hundredths (67.20) feet to the southerly bank thereof; (11) south eighty degrees thirty-five minutes forty seconds ($80^{\circ} 35' 40''$) west, thirty-two and seventy-nine hundredths (32.79) feet; (12)

*Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge*

north eighty-nine degrees forty-nine minutes (89° 49') west, eighty-two and seventy-two hundredths (82.72) feet; (13) north seventy-four degrees twenty-eight minutes fifteen seconds (74° 28' 15") west, forty-nine and eighty-eight hundredths (49.88) feet; (14) north forty-six degrees forty-six minutes thirty seconds (46° 46' 30") west, one hundred fourteen and fifteen hundredths (114.15) 10 feet; (15) north fifty-five degrees thirteen minutes (55° 13') west, forty-four and twenty-six hundredths (44.26) feet; (16) north eighty-five degrees thirty-seven minutes thirty seconds (85° 37' 30") west, thirty-nine and fifty-six hundredths (39.56) feet; (17) north thirty-three degrees seventeen minutes (33° 17') west, forty-two and eighty-one hundredths (42.81) feet; (18) north eleven degrees three minutes (11° 03') east, sixty-one and fifty-five hundredths (61.55) feet; (19) 20 north two degrees thirty minutes thirty seconds (2° 30' 30") west, twenty-one (21) feet; (20) north sixty-eight degrees fifty-five minutes thirty seconds (68° 55' 30") west, six (6) feet to the southeasterly abutment of said bridge; (21) north ten degrees fifty-six minutes (10° 56') east, thirty-two and fifteen hundredths (32.15) feet to the place of beginning. Courses 11, 12, and 13 being along the southerly banks of the Pascack Brook 30 aforesaid.

Containing 0.843 acres.

Now Therefore, Be It Resolved that the Mayor and Council will hereby authorize the Borough Clerk to notify the said William H. Dean and Evangeline E. Dean and Messrs. A. C. Hart and Vander-

***Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge***

wart, their attorneys, that the award made by said Commissioners is not acceptable to the said Borough and that further proceedings in connection with the said award by the said Mayor and Council is hereby abandoned.

Resolution of the Borough of Park Ridge

10 Whereas the Borough of Park Ridge made application for the appointment of three Commissioners to fix the compensation to be paid for certain lands of W. H. Dean Company, situate in the Borough of Park Ridge, Bergen County, New Jersey, consisting of a tract of three and seven hundred thirty-nine thousandths acres (3.739), for which the Commissioners of Assessment have awarded the sum of One Hundred Dollars (\$100.00), which tract is described as follows:

20 All that certain lot, tract or parcel of land and premises situate, lying and being in the Borough of Park Ridge, County of Bergen and State of New Jersey.

30 Beginning at the southwesterly corner thereof in the middle of the Mill Road, it being the northwesterly corner of lands of the Borough of Park Ridge, and also the beginning point mentioned in a certain deed made by William H. Dean and Evangeline A., his wife, to the W. H. Dean Co., dated April 16, 1906, and recorded in the Bergen County Clerk's office in Liber 628, page 545 and running thence (1) south fifty-three degrees forty-eight minutes (53° 48') east one hundred fifty-seven and sixty-five hundredths (157.65) feet; (2) south five degrees fifty-five minutes (5° 55') east,

*Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge*

seventy (70) feet to a rock with a hole bored into it, situate in the middle of the Pascack Brook; (3) along the center of said brook down stream south forty-five degrees fourteen minutes ($45^{\circ} 14'$) west, two hundred twenty-nine and eighty-two hundredths (229.82) feet, all along said lands of the Borough of Park Ridge to the northerly line of lands formerly of Andrew P. Berry, now of the Borough of Park Ridge; (4) along the northerly line of said last mentioned lands south sixty degrees no minutes ($60^{\circ} 0'$) east, one hundred nine and fifty-five hundredths (109.55) feet to what is known as the eighteen foot line; (5) north sixty-six degrees forty-three minutes ($66^{\circ} 43'$) east, thirty-four and twenty-three hundredths (34.23) feet; (6) north twenty-eight degrees twelve minutes ($28^{\circ} 12'$) east, ten and fifty-two hundredths (10.52) feet; (7) north fifty degrees fifty-four minutes ($50^{\circ} 54'$) east, twenty (20) feet; (8) north fifty-five degrees, three minutes ($55^{\circ} 03'$) east, seventy-one and thirty-six hundredths (71.36) feet; (9) north sixty-five degrees eight minutes ($65^{\circ} 08'$) east, thirty-six and twenty hundredths (36.20) feet; (10) north seventy-seven degrees one minute ($77^{\circ} 01'$) east, seventy-four and seventy-five hundredths (74.75) feet; (11) north forty-nine degrees ten minutes ($49^{\circ} 10'$) east, fifty-eight and twenty hundredths (58.20) feet; (12) north thirty-four degrees twenty-one minutes ($34^{\circ} 21'$) east, seventy-two and fifty-three hundredths (72.53) feet; (13) north twenty-one degrees forty-five minutes ($21^{\circ} 45'$) east, one hundred sixty-three and fifty-seven hundredths (163.57) feet; (14)

*Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge*

- north fifteen degrees forty-five minutes ($15^{\circ} 45'$) east, forty-two and eighty-five hundredths (42.85) feet; (15) north eleven degrees fifty-three minutes ($11^{\circ} 53'$) east, one hundred thirty-one and fourteen hundredths (131.14) feet; (16) north twenty-six degrees forty-four minutes ($26^{\circ} 44'$) east, fifteen and thirty-four hundredths (15.34)
- 10 feet to the southwesterly corner of the abutment of the private bridge of William H. Dean over the Pascack Brook; (17) along the westerly side of said bridge north ten degrees nineteen minutes fifteen seconds ($10^{\circ} 19' 15''$) east, thirty-two and five hundredths (32.05) feet to the northwesterly abutment of same; (18) north eleven degrees twelve minutes ($11^{\circ} 12'$) east, eleven and twenty-four hundredths (11.24) feet; all along the said eighteen foot line; (19) north twenty degrees forty-seven minutes ($20^{\circ} 47'$) east, twenty-seven and
- 20 sixty-one hundredths (27.61) feet to the center of Grand Avenue; (20) along said center north seventeen degrees fifty-two minutes ($17^{\circ} 52'$) west, fifteen and sixty hundredths (15.60) feet to the center of Mill Road aforesaid; (21) along said center south eighty-one degrees five minutes ($81^{\circ} 05'$) west, ninety-six and eighty-nine hundredths (96.89) feet; (22) south sixty-eight degrees twenty-nine minutes ($68^{\circ} 29'$) west, two hundred eight
- 30 and forty-four hundredths (208.44) feet; (23) south fifty-two degrees no minutes ($52^{\circ} 00'$) west, all along the center of Mill Road two hundred forty-nine and forty-five hundredths (249.45) feet to the place of beginning.

Containing 3.739 acres.

***Answering Affidavits of Defendant
Resolution of the Borough of Park Ridge***

Now Therefore, Be It Resolved that the Borough of Park Ridge does hereby accept the award of One Hundred Dollars (\$100.00) made by said Commissioners for the aforementioned tract of land and that a check in the sum of One Hundred Dollars (\$100.00) be drawn payable to the order of W. H. Dean Co.

Be It Further Resolved that the Borough Clerk ¹⁰
tender said check to the W. H. Dean Co. together
with a certified copy of this resolution.

Be It Further Resolved that Messrs. A. C. Hart
and Vanderwart also be notified that this award
is acceptable to the Borough and that the check
for One Hundred Dollars (\$100.00) has been tendered to the W. H. Dean Co.

*Answering Affidavits of Defendant
Order*

SCHEDULE "C"

NEW JERSEY SUPREME COURT

	In the Matter		
	of the		
10	Application of The Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean, Evangeline E. Dean, situate in said Bor- ough of Park Ridge, Bergen County, New Jersey, to be taken and condemned for public use.	}	Order
20			

Application being made by Messrs, Mackay & Mackay, attorneys for the petitioner upon notice given to Messrs. A. C. Hart & Vanderwart, attorneys for the defendants in the above-entitled cause within twenty days after the filing of the report of the Commissioners of Assessment to abandon the proceedings in the above entitled cause, before the Honorable Luther A. Campbell, Justice of the

30 Supreme Court at the Court House, Hackensack, New Jersey, on the twenty-third day of July, nineteen hundred and twenty-seven at nine A. M. (Daylight Saving Time), and George W. Mackay appearing for the petitioner and Archibald C. Hart appearing for the defendants William H. Dean and Evangeline E. Dean.

*Answering Affidavits of Defendant
Order*

It is on this twenty-third day of July, nineteen hundred and twenty-seven Ordered that the proceedings for condemnation in the above entitled cause are hereby abandoned and that the petitioner is hereby ordered to pay to the defendant the following costs and expenses, to wit:

To Messrs. A. C. Hart and Vander-	
wart, counsel fee as attorney for	10
defendant -----	\$300.00
Witness Fees -----	75.00
A. L. Robinson, stenographer's fees	22.00

which said fees are fixed by consent of the respective attorneys herein; and

It Is Further Ordered that the fixing of the fees for the Commissioners of Assessment which are to be paid by the Borough of Park Ridge, shall be postponed until further application be made before the aforementioned court.

20

L. A. CAMPBELL,
Justice of the Supreme Court.

*Answering Affidavits of Defendant
Stipulation*

SCHEDULE "D"

Before His Honor Charles W. Parker,
Justice of the Supreme Court.

10 In the matter of the application
 of the Borough of Park Ridge
 for the appointment of three
 Commissioners to fix the
 compensation to be paid for
 certain lands of William H.
 Dean and Evangeline E. } Stipulation
 Dean, situate in said Bor-
 ough of Park Ridge, Bergen
 County, New Jersey, to be
 taken and condemned for
 public use.

20

Whereas the time expired on the 31st day of May, 1927, for the commissioners of assessment duly appointed by Hon. Charles W. Parker, Justice of the Supreme Court, for the filing of their report in the Bergen County Clerk's office in the above entitled matter.

30 It is therefore stipulated and agreed between counsel for the Borough of Park Ridge and counsel for the William H. Dean and Evangeline E. Dean that the report be filed and that in the event of an appeal being taken in the within cause that neither

*Answering Affidavits of Defendant
Stipulation*

parties herein will make objection to the filing of said report and that it will be considered as though it had been filed as of proper time.

Dated June 29, 1927.

MACKAY & MACKAY,
Attorneys for Borough of
Park Ridge.

HART & VANDERWART,
Attorneys for William H. Dean
and Evangeline E. Dean.

10

20

30

*Replying Affidavits of Plaintiff
Affidavit of A. C. Hart*

(Filed July 11, 1930)

BERGEN COUNTY CIRCUIT COURT

10	William H. Dean and Evange- line E. Dean,	Plaintiffs,	{	Action at Law. Replying Affida- vits of Plaintiff.
	vs.			
	The Borough of Park Ridge,	Defendant.	}	

State of New Jersey, }
County of Bergen, } ss.

Archibald C. Hart, being duly sworn, on his oath
says:

1. I have read the answering affidavits of
George W. Mackay and Howard Mackay to the
20 affidavits of the plaintiff in this motion.

2. Mr. George W. Mackay errs when he swears
in several parts of his affidavit that he told me at
different times prior to the attempt to abandon
the condemnation proceedings herein that he pro-
posed doing so. I knew not a thing of the inten-
tion to abandon the proceedings until July 14,
1927. On that date, Mr. George W. Mackay
asked me to consent to the abandonment and I
wrote him on July 14, 1927, as follows:

30

Replying Affidavits of Plaintiff
Affidavit of A. C. Hart

July 14, 1927

George Mackay, Esq.,
238 Main Street,
Hackensack, N. J.
My dear George:

We cannot consent to the abandonment of one
part of the land involved in the Dean condemna- 10
tion. I would consent to it, but there is a very
important reason why I may not do it.

Kindest regards,

Very truly yours,

A. C. HART.

3. The first I knew of the failure of the Com- 20
missioners to file their report within time was
when Mr. George W. Mackay himself brought to
me a proposed stipulation. This I have in my
files ready to present to the Court. A copy is at-
tached hereto marked Schedule "1." I suggest
that if Mr. Mackay intended to abandon these pro-
ceedings, he would not have presented this stipu-
lation for my signature. As a matter of fact, he
had entire charge of the filing of the reports and
filed them. If he had intended to abandon the 30
proceedings, I respectfully present that he would
not have filed the report or attempted to revive
it if as a matter of law, it was without effect.

4. On June 24, 1927, and after a presentation
of Schedule "1," I wrote Mr. Mackay a letter as
follows:

*Replying Affidavits of Plaintiff
Affidavit of A. C. Hart*

June 24, 1927

George W. Mackay, Esq.,
Hackensack, New Jersey.

Dear George:

10 I have the proposed stipulations in the Dean matter, but they do not entirely fill the bill, unless it is clear that we are going to ask the appointment of the same commissioners who will make the same report and that I shall be informed the day of this meeting so that I may file my appeal in time. If that is our understanding, I shall sign the stipulation. I know it is the arrangement between us. Justice Parker is to be here on Monday and if you will have your order ready and this understanding is clear, we may go before him at that time.

20 Best wishes, I am

Very fraternally,

A. C. HART.

5. As to the affidavit of Mr. Howard Mackay, his recollections are incorrect. At the time of the motion to strike out the complaint herein, which
30 was presented by Mr. Howard Mackay, I pointed to one of the reasons that he served upon me for the motion. It had to do with the non-filing of the commissioners' report within time and I asked him whether his firm was going to violate this stipulation. He read it and then appeared before the

Replying Affidavits of Plaintiff
Affidavit of A. C. Hart

Honorable Edwin C. Caffrey, the presiding judge,
and told the Court that he would not rely upon
this reason because of the stipulation entered into
between counsel.

ARCHIBALD C. HART.

Sworn and subscribed to before me
this 1st day of May, 1930.

BERTHA H. SCHUMANN,

10

Notary Public of New Jersey.

20

30

*Replying Affidavits of Plaintiff
Affidavit of William Conklin*

BERGEN COUNTY CIRCUIT COURT

William H. Dean and Evange- line E. Dean, vs. 10 The Borough of Park Ridge, 	Plaintiffs, Defendant.	{	Action at Law. Replying Affida- vits of Plaintiff.
---	-----------------------------------	---	--

State of New Jersey, }
 County of Bergen, } ss.

William Conklin, being duly sworn, on his oath
 says:

1. I have read the affidavit of George Mackay
 attached to the answering affidavits in the above
 entitled cause, and particularly the fifth para-
 20 graph thereof.

2. It is not true that the reports in this case
 were forwarded to me by Mr. Mackay or any other
 person, by letter or otherwise. I do not remem-
 ber the exact dates, but the truth is I received a
 telephone message from the office of Mr. Fred
 Fountain between two and four o'clock of the last
 day in which the Commissioners might file their
 report in this matter. This telephone message
 was that Mr. Fountain, one of the Commissioners,
 30 had the report in his office for my signature and
 that the reports had to be signed before four
 o'clock that day inasmuch as it was the last day
 on which they could be filed. I immediately drove
 to Hackensack, to the office of Mr. Fred Fountain.
 He had the reports. It was after four o'clock.

*Replying Affidavits of Plaintiff
Affidavit of William Conklin*

Mr. Fountain said that it might even then be too late because the Clerk's Office closed at four-thirty o'clock. I signed the reports and left them just where I received them from Mr. Fountain.

WILLIAM CONKLIN.

Sworn and subscribed to before me
this 2nd day of May, 1930.

BERTHA H. SCHUMANN,

10

Notary Public of New Jersey.

SCHEDULE "1"

Before his Honor Charles W. Parker,
Justice of the Supreme Court.

In the Matter of the Application of The Borough of Park Ridge for the appoint- ment of three Commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean, and Evange- line E. Dean, situate in said Borough of Park Ridge, Ber- gen County, New Jersey, to be taken and condemned for public use.	}	Stipulation
--	----------------------------------	--------------------

20

30

Whereas on the twenty-sixth day of March, nineteen hundred and twenty-seven through Mackay & Mackay, attorneys for the applicant, the Borough of Park Ridge, a petition was filed in the above entitled matter for the appointment of three commissioners to condemn certain lands in

*Replying Affidavits of Plaintiff
Schedule "I"*

the Borough of Park Ridge, belonging to William H. Dean and Evangeline E. Dean; and

Whereas on the ninth day of April, nineteen hundred and twenty-seven the Honorable Charles W. Parker, Justice of the Supreme Court duly appointed William Conklin, James A. Romeyn and Fred M. Fountain, Commissioners of Assessment;
10 and

Whereas the said Commissioners proceeded to perform their duties according to law, but failed to file their report on or before the thirty-first day of May, nineteen hundred and twenty-seven which was the last day for the filing of the same, so that the duties on and after the aforesaid date of the said commissioners ceased; and

Whereas Messrs. Mackay & Mackay, attorneys for the Borough of Park Ridge and Archibald C.
20 Hart, attorney for William H. Dean and Evangeline E. Dean desire to have new commissioners appointed;

It is, Therefore, stipulated and agreed between the attorneys hereto that the application for the appointment of new commissioners be made before the Honorable Charles W. Parker, Justice of the Supreme Court, without the necessity of filing a new petition and without advertising as required by the statute for the appointment of the
30 same.

Attorneys for Applicant,
Borough of Park Ridge,

Attorneys for William H. Dean
and Evangeline E. Dean.

Dated, June , 1927.

Order for Summary Judgment

(Filed July 10, 1930.)

BERGEN COUNTY CIRCUIT COURT.

 William H. Dean and Evange-
 line E. Dean,

Plaintiffs,

vs.

The Borough of Park Ridge,

Defendant.

 Action at Law.
 Order for Sum-
 mary Judgment.

10

It appearing by affidavits filed in the cause that the defense made by the defendant's answer is untenable, and the defendant, after due notice, having failed to show such facts as entitled it to defend;

It Is Ordered that the defense be struck out and that final judgment be entered for the Plaintiff against the Defendant for the sum of \$11,- 20 682.00 and costs.

EDWIN C. CAFFREY, Judge.

Dated July 9, 1930.

Judgment

(Entered July 10, 1930.)

BERGEN COUNTY CIRCUIT COURT

 William H. Dean and Evange-
 line E. Dean,

vs.

 The Borough of Park Ridge.

 } Action at Law.
 } Summary Judg-
 } ment.

10

Hart & Vanderwart, Attorneys for Plaintiff.

Amount of damages Eleven Thousand Six Hun-
 dred and Eighty-two Dollars and cost. Fifty-four
 Dollars and ninety-five cents and against the de-
 fendant.

Damages ----- \$11,682.00

Costs ----- 54.95

20

 \$11,736.95

Judgment entered July 10, 1930.

Book K—Circuit Court Judgments. Page 367.

30

Discharge of Lis Pendens

(Filed July 23, 1927.)

In the Matter of the Application of The Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean and Evange- line E. Dean, situate in said Borough of Park Ridge, Bergen County, New Jersey, to be taken and condemned for public use.	Discharge of Lis Pendens	10
--	-----------------------------	----

To Whom It May Concern:

Whereas certain condemnation proceedings 20
were commenced by the Borough of Park Ridge
for the purpose of acquiring the land hereinafter
described; and

Whereas by an order duly signed by the Honor-
able Luther A. Campbell, Justice of the Supreme
Court on the twenty-third day of July, nineteen
hundred and twenty-seven the proceedings for the
condemning of the land owned by William H.
Dean and Evangeline E. Dean were ordered aban-
doned; 30

Notice Is Hereby Given that the lien of the lis
pendens covering the property hereinafter de-
scribed in Book 8, page 630, owned by William
H. Dean and Evangeline E. Dean is hereby dis-

Discharge of Lis Pendens

charged, which covers all that certain lot, tract or parcel of land situate, lying, and being in the Borough of Park Ridge, Bergen County, New Jersey,

- Beginning at the northwesterly corner thereof at a spike in the northeasterly corner of the abutment at the northeast corner of the private bridge of William H. Dean over the Pascack Brook, situate southerly and near Grant Avenue and running thence (1) north fifty-three degrees forty-seven minutes ($53^{\circ} 47'$) east along what is known as the eighteen foot line, eleven and eighty hundredths (11.80) feet; (2) south sixty-two degrees and forty-nine minutes ($62^{\circ} 49'$) east, twenty-nine and sixty hundredths (29.60) feet; (3) south forty-five degrees forty-four minutes ($45^{\circ} 44'$) east thirty-five and forty-five hundredths (35.45) feet; (4) south fifty-one degrees forty-minutes ($51^{\circ} 40'$) east, sixty-five and sixty hundredths (65.60) feet; (5) south forty-two degrees forty minutes ($42^{\circ} 40'$) east, forty-eight and seventyhundredths (48.70) feet; (6) south eighty-one degrees thirty-two minutes ($81^{\circ} 32'$) east, twenty-seven and sixty-five hundredths (27.65) feet; (7) south four degrees twenty-three minutes ($4^{\circ} 23'$) west, thirty-seven and sixty hundredths (37.60) feet; (8) south sixty-six degrees forty-five minutes ($66^{\circ} 45'$) east one hundred fifteen and eighty-five hundredths (115.85) feet; (9) south seventy-two degrees three minutes ($72^{\circ} 03'$) east, thirty and ninety hundredths (30.90) feet; (10) south twenty-four degrees forty-seven minutes ($24^{\circ} 47'$) east, crossing the Pascack Brook, sixty-seven and twenty-hundredths (67.20) feet to the southerly bank

Discharge of Lis Pendens

thereof; (11) south eighty degrees thirty-five minutes forty seconds ($80^{\circ} 35' 40''$) west, thirty-two and seventy-nine hundredths (32.79) feet; (12) north eighty-nine degrees forty-nine minutes ($89^{\circ} 49'$) west, eighty-two and seventy-two hundredths (82.72) feet; (13) north seventy-four degrees twenty-eight minutes fifteen seconds west, forty-nine and eighty-eight hundredths (49.88) feet; (14) north forty-six degrees forty-six minutes thirty seconds ($46^{\circ} 46' 30''$) west, one hundred four-
 teen and fifteen hundredths (114.15) feet; (15) north fifty-five degrees thirteen minutes ($55^{\circ} 13'$) west, forty-four and twenty-six hundredths (44.26) feet; (16) north eighty-five degrees thirty-seven minutes thirty seconds ($85^{\circ} 37' 30''$) west, thirty-nine and fifty-six hundredths (39.56) feet; (17) north thirty-three degrees seventeen minutes ($33^{\circ} 17'$) west, forty-two and eighty-one hundredths (42.81) feet; (18) north eleven degrees
 three minutes ($11^{\circ} 03'$) east, sixty-one and fifty-five hundredths (61.55) feet; (19) north two degrees thirty minutes thirty seconds ($2^{\circ} 30' 30''$) west, twenty-one (21) feet; (20) north sixty-eight degrees fifty-five minutes thirty seconds, ($68^{\circ} 55' 30''$) west, six (6) feet to the southeasterly abutment of said bridge; (21) north ten degrees fifty six minutes ($10^{\circ} 56'$) east, thirty-two and fifteen hundredths (32.15) feet to the place of beginning.

Courses 11, 12 and 13 being along the southerly banks of the Pascack Brook aforesaid.

Containing 0.843 acres.

MACKAY & MACKAY,
 Attorneys for Petitioner
 Borough of Park Ridge.

Order Appointing Commissioners

(Entered April 9th, 1927.)

Before His Honor, Charles W. Parker, Justice of
the Supreme Court:

	In the Matter of the	
10	Application of the Borough of Park Ridge for the Appoint- ment of three Commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean and Evange- line E. Dean, et als., situate in said Borough of Park Ridge, Bergen County, New Jersey, to be taken and con- demned for public use.	Order for Ap- pointment of Commissioners.
20		

30 The Borough of Park Ridge having made appli-
cation to me by petition in writing to appoint three
disinterested freeholders, residents of the County
of Bergen, to examine or appraise the land or
property of William H. Dean and Evangeline E.
Dean, et als., mentioned in said petition and to
assess the damages on at least six days' notice to
be given to the parties interested in said property
in such manner as I may direct, and in such order
of appointment to fix the date on or before which
such commissioners must file their report, and I
having ordered that Saturday, the 9th day of Ap-

Order Appointing Commissioners

ril, 1927, at ten o'clock in the forenoon or as soon thereafter as the same could be heard at the Court House in the City of Morristown, New Jersey, is the place for the hearing of said petition before me, and that notice of such hearing should be published in the Evening Record on the 28th day of March and the 4th day of April, and that said notice of hearing be given to the parties named in said petition on or before the 31st day of March, 1927; and the hearing now having been had on the day and at the hour and place named in said order, and evidence satisfactory to me having been presented by affidavits that notice has been served and the proof of publication as required by said order, and I having heard what was to be said in the matter by the attorney for the petitioner, and no objections being heard to the granting of said petition. 10

It Is Now, on this ninth day of April, 1927, 20
Ordered that the following be appointed, and I do hereby appoint Fred Fountain, William Conklin and James A. Romeyn, three disinterested freeholders, residents of the County of Bergen, commissioners to examine and appraise the lands or property described in said petition and to assess the damages to be sustained in the taking and condemning the said lands or property for the public use of the Borough of Park Ridge, and for the purposes set forth in said petition, and to proceed 30
therein in all respects as is directed by the act entitled, "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Revision of 1900)," and

Order Appointing Commissioners

It Is Further Ordered that said commissioners give six days' notice to each of the persons interested in the lands or property described in the said petition, of the time and place when and where they will meet and proceed to execute their duties under this appointment, and

It is Further Ordered that said commissioners shall file their report on or before the 31st day of
10 May, nineteen hundred and twenty-seven.

CHARLES W. PARKER,

Justice of the Supreme Court.

Entered April 9, 1927.

20

30

ORDER AMENDING ORDER PRINTED AS
SCHEDULE "C" ON DEFENDANT'S AFFI-
DAVITS.

(Filed November 13, 1929.)
NEW JERSEY SUPREME COURT

In the matter of the application
of the Borough of Park
Ridge for the appointment
of three Commissioners to
fix the compensation to be
paid for certain lands of
William H. Dean, et al, sit-
uate in said Borough of Park
Ridge, Bergen County, New
Jersey, to be taken and con-
demned for public use.

10

Order Amend-
ing Order.

Application having been made by Hart and
Vanderwart, solicitors of William H. Dean and
Evangeline E. Dean, parties to the above entitled
action, to amend an order herein executed by my-
self as a Justice of the Supreme Court on July 23,
1927, and I having considered the application and
having heard counsel for all parties,

20

It is, on this 1st day of November, 1929, Order-
ed that the said order be amended by striking out
the words appearing in the second paragraph 30
thereof as follows: "that the proceedings for con-
demnation in the above entitled cause are hereby
abandoned."

LUTHER A. CAMPBELL,
Justice Supreme Court.

Stipulation

Before His Honor, Charles W. Parker, Justice of
the Supreme Court:

10	In the Matter of the Application of the Borough of Park Ridge for the appoint- ment of three commissioners to fix the compensation to be paid for certain lands of Wil- liam H. Dean and Evange- line E. Dean, situate in said Borough of Park Ridge, Ber- gen County, New Jersey, to be taken and condemned for public use.	} Stipulation.
----	--	----------------

20 Whereas on the twenty-sixth day of March,
nineteen hundred and twenty-seven through
Mackay & Mackay, attorneys for the applicant,
the Borough of Park Ridge, a petition was filed
in the above entitled matter for the appointment
of three commissioners to condemn certain lands
in the Borough of Park Ridge, belonging to Wil-
liam H. Dean and Evangeline E. Dean; and

30 Whereas on the ninth day of April, nineteen
hundred and twenty-seven the Honorable Charles
W. Parker, Justice of the Supreme Court duly
appointed William Conklin, James A. Romeyn
and Fred M. Fountain, Commissioners of Assess-
ment; and

Stipulation

Whereas the said Commissioners proceeded to perform their duties according to law, but failed to file their report on or before the thirty-first day of May, nineteen hundred and twenty-seven which was the last day for the filing of the same, so that the duties on and after the aforesaid date of the said commissioners ceased; and

Whereas Messrs. Mackay & Mackay, attorneys for the Borough of Park Ridge and Archibald C. Hart, attorney for William H. Dean and Evangeline E. Dean desire to have new commissioners appointed; 10

It Is Therefore, stipulated and agreed between the attorneys hereto that the application for the appointment of new commissioners be made before the Honorable Charles W. Parker, Justice of the Supreme Court, without the necessity of filing a new petition and without advertising as required by the statute for the appointment of the same. 20

Attorneys for Applicant, Borough
of Park Ridge

Attorney for William H. Dean and
Evangeline E. Dean

Dated—June , 1927

Opinion of Supreme Court

(Filed May 7, 1931.)

William H. Dean Et Ux. v. The Borough of
Park Ridge.

Argued October 10, 1930—Decided May 7, 1931.

1. Under the provisions of the sixth section of the Eminent Domain act, the commissioners appointed by the justice of the Supreme Court
10 must file their report, in writing, in the office of the clerk of the county in which the land is situated within the time limited by the justice; and upon failure to file the report within the time so limited, the powers of the commissioners cease, and renders any subsequent action by them nugatory.

2. The idea that counsel in a cause can, by mutual consent, expunge a legislative mandate contained in a statute, is fallacious, and in entire disregard of legal principles.

20

On appeal from the Bergen County Circuit Court.

Argued before Gummere, Chief Justice, and Justices Trenchard and Lloyd.

For the appellant, Mackay & Mackay.

For the respondents, Hart & Vanderwart.

The opinion of the court was delivered by

Gummere, Chief Justice. This is an appeal from
a judgment entered in the Bergen Circuit Court
30 as a result of granting a motion to strike out the answer filed by the defendant, the borough of Park Ridge. After striking out the answer, the

Opinion of Supreme Court

court directed the entry of judgment in favor of the plaintiffs for the amount claimed by them in the complaint which they filed.

The case presents the following situation: The mayor and council of the borough of Park Ridge adopted an ordinance providing for the acquisition of land belonging to Mr. and Mrs. Dean and which the borough sought to acquire for use in connection with its water supply system. Being 10
unable to agree with the owners for the purchase of the land, the borough instituted condemnation proceedings for its acquisition, and applied to Mr. Justice Parker of the Supreme Court for the appointment of commissioners. The application was granted on April 9th, 1927. Commissioners were duly appointed, the order of appointment directing that they file their report on or before the 31st day of May then next. The commissioners not having filed their report within the time limited by the order, the attorneys of the 20
respective parties thereafter appeared before Mr. Justice Parker, and applied for an order permitting the commissioners to file their report at a subsequent date. This the justice refused to do, upon the ground that our eminent domain statute did not authorize such action. The attorneys then entered into a stipulation that, although the time for filing the report of the commissioners had expired, nevertheless, if the report was subsequently filed and an appeal was taken from the 30
award of the commissioners, neither of the parties would object to the fact that the report was filed out of time, but would agree that it be considered as though it had been filed within the

Opinion of Supreme Court

time limited. In accordance with this agreement, the commissioners filed their report on the 5th day of July, 1927, awarding the property owners \$9,900 as compensation for the land which was the subject of the condemnation proceeding. The municipal authorities, apparently considering this award excessive, adopted a resolution refusing to accept it and ordering the abandonment of the
10 condemnation proceeding. Thereupon the present suit was started in the Circuit Court, the plaintiffs seeking to recover from the borough the amount of this award. The defendant filed an answer, the purport of which was that the condemnation proceeding was of no force and effect and was not binding upon the borough, because the award of the commissioners was not filed within the time directed by the order appointing them. The Circuit Court judge, considering that this did not constitute a legal defense, directed, as has al-
20 ready been stated, that the answer be struck out and judgment for the amount of the award be entered in favor of the plaintiff.

We consider that this action on the part of the trial court constituted legal and harmful error. The sixth section of our Eminent Domain act (Comp. Stat., p. 2184), after providing that the commissioners appointed pursuant to the authority of the statute shall proceed to view and examine the land sought to be condemned, and make
30 a just and equitable appraisal of the value of the same, and make a true report thereon in writing, then provides that they shall file their report within the time limited by the justice in the office of the clerk of the county in which the

Opinion of Supreme Court

land is situated, and declares that "if the report is not made within the time limited, the powers of the commissioners shall cease, and an application may be made to a justice of the Supreme Court for the appointment of new commissioners on such notice as the justice may direct." In our opinion, this statute is mandatory, so far as it relates to the duty of the commissioners and the time within which that duty must be performed; 10 and that the declaration of the legislature that, if the report is not made within the time limited, the powers of the commissioners shall cease, absolutely destroys their official position and renders any subsequent action by them nugatory. The case in this respect is like that of *State v. Davis*, 9 N. J. Adv. R. 4, where we held that an indictment presented by a grand jury after the expiration of the term for which it was appointed was a nullity because of the fact that the grand jury had then ceased to exist. 20

It is argued in opposition to this view that the effect of the agreement between counsel, to which reference has been made, barred the borough from taking advantage of the statute; and that, having made this agreement, it was estopped from setting up as a defense that the commissioners' report was nugatory. We are not impressed with this contention. The idea that counsel in a case can by mutual consent expunge from a statute the legislative mandate contained therein, and by 30 their agreement give life to the commissioners' report, notwithstanding that, by force of the statute, it was made by persons whose power to

Opinion of Supreme Court

make it had ceased to exist, is in plain disregard of legal principles; for, if it be sound, we see no reason why counsel, by mutual agreement, cannot arbitrate a mandatory provision in any statute involved in a litigation between the parties whom they represent.

The judgment under review will be reversed.

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Rule on Reversal and Remittitur

(Filed, May 21, 1931.)

NEW JERSEY SUPREME COURT

William H. Dean and Evange- line E. Dean, Plaintiffs-Appellees, vs. Borough of Park Ridge, Defendant-Appellant.	}	Action at Law Rule on Reversal and Remittitur	10
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This cause coming on to be heard at the January term, 1931, in the presence of the counsel of the respective parties and the case having been read and the argument of the counsel as well as the record and proceedings duly considered upon the appeal;

It Is Thereupon Ordered, Adjudged and Decreed that the judgment of the Bergen County Circuit Court be reversed, and that the record and proceedings be remitted to the Bergen County Circuit Court to be proceeded with, according to law and the practice of said Court. 20

Entered May 21, 1931.

On motion of
 MACKAY AND MACKAY,

Attorneys for Appellant,
 HOWARD MACKAY,

Of Counsel.

Filed in Bergen County Clerk's Office, June 30
 19th, 1931.

Notice of Appeal and Grounds of Appeal

(Filed, June 25th, 1931.)

NEW JERSEY SUPREME COURT

William H. Dean and Evangeline E. Dean, Plaintiffs-Appellants, vs. 10 The Borough of Park Ridge, Defendant-Appellee.	}	Action at Law Notice of Appeal and Grounds of Appeal
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To Mackay and Mackay, Esqs.,
 Attorneys of Defendant-Appellee:

Sirs:

20 Take Notice that the plaintiffs, William H. Dean and Evangeline E. Dean, the appellants herein appeal to the Court of Errors and Appeals in the last resort in all cases in New Jersey from the whole of the judgment entered in this cause, on the following grounds:

1. That the Supreme Court reversed the judgment of the Bergen County Circuit Court, although there was error in so doing.
 2. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court striking out the answer of the defendant.
 3. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court striking out the whole defense of the defendant.
- 30

Notice of Appeal and Grounds of Appeal

4. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court ordering final judgment in favor of the plaintiffs and against the defendant.

5. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court striking out defendant's first separate defense.

6. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court striking out the defendant's second separate defense. 10

7. Because the Supreme Court erroneously reversed the order of the Bergen County Circuit Court striking out the defendant's third separate defense.

Yours, etc.,

HART & VANDERWART

Attorneys of Plaintiffs-Appellants.

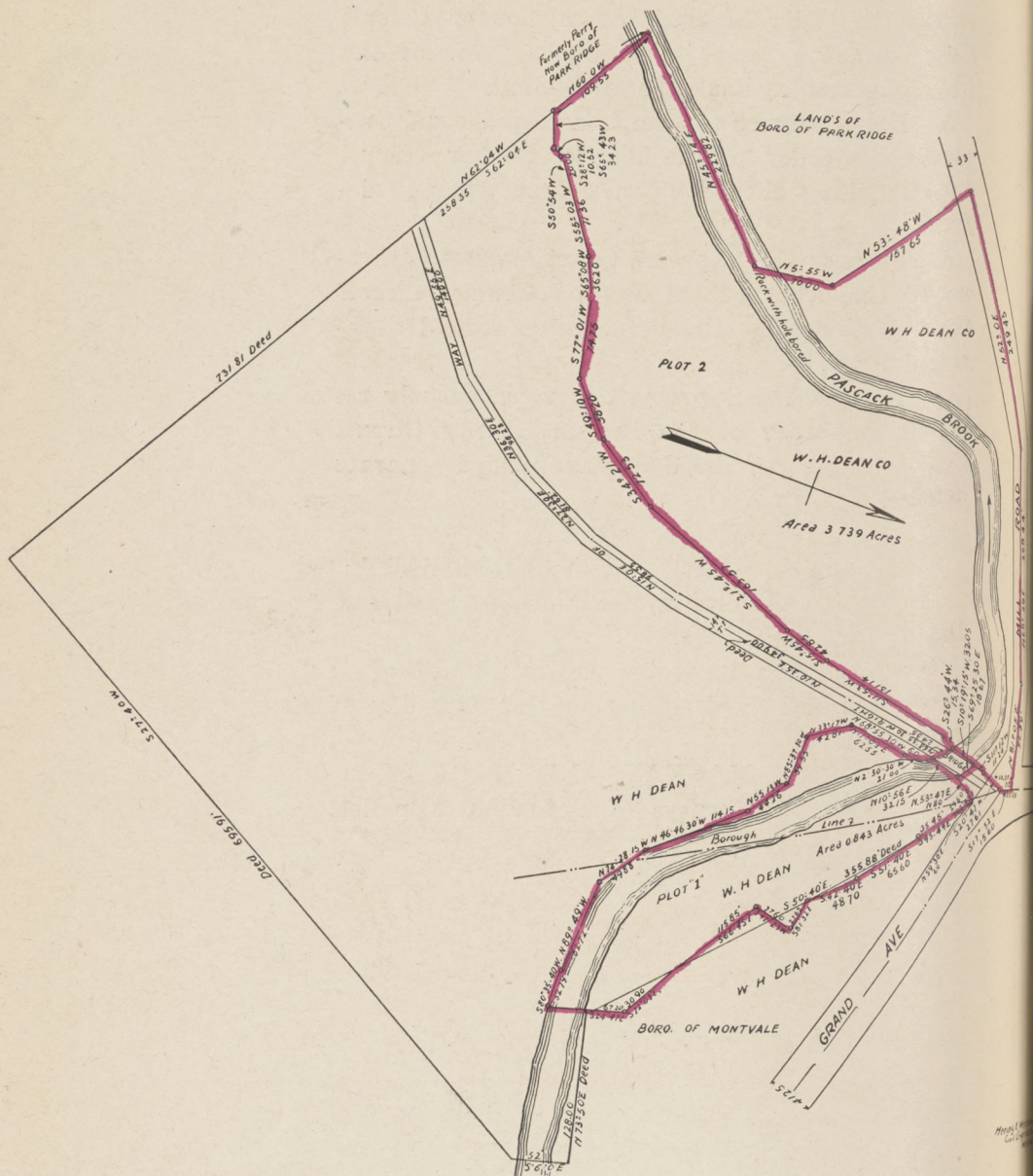
Dated: June 24th, 1931.

20

Service of the foregoing notice of appeal is hereby acknowledged as of time this 24th day of June 1931.

MACKAY AND MACKAY,
Attorneys of Defendant-Appellee.

Map. Schedule "A" attached to affidavits of William H. Dean, Archibald C. Hart and George W. Mackay.



New Jersey Court of Errors and Appeals

William H. Dean and Evangeline E. Dean, Plaintiffs-Appellant, vs. Borough of Park Ridge, Defendant-Appellee.	}	Action at Law Brief of Plain- tiffs-Appellant
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STATEMENT

This appeal brings up for review the action of the Supreme Court in reversing a judgment entered on an order made in the Bergen County Circuit Court striking out the answer of the defendant and each separate defense therein and directing summary judgment in favor of the plaintiffs against the defendant for the sum claimed in the complaint.

The facts briefly are: The Borough of Park Ridge, the defendant, required two plots of land in the Borough of Park Ridge for public purposes, one of which was owned by the plaintiffs herein, and the other by the Wm. H. Dean Co., a corporation, the majority stock of which was owned by William H. Dean. The parties were unable to agree upon the consideration and the Borough applied to the Honorable Justice Parker, who appointed Commissioners pursuant to the statute, on April 9, 1927. By the terms of the order appointing the Commissioners, they were required to file their report before May 31, 1927. Although two condemnation proceedings were actually instituted, one against the Dean corporation, and the other against the two

Deans, the same Commissioners were appointed in both cases; they heard both cases together, and although they made separate reports, made them at the same time.

The reports of the Commissioners were not filed within the time prescribed by the order appointing them. The responsibility for this non-compliance with the terms of the order is debatable, but most certainly is due either to laxness on the part of the Commissioners or on the Borough of Park Ridge or its attorneys, and according to the affidavit of William Conklin (State of Case, page 62) it would seem that the Borough was responsible.

The Commissioners by their report awarded to the Dean corporation \$100 for the tract of land described as plot No. 1 (State of Case, page 84). This plot contained 3.739 acres. They further awarded to the individual Deans for plot No. 2 the sum of \$9900. This plot contained 0.843 acres. *It is significant to note that the reports of the commissioners in each case were prepared by the attorney for the defendant.* (State of Case, page 38, line 4.) Obviously, the commissioners agreed among themselves upon the sum of \$10,000 for both plots of land and paid little, if any, attention to the amounts inserted in the respective reports, thereby showing the influence upon their actions of the hearing of the proceedings together and the conduct of both proceedings as though they were really one.

On June 29, 1927, after the time had expired for the filing of the Commissioner's report, counsel for the Borough and for the plaintiffs entered into a stipulation (State of Case, page 31). The clear purport of this stipulation was to waive for the

benefit of both parties notably the Borough of Park Ridge the statutory requirements concerning the filing of the report before the date set in the order. This stipulation was entered into after an unsuccessful attempt had been made by the attorneys for the Borough to have a stipulation (State of Case, page 74) signed and new Commissioners appointed on that stipulation. Later on, A. C. Hart, (State of Case, pages 59, 60) belies Mr. George Mackay's explanation of the circumstances surrounding this event (State of Case, page 39).

It is apparent that the Borough could not have the report of the Dean corporation proceeding legalized without that of the Deans being similarly accepted. Both had been considered one proceeding. The acquisition of both parcels was provided for within one ordinance. The Borough was helped materially by the acceptance of the Dean Company report. Both the Borough and their counsel benefited by the signing of the stipulation before Justice Parker (State of Case, page 31).

Counsel for both sides recognized the force and efficacy of this stipulation when the Dean corporation appealed to the Circuit Court from the \$100 award. Counsel for both parties recognized this stipulation when on July 14, 1927, Mr. Mackay asked Mr. Hart to *consent* to the abandonment of the proceedings. Counsel for the Borough recognized the validity of this stipulation when subsequently there were taken the abortive steps whereby they sought to have the proceedings abandoned. Unfortunately, the law concerning the abandonment of condemnation proceedings was not complied with.

Counsel further recognized the validity of this stipulation by filing a report of the Commissioners at all. This report was filed on July 5, 1927, and on July 13, 1927, after the filing and acceptance of both reports, much to the surprise of the plaintiffs' attorneys, they were informed that the Borough had decided to abandon the proceedings.

Assuming that the report of the commissioners was legally filed, the twenty day period provided by the statute gave the condemnor until July 25, 1927 to abandon "upon payment to the owners and other parties who have appeared before the commissioners or the jury of their reasonable costs, expenses and counsel fees to be determined by a Justice of the Supreme Court, and upon filing a discharge of the lien of the notice of *lis pendens*."

Obviously, the twenty day requirement concerning the payment, etc., has not been carried out, since by the affidavit of George W. Mackay in paragraph 8 thereof (State of Case, page 42, line 24) he sets forth the fact that indeed the checks for the amount set forth in Justice Campbell's order were not drawn until September 12, 1927, almost two months after the time for the payment of these sums had expired.

The opinion of the Supreme Court makes it plain that there is only one issue to be decided in this case. That issue is *whether or not the attorneys for the defendant municipal corporation may bind their clients with a stipulation waiving a statutory provision*.

POINT I.

THE STIPULATION SIGNED BY THE ATTORNEYS FOR THE BOROUGH IS BINDING UPON THEIR CORPORATE CLIENTS.

In this State, the Borough Law (I Compiled Statutes 226) provides, *inter alia*,

“...it shall have perpetual succession, may sue and be sued, have a common seal, and purchase, acquire, lease, hold, let and convey real and personal property”

Even if the authority given by this Act to Boroughs to sue and be sued did not necessarily imply a retention of counsel, we find in Section 3 of the Borough Law (I Cumulative Supplement to Compiled Statutes 168) the power vested in the Mayor to appoint among other officers a Borough Attorney. According to the twelfth paragraph of the affidavit of George W. Mackay (State of Case, page 43) Mackay and Mackay have been the Borough Attorneys for the Borough of Park Ridge since 1924 (State of Case, page 43, line 4). The plaintiffs presume to infer that Mr. Mackay is very familiar indeed with the way the Borough conducts its affairs and unquestionably as the Borough Attorney does the work usually done by such an official, including the preparation of resolutions and the giving of advice on subjects other than those which are strictly legal. Again, in paragraph 4 of Mr. Mackay's affidavit (State of Case, page 37, line 17) he recites the fact that Mackay and Mackay, the attorneys for the Borough, *were instructed to commence pro-*

ceedings in the Supreme Court to acquire both parcels of property by condemnation. Since by authority too, it is well settled that a municipality may employ an attorney, we proceed to a discussion of the powers of such an attorney once employed. It is submitted on behalf of the plaintiffs and respectfully urged upon this Court that the rule of reason supported by well considered authority is that the relations existing between the attorney for a municipality and the municipality are in the absence of unusual circumstances those which exist in the ordinary case of attorney and client. Judge Dillon so concludes in the Fifth Edition of his excellent treatise (*Dillon on Municipal Corporations, Volume I, Section 389, page 671*).

The Supreme Court of this State had occasion in 1877 to pass upon this question, and in the case of *Paret vs. the City of Bayonne* (39 N.J.L. 559) the Court said, in sustaining *an agreement made by an attorney for a municipal corporation to refer a case* at page 560:

“It will be assumed that the attorney of a corporation may, in virtue of his retainer, consent to a reference of the cause, though he had no authority under seal to appear, or to consent to a reference, and that after award made, it will not be set aside on the supposed want of authority in the attorney to consent to the submission. *Faviel vs. Railway Company*, 2 Exch. 344; *Alexandria Coal Company vs. Swann*, 5 How. 83. As a rule of practice, this power results from the nature of the attorney’s employment. It will also be assumed that a municipal corporation

has power to submit a controversy to arbitration, and that its attorney may consent to a reference for it, unless it be disabled therefrom expressly by some positive provision in its charter, or impliedly from the nature of the subject matter in controversy. *Dix vs. Dummerston*, 19 Vt. 262; 1 Dillon on Mun. Corp. 389 n."

The fact that by a stipulation, attorneys waive compliance with the statutory requirements does not render ineffectual the stipulation. The Courts are eager and anxious to uphold the validity of stipulations made by counsel and will see that they are carried into effect according to the spirit and meaning of them.

Welsh vs. Blackwell, 14 N.J.L. 345.

It is apparent that attorneys may and, today especially, very often do waive strict compliance with the statutory requirements. A notable instance of this is the acknowledgment of service by attorneys of process issued out of the Courts. From the earliest history of the common law, jurisdiction of the person was essential and there is a very close analogy indeed between a situation where an attorney by agreement waives compliance with the statutory requirement concerning the service of process and where an attorney, when acting for a client, municipal or otherwise, stipulates to waive a provision of the statute concerning the filing of a report within a certain time. In a matter of this kind, there can be no question of degree, since who can say whether in one instance more is waived than in another. It suffices to say that by this time it is

well settled that attorneys can and do waive such statutory requirements.

Hiller vs. Pfeffer 79 N.J.L. 362.

Purcell vs. Bennett 68 N.J.L. 519.

In the latter case, Mr. Justice Hendrickson, speaking for the Supreme Court, said at page 520:

"That it is the clear policy of our courts to recognize such acts by the attorneys of the court as valid, and to presume them to be authorized until the contrary is shown by the party aggrieved, may be gathered from the decisions with regard to appearances entered by attorneys for defendants; for this is a function quite similar to that of acknowledging service. The true rule in this respect was laid down by Vice Chancellor Van Fleet, in *Mutual Life Insurance Co., vs. Pinner*, 16 6Stew. Eq. 52, 57, where he says: 'The entry of an appearance for a defendant carried with it a presumption that it was entered by authority. If the contrary be alleged, affirmative proof must be produced, and until it is, the appearance will be held to be valid.' Several cases, both in law and equity, are cited in support of the rule laid down. And the same rule should apply to acknowledgments of service for defendants. The rule probably grows out of the relation of the attorneys to the court. They are regarded as officers of the court. In *Hendrickson vs. Hendrickson*, 3 Gr. 102, 105 Mr. Justice Ryerson, speaking upon this subject, said: 'The confidence placed by courts of law in their attorneys is very great. When a man

commences an action in this court, and an appearance thereto is proffered by one of our attorneys, we never question his authority to appear."

The proposition that binding stipulations operate as an estoppel is too well settled for the citation of authority.

An Appellate Court of the State of New York, in the case of *Collins vs. Saratoga Springs*, 70 Hun 583, affirmed by the Court of Appeals in 40 N. Y. 637 had occasion to pass upon a stipulation made by the attorney for the Village of Saratoga Springs in the conduct of proceedings brought for the appointment of Commissioners to appraise the damage done the plaintiffs property by virtue of a change of grade in the street. In that case, the attorney for the Village stipulated for the appointment of commissioners and it was held that the stipulation empowered the Court to make an order appointing such commissioners before the return day and on shorter notice than required by statute of the State of New York. Mr. Justice Herrick, writing for the court said,

"It seems to me that there can be no question but that the attorneys appointed by and appearing for the municipal corporation stand in the same position as attorneys appointed by and appearing for private persons, and that courts have the right to rely on stipulations and consents made by them in the course of judicial proceedings, the same as upon those made by attorneys appearing for private persons, and that they have the same power and authority to bind

the clients for whom they appear; and that, in the absence of fraud or collusion, orders entered or proceedings taken in reliance upon such appearances and stipulation or consent will not be set aside."

Most opportunely the statements of a Justice of our sister State, which is the law in the State, were delivered in a case involving the taking of lands, the resemblance between which and the case sub judice is striking, and it is respectfully submitted by the plaintiffs appellant a concise statement of the rule which should be adopted as law in this State.

It certainly should not take a lawyer to realize the chaos which would result in the practice of the profession, should an attorney, representing a client, be unable to rely not only upon oral stipulation, but upon a stipulation reduced to writing, made by an attorney representing another client, be it municipal or not. Is this Honorable Court, in effect, to instruct members of the Bar that a stipulation made by an attorney for a municipality is not enough, but suggest to them as the only other possible alternative, which they should insist upon in the interest of their client, a certified copy of a resolution or ordinance of the municipality itself. The most patent and obviously dangerous, to the municipality, part of this entire case and, to the mind of the writer, the most unfortunate, is the avidity with which the defendant seizes upon and tried to enforce the smaller award for the ridiculous sum of \$100 made for a parcel of property more than three times as large as the present one, while it blithely decides that in the case where they are called upon to pay the true value of property they will abandon

the proceedings. The appellant urges upon the Court a remembrance of the fact that these reports were prepared by the attorney for the Borough.

POINT II.

THE BOROUGH IS ESTOPPED BY ITS CONDUCT TO QUESTION THE VALIDITY OF THE CONDEMNATION PROCEEDINGS.

Not only is the Borough estopped by the operation and effect of the stipulation discussed in Point I of this brief, but by their conduct throughout the entire proceedings. The affidavits disclose that at a later date from the filing of the report, the municipal authorities considered the advisability of paying the award or abandoning the proceedings and did not decide definitely to abandon them until about July 12, 1927. Their decision to abandon was at most a half-hearted gesture. Checks drawn in attempted furtherance of the proceedings to abandon were not even drawn by the Borough until September.

Obviously, if the defendant or its counsel had considered the proceedings ended by the non-filing of the report within the time limited by the order, the subsequent and futile attempts on their part in the institution of proceedings to abandon would neither have been necessary nor attempted.

It is indeed elementary and fitting that where a person who has the right to accept or reject the transaction takes and retains benefits thereunder, or makes a choice of a course of action where there is more than one course of action open, he ratifies

the transaction and cannot avoid its obligation or effect, but is estopped to take a position at all inconsistent therewith.

21 Corpus Juris 1059, 1203.

Ketcham vs. Ketcham, 84 N.J.E. 577.

Erie R. Co. vs. Delaware R. Co., 21 N.J.E. 283.

Higbee vs. Camden Transportation Co., 20 N.J.E. 435.

Logically, and with reason, the honorable Bench below limits and narrows down the issues in this case by its opinion (State of Case, page 79, line 27) until the only issue really before the Court is the one as to whether or not the attorneys for the defendant have the power to make the stipulation heretofore discussed. The discussion under Points II and III of this brief is only for the sake of completeness.

POINT III.

THE ATTEMPT TO ABANDON THE CONDEMNATION PROCEEDINGS WAS INEFFECTUAL.

The statute which enables the defendant to abandon is as follows: The statute (C.P. 2187 - 15) provides:

"Any proceeding to condemn taken under this Act may be abandoned at any time within twenty days after filing of the report of the commissioners . . . upon payment to the owners and other parties who have appeared before the commissioners . . . their

reasonable costs and counsel fees, to be determined by a Justice of the Supreme Court, and upon filing a discharge of the lien of the notice of *lis pendens*."

The record shows that the report of the commissioners was filed on July 5, 1927, and it also shows that within twenty days a Justice of the Supreme Court "fixed" the costs, expenses and counsel fees, but it also shows that those were not paid until several weeks afterward.

The statute is plain. It provides that the abandonment is had by paying the moneys within twenty days, and the filing of a discharge of lien of the notiet of *lis pendens*. The moneys were not paid and hence the proceedings were not abandoned. That would seem to be as clear as crystal.

At least there was no stipulation extending the time. The affidavits will show that counsel for the plaintiffs-appellant directed the attention of counsel for the defenlant to the necessity of paying the moneys. There was no deceit or anything of that sort in the case. Counsel did not pay the moneys and the law required him to do in order to accomplish an abandonment.

The Court of Errors and Appeals case of *Vreeland vs. Jersey City*, 54 N.J.L. 49, is headnoted in the following language:

"1. Statutes conferring the power of condemnation under the right of Eminent Domain are strictly construed. Every condition described in the grant must be complied with, and the proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities

and the modes of procedure prescribed are the essence of the grant, which the Court can not disregard on a conception that they are not essential”

See also: *Loucheim vs. Hemsley*, 59 N.J.L. 149.

Manda vs. City of Orange, 66 Atl. 917.

Hampton vs. Clinton, 65 N.J.L. 158, 160.

THE PLAINTIFFS APPELLANT RESPECTFULLY PRAY THEREFORE, THAT THE JUDGMENT UNDER REVIEW BE REVERSED AND THAT OF THE CIRCUIT COURT BE REINSTATED.

Respectfully submitted,

HART and VANDERWART,

Attorneys for and of Counsel
with Plaintiffs-Appellant.

New Jersey Court of Errors and Appeals

WILLIAM H. DEAN and EVANGE-
LINE E. DEAN,
Plaintiffs-Appellants,

vs.

BOROUGH OF PARK RIDGE,
Defendant-Appellee.

On Appeal.

BRIEF OF DEFENDANT-APPELLEE.

Statement.

The Mayor and Council of the Borough of Park Ridge, a municipal corporation in the County of Bergen, adopted an ordinance providing for the acquisition of land belonging to the appellants, which the Borough sought to acquire for use in connection with its water supply system. At the same time the Borough of Park Ridge also sought to acquire another tract of land belonging to a corporation known as the Wm. H. Dean Co.

Being unable to agree with the owners for the purchase of the land the Borough instituted condemnation proceedings and applied to Mr. Justice Parker of the Supreme Court for appointment of Commissioners. Separate petitions were filed and by an order dated April 9th, 1927, Mr. Justice Parker appointed the same Commissioners in each case and directed them to file their reports on or before the 31st day of May then next. The Commissioner's reports were not filed within the time limited by the orders, to wit, May 31st, 1927 and were finally filed after the expiration of the time

appointed by Mr. Justice Parker, to wit, on July 5th, 1927.

The Commissioners not having filed their reports within the time limited by the order, the attorneys for the respective parties thereafter appeared before Mr. Justice Parker and applied for an order permitting the Commissioners to file their reports at a subsequent date. This application was refused upon the ground that our Eminent Domain Statute did not authorize such action. The attorneys then entered into a stipulation (case p. 31 and case p. 56), that although the time for filing the report of the Commissioners had expired that nevertheless the report should be subsequently filed *and if an appeal was taken from the award of the Commissioners that neither of the parties would object to the fact that it was filed out of time but would agree that it had been filed within the time limited.*

An appeal was taken as to the award of \$100.00 for a parcel containing 3.739 acres, but no appeal was taken from the award of \$9,900.00 for a parcel containing .843 of an acre (shown on map on last page of the State of the Case and designated as Plot 2 and Plot 1 respectively).

In accordance with this agreement the Commissioners filed their report on the 5th day of July, 1927 awarding the property owners \$9,900.00 as compensation for the land which was the subject of the condemnation proceeding. No appeal was taken from this award although the report had been filed out of time, in accordance with the stipulation.

The Borough of Park Ridge, at a meeting held July 11th, 1927 adopted resolutions (case pp. 47, 50), one to accept the award of \$100.00 for Plot No. 2 as shown on the map on the last page of the State of the Case and the other refusing to accept

the award of \$9,900.00 for Plot No. 1 shown on the aforesaid map, and further determining to abandon the proceedings.

Subsequently the owners commenced an action in the Bergen County Circuit Court against the Borough of Park Ridge to recover the amount of the award (see the complaint, case pp. 4, 5, 6 and 7). Upon the service of the summons and complaint the Borough of Park Ridge, through its attorneys, served notice on the plaintiffs of a motion to strike out the complaint upon the following grounds:

"1. Said complaint does not set forth a cause of action against the Borough of Park Ridge because the alleged report of the commissioners was not filed within the time directed by the Supreme Court Justice.

2. Because the plaintiffs, through their duly authorized attorneys appeared when the order was entered by the Supreme Court Justice, whereby the alleged proceedings in condemnation were abandoned."

This motion was denied (case p. 15). The defendant, Borough of Park Ridge, then filed its answer (case pp. 16 and 17) after which, motion was made by the plaintiffs to strike out the answer (case p. 18) and the Circuit Court subsequently, by order dated July 9th, 1930 struck out the answer and ordered final judgment to be entered for the plaintiffs against the Borough of Park Ridge for the sum of \$11,682.00 and costs. This judgment was duly entered (case p. 65).

From this order and judgment the defendant, Borough of Park Ridge appealed to the Supreme Court and the Supreme Court, by its opinion filed May 7th, 1931, (case pp. 76 to 80) reversed the judgment of the Circuit Court. Thereupon an appeal was taken to this Court.

POINT I.

The stipulation signed by the attorneys for the Borough is not applicable nor has it any legal effect upon the proceeding brought by the appellants.

Counsel for the appellants in their brief makes it certain that they intend to rely only upon one issue, namely, "Whether or not the attorneys for the defendant municipal corporation may bind their clients with a stipulation waiving a statutory provision." (See appellants brief, page 4).

It must be borne in mind that the Borough of Park Ridge undertook condemnation proceedings to acquire two separate tracts of land. They were obliged to proceed under the Eminent Domain Act because of their inability to agree with the owners as to the amount to be paid. Separate petitions were filed. Separate orders were made appointing Commissioners, the same Commissioners having been appointed in each instance. The order appointing them was dated April 9th, 1927. By its terms it directed the Commissioners to file their reports on or before May 31st, 1927. Their reports were not filed until July 5th, 1927, more than a month after the time allowed under the order of Mr. Justice Parker. Before the filing of the Commissioners' reports on July 5th, 1927 the respective attorneys entered into a stipulation on June 29th, 1927, wherein they stipulated and agreed that the report be filed and that in the event of an appeal being taken in the within cause that neither parties herein will make objection to the filing of said report and that it will be considered as though it had been filed as of proper

time (case p. 56). This same stipulation was entered into in both cases.

As we said before an appeal was taken from the award of \$100.00 by the appellants and no objection was raised at the trial as to the filing of the Commissioners' report out of time, but no appeal was taken to the award of \$9,900.00. Subsequently the Mayor and Council, by resolution, at a meeting of July 11th, 1927, abandoned the proceedings in connection with this award (case p. 47).

It is clear therefore that the stipulation did not apply to the action in the Circuit Court; that the respective attorneys never had any such intention in mind; that both, evidently, assumed that the filing of the reports out of time would not be taken advantage of by either side in the event of an appeal from the award and no such appeal having been taken, the stipulation spent its force.

Even assuming for the sake of argument that an appeal had been taken, and the attorney for the Borough at the trial had raised the question as to the validity of the condemnation proceedings; the stipulation would have been of no avail because the attorneys themselves were without power to enter into such a stipulation in view of the fact that the statute was mandatory and no agreement of counsel could be interposed to avoid the express directions of the Eminent Domain Act, as Mr. Chief Justice Gummere says in his opinion for the Supreme Court (case p. 76 at p. 79) :

"The idea that counsel in a case can by mutual consent expunge from a statute the legislative mandate contained therein, and by their agreement give life to the commissioners' report, notwithstanding that, by force of the statute, it was made by persons whose power to make it had ceased to exist, is in plain dis-

regard of legal principles; for, if it be sound, we see no reason why counsel, by mutual agreement, cannot abrogate a mandatory provision in any statute involved in a litigation between the parties whom they represent."

This language of Mr. Chief Justice Gummere is in full accord with the established law of this State.

The case of *Paret v. City of Bayonne*, 39 N. J. L. 559, cited by counsel for appellants in their brief, holds directly contrary to what they contend. They have merely quoted dictum from the opinion. In that case the Supreme Court very clearly held at page 564:

"Nor was it competent for the officers of the corporation to consent that an appraisal of damages should be made in a manner and by a proceeding different from that established by the charter. The officers of a corporation are agents, with only special powers such as are delegated to them by the act of incorporation, or such as are necessarily implied from the powers delegated. In making public improvements, at the expense and for the benefit of the owners of adjacent property, they are regarded as the agents of the individuals who, as owners of property benefitted, may be called upon to contribute for the costs and expenses. *Bond v. Newark*, 4 C. E. Green 376; *Schum v. Seymour*, 9 Id. 143. In the performance of those functions they are required to conform strictly to the method of procedure prescribed. Nowhere have the principles on which these doctrines rest been more frequently enunciated, or strictly enforced, than by the courts of this state. (Cases cited)

The common council, not having the power to consent that the amount of the plaintiff's compensation should be determined in this

manner, the consent of its attorney was a nullity."

This case was affirmed by the Court of Errors and Appeals in 40 N. J. L. 333.

We submit that there are instances where stipulations entered into by attorneys will be recognized and enforced by the Courts, but we are not aware of any instance nor have we been able to find any decision wherein an agreement or stipulation between attorneys attempting to waive, alter or change the provisions of a mandatory statute have been upheld or recognized, and in line with this our Court of Errors and Appeals has held:

"That agreements made by attorneys and counsel, as to the manner of conducting a cause, will be respected and enforced by the court; but such agreements are not legal contracts, and are under the discretion and control of the court; and an agreement wanting in mutuality, and by which, without the consent of his client, an attorney has waived his client's substantial legal right, will not be enforced. And in *Faughnan v. Elizabeth*, 58 N. J. L. 309, the Supreme Court held that a satisfaction of judgment entered by the clerk by virtue of a warrant from the attorney of record of the plaintiff, will be vacated if the attorney was without authority to satisfy the judgment, and the defendant was not misled and other parties are not affected by the vacation. See also, *Pursell v. Bennett* (Supreme Court), 68 N. J. L. 519, where it was held that in the absence of showing to the contrary only, it will be presumed that an acknowledgment of service was duly authorized.

And the same doctrine has been enunciated in Chancery. In *Dickerson v. Hodges*, 43 N. J. Eq. 46, Vice-Chancellor Van Fleet held that a solicitor has no authority under his retainer to surrender any substantial right

of his client without his client's consent. See, also, *Strauss v. Rabe*, 97 N. J. Eq. 208, 213." *Highgrade Cut Fabric Co. v. U. S. Stores Corp.*, 105 N. J. L. 324, 329.

To emphasize the consideration given by our Courts to the provisions of a mandatory statute and the persistency with which our Courts have refused to recognize any stipulation or agreement attempting to waive or vary the mandatory provisions contained therein, we may call the Court's attention to the case of *Neu v. Rogge*, 95 Atl. Rep. 632, where our Court of Errors and Appeals reversed a judgment of the Supreme Court, when it set aside a judgment and ordered that the complaint and summons stand and that the plaintiff may, within twenty days file the statutory notice *nunc pro tunc*, if no intervening rights have been acquired by parties who were entitled to such notice. In that suit which was a suit for deficiency on a bond, the defendant failed to file the statutory notice of his intention to sue as required by the statute, C. S. Vol. 3, p. 3423, Sec. 51, and the Supreme Court made an order permitting the plaintiff to file the statutory notice *nunc pro tunc*. Mr. Justice Kalisch, speaking for the Court of Errors said at page 634:

"The legislative policy appears to be that the entry of such a judgment without filing the statutory notice cannot be made, even though the defendant consents to such entry."

We therefore reiterate that even assuming that a stipulation had been consented to by the Borough of Park Ridge in the instant case, to consider the Commissioners' report as having been filed as of time, it would have no legal binding force or effect for the reason that it would have been an

attempt to evade the provisions of the Eminent Domain Act which are mandatory.

By the order of Mr. Justice Parker, dated April 9th, 1927 the Commissioners were to have filed their report on or before May 31st, 1927. They did not do this and by reason of Section 6 of the Eminent Domain Act, 2 C. S. page 2184 their powers were at an end, and the plaintiffs' remedy was to have proceeded by mandamus to compel the Borough of Park Ridge to have new Commissioners appointed and to proceed in accordance with the Eminent Domain Act.

Section 6 above referred to is very clear and specific. Among other things it provides:

“ * * * If the report is not made within the time limited, the powers of the commissioners shall cease and an application may be made to a Justice of the Supreme Court for the appointment of new Commissioners, on such notice as the Justice may direct * * * ”

POINT II.

An action at law cannot be maintained against the Borough to recover an alleged award of Commissioners in Condemnation.

The Borough of Park Ridge is a municipal corporation and is a subdivision of the State and as such is synonymous with a state agency such as the State Highway Commission.

Mr. Justice Bergen, speaking for our Court of Errors and Appeals said:

“ * * * Under the statute (referring to the Eminent Domain Act) the State Highway Commission, as an agency acting for the

State, is bound to initiate the condemnation proceedings in order to fix the compensation due landowners whose land is taken for public use. Such an agency can be required by mandamus to take proper proceedings to condemn the land, and in such proceedings the question whether there has been any encroachment can be settled by a jury on a proper issue framed. *Finger v. Doane*, 1 N. J. Adv. Rep. 773, 121 Atl. 455. When the damages have been thus ascertained, it is not to be presumed that the Legislature has not, or would not, make provision to pay for the land which it had taken in advance of compensation for the benefit of the State. The creation of such an agency with the power to condemn implies that the Legislature will make provision to pay the award, otherwise we would have to assume that the State intended to violate the Constitution by taking land without compensation, a thought not to be tolerated.

* * * His remedy is to require the State Highway Commission to fulfill their statutory duty, which is to take proper proceedings to condemn the land." *Haycock v. Jananarone*, 122 Atl. Rep. 805, 806. (Parentheses ours)

In view of the foregoing it seems almost unnecessary to argue the question of the abandonment of the proceedings by the Borough of Park Ridge, for it stands to reason that after the failure of the Commissioners to file their report within the time directed by the order of the Supreme Court Justice their powers ceased, and the proceedings automatically terminated. There would therefore be no necessity of any action upon the part of the Borough to attempt to abandon something, which by reason of the statute had no legal existence. In other words, the award of the Commissioners having been made after the time in

which it was directed to be filed by the Court's order, was a nullity and therefore incapable of being abandoned.

However, counsel for the appellants seemed to have argued this under Point III of their brief and the authority which they cite seems to bear out the contention of the defendant, wherein they say at page 13 of their brief:

"The Court of Errors and Appeals case of Vreeland vs. Jersey City, 54 N. J. L. 49, is headnoted in the following language:

'1. Statutes conferring the power of condemnation under the right of Eminent Domain are strictly construed. Every condition described in the grant must be complied with, and the proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and the modes of procedure prescribed are the essence of the grant, which the Court can not disregard on a conception that they are not essential'".

This fully coincides with what we contend, namely, that when the Commissioners in Condemnation failed to file their report as directed on or before May 31st, 1927 their powers ceased and any further action taken by them could have no legal effect nor bestow any rights upon the appellants. The appellants remedy at that time was to proceed as required by the statute, to give notice to the Borough upon application for appointment of new Commissioners and have a new award made, and not to attempt to bring an action in a law court for the recovery of a sum awarded under the Commissioners' report, which, because of their failure to comply with the statutory requirements became a nullity.

We feel that a careful reading of the affidavits

used on the argument of the motion to strike, in the Circuit Court will clearly convey to the Court the positions of the respective counsel. We therefore prefer to take no notice of the insinuations and aspersions cast upon us by counsel for the appellants, except to say that they are merely an attempt on the part of the appellants' counsel to extend the provisions of a stipulation made in good faith, beyond what was contemplated by the parties at the time of the making thereof and as counsel well knew or should have known, that his remedy, (if by any stretch of the imagination the report of the Commissioners could be sustained) was by an appeal as provided for in the Eminent Domain Act, which he failed to take.

It is our contention that the judgment of the Supreme Court was proper and should be affirmed, with costs.

Respectfully submitted,

MACKAY & MACKAY,
Attorneys for Defendant-Appellee.

HOWARD MACKAY,
Of Counsel.

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Attorneys for Defendants Appellees.

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