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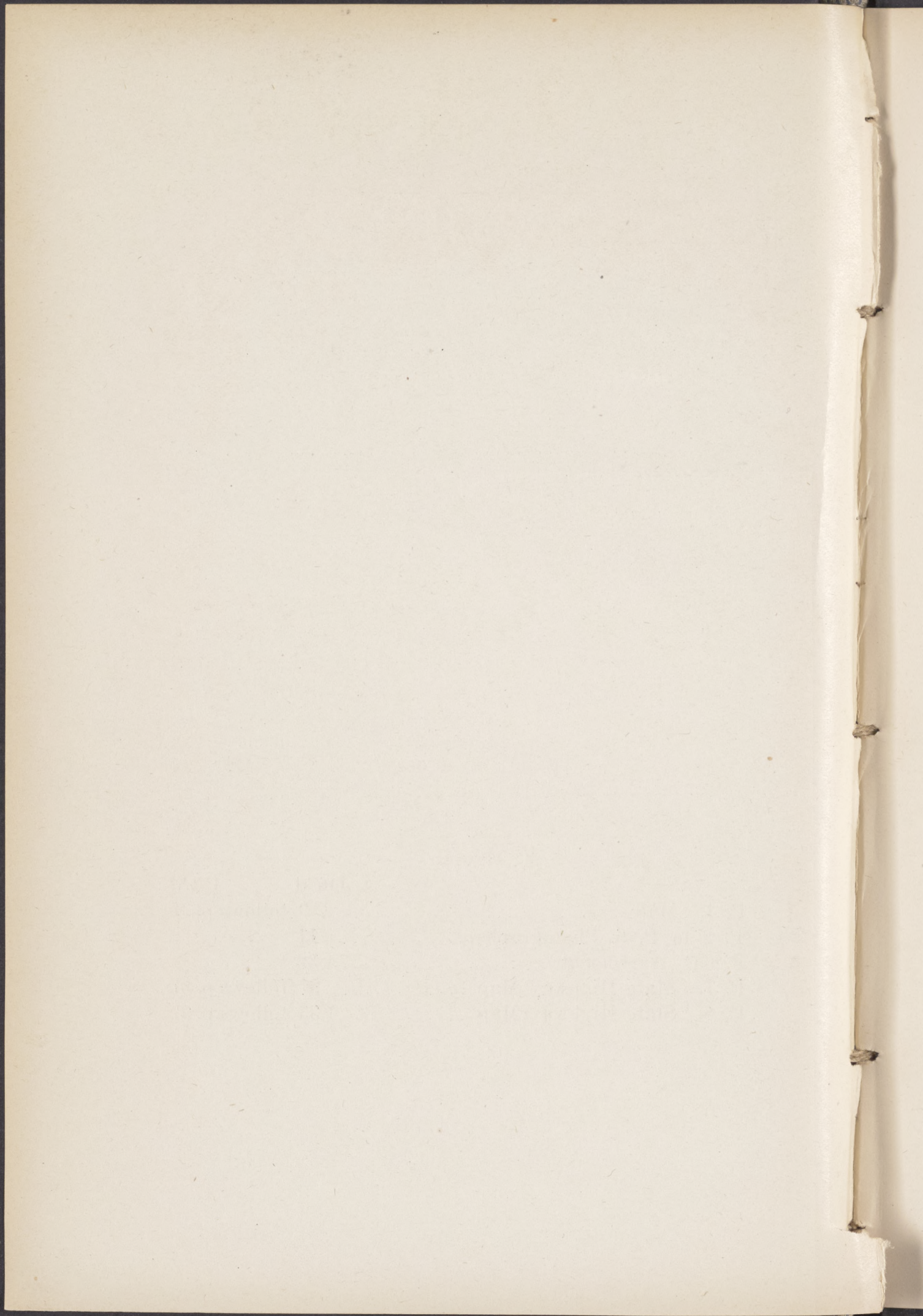
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Summons.

SUMMONS.

The State of New Jersey to Philip Jan-
narone: YOU ARE SUMMONED to answer the
(SEAL) annexed complaint of Allan T. Haycock in
an action at law in the Supreme Court. AND
TAKE NOTICE that unless you file your an-
swer to said complaint with the Clerk of the Supreme
Court at Trenton, within twenty days after service upon
you of this writ and the annexed complaint, the plaintiff
may proceed in the suit and judgment may be entered
against you.

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WITNESS, William S. Gummere, Chief Justice of the
Supreme Court at Trenton this twenty-eighth day of
November, nineteen hundred and twenty-one.

ENOCH L. JOHNSON,

Clerk.

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KING & VOGT,
Attorneys.

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Complaint.

COMPLAINT.

New Jersey Supreme Court

ESSEX COUNTY.

10

ALLAN T. HAYCOCK,

Plaintiff,

vs.

PHILIP JANNARONE,

Defendant.

Action at Law.

Complaint.

20

Plaintiff, residing at Bloomingdale, Passaic County, New Jersey, says:

1. He is the owner of certain property situate at Bloomingdale, Passaic County, N. J., located along a certain State Highway route, known as Route No. 8, on the Paterson and Hamburg Turnpike.

30

2. In the year 1920 the defendant raised the grade of the road in front of the property of plaintiff for a varying distance of from four feet at one end of the property to about six inches at the other end; that the property of the plaintiff is now from twelve inches to six feet below the grade of the road.

3. In laying said road the defendant also trespassed upon and took property of the plaintiff and used it for part of the roadway, and built a retaining wall one foot thick for the distance of one hundred twenty-five feet on the property of plaintiff.

40

4. Said retaining wall varies from one foot in height to over four feet in height, is constructed on plaintiff's property and so near to three large ornamental trees that by reason of such construction said trees will die.

Complaint.

5. The defendant also constructed or caused to be constructed a four-foot iron rail on top of said concrete wall.

6. The total frontage of the property owned by Mr. Haycock is two hundred thirty-four and three-fourths feet and the aforesaid wall was erected and the property taken from that portion of the aforesaid land which consists of two vacant lots. 10

7. The concrete wall is so constructed that access is prevented to said lots and by reason thereof they have become valueless.

8. Said property was taken and the concrete wall constructed without the consent of plaintiff and no compensation has been paid to him therefor.

9. By reason of the premises, plaintiff has been damaged in the sum of \$1,500 and therefore brings this suit.

KING & VOGT,
Attorneys of Plaintiff. 20

30

Answer.

ANSWER.

Filed December 21, 1921.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

ALLAN T. HAYCOCK,

Plaintiff,

vs.

PHILIP JANNARONE,

Defendant.

Action at Law.

Answer.

20

Defendant, residing at Belleville, New Jersey, says:
He denies the allegations of the complaint.

FIRST SEPARATE DEFENSE.

The alleged retaining wall is built entirely within the lines of the public highway referred to in the complaint.

SECOND SEPARATE DEFENSE.

1. The alleged change in grade was made and the retaining wall and iron rail were erected and constructed at the direction of the State Highway Commission.

30

2. Prior to the performance of any of the alleged work or entrance upon the alleged property of the plaintiff, the State Highway Commission, for adequate cause, had entered upon and taken the property upon which the alleged trespass occurred for the purpose and as a part of a State highway, had established the grade of the road in front of the property alleged to belong to plaintiff, and taken all other necessary steps required to be taken in accordance with the laws of the State of New Jersey in such case made and provided, and an Act of the Legis-

40

Answer.

lature of New Jersey, entitled "An Act to establish a State Highway Department, and to define its powers and duties, and vesting therein all the powers and duties now devolved by law upon the Commissioner of Public Roads and the existing State Highway Commission and Highway Commission," approved March thirteen, one thousand nine hundred and seventeen, and the supplements thereto and the amendments thereof, and was entitled to make the alleged change in the grade and erect the retaining wall and to do the other acts complained of. 10

REED & REYNOLDS,
Attorneys of Defendant.

A true copy.

ENOCH L. JOHNSON,
Clerk.

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*Reply.***REPLY.**

Filed November 23, 1921.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

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ALLAN T. HAYCOCK,

*Plaintiff,**vs.*

PHILIP JANNARONE,

*Defendant.**Action at Law.**Reply.*

Plaintiff, replying to the answer of defendant, says:

20

REPLY TO FIRST SEPARATE DEFENSE.

1. He denies the first separate defense.

REPLY TO SECOND SEPARATE DEFENSE.

1. He denies paragraph 1 of the second separate defense.
2. He denies paragraph 2 of the second separate defense.

30

OBJECTION IN POINT OF LAW.

1. At the trial of the within action plaintiff will object in point of law to the second separate defense on the ground that it constitutes no defense to plaintiff's cause of action.

KING & VOGT,
Attorneys of Plaintiff.

40

Frederick H. Millen, Jr., direct.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

November 6, 1922.

ALLAN T. HAYCOCK,

vs.

PHILLIP JANNARONE.

Action at Law.

10

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appear King & Vogt (by Elmer King).

For the defendant appear Reed & Reynolds (by Hugh B. Reed).

A jury is called and sworn.

20

Mr. King opens for plaintiff.

Mr. Reed opens for defendant.

FREDERICK H. MILLEN, JR., sworn in behalf of the plaintiff.

Direct examination by Mr. King.

Q You live at Butler or Bloomingdale? A Pompton Lakes.

30

Q What is your business? A Surveyor.

Q Profession I should have said. How far is Pompton Lakes from Butler? A Three miles.

Q How old are you? A Thirty-one.

Q How long have you known the town of Butler? A Fifteen years.

Q And Bloomingdale? A About the same time.

Q What is the name of the river that separates it?
A Pequannock.

40

Frederick H. Millen, Jr., cross.

Q Did you prepare a map at our request of the plaintiff's property? A Yes, sir.

Q Kindly unroll it. Did you make a survey of the property and put the distances and so forth that are delineated on the map? A Yes, sir.

10 Q Have you correctly delineated on the map what you discovered on the grounds? A Yes, sir.

Cross examination by Mr. Reed.

Q Where on that map is Mr. Haycock's property? A This is his house (pointing). This represents his front line, that being one corner and this is the other (pointing).

Q Have you designated the present road on the map? A This represents the concrete pavement (pointing).

20 Q That line represents the concrete pavement? A Yes, sir.

Q What does this line to the left represent? A That line represents the property line.

Q How did you determine the property line? A Based on a survey from the description and monuments.

Q Where have you outlined the width of the turnpike road, how did you determine that?

Mr. King. I object as it is not cross examination.

The Court. I will admit it.

30 A Using the description of the property and the monuments.

Q Did you have a description of the road, do you know where the line of the road on this side of the right-hand side was, how did you determine that? A By the property line.

Q Well, the property line would be influenced by the width of the road, wouldn't it?

40 *Mr. King.* I object until the map is admitted in evidence, these questions are inadmissible.

Frederick H. Millen, Jr., re-direct.

The Court. Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. King. I now offer the map in evidence.

The Court. I will admit it.

Map is marked Exhibit P. 1 in evidence.

10

Re-direct examination by Mr. King.

Q You have marked here on the left of the map in red line, "Sisco's wall," where it cuts across and falls down parallel to the most westerly side of this black line? A Southerly.

Q What does that show? A That red line shows the retaining wall.

Q What does this red line to the south of the retaining wall show? A The approximate portion of the dumped earth.

20

Q And you have marked here concrete walls with road pointing to the black? A To the red.

Q And here you marked "dumped," showing this is dumped in here? A Yes, sir.

Q What is the distance between A and B line which traverts the road bed? A About one hundred feet.

Q Look at your marks? A 114 feet to the end of the wall.

30

Q What is "B" known to represent? A It represents the way the cross section was taken.

Q And "A" likewise? A Yes, sir.

Q And 114 feet extends from the road on the top to the road on the bottom? A Yes, sir.

Q Now, the next black line to the north? A That is the margin of the concrete pavement.

Q Where is the corresponding margin on the other side? A For the black lines.

40

Frederick H. Millen, Jr., re-direct.

Q You have marked here 20 feet, what is that? A That is the width of the concrete pavement.

Q What is this down on the south side of the road? A Mr. Haycock's house.

Q Are there any houses built between this house and Sisco's wall up there (pointing)? A No, sir.

10 Q I direct your attention to the part marked "A", is that a further exemplification of the fill and dump? A Yes, sir.

Q Explain that to the jury. A This diagram represents a cross section taken at this point showing the level of the ground at the low and high earth dump, and retaining wall and rim above the retaining wall and concrete pavement, this being the fill above the original level (pointing). This distance (pointing) from the ground to the crown of the road is seven feet two inches. The distance from the ground to the top of the wall is seven feet. 20 The distance from the ground to the top of the earth dump is two feet nine inches. The distance from the ground to the top of the pipe is ten foot ten inches. The position of the property line at this point is on the wall.

Q How about the width of the fill? A About eight feet that is.

Q Now, I direct your attention to the exemplification marked "B", is the same thing true there? A Yes, sir.

30 Q Explain that to the jury, please. A This shows a diagram of a cross section taken from the bottom of line "B." The road dump at this point. This is the retaining wall and the pipe railing above it (pointing). This is the level of the road as it is filled. Four feet from the ground to the top of the wall, four feet three inches from the ground to the top of the road, three feet from the ground to the top of the dump, and seven feet seven inches to the top of—

Q At point "A" you have a distance of— A Seven feet. 40

Frederick H. Millen, Jr., re-direct.

Q And down at this point (pointing) "B," you have a distance of? A Four feet.

Q The distance between the two points is 114 feet?
A Yes, sir.

Q Now, where this point is cut off at the top, what does that show? A That shows the corner cut for the purpose of the adjoining property.

10

Q What sort of a wall is that, if any? A A dry stone wall.

Q Can you tell about the height of that wall? A It is the same height as the concrete wall at that point.

Q What have you to say as to this line on the south being the property line of the plaintiff's deed? A That satisfies the description of his deed.

Q I now show you some photographs taken over there and ask you whether you can identify them as being the portion of the concrete wall and fill? A Yes, sir.

20

Q Does it clearly represent the matter which it purports to represent? A Yes, sir.

Q I show you a photograph and ask you whether that represents this portion up in the top, showing the stone wall and a portion of the concrete? A Yes, sir.

Q Does it fairly represent that condition? A Yes, sir.

Q And another photograph showing the concrete wall and the topography of the lot and a portion of the fill, does it clearly represent that condition? A Yes, sir..

30

Q And finally, one showing the concrete road on top with the superstructure over the road, the pipes inserted.
A Yes.

Mr. King. I offer in evidence these five photographs.

Same are marked Exhibits P. 2, P. 3, P. 4, P. 5 and P. 6 in evidence.

Q Have you computed the number of cubic feet necessary to fill in to raise this land to the level of the present

40

Frederick H. Millen, Jr., re-direct.

road, permitting the same condition as to the height, so that the land below will still remain below? A Yes, sir.

Q Have you done so? A Yes, sir.

Q In directing your attention to the fill, which you have figured on, it extended from where to where? A Do you mean this (pointing)?

10 Q The fill, along the road first? A It would extend from a point here, where the fill begins, to the end of the property.

Q And how far back? A A distance of 25 feet back from the wall.

Q How far are the houses in Bloomingdale, are they built back from the street the usual distance along that road? A Anywhere from two to fifty feet.

20 Q What did you say about twenty-five feet being the approximate distance? A It is the approximate distance of the house here and above.

Q When you got this fill back to the front of the house, what did you do then, slope it down? A Yes, sir.

Q How many cubic yards would there be in that fill?

Mr. Reed. I object as immaterial and has no bearing on the proper measure of damages.

(Question withdrawn.)

30 Q Were you familiar with the condition of the road before this improvement was made and the location of the ground in reference to the level of the road, prior to this improvement? A Fairly well.

Q What have you to say as to the condition of the lot in reference to the road, the level of the lot in reference to the road? A About the same level.

Q And the condition is now in the manner you have just described to the jury? A Yes, sir.

40 Q Now, I will press my question. How many cubic yards would it take to fill in that lot for twenty-five feet back, with the proper slope from the street?

Frederick H. Millen, Jr., cross.

Mr. Reed. I object as it has no bearing on the proper measure of damages.

(Counsel argue.)

Mr. King. I will pass that point for the present time, I would like to inspect Mr. Reed's citation of the law during lunch hour.

Cross examination by Mr. Reed.

10

Q I understand you to say, Mr. Millen, that this red line at the left of the road runs along to the present wall, is that right? A Yes, sir.

Q That would satisfy the description of Mr. Haycock's deed? A The black line immediately beside it.

Q Would satisfy the description in his deed? A Yes, sir.

Mr. Reed. Have you a copy of that deed, Mr. King?

20

Mr. King. Yes, here it is.

Q Will you point out to me in the description, I understand this deed is from Catherine Pinkerton to Allan T. Haycock, dated the twenty-second of March, 1915, and recorded in the office of the clerk of Passaic County, in book 24, page 273. Point out the description that you say that will satisfy. A It satisfies all.

Q That description says, "Beginning in a southerly line of formerly the Paterson and Hamburg Turnpike road, of the intersection with Sisco's," did you take this black line to be the southerly line of the Paterson and Hamburg Turnpike road? A Yes, sir.

30

Q How did you determine that? A By the existing monuments.

Q What were the existing monuments, what did you find? A Pipe at this point (pointing), a distance down the road, and found monuments to the rear to which the deed refers.

40

Frederick H. Millen, Jr., re-direct.

Q Monuments in the rear of the property? A Yes, sir.

Q Did you find any monuments at the intersection of Sisco's and that black line? A No, it was covered.

Q How do you know it was covered? A If it was there it must have been covered.

10 Q How do you know it was there? A I don't know.

Q That is the beginning point, isn't it? A Yes, sir.

Q You say at that point there is no monument you could see? A No.

Q This black line above the letter "A," that is the lower of the two, letters "A"; what does that indicate? A The approximate level of the ground before the fill was made.

Q How did you determine that? A By the former relationship with the undisturbed part.

20 Q What do you mean by that, "former relationship," tell us the process you went through to determine that was the level of the road, and a cross section of the former turnpike level on "A"? A A knowledge of the lay of the land.

Q Your knowledge of the lay of the land? A Yes, sir.

Q How accurate was that knowledge, did you ever survey this property before the road was constructed by the State? A No.

Q That was guess work then? A Approximately.

30 Q Approximately guess work? A It was guess work.

Q Is that same thing true of the level "B"? A Yes, sir.

Re-direct examination by Mr. King.

Q I direct your attention to the last question, that your presumption of the level of the ground before the fill was guess work, did you mean what you say there? Let me call your attention to a photograph, it is a photograph marked P. 3, showing the fill and the original surface of the ground? A Yes, sir.

Frederick H. Millen, Jr., re-cross.

Q Now, what did you do, did you go according to the original ground that was there, as you could see it? A Yes, sir.

Q Where is there any guess work about that? A Here is the level I took.

Q If you could see the ground that was there for years and years and the fill, did you delineate the ground on "A" and "B" as you saw it, and as it existed for years; where is there any guess work about that? A The part that is covered. 10

Q Oh, the part that is covered? A Yes, sir.

Re-cross examination by Mr. Reed.

Q Can you tell me whether or not the level of the road as it existed prior to 1919, when the State took it over, at cross section "B," was higher or lower than the land to the left of it here, Mr. Haycock's land? A Slightly higher. 20

Q Do you know how much higher? A Not exactly.

Q That is guess work then, how much higher it was? A Yes, sir.

Q And that same thing is true on cross section "A"? A Yes, sir.

Q Now, Mr. Millen, that pile of earth you have marked in red, indicated along the road by an irregular line, and on this point "B" and "A" at the right-hand side of the road, can you point those out to me on any of these photographs? A Yes, here it is on that, and here, there it is there. 30

Q That is the earth immediately against the concrete? A Yes, sir.

Q In each instance? A Yes, sir.

Q That is on three of the pictures? A It appears on those three.

Q And not on these, because these are different view points. A That's right. 40

Allan T. Haycock, direct.

Mr. Reed shows the pictures to the jury, showing the fill indicated on the map in red.

10 *Mr. King.* I want to introduce by consent of the other side, the title deeds, which I will read in the record. "J. L. S. to A. H. Vreeland, recorded No. 5-220. A. H. Vreeland to John Pinkerton recorded in K-8-605. John Pinkerton and Catherine, his wife, to F. R. Casterline, recorded in F-13-124," that was because of a correction deed. "Catherine Pinkerton, widow, to Allan T. Haycock, 1909, recorded in H-20-396, and then a deed from Catherine Pinkerton, widow, to Allan T. Haycock in 1915, recorded in X-24-273.

20 *Mr. King.* It is stipulated by and between respective counsel that the defendant erected the wall and the railing and put in the fill.

Mr. Reed. I will agree.

ALLAN T. HAYCOCK, sworn in behalf of the plaintiff.

Direct examination by Mr. King.

Q Where do you live? A Bloomingdale.

Q How long have you lived there? A Thirteen years.

Q Your age is what? A Fifty-eight.

30 Q Where did you live prior to living in Bloomingdale?
A Butler.

Q How near is that to Bloomingdale? A Just across the river.

Q How long have you known this property in question? A Forty years.

Q Do you know how it was used prior to the time you bought it? A As a farm.

Q Who farmed it? A A. H. Vreeland.

40 Q For how many years? A I do not know exactly, I would say fifteen.

Allan T. Haycock, direct.

Q That makes fifteen and the thirteen you were there, twenty-eight. Now, who had it before Vreeland? A Vreeland had it so long as I can remember.

Q That would be how many years? A Well, forty, I can remember since I was eighteen years old.

Q You are the plaintiff who complains about the erection of this wall? A I am. 10

Q I wish you would tell the jury, before this improvement was made, what relation the old road bore to your property, give the height and the depth of the property below the old road? A My property was about eighteen inches below the old road.

Q That is the county road? A I presume it was; yes, sir.

Q I now direct your attention to your own property and before the state road was put in, what did you do with reference to the vacant land? A Used it for a garden. 20

Q Cultivated it? A Yes, sir.

Q How many years had you cultivated it? A Five or six.

Q And had it been cultivated before that? A Oh, yes.

Q For how many years? A I don't remember how many years Mr. Vreeland farmed it, but I remember seeing corn growing on that ground when I was a boy.

Q Do you know where the concrete wall is next to your house? A Yes, sir. 30

Q Give the relation of the present wall to the place where the land was cultivated? A It was cultivated up to the wall.

Q Over these years you have spoken about? A Yes, sir.

Q When you cultivated the land, where did you cultivate it? A Up to where the wall is now.

Q You have heard the testimony of the engineer as to the fill shown by the red line on the map, what have you to say about his testimony? A I would say it is right. 40

Allan T. Haycock, direct.

Q When was this earth put in on your property, as you claim? A In 1920.

Q And put in by Mr. Jannarone, the contractor? A Yes, sir.

Q When was the wall erected? A In August, 1920.

Q Who erected the wall? A I cannot answer that.

10 Q I should not have asked you that. We have stipulated that was put in by Mr. Jannarone. I direct your attention to the map on which the iron pipe is marked and you will notice that there is a red line drawn across there, what is there up there? A A rubble wall.

Q How was the lot before that time? A It ran up square.

Q Does your block line show where the lot was before? A Yes, sir; there is some iron pipe in there.

Q Your lot formerly ran up to a point in there (pointing)? A Yes, sir.

20 Q This is a rubble wall the defendant built? A Yes, sir; a new stone wall.

Q How high is the stone wall? A Seven or eight, probably nine feet.

Q The stone wall begins there? A At the end of the concrete.

Q And extends down to Sisco's wall? A Yes, sir.

Q Is there a road above this Sisco's wall? A A road that goes into the Erie coal office.

30 Q This road was also raised? A Yes, and a sewer put in there.

Q Let us go back to that iron pipe you spoke of. There was one there? A Yes, sir.

Q When did you see it? A I put it there when the surveyors made the property.

RECESS FROM 1 TO 2 P. M.

40 Q You were testifying before lunch that you had cultivated this as a garden up toward the road, now, before the State or Jannarone put in this concrete wall what was

Allan T. Haycock, cross.

there to hold up the small embankment of the road? A Rocks, they placed them there and piled them up and built the road on them.

Q Was that a perpendicular or a slanting wall? A Just a rough stone wall with boulders sticking out.

Q Where did Jannarone erect his wall with reference to the stone that separated the county road? A Just inside the county road. 10

Q Assume, if you will, that this black line is the line of the road? A The county road.

Q Yes, and this red line is the concrete wall put up now, we will say erected, this concrete wall was put on several of the stones put there before? A Yes, sir.

Q What have you to say about possession of the land up to the old stone wall which showed the end of the incline of the county road? A I used to farm it up to that.

Q What have you to say about your predecessor in title in the use of this land up to the stone wall, put in by the county, I mean Vreeland, how far did he farm it up? A As far as I know up to some point up to that. 20

Q (*By the Court.*) Farmed it up to the stone wall? A Yes, sir.

Cross examination by Mr. Reed.

Q Mr. Haycock, did you live, I understand in this house, indicated on here toward the bottom? A Yes, sir. 30

Q Were you home when this work was being done? A Not when the wall was erected.

Q You were not home when the wall was erected? A No, sir.

Q You were ill and away? A I was in the Paterson General Hospital.

Q Had they begun the work before you went away? A Yes, sir.

Q How far had it progressed? A They were busy digging the drainage. 40

Allan T. Haycock, cross.

Q Digging the drainage along the road? A Yes, sir.

Q And it was completed when you returned? A Yes, sir.

Q What work had been finished at that time? A The wall, not the road.

Q They were still at work on the road when you returned, putting up the railing? A No, they didn't put up the railing until afterwards, they built the new stone wall there, concrete wall, around that corner and down to Sisco's wall before they erected the railing.

Q That was after you returned? A It was.

Q Do you remember who was on the job there, when you returned, beside Mr. Jannarone? A I don't know the people who were working for him.

Q Do you know the engineer, Mr. Davenport? A Mr. Davenport.

20 Q Did you see him? A I think so.

Q Did you talk to him? A I think he was the man who came to my house after the wall was finished and wanted to build it down in front of my house.

Q You talked to him about that? A Yes, if he is the man, I think he is.

Q Had you said anything to him before, about building the wall down in front of your house? A No, sir.

Q You had not spoken to him about that? A No, sir.

30 Q Now, as I understand you, the county road, can you tell us, indicating on the map, to what point the county road extends? A To that black line, I would say.

Q The county road extends to the black line on the map here (pointing)? A Yes, sir.

Q And that was roadway, was it? A Not the bed.

Q How far does the road bed extend? A I should say four to five feet.

Q You mean the used portion of the road? A Yes, sir.

40 Q You spoke of the wall built there by the county, I understand it was a rough stone wall? A That was

Allan T. Haycock, cross.

where they placed different rocks and dumped the road dump.

Q Your land up here between "A" and "B" was lower than the county road as it existed? A Yes, sir.

Q How much lower? A Eighteen inches.

Q And then from the travelled road the side slanted off to your property, didn't it? A You mean entirely off the road? 10

Q From the edge of the road 18 inches high down to the level of your property? A Yes.

Q How wide was that slant? A Two and a half feet.

Q Do you mean that where the slant begins was on this line (pointing)? A Yes, sir.

Q And then slanted on toward your property? A Yes, sir.

Q Well, perhaps I haven't got that clear in my mind. Where that slant began to slant, up from there or down from there (pointing to the map)? A You mean from the edge of the county road? 20

Q Yes; from the black line did it slant up or down? A Both ways.

Q That was part of the fill the county had put in? A Yes, sir.

Q When did the county first fill that that way? A I do not know.

Q Before your request? A Before I moved over there. 30

Q You said you recalled this vicinity and the condition of things there for about forty years back? A Yes, sir.

Q That would take us back to 1882, wouldn't it? A Yes, sir.

Q In 1882 what were the conditions there, do you remember? A No; I just remember going up the road at different times.

Q You don't know the width of the road? A I was not interested. 40

Allan T. Haycock, cross.

Q When did you first become interested so you could tell as to the width of the road? A In 1909.

Q That is when you bought? A Yes; when I bought.

Q Your deed was dated 1915, wasn't it? A That was for one deed, yes, sir.

10 Q Why did you obtain that deed? A Because the woman I bought off gave me a deed for the whole strip down to the bridge, she had sold half the lower end and hadn't deducted it off.

Q The first deed you obtained in 1909? A Yes, sir.

Q And the first time you became familiar with the conditions was then? A Yes, sir.

Q And you didn't know the conditions of the road prior to 1909? A No, sir.

Q Did the county build the road in 1909? A Yes, sir, it was the county road then.

20 Q Was it that same width then? A Yes, the same as that.

Q As it was in 1919? A So far as I know.

Q Would you have known if there had been any change? A After I moved over?

Q You moved there in 1909, you didn't notice any change after 1909 until the State took the road over? A No, sir.

30 Q You spoke of your ground being eighteen inches below the crown of the road in 1909, how far did that extend, it didn't extend up in front of your house, did it? A No, sir.

Q Your house and the road were about on the same level? A I might say so, the front of that house may have been six inches lower.

Q The front of your house may have been six inches lower? A Yes, sir.

Q How much lower is it now? A Yes, sir.

Q In front of your house? A Yes, sir.

40 Q The wall does not extend in front of your house? A No, sir.

Frederick H. Millen, Jr., direct.

Q The wall stops where this road line stops? A Yes, sir.

Q Well, now, can you tell me how far down the map here, what is this, south? A East, that way I call south (indicating).

Q How far east does the fill commence? A Right at that corner.

10

Re-direct examination by Mr. King.

Q I don't know whether I understood correctly because counsel was between you and me, but I gathered that he asked you speaking now of the fill of the county, to get this straight, I ask you how far the fill came, did it extend down to the black line and when the concrete wall was built by Jannarone without disturbing this wall that came down from the old county road? A Yes, sir.

Q The other counsel asked you this, "And the fill from the county road extended beyond this line here (indicating) and you said yes," now both of those are not true? A No.

20

Q Now, which is true, did the fill from the county extend beyond this black line that is there (indicating)? A No.

Q And did the concrete wall built by Jannarone and the fill put in by the county? A Exactly.

Re-cross examination by Mr. Reed.

Q Do you mean then that for the entire length of this wall, it was along the edge of the end of the fill of the county? A Yes, sir.

30

Q Just touched the edge of it? A Yes, sir.

FREDERICK H. MILLEN, JR., recalled in behalf of the plaintiff.

Direct examination by Mr. King.

Q Did you make a computation of the number of cubic yards it would require to fill in to the grade of the present

40

Frederick H. Millen, Jr., direct.

street, between the point shown by the concrete wall and back from the wall twenty-five feet, with the addition of enough earth to fill in the slopes so it would contain itself?

A Yes, sir.

Q Now, what was the amount of your computation?

10

Mr. Reed. I object.

(Counsel argue.)

The Court. Your question, as I understand it, was the number of cubic yards that would have to be used to fill in the property of the plaintiff south of this retaining wall.

Mr. King. Yes, sir, about four feet deep. I want to run the fill from the top of this wall back 25 feet, which is in front of this house, and then sloping down to support it.

20

The Court. (Pointing to the map.) That is this way and sloping down?

Mr. King. Yes, your Honor.

The Court. Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q (*By Mr. King.*) Now, can you tell me the quantity it would require to fill from the concrete wall back 25 feet with the proper slope, the level of the earth filled in to be eighteen inches below the present road?

Mr. Reed. I object as it is immaterial.

The Court. Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

Q Are there any business places on this road, near to the property in question? A Yes, sir.

Samuel R. Donald, direct.

Q Where? A Between Mr. Haycock's and the main street of Butler.

Q That is down? A This way, east.

Q What is the nearest business place? A I do not know the name of it, it is an ice cream parlor.

Q How far away? A About three hundred feet.

Q Are there any other places except that one? A 10
Not near.

Q What have you to say about the remainder of the land, what is that used for? A There is a coal and lumber yard above there.

Q That is down on the railroad? A Yes.

Q Now, again I ask you about the number of cubic yards it would take to fill from the concrete wall back for 25 feet, 18 inches below the present surface of the road, with the proper embankment to fill.

Mr. Reed. I object for the same reason. 20

The Court. Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

SAMUEL R. DONALD, sworn in behalf of the plaintiff.

Direct examination by Mr. King.

Q Where do you live? A At Bloomingdale. 30

Q It is the same Bloomingdale in which this property is located? A Yes, sir.

Q How long have you lived there? A Forty-one years.

Q How long have you known this property in question? A Forty-one years.

Q What is your business? A Real estate and insurance, at the present time.

Q How long have you been in the real estate business? A Twenty-five years. 40

Samuel R. Donald, direct.

Q Have you sold any real estate adjacent to the property in question? A Yes, sir.

Q When? A During these twenty-five years.

Q How recently? A I cannot answer just recently.

Q About how long ago, what is the nearest piece of property you have sold in this vicinity? A About 600
10 yards, that is about five or six or seven years ago.

Q Have you known of any property being sold near to this property in question? A Yes, sir.

Q When was that sale? A There is a tract being developed across the street, that is the Vreeland tract, that is being developed now.

Q It is? A Yes, the property is being sold often, not every day, but often.

Q Quite frequently? A Yes.

Q Many lots were sold? A Yes, sir.

Q Is there building being done over on the Vreeland
20 property? A Yes, sir.

Q Have you learned what these lots brought? A Yes, sir.

Q What relation does the property in question as to the desirability for building, bear to the lots on the Vreeland tract? A This originally was part of the Vreeland tract, the Vreeland tract now has been developed across the street, this has been disposed of several years ago, and the remaining tract across the street on the
30 north side is the tract that is being developed now into popular building lots 50 by 100, 125 some, made up in building lots 50 feet front, some 100 feet, and some 125 feet.

Q You say squares have been sold? A Oh, yes.

Q Have any buildings been erected on those lots? A Yes, several, perhaps fifty.

Q Bloomingdale is how large a town? A Well, between twenty and twenty-five hundred inhabitants.

Q Do you know how the town is developed and where?
40 A Yes, sir.

Samuel R. Donald, cross.

Q Have you seen it developed? A Yes, sir.

Q Have you kept your eyes and ears open to learn of sales, have you? A Yes.

Q So you could say you have a fair knowledge of value of property around there? A Yes, sir.

Q What, in your opinion, was the fair value of a 50-foot lot the depth of the plaintiff's lot up at the corner where it is marked "Sisco," that corner lot before the new road was put in? 10

Mr. Reed. I object. I don't think he is qualified, or he hasn't shown he is qualified.

Cross examination by Mr. Reed.

Q How long ago have you sold any property in this vicinity? A I have sold several tracts on Main street.

Q What? A Main street, of which this is a continuation. 20

Q How long ago? A Well, I sold one, in mind, about two years ago, further down Main street.

Q That is further south? A Further east.

Q You get more to the center of the town that way? A No, south would be Butler from this property.

Q Where would be Bloomingdale? A Further east.

Q Further east would be down the road? A Bloomingdale.

Q You sold one about 600 yards away from this? A That is four or five years ago, but recently, further east, I sold about two years ago. 30

Q What sort of property was that? A Business property, vacant lots.

Q What did it consist of? A Vacant lots, 43 foot front by, well, running to the Pequannock river, 190 feet deep.

Q Where with relation to Mr. Haycock's property is the Pequannock river? A It runs directly to the river.

Q His property slopes down to it? A Yes, sir. 40

Samuel R. Donald, cross.

Q What sort of property is this on the north side on this road? A Farm land originally.

Q What? A Farm land it was originally.

Q How does it lie with respect to the road? A There are a great number of acres of level land and then it raises.

10 Q In other words, the slope of the land is from this Vreeland tract down to the river? A Yes, sir.

Q A gradual slope or approach? A No, there is several acres of level land.

Q On which side of the road? A On the north side, both sides.

Q What depth? A Well, beginning in the front of the Haycock tract running down to a depth of five or six hundred yards.

20 Q To the river? A No, north, then that would run east, level land of several acres so, there are two or three street on that level land.

Q That is north? A Yes.

Q What about south? A There is nothing south except a soft rubber mill at Butler.

Q Is it level south of the road or does it slope? A It is built up with factories, hard rubber mills down there.

Q This Vreeland tract north is on a residential tract? A Yes, sir.

30 Q Developed? A Yes, sir.

Q Lying level with the present road? A Yes, sir.

Q From your own knowledge you have no sale made of this Vreeland tract, what you know about it you have heard from others? A I am in touch with them, I know prices.

Q It is what someone told you about it, not what you saw yourself? A From the owners themselves.

40 *Mr. Reed.* I object to the testimony because it appears that the only recent sales made by him

Discussion.

were in different parts of town and for a different kind of property and as to his knowledge of the tract across the road it is all hearsay. And the further objection that it is not the proper measure of damages.

(Counsel argue.)

Adjourned to Wednesday, November 8, 1922, at 10 A. M.

10

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT, 35.

Wednesday, November 8, 1922.

20

ALLAN T. HAYCOCK,

vs.

PHILLIP JANNARONE.

*Action at
Law.*

Counsel present as before stated.

The Court. Before I outline my theory of the case, will counsel admit that it is true that the State elevated this road, and for the purpose of elevation took possession of whatever property they took prior to condemnation proceedings. That is, that the State went in there and, whether they condemned or not does not interest me at this time, but they went in there and took possession of the road under the statute giving them authority to enter before they condemned.

30

Mr. Reed. I don't want it to appear that they took any property of the plaintiff.

40

Discussion.

The Court. No, but they took the property they actually took.

Mr. Reed. Yes, but as far as I know they made no condemnation.

The Court. Will you admit that, Mr. King?

Mr. King. I do.

10 *The Court.* Then, my thought is this, if the case reaches the jury, and they find as a matter of fact, that the retaining wall was not built on the plaintiff's land, that would, of course, dispose of the case.

Now, turning to the other and more difficult phase of it: There is a statute, I think, which empowers the State to take land for the purpose of building a highway and to enter upon land before it commences condemnation proceedings. I think counsel both agree with me as to that law. Now, if it appears that the State in this case
20 went upon the land of the plaintiff, under that statute, it would enter the land rightly, and so it would not be a trespasser, and, of course, following that logic any servant of the State, or employee of the State would not be a trespasser. When then did any employee of the State become a trespasser? Now, if it appears that the contractor in this case, or defendant, went upon this land as I have indicated and was not a trespasser, completed his work and left it; and if it appears that the State did
30 not take proceedings to condemn the property, I do not see how you can hold the contractor for this reason. If you accept the most favorable theory, that having gone upon the property rightfully, they have done something wrong, still, that wrong was done after the contractor had left the property, if that is a fact, and I don't see how you can call the contractor a trespasser, and my feeling would be in that instance that I would not let the jury have the case, if those facts were proved.

Now, I think I make myself clear. The State goes
40 on legally and the contractor goes on legally, and the

Discussion.

contractor finishes his work and is not a trespasser at all, and then the State by its wrong doing, if it is true the property belonged to the plaintiff, which is a question, if that is true, the State refused to condemn, and in that case I think the law would protect the contractor who had gone on the land not as a trespasser, but under the protection of the legislature, completed his work and left there, and I do not think you can insist that the State not having condemned, both can be held as joint *tort feasers*, under the theory that while they had gone upon the land legally they had abused that privilege by not following out fully the provisions of the statute, and therefore became trespassers *ab initio*. And if you go a step further as to the damages, which I think is the most difficult phase of the case, the only measure of damages in this case would be the value of loss of enjoyment of the property. It seems not a very complete designation of what the measure of damages may be, but it has been interpreted by decisions. It is the actual value of the loss of enjoyment, and would not in my opinion give the plaintiff a right to prove the cost of taking down this wall, or the cost of filling behind the wall, or the right to recover the difference between the rental value before or after the injury, in the absence of positive proof of pecuniary loss. The plaintiff could prove his actual losses; pecuniary losses as a result of his inability to enjoy the property, as under *Lewis v. P. R. R.*, in 76 N. J. L., wherein the house was moved and the rental was lost and the Court permitted that to go in as the damages. But, I do not think in this State we have gone as far as to state we will permit differences of rental value before and after, in the absence of pecuniary loss. This is dissimilar to the *Manda* case. In this case I think we have to follow the damages as indicated in the case of *Ackerman v. Nutley*. This is my opinion of the damages, which would not be very substantial, I do not imagine.

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30

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Discussion.

Mr. King. May I offer proof of the number of cubic yards it would take to fill in from the wall to the building, which question counsel of the other side objected to, and the Court sustained?

The Court. Yes.

10 *Mr. King.* I now offer the cost of the removal of the wall.

Mr. Reed. I object.

The Court. Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. King. As to each of these rulings I take an exception.

20 *The Court.* Oh, yes, you may have an exception.

Mr. King. Now, I would like to call for contract between the State Highway Commission and Phillip Jannarone, the contractor.

Mr. Reed. I hand you the original contract between the State Highway Commission and Phillip Jannarone.

30 *Mr. King.* I want to offer this in evidence. This will put the case in such a position that if I decide to take an appeal it will put all the facts before the Court. I assume defendant's counsel will make a motion for a non-suit.

The Court. Put it all in.

Mr. King. I offer in evidence as part of our case an agreement between the State of New Jersey Highway Department and Phillip Jannerone, defendant, covering Route 8, Section 3.

The same is marked Exhibit P. 6A in evidence.

Mr. King. I offer in evidence a blue print given by the State Highway Department to Phillip Jannarone.

40 Same is marked Exhibit P. 7 in evidence.

Discussion.

Mr. King. I offer blue print showing the construction of the wall with the statement made by defendant's counsel that the abutment has been moved in two feet.

Mr. Reed. Two feet north of the center line as the work actually was constructed.

Blue print marked Exhibit P. 8 in evidence.

The Court. I am assuming every fact which, of course, is most favorable to the plaintiff, which is as you told us that you do own the land, and that the State entered that land by legislative rights to elevate this road, and that they did build a wall on the land of the plaintiff. I am assuming, too, that it was built by the defendant in this case under a contract with the State, and that the State had never condemned the land. I am making all those assumptions in your favor. 10

Mr. King. There is one thing more which I think should appear, that is, when the work was begun and when the work was completed, to stipulate that on the record, for if the rule should apply that they had to condemn within a reasonable time, there is nothing to show when the work was begun or when it was completed. 20

The Court. Why can't you do that, put that on the record, when the work was begun and when it was completed?

Mr. Reed. The contract was awarded April 8, 1920, and the work was accepted September 14, 1921, that was after the completion and the inspection of the work. 30

Mr. King. I want one more date, please. The physical completion of the work.

Mr. Reed. Probably about September 1, 1921, the work was completed.

The Court. When was the work physically commenced?

Mr. Reed. May, 1920.

The Court. Is that the work on the wall? 40

Motion for a Non-suit.

Mr. Reed. On the wall, the work was commenced about August, 1920, on the wall, and it took two or three weeks to build the wall, they began in August, 1920, as near as we can recall.

The Court. Do you make a motion for a non-suit?

10 *Mr. Reed.* Yes, I move for a non-suit to be granted in this case on the ground it appears in effect that the State has been made a party, and the State cannot be made a party to an action suing a contractor who has done the work under the direction of the State Highway Commission, an arm of the State, and as he has been held in Curtis against the State Highway Commission "an action against it is an action against the State itself." On the further ground that even if the land upon which this wall was constructed and which it is complained is the land of the plaintiff, the State constructed this highway
20 under the statute of the right to enter upon that land and take it prior to condemnation, having had that right, and a road having been constructed by this contractor under a contract with the State for the purpose of constructing the road, he cannot be a trespasser, and unless he is a trespasser this action must fail.

I think I should add to make a further reason for my motion for a non-suit, that it does not appear from the testimony that this wall was erected upon the land of the
30 plaintiff.

The Court. For the purpose of this motion, all of the facts as testified to by the plaintiff and the most favorable inference from those facts are resolved in the plaintiff's favor, and the motion admitting that denies sufficiency of the facts in law to make out a case. The Court feels that assuming that this wall was built on the plaintiff's land and built there by the defendant, Phillip Jannarone, under a contract with the State of New Jersey, the State having proceeded to enter the land by au-

Motion for a Non-suit.

Judgment.

thority given it by the legislature to enter land which it contemplated condemning, and the entry of the State having been by authority of law, which would have been a trespass but for such authority, and it having been admitted that the wall was built, the State did not, as a matter of fact, take proceedings to condemn the land.

I am of the opinion that the defendant cannot be held 10
in this action because he was not a trespasser when he did the work and could not be made a trespasser *ab initio* after the work was completed by a subsequent tortious act or omission of the State in which he did not participate.

I will grant defendant's counsel motion and allow plaintiff's counsel to have an exception.

Exception noted as ground of appeal.

20

This case was tried before Judge Worrall F. Mountain, to whom the same was referred for trial by Chief Justice Gummere, with a jury at the Essex Circuit, on November 6th, and 8th, 1922.

At the conclusion of the plaintiff's case, the Court ordered that plaintiff be non-suited.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant, Philip Jannarone, do recover of the said plaintiff, Allan T. Haycock, his costs which have been taxed at the sum of thirty-nine dollars and ten cents (\$39.10.)

Costs- \$39.10

Judgment entered November 23rd, 1922.

Wm. S. Gummere, C. J.

Notice and Grounds of Appeal.

NOTICE OF APPEAL AND GROUNDS OF APPEAL.

Filed December 8, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	ALLAN T. HAYCOCK, <div style="text-align: center;"><i>vs.</i></div> PHILIP JANNARONE,	Plaintiff, Defendant.	} <i>Action at Law.</i> } <i>On Appeal</i> } <i>from the Su-</i> } <i>preme Court.</i> } <i>Notice of</i> } <i>Appeal and</i> } <i>Grounds of</i> } <i>Appeal.</i>
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20 To MESSRS. REED & REYNOLDS,
Attorneys of the Defendant.

TAKE NOTICE that plaintiff, ALLAN T. HAYCOCK, appeals from the judgment entered in the Supreme Court in the above-entitled suit, to the Court of Errors and Appeals in the last resort for all causes, and assigns, as Grounds of Appeal, the following:

1. Because the Court found in favor of the defendant and against the plaintiff.
- 30 2. Because the Court granted a motion for a non-suit in favor of the defendant and against the plaintiff.
3. Because the Court held that the defendant's acts did not amount to a trespass upon the property of plaintiff.
4. Because the Court refused to permit evidence to be taken of the number of cubic yards it would take to fill in the property of the plaintiff.
- 40 5. Because the Court refused to permit evidence to be introduced of the cost of the removal of the wall on plaintiff's property, which had been constructed by the defendant.

Stipulation.

6. Because the Court refused to permit evidence to be introduced as to the depreciation in value of the property of plaintiff by reason of the acts of the defendant.

7. Because the Court held that since the defendant trespassed on the property of the plaintiff by reason of the fact that he had a contract with the State Highway Commission, he was freed from liability. 10

8. Because for divers other reasons, the decision of the Court granting a non-suit in favor of defendant and against the plaintiff, upon which judgment was entered, is illegal and oppressive and should be set aside.

KING & VOGT,
Attorneys of Plaintiff.

STIPULATION.

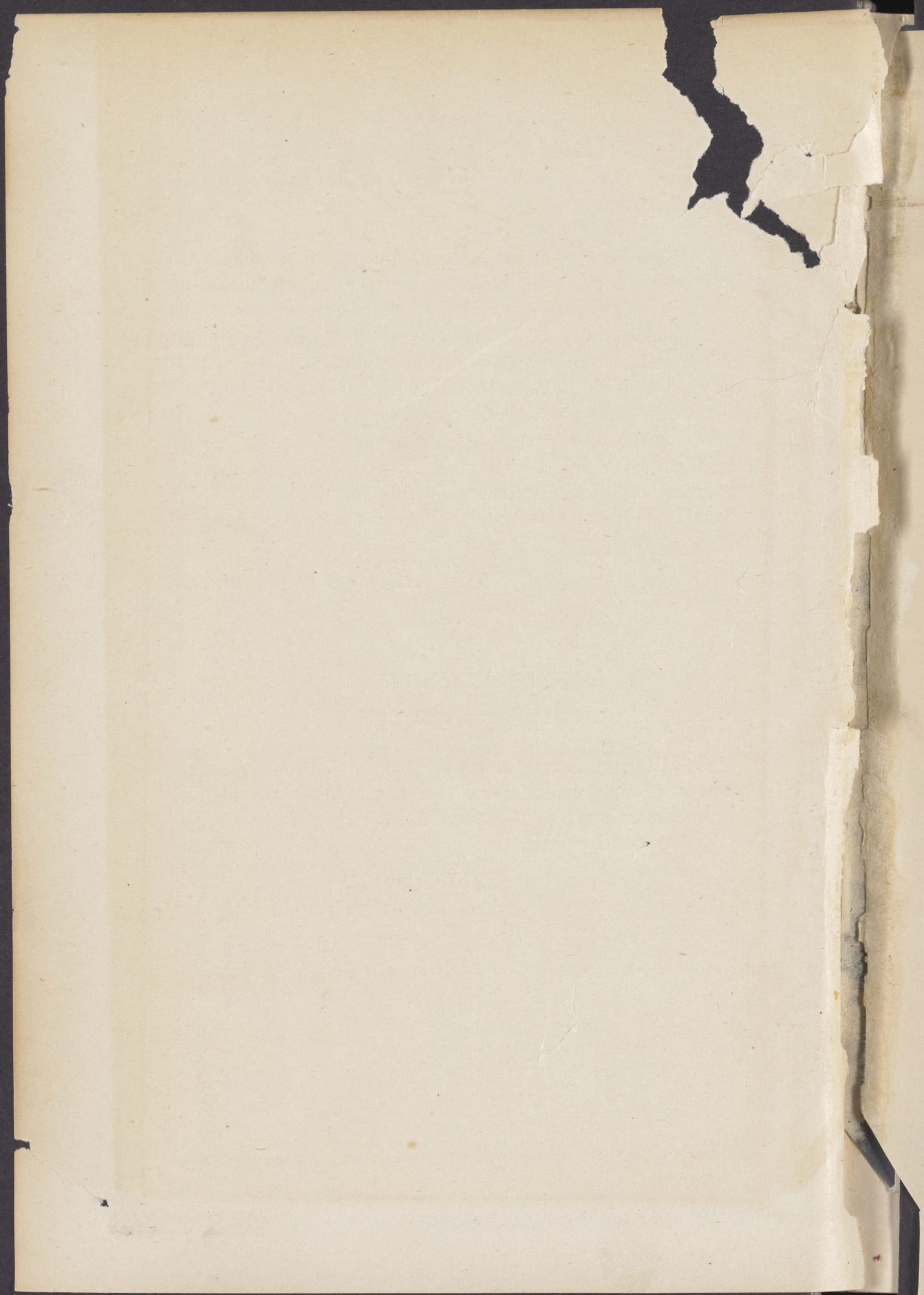
20

Filed January 21, 1923.

IT IS HEREBY STIPULATED and AGREED between the attorneys of the respective parties hereto, that the above cause be continued to the June, 1923, term, of the Court of Errors and Appeals.

KING & VOGT,
Attorneys for Plaintiff. 30

REED & REYNOLDS,
Attorneys for Defendant.



Sisco's Wall
← 162.75 fr.

Concrete Wall

At least
1,000 cu. yds
material
to fill these lots
even with road
25 feet back

Dump

114 feet

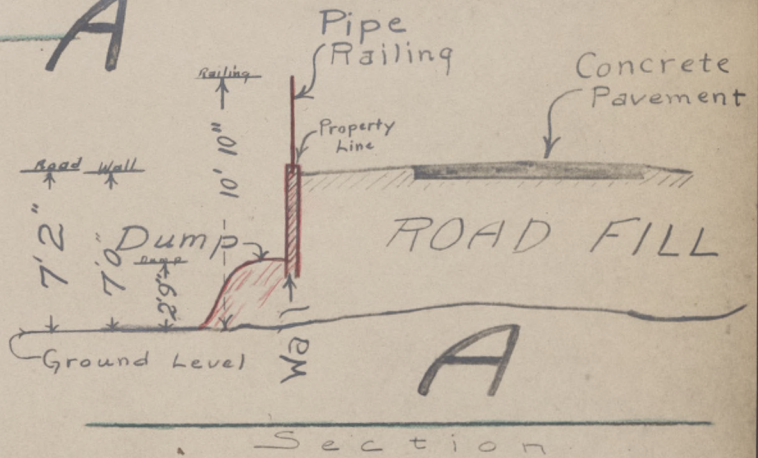
234.75 feet

Concrete Pavement

Iron Pipe

← 105. ft

A



B

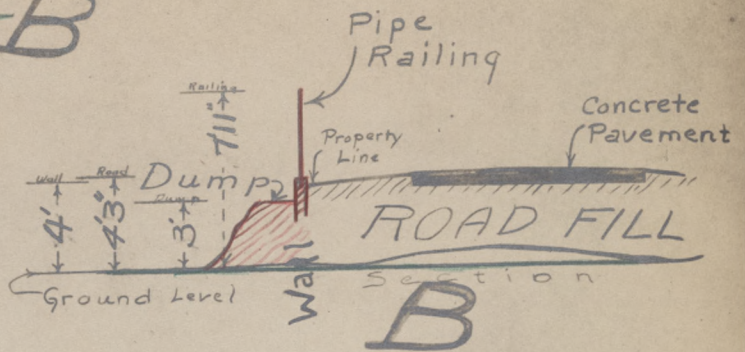
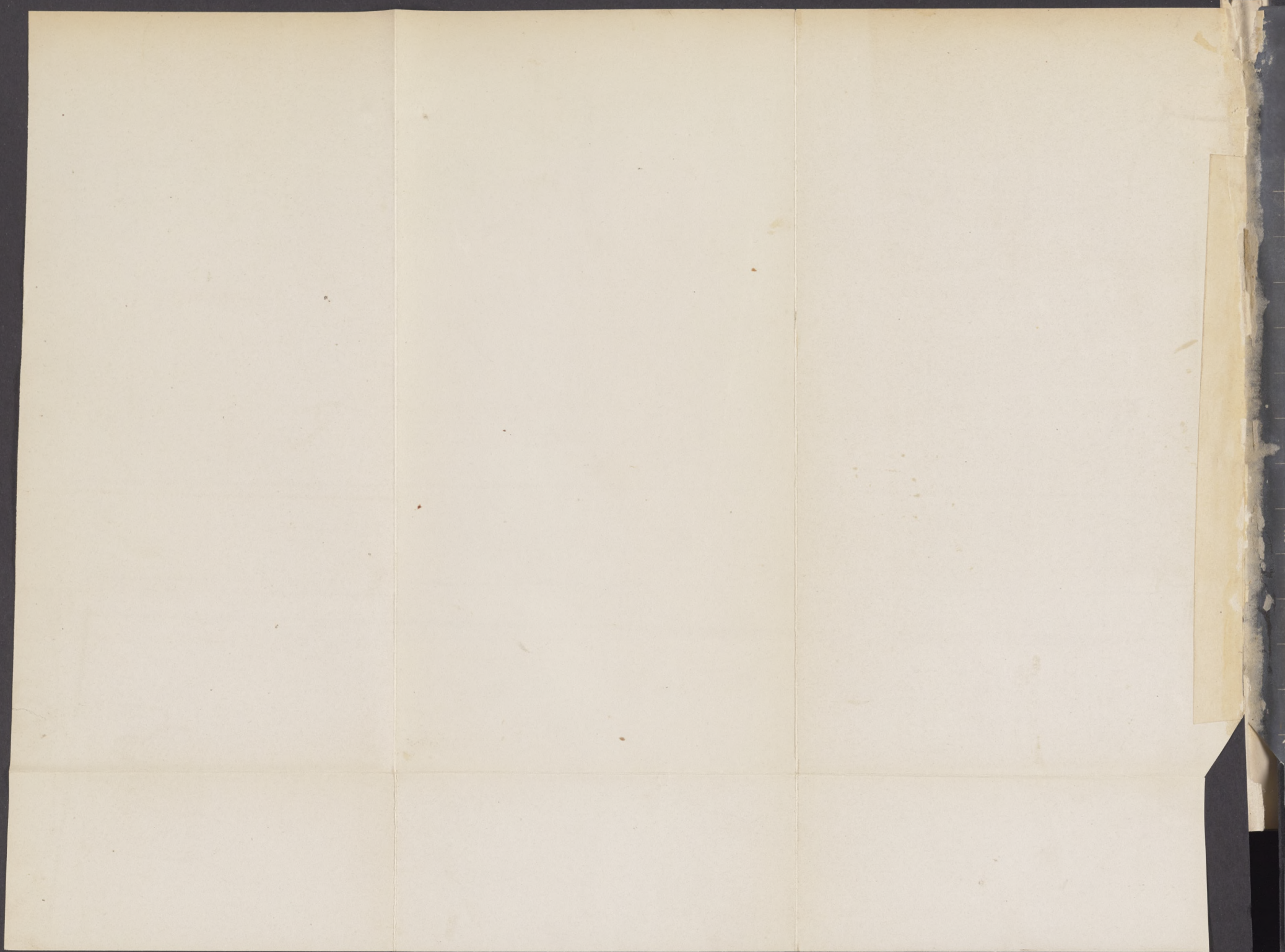
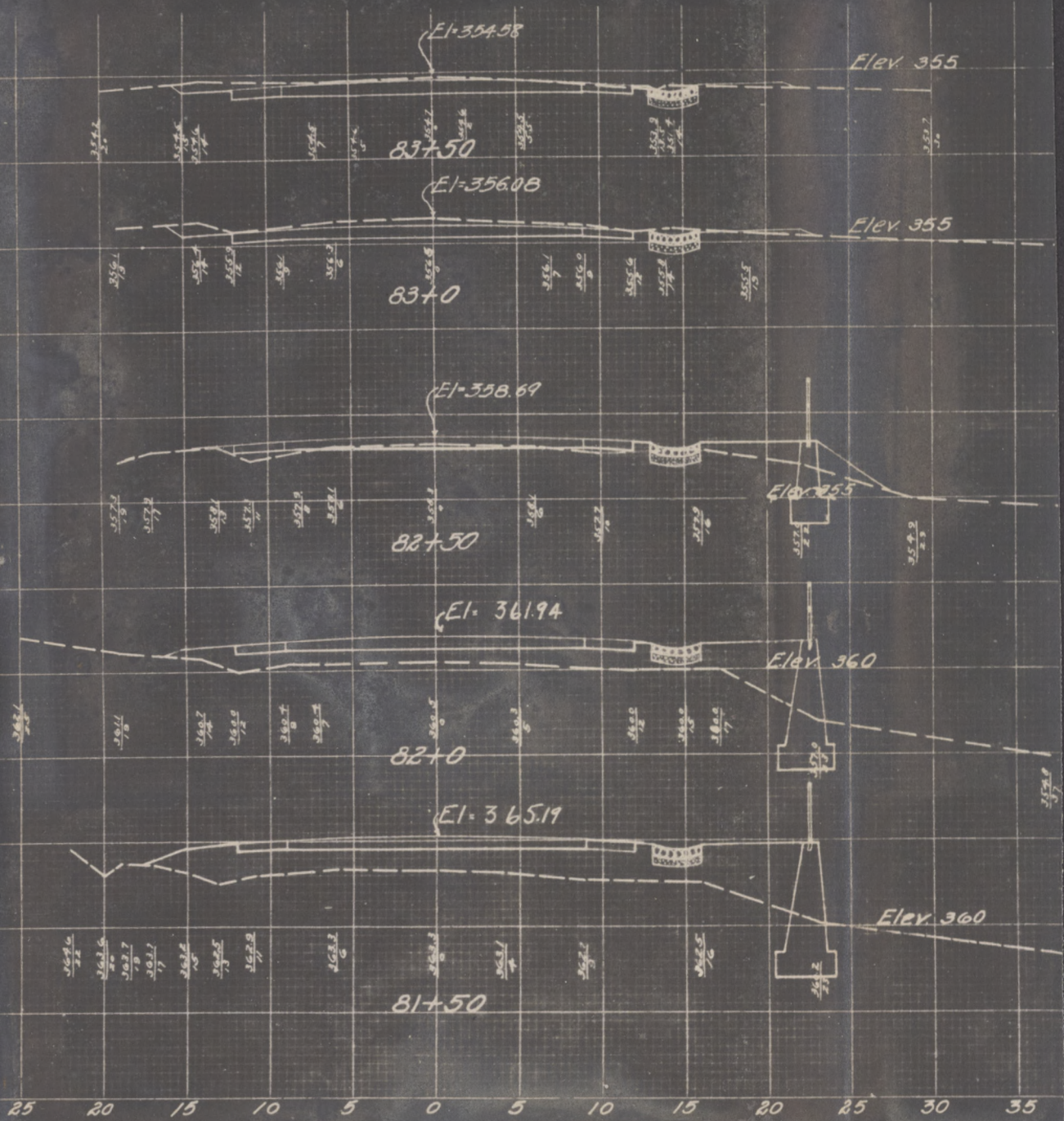


Exhibit P-1.

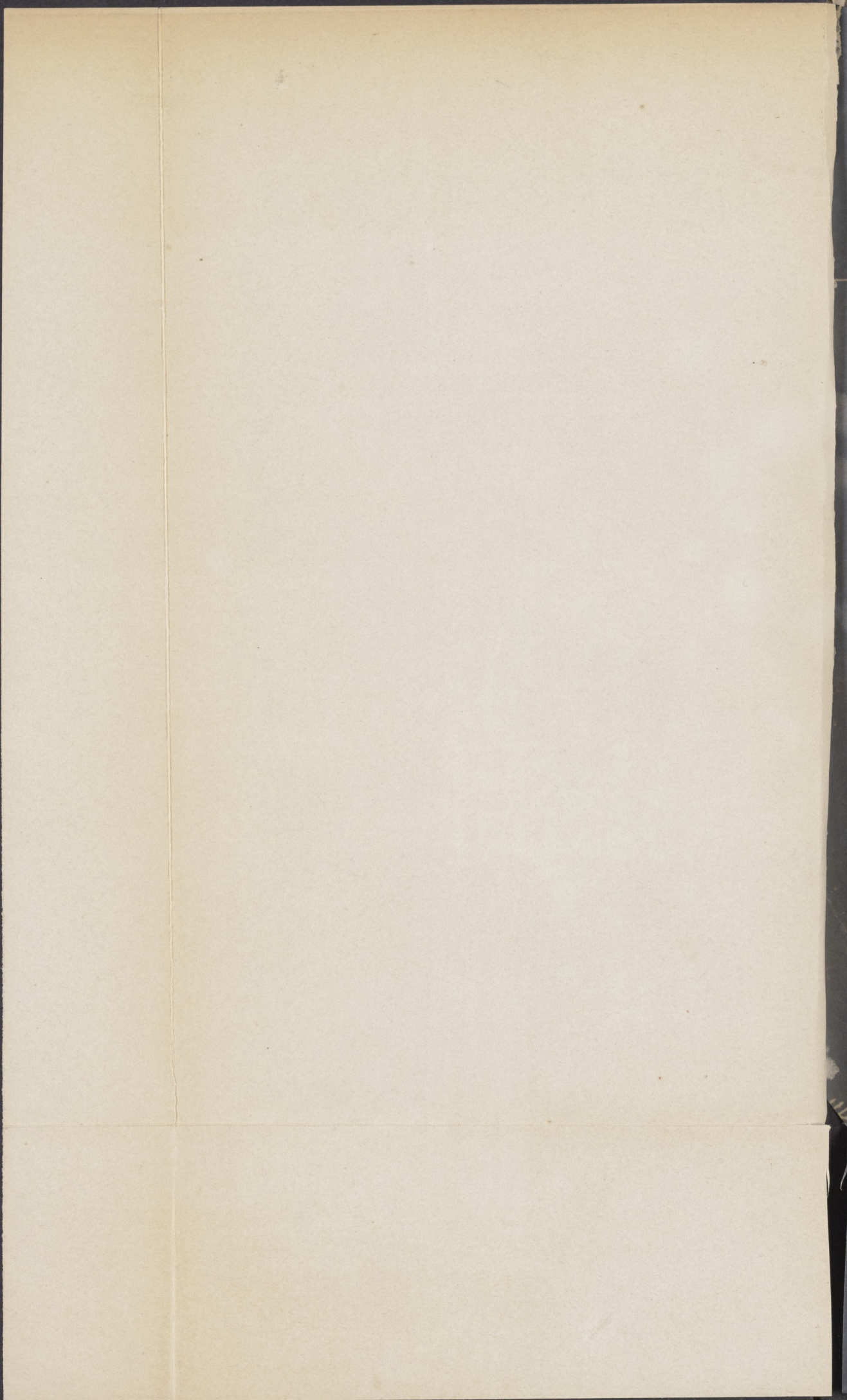


81+50 to 83+50

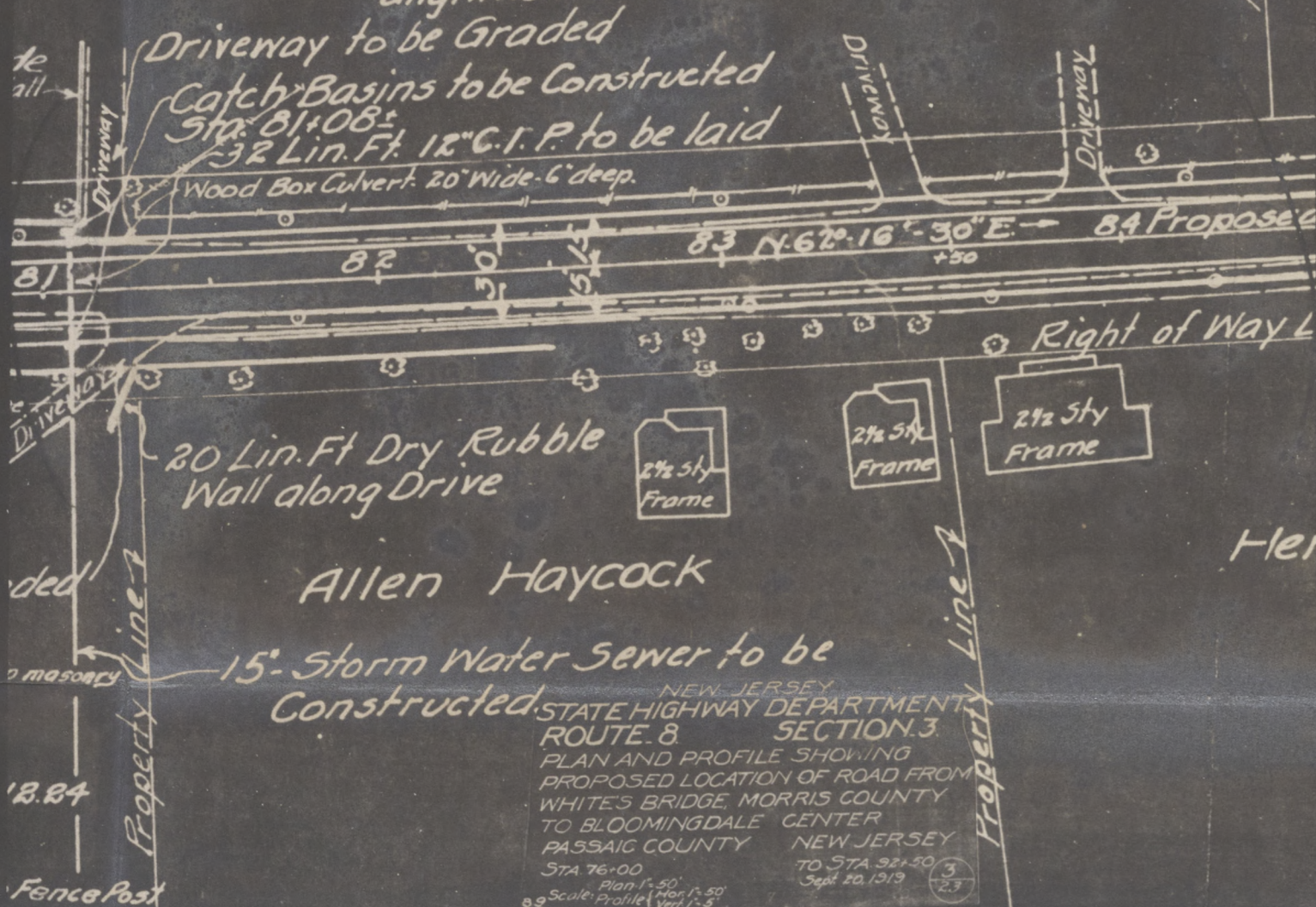


NEW JERSEY
STATE HIGHWAY DEPARTMENT
ROUTE 8 SECTION 3

CROSS-SECTIONS
 OF PROPOSED ROAD FROM
 WHITE'S BRIDGE MORRIS COUNTY
 TO BLOOMINGDALE CENTER
 PASSAIC COUNTY NEW JERSEY
 STA 81+50 To STA 87+50
 Scale 1"=50' Sept 20, 1919



Note: Distance between Sta. 83+0 and 83+50 = 63.84. Sta. 82+93.04 on first alignment = Sta. 83+06.8 on this Alignment.



Driveway to be Graded
Catch Basins to be Constructed
Sta. 81+08.5
32 Lin. Ft. 12" C.I. P. to be laid

Wood Box Culvert. 20" Wide - 6" deep.

20 Lin. Ft Dry Rubble Wall along Drive

Allen Haycock

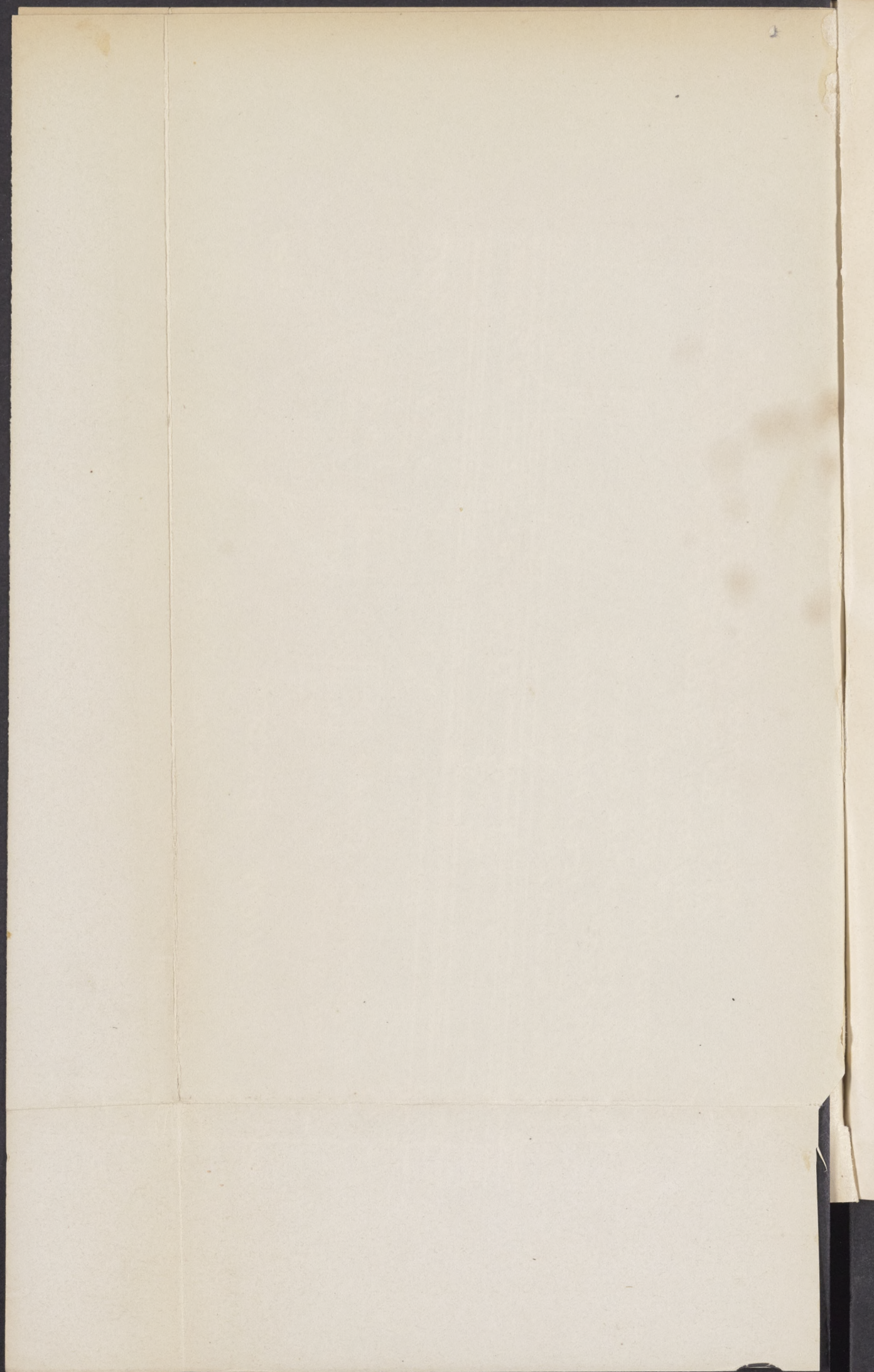
15" Storm Water Sewer to be Constructed

NEW JERSEY
STATE HIGHWAY DEPARTMENT
ROUTE 8 SECTION 3
PLAN AND PROFILE SHOWING
PROPOSED LOCATION OF ROAD FROM
WHITE'S BRIDGE, MORRIS COUNTY
TO BLOOMINGDALE CENTER
PASSAIC COUNTY NEW JERSEY
STA 76+00 TO STA 92+50
Scale: Plan 1" = 50' Profile 1" = 5'
Sept 20, 1919

3
2.3

Hei

3000 ft



14 JUN. T. 1923

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

New Jersey Court of Errors and Appeals.

ALLAN T. HAYCOCK,
Plaintiff-Appellant,

VS.

PHILIP JANNARONE,
Defendant-Respondent.

Action at Law.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF THE PLAINTIFF-APPELLANT.

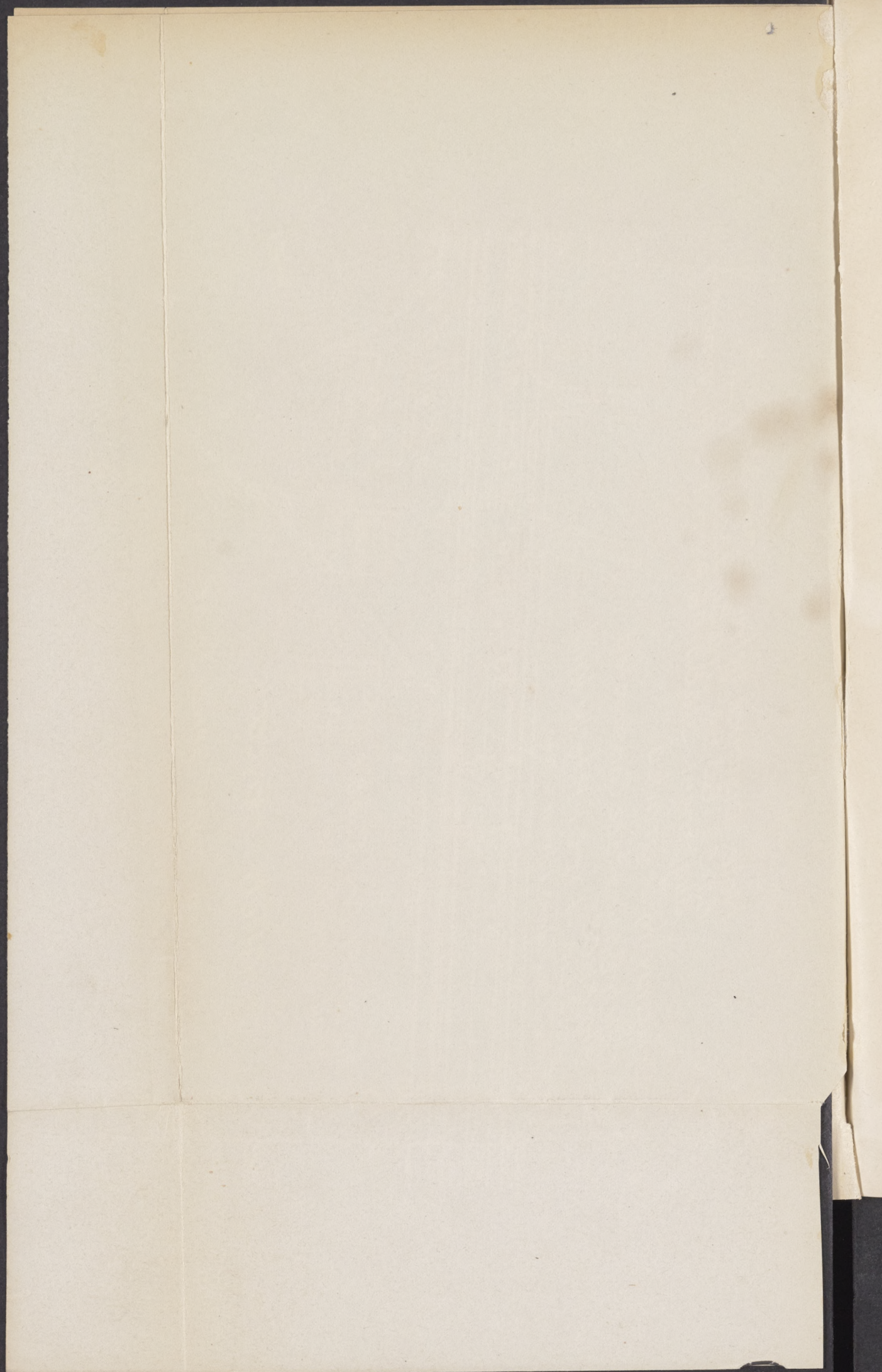
Facts.

Plaintiff is the owner of a tract of land in Bloom-
ingdale, Passaic County, with a frontage on the
Paterson-Hamburg Turnpike of three hundred
forty-eight and seventy-five hundredths feet (Ex-
hibit P-1).

The turnpike is part of the state highway
system.

The plaintiff's proofs show that the State High-
way Commission entered into a contract with the
defendant (p. 32, line 31), *an independent con-
tractor* to change the grade of the road, lay the im-
proved surface and do other work connected there-
with. Pursuant thereto, defendant raised the
grade of the road in front of Plaintiff's property
several feet, dumped a large quantity of earth
thereon and erected a concrete wall *on the property
of plaintiff* (p. 10, line 24; p. 11, line 15; p. 19,
line 20) for a distance of one hundred fourteen feet
(p. 9, line 30; Exhibit P-1). This wall supports
and maintains the highway on the Southerly side.
On the top of the wall was erected a fence (p. 10).

No compensation was paid to plaintiff for the
resulting damage to his property. This suit was



14 JUN. T. 1923

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

New Jersey Court of Errors and Appeals.

ALLAN T. HAYCOCK,
Plaintiff-Appellant,

VS.

PHILIP JANNARONE,
Defendant-Respondent.

Action at Law.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF THE PLAINTIFF-APPELLANT.

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(p. 9, line 30; Exhibit P-1). This wall supports
and maintains the highway on the Southerly side.
On the top of the wall was erected a fence (p. 10).

No compensation was paid to plaintiff for the
resulting damage to his property. This suit was

instituted against the contractor, Philip Jannarone, who had admittedly done the work (p. 16, line 17). At the close of the plaintiff's case, the Court granted a motion for non-suit in favor of the defendant and against the plaintiff (p. 35, line 18). Judgment was entered thereon (p. 35).

Reasons.

We assign the following reasons in support of our appeal:

1. THE COURT ERRED IN GRANTING A MOTION OF NON-SUIT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

2. THE COURT ERRED IN HOLDING THAT THE DEFENDANT'S ACTS DID NOT AMOUNT TO A TRESPASS UPON THE PROPERTY OF THE PLAINTIFF.

3. THE COURT ERRONEOUSLY HELD THAT, SINCE THE DEFENDANT CAME ON THE PROPERTY OF PLAINTIFF UNDER A CONTRACT WHICH HE HAD WITH THE STATE HIGHWAY COMMISSION, HE WAS FREED FROM LIABILITY.

4. THE COURT ERRONEOUSLY REFUSED OFFERED EVIDENCE OF THE NUMBER OF CUBIC YARDS IT WOULD TAKE TO FILL IN THE PROPERTY OF THE PLAINTIFF.

5. THE COURT ERRONEOUSLY REFUSED TO PERMIT EVIDENCE TO BE INTRODUCED OF THE COST OF THE REMOVAL OF THE WALL ON PLAINTIFF'S PROPERTY, WHICH WALL HAD BEEN CONSTRUCTED BY THE DEFENDANT.

6. BECAUSE THE COURT REFUSED TO PERMIT EVIDENCE TO BE INTRODUCED AS TO THE DEPRECIATION IN VALUE OF THE PROPERTY OF THE PLAINTIFF BY REASON OF THE ACTS OF THE DEFENDANT.

We shall discuss reasons numbers 1, 2 and 3 above set forth, together, as they comprehend the same situation.

ARGUMENT.**FIRST.****The Court erred in granting the motion for non-suit.**

The Court granted the above motion in favor of the defendant on the ground that plaintiff had failed to show any legal liability so far as the defendant was concerned (p. 34, line 30) and had failed to produce proper proof as to damages sustained (p. 31, line 15). The facts, as they appeared at the time of the making of the motion for non-suit, were that the plaintiff owned a piece of property, that the defendant had dumped a large quantity of earth thereon, had erected a concrete wall partly thereon varying in height from two to seven feet (p. 10; Ex. P-1) (the solid red line on Ex. P-1 shows the wall (see P-9, line 24)), and that no compensation for such invasion of plaintiff's property had been made. It further appeared that the defendant had made a contract with the State Highway Commission to grade and lay the road in front of plaintiff's property, and to do the work incident thereto, and that it was in consequence of this contract, that he had erected the wall which was in the nature of a retaining wall for the roadway (p. 16, line 17; p. 33, line 10). No justification, however, even under the contract, was made for the placing of the large amount of earth on plaintiff's property.

The Court's reasons for granting the non-suit were erroneous and his action in so doing is the subject of legal error. We cannot understand how a defendant can do a wrong, which in this case, was a trespass upon plaintiff's property, and secure freedom from liability thereunder by claiming that he entered the property of plaintiff and committed

the acts complained of, because he had a contract to do so with the State.

It is true that the Statute (Chapter 2, P. L. 1919) covering the operations of the State Highway Commission, provides for condemnation of property, such proceedings to be instituted by the state, and also provides for entering the property prior to condemnation and then subsequent payment of compensation. In this case, however, entry was made on the property of plaintiff, at a time when he was away from home and ill in the hospital (p. 19, line 34) *and no condemnation proceedings had ever been had or any compensation paid* (p. 33, line 17). The Court stated that his reason for granting the non-suit was that Jannarone could not be a trespasser because he entered under the authority of the State.

The defendant, by reason of his contractual relation with the State, cannot gain immunity from liability (see *Collins vs. Langan*, 58 N. J. L. 6).

The Court's ruling is also incorrect because the State's only right of entry flows from the provisions of the Statute, which provide for awarding compensation thereafter by proper proceedings to be instituted by it. There is a constitutional inhibition against taking property without payment therefor.

Without such action any entry by it would be improper. So far as the plaintiff is concerned, he is entitled to have his property free from such entry except as the provisions of the statute are complied with.

The plaintiff in this case cannot sue the State as it is a sovereign body. It cannot sue the State Highway Commission for it is simply an agent of the State, and the same legal freedom from suit exists as to it. It cannot maintain either an ejectment suit or a suit for damages as against the State. The plaintiff's only remedy is as against

the wrongdoer, the man who physically performed the acts. To hold that no recovery can be had for such action, means the taking and user of plaintiff's property without payment therefor.

This, within a very narrow compass, is the precise question which presented itself at the time the non-suit was granted and which is now submitted to this Court.

SECOND.

The Court erred in refusing to permit the introduction of evidence as to damage claimed by plaintiff (Reasons No. 4 to 6, inclusive, set forth above) and in non-suiting plaintiff for failure to prove damage (p. 31, line 17).

The plaintiff endeavored to prove the amount it would cost to fill in his land to make it level with the height of the earth dumped upon his property by the defendant. This the Court refused (p. 24). Prior to the dumping of the earth and the erection of the retaining wall, the property in question had been within a foot or so of the level of the roadway. After the dumping of the earth and the erection of the wall, the level of the roadway varied from two feet, at one end of the property, to nearly seven feet at the other above the level of plaintiff's land (Ex. P-1). Complete access to his property was extinguished and the property rendered practically valueless.

We first endeavored to show the cost it would entail to level the property so that access could be had to it. Evidence was offered at page 24, for this purpose and was excluded by the Court. We most respectfully submit that while this was not

an exclusive measure of damage, it was *an element of damage* which could legally have been admitted.

We next urge that the Court erred in refusing to permit evidence of the *difference in value between the property of the plaintiff before and after the commission of the acts of defendant*.

The Court held that the only measure of damage was the pecuniary loss arising from a deprivation of *enjoyment* of the property and cited *Lewis vs. New Jersey Railroad*, 76 N. J. L., page 220, as authority for his decision. In the case at bar at page 31, line 30, the Court held that he would not consider, as evidence, the offer of plaintiff to prove the cost of tearing down the wall, the cost of filling behind the wall or evidence of the difference between the value before and after the injury (p. 31, line 22).

The property of the plaintiff was *vacant land* adjoining another portion of his property connected therewith on which his house was located. The property was in a built up section of Bloomington, New Jersey, and was prior to the acts of defendant available for building lots. To hold that plaintiff is to be non-suited if he cannot actually show a *loss of enjoyment*, cannot be the correct rule of law. He would in any event be entitled to nominal damages. *Corbo v. East Orange and Ampere Land Co.*, 86 N. J. L. 563.

In the case at bar, it is true that the grade of the roadway was changed in front of *plaintiff's property* and if this had been the only matter which was the subject of complaint and if the acts of defendant had not resulted in a permanent condition, the rule as to the measure of damages would have been that fixed by the trial court following the decision of *Lewis vs. P. R. R. Co.*, 76 N. J. L. page 220. But in the case at bar, plaintiff charged and proved not only that the grade had been changed in front of his property but *a concrete*

retaining wall had been erected without right on his land and a large quantity of earth dumped thereon (Ex. P-1; p. 33, line 10; p. 34, line 31).

The reason for the doctrine in the *Lewis* case was that it would not be assumed that the *unlawful condition of change of grade was a legal and permanent one* by allowing a recovery once for all for the diminution in value of the premises. The Court there said:

“Damages recoverable by a property owned by reason of the *unlawful change of grade of a street* are confined to such as accrue to such property owned for the injury to his *enjoyment of the property* down to the commencement of the suit.” Citing *Hatfield vs. C. R. R. Co.*, 4 Vr. 251; *Collins vs. Langan*, 29 Vr. 6; *Ackerman vs. Nutley*, 41 Vr. 438.

Those decisions can have no bearing on a case such as this where entry is made on plaintiff's property, earth and rocks dumped thereon and a *permanent concrete wall erected thereon*. All of the cases referred to were cases of a change in grade of a roadway bordering on plaintiff's property.

In *Ackerman vs. Nutley*, it was said that the earth which had been placed *in the highway* had not been removed by the plaintiff and he might never do so and that it was therefore illegal to permit him to recover the cost of removal.

In the case at bar, however, we have a permanent structure built on *plaintiff's land* which structure acts as a *retaining wall* for the permanently improved public highway.

The Court should take judicial notice that the plaintiff cannot remove such a structure.

In a matter of this kind where it appears as a matter of fact that the plaintiff could not remove the wall from the very nature of its construction and the purpose it serves, the Court will recognize

that the condition created is a permanent one. This is not a case where the injury complained of is temporary and removable which was the situation in the cases relied upon by defendant.

In the case of *McGuire v. Grant*, 25 N. J. L. 356, where plaintiff's property had been damaged by excavations made by defendant on the adjoining lot the court held that the measure of damages to be applied in determining the compensation for the wrongful act of defendant was the diminution in value of plaintiff's property.

In the case of *Manda v. City of Orange*, 77 N. J. L. 285, the suit was for trespass. The defendants acting as they supposed by virtue of proceedings in condemnation entered upon the land of plaintiff and laid a water pipe. The proceedings in condemnation were held to be improper. Suit was thereupon brought to recover damages for trespass.

The Court approved the charge of the trial court which fixed the measure of damages as the *difference between the value of the property immediately prior to the trespass and its value after the trespass had been committed*, and while it was not called upon to determine whether the diminution in value was the proper measure in every case, referred with approval to the doctrine to that effect laid down in *McGuire vs. Grant*, 1 Dutcher, 356.

We respectfully submit that the judgment of non-suit should be reversed.

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of Counsel.

14 JUN. T. 1923

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ALLAN T. HAYCOCK,

Plaintiff-Appellant,

vs.

PHILIP JANNARONE,

Defendant-Respondent.

Action at Law.

*On Appeal from
the Supreme
Court.*

BRIEF FOR DEFENDANT.

Facts.

This is an appeal by the plaintiff from a judgment of non-suit, in the Essex Circuit of the New Jersey Supreme Court, in a suit brought to recover damages alleged to have been caused by raising the grade of the road in front of the plaintiff's property, and for defendant's alleged trespass and construction of a retaining wall on land of the plaintiff.

The facts in the case briefly stated are that the New Jersey Highway Department in pursuance of the authority vested in it under the *State Highway System Act*, Chap. 14, P. L. 1917, undertook to improve certain state highways, including a section of a State Highway extending from White's Bridge, Morris County, to Bloomingdale Center, Passaic County, known as Route 8, Section 3 of the State Highway System.

In furtherance of this undertaking, the State caused its engineers to make surveys of the state highways to be improved, including Route 8, Section 3 aforesaid, and prepare maps and specifications, in conformity with which contractors were to make the proposed improvements.

The contract for the improvement of Section 3, Route 8 aforesaid, was duly let to Philip Jannarone the defendant herein, who undertook and performed said contract in accordance with the aforesaid maps and specifications, and

under the supervision of the State Highway Commission's engineers (State of Case, pp. 32, 33, 34).

Over a portion of Section 3 of Route 8, running past the land of the plaintiff, the grade was changed, and a retaining wall built under the directions and supervision above stated.

In support of the above statements we refer to Exhibit P. 7 showing the right of way, the original elevation, the line of old road and new road as constructed, the wall, etc., and P. 8 which shows in cross sections the old level and slope and the new level, wall and railing complained of (the wall as actually constructed is 2 feet nearer the center of the roadway than shown on survey) (see page 33, of state of case, line 4). The contract and specifications between the State Highway Department and defendant Exhibit 6 A (p. 32, l. 32) describes the work to be done by defendant in detail with reference to said maps (Exhibits 7 and 8). The contract was omitted from State of Case to save expense of printing.

First.

The first ground of appeal is that the Court found in favor of the defendant and against the plaintiff.

The plaintiff's complaint alleges that the defendant raised the grade of the road in front of the plaintiff's land, and that the defendant trespassed upon and took property of the plaintiff, using it for a part of the highway, and built thereon a retaining wall surmounted with an iron railing. The Court could not do otherwise than find for the defendant. A verdict must be rendered for a defendant, when the plaintiff fails to establish his case by the evidence introduced. And when under circumstances most favorable to the plaintiff, viz. before the hearing of the defendant's case, the plaintiff by his own evidence fails to establish his alleged cause of action, he cannot prevail.

Although it was shown that the defendant acting under contract with the State Highway Department did raise

the grade of the road, yet that fact gives to plaintiff no right of action against defendant.

As to the alleged trespass, and the construction of retaining wall on land of the plaintiff, again the plaintiff has failed to make out a case;—

The testimony of Millen, the most important witness for the plaintiff, proves nothing as to the location of the wall complained of with respect to plaintiff's line. Millen is a surveyor, who made a survey of the road and adjacent land of plaintiff. This survey is attached to the State of the Case as Exhibit P. 1. The basis of this survey and the manner in which it was made, are set forth in the testimony of Millen (State of Case, p. 13, l. 10 to p. 14, l. 32 inclusive). As will be seen from a perusal of his testimony he did not fix the road line or the location of the wall with respect to the position of any monument but he assumed the location in question because they "would satisfy the description in the deed." He admitted Exhibit P. 1 to be based on "guess work."

The inaccuracy of such a survey is further ascertained by the testimony of plaintiff, Haycock, who stated that he himself was the one who had placed the pipe, which Millen spoke of as the monument at the beginning point in the description above referred to (State of Case, p. 18, l. 34). For the purposes of this suit, such a survey is valueless, and fails to disclose a trespass by the defendant. Plaintiff testified that defendant Jannarone erected his wall "inside the county road" (p. 19, l. 10); and further that this concrete wall was placed on the old stone wall that supported the fill on the old country road (p. 19, ll. 15-16); and again plaintiff did not lay any claim to the land on which the retaining wall rests, when he testified that he had only cultivated his land up to where the present concrete wall stands (p. 17, ll. 31-38); again when he testified that he used to farm his land up to the old stone wall (p. 19, ll. 16 to 18 inclusive). The last two statements together with the above reference (p. 19, ll. 9-11, inclusive) definitely serve to fix the concrete wall within the lines of the county road. Further Haycock testified that he

was away from home when the wall was erected (p. 19, l. 31) consequently his testimony as to the location of the new wall with reference to that of the old road cannot be accurate.

The inaccuracy of the survey by Millen (designated Exhibit P. 1), is shown again when Haycock testified that the heavy black line which Millen assumed to be the line of the county road, was within the sloping sides of the old county road as established in 1909 (p. 21, ll. 19-26, inclusive).

Let us refer for a moment to plaintiff's Exhibits P. 7 and P. 8. In Exhibit P. 7 are shown in broken lines the grade of the old county road with the sloping embankment (up to which Haycock farmed) and the grade of Haycock's land, at intervals along Haycock's property. At no point does the concrete wall come outside the old embankment.

Again in Exhibit P. 8, the concrete wall is shown a considerable distance with the Right of Way, so that plaintiff failed to prove that his lands had been invaded.

We insist that we have definitely shown that it does not appear from the plaintiff's case that the embankment or wall complained of, or any part of it, is upon land of the complainant, but even if all or some part of it occupies some part of the land of the complainant, we contend that the defendant is neither a trespasser or liable in damages.

By Chapter 14 of the Laws of 1917, entitled "An Act to Establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof," P. L. 1917, p. 25, the State Highway Commission is directed to lay out certain routes, among them Route No. 8, of which the section passing the property of the plaintiff is Section 3 (see p. 26).

Section 6, p. 29, of the act provides for the pavement, and that part of it which is of interest here is as follows: Section 6 as amended by P. L. 1919, Chap. 220, p. 512:

"In all cases the width of the pavement shall be at least eighteen feet and the total width of the

roadway shall be at least thirty feet, except at bridges, culverts or grade crossings" * * * Section 7, * * * "All work of improvement, betterment, reconstruction or resurfacing shall be done in accordance with plans and specifications prepared by the State Highway Department."

Section 19 defines the words used in the act, and under "*improvement*," page 33, we find that

"improvement shall consist of location, grading, surface and sub-surface drainage provisions, including curbs, gutters and catch basins, retaining walls, intersections, private entrances, guard rails, shade trees, illumination, guide posts and signs, ornamentation and monumenting."

"*Work*" is defined, page 34, as

"The acquisition of land for any purpose connected with highways by lease, gift, purchase, demise, or condemnation, for temporary or permanent use."

In Chapter 15, of the Laws of 1917, P. L. 1917, page 35, "An Act to establish a State Highway Department and to define its powers and duties; and vesting therein all the powers and duties now devolved by law upon the Commissioner of Public Roads, and the existing State Highway Commission and Highway Commission," the general powers of the Commission are set forth in Section 12, of the Act, and those which are of interest here are set out in sub-paragraphs "e" of Section 12, as amended by the laws of 1919, page 523, as follows:

"e. To widen, straighten and regrade any State highway and to acquire any lands or rights therein by gift, devise, purchase or condemnation, according to the procedure as contained in an act entitled, 'An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900), approved March twentieth, one thousand nine hundred, and vacate any State highway or any part thereof.

The State Highway Commission shall have the right and power to enter upon and take property in advance of making compensation therefore in any case where it cannot acquire land or other

property by agreement with the owner, either by reason of disagreement as to price, or the legal incapacity, or absence of the owner, or his inability to convey a valid title, or by reason of any other cause.

In any such case, upon the said Highway Commission exercising this right and entering upon and taking land in advance of making compensation therefor, it shall present a petition, and proceedings shall be had to fix the compensation to be paid to the owner, as provided in said act entitled. 'An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900), approved March 20, 1900. To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act. To do and perform all acts now required by any law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission or the Highway Commission. These powers are to be liberally construed."

As we have above shown, the State Highway Department, pursuant to this act, entered into a contract with the defendant to construct a road past the property of the plaintiff, according to plans and specifications made by it (Exhibit 6-a).

At the time that this wall was built, Mr. Haycock was away from home, was ill in the hospital, and during his absence the wall was built (p. 19, ll. 30-40; p. 20, ll. 1-10; and p. 4 of plaintiff's brief).

Counsel for plaintiff concedes that the State had a right to enter the land of the plaintiff, if it did enter it (p. 4 of plaintiff's brief, State of the Case, pp. 30-31), but he complains that no proceeding in condemnation to ascertain the amount which defendant should be paid for the land alleged to have been taken was had subsequently, and the result is that his land is gone, as he thinks, and he knows of no proceeding by which the State can be compelled to have this compensation fixed, and therefore he takes the position that the defendant, having

built the wall at the direction of the engineers of the State, under his contract with the Highway Department and in accordance with its plans and specifications, an act which was rightful at the time that he built it, has become the wrongdoer, because the State did not subsequently do what the plaintiff claims it ought to have done, fix his compensation and pay him for it.

In other words, the defendant, having gone on the land and built the wall with due authority, because of the failure of the officers of the State to perform their duty, a condition subsequent, has become a trespasser *ab initio*.

Counsel for plaintiff has cited no case in which such a rule is established and we think that there are none.

Second.

Reasons 4 to 6 inclusive, deal with the introduction of evidence. Plaintiff's first offer was to show the cost of filling his land so as to make it level with the new grade of the road established by the Highway Commission. There is absolutely no precedent for such a measure of damage, and it is wrong in theory.

It is evident that the real damage which plaintiff thinks he has suffered by reason of the work done at this point, is the change in grade of the road, not the building of the wall nor any of the incidentals, but the fact that his land is now lower with respect to the surface of the roadway than it was before the work was done.

The owner of adjacent property has no right of compensation for change in grade unless conferred by statute, *Clark v. City of Elizabeth*, 61 N. J. L., p. 565, at 590.

Plaintiff next complains that the Court refused to permit evidence of the difference in value before and after the construction of the wall. You will look in vain in the state of the case for any such refusal, and if there was one no exception was taken to it. The Court gave his theory of the issues before him, on pages 30 and 31 of

the state of the case, but he did not say he would refuse such testimony. If he had his remarks would not have amounted to a ruling, and in any event no exception was taken to them or any of them.

Again counsel contends, page 7, that there is a permanent structure built on plaintiff's land as a retaining wall for permanently improved public highway.

We insist it does not appear from the evidence in the case that the wall or any part of it was built on plaintiff's land. Plaintiff himself says, that it was built inside the county road (p. 19, l. 10, of the State of Case) but if it was not built inside the road, but on the plaintiff's land as he claims, either the State had the right to build it and it is therefore permanent, in which case the defendant has no right of action against defendant, Jannarone (*Hamill v. Territelli*, 195 Ill. Appeal 174; *Eachus v. Los Angeles*, 130 Cal., p. 492, 62 Pac. 829), or the State had no right to build it, in which event the plaintiff may remove that portion of the wall upon his land but not the grade of the street. He is not impotent. He has his remedy. And it is not to be supposed that the State will refuse to reimburse him for the cost thereof, unless the State entered as a matter of right.

In that event what the plaintiff is entitled to is not the land, not the demolishing of the wall, but to the value of the land taken, and that right is against the State and not the defendant.

We respectfully request that the appeal be dismissed.

REED & REYNOLDS,
Attorneys of Defendant-Respondent.

