

## New Jersey Court of Errors and Appeals

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THE CENTRAL RAILROAD COM-  
PANY OF NEW JERSEY,  
Plaintiff in Error,

*vs.*

JOSEPH MARINO,  
Defendant in Error.

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In Tort.

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Brief for Plaintiff  
in Error.

Caleb Miller was the owner of certain lands (see Map) at the time of the extension of the line of the Central Railroad of New Jersey from Somerville to Easton, a portion of which is now owned by the plaintiff. By condemnation proceedings the Railroad Company took certain of these lands and made compensation for the damages relative thereto, in the construction of its roadbed for the purpose of extending its line. It is claimed that at the time of the building of the line of the railroad, Miller had a driveway across his lands over which the Railroad Company laid its track leading to and from the public highway—being a road between Somerville and Raritan.

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By the Act of 1847, (pages 128-135 inclusive) the Somerville and Easton Railroad Company was incorporated, and this line was extended under that Act of incorporation. Section 9 of that Act provides: "That it shall be the duty of the said Company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad or roads, where any public or other roads shall cross the same, so that the passage of carriages, horses, and cattle on the said road shall not be impeded thereby; and also, where the said

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“ road shall *intersect any farm or lands of any individual,*  
 “ to provide and keep in repair suitable wagon-ways over  
 “ or under said road, so that *he* may pass the same.”

This driveway from Miller's house to and from the highway was used during a portion, if not the whole of his occupancy, and by subsequent owners until and during Cooper's ownership, when he, Cooper, opened up what is called "Cooper street," and filed with the Clerk of the  
 10 County a map showing the street, made by Doughty, Engineer, February 18, 1896. (Page 6, line 10). There was no dedication of a street to the public by Miller or any subsequent owner over this land now claimed as a way, nor was there any evidence tending to dedication excepting the filing of the map by Cooper, August 4, 1897, with the County Clerk. (Page 28, line 30). The map also shows that Washington Place connects with Cooper Street, whereby these lands of Miller and the  
 20 plaintiff had, and have a way by which they could go to and from the public highway independent of the way over the Railroad Company's tracks. (Page 29, lines 10 to 20; page 30, line 10).

In compliance with a decree of the Court of Chancery, upon the application of the New York & Philadelphia Traction Co., to define the mode of crossing the Central R. R. of N. J., at Somerville, made July 20, 1897, the Railroad Co. raised its tracks, so that the Traction Company could run its cars under the railroad going  
 30 between Somerville and Raritan, as appears by the map—in the year 1898—making an embankment from three to four feet high at the point where this way formerly crossed the railroad tracks. At the same time, in order to create the sub-way, the street was cut down by the town authorities of Somerville so that at the junction of the way with the street where formerly it was a gradual  
 40 incline, there is a retaining wall of ——— feet in height. and by reason of the excavation and wall, it was, and is impossible to reach the highway, or pass from the highway over the lands approaching the track on the North. and thus reach the plaintiff's lot. (Page 27, lines 30 to

40). This, the Railroad Company had nothing to do with.

The change of the grade of the street was made by the town authorities, as will be seen by reading the decree.

The Plaintiff is the owner of a small lot on the South side of the track, described on the map.

The action of the Plaintiff is for damages to his lands resulting from the embankment necessarily built in accordance with the decree of the Court of Chancery. 10

At the close of the Plaintiff's case the Defendant asked the Court to direct a verdict for the Defendant on the following grounds, namely:

First: Because Cooper Street had never been dedicated to, or accepted by, the public. The Plaintiff—through Washington Place—had access to and from his lands.

Second: If the way was existent at the time of the construction of the railroad, the right to its maintenance 20 was inherent in the *then owner* of the premises; and if the lands were sub-divided the grantee of any sub-division could acquire no right under the charter, because the reservation was an individual reservation, and applied to all the lands of the *then owner in entirety*, and *not to sub-divided parts to different owners*.

Third: That the defendant Company had no choice with respect to the raising of the road-bed, but was obliged to make the elevation, and if in so doing damage was done to adjoining land, it was a damage for which 30 the Company was not responsible.

#### I.

*Cooper Street had never been dedicated to or accepted by the public, and the Plaintiff at the time of his purchase had access to his lands by another street.*

There is no evidence of any dedication to, or acceptance by, the public of Cooper Street. Indeed, it was only a single wagon track-way used by Caleb Miller going to 40

and from his house, and for the use of such persons as had business with Mr. Miller during his life time. That use continued to the different persons owning the Miller property down until the change of the grade of the railroad. (Page 34, lines 30 to 40).

By the map it appears that Washington Place connected with this way now designated as Cooper Street, and thus the Plaintiff had access to his lands by another way. (Page 30, line 10). No claim can be made for the  
 10 obstruction of a street leading to and from the Miller residence, and the only way which the Miller property had was the way created under Section 9 of the charter. This brings us to the second point.

## II.

*Was the way existent at the time of the construction of the Railroad? If so, the right to its maintenance was inherent to the then owner of the premises. No grantee  
 20 of a sub-divided interest could acquire any right under this section of the charter.*

The Act applies only to such roads as were existing at the time of the construction of the railroad. The words "where any public or other roads shall cross the same" mean roads existing at the time of the construction of the Railroad. Also the words "where the said road shall intersect any farm or lands of any individual," applies only to such roads as were in existence at that time. Since 1854 this way has been used.

30 The condemnation proceedings for the purpose of acquiring a right of way over these Miller lands was taken in 1848, and the award was made on the twenty-second day of April, 1848. The road was extended during 1848, and while it may be that the road was in existence at the time of the construction of the Railroad, there is no direct proof to that effect. Perhaps it may be assumed however that there was a way, from one circumstance, namely: Miller's residence was then standing as it is  
 40 from his house would be by this way, and in addition

thereto the Railroad has maintained the crossing at this point from 1854 down to the change of the grade in the road as made by the decree of the Court of Chancery.

If that is so, the remaining question for consideration from this point is, whether the reservation in the Charter was an individual one, relating only to the owner of the lands as they were at the time of the condemnation proceedings, or whether it applies to an owner of any subdivision of the lands?

The language of the statute is as follows: "Where 10  
"the said road shall *intersect* any farm or lands of *any*  
"individual, to provide and keep in repair suitable wagon  
"ways over or under said road, so that *he* may pass the  
same."

I submit, the clear intention of the statute was to protect the owner of the lands as they then existed in a way then existing. If the owner should choose to put other ways through his land and across the railroad, the Company would in no manner be bound to keep in repair 20  
any bridges or passages for such purpose over or under  
the Railroad. The right to provide and keep in repair  
suitable wagon ways over or under the railroad by the  
statute is provisional, namely, "where such road shall  
*intersect* any farm or lands of any individual so that *he*  
may pass the same.

It will be also observed that the object of the statute was to provide for the owner a way of passing from one portion of his farm to another. Observe the language of the statute: "Where the said road shall *intersect* any 30  
"farm or lands of any individual." This statute was to  
enable an owner of lands to have access to all portions of  
his lands, notwithstanding the intersection by the rail-  
road. If Miller had sold all of his land on the North side  
of the railroad, he would have no right under this statute  
to a way over the railroad, because his lands were no  
longer intersected by the railroad. The Plaintiff's lands  
are not intersected by the railroad; they are entirely on  
the South side of the railroad.

This way exists not by reason of dedication or grant, but under the statute—the 9th Section—and the Miller 40

property only had a right to it by reason of the intersection of its lands by the railroad. When that intersection ceased, Miller's right to cross ceased; and when Miller or any of his grantees sold any portion of these lands which were not intersected by this railroad, such grantee had no right under this statute to any way over the railroad.

When the Plaintiff purchased his lot, he took it subject to the rights of the Railroad Company, with respect  
 10 to all damages which should be occasioned by the Railroad Company in the use of the condemned lands adjoining this lot. By the condemnation proceedings the Railroad Company had the right to use the way condemned as it thought proper for railroad purposes, and whatever damage arose to adjoining lands were compensated for by the award made to the owner under the condemnation proceedings.

My insistent is that a fair construction of this statute clearly indicates that it only applies to a farm or  
 20 lands of any individual which shall be *intersected* by the Railroad, and that the provisions relating to the maintenance of the way confers only a right to *the individual who owns such intersected lands*, and does not apply to the portion of the Miller tract which has been sold to the Plaintiff. He does not own any lands intersected by the Railroad.

The learned Justice upon the trial of this case construed this statute adversely to the view here presented for the purposes of the trial. He uses the following language:  
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“ It is urged, and I think with considerable reason  
 “ and force, that it was provided for the use of the two  
 “ pieces of land in one individual ownership, so that the  
 “ owner might use the way for access to and exit from the  
 “ divided parts of his land in the same way that he formerly used the land when it was lying in one tract. If  
 “ that is so, then, when the ownership is severed and the  
 “ lands on one side of the road are in one owner and the  
 40 “ lands on the other side of the road in another owner.

"it might be questioned whether this right to have this  
 "wagonway maintained existed in the owner of either  
 "portion.

"It appears in this case that this wagonway across  
 "the tracks of the Railroad Company has been used for  
 "many years, probably from the time the railroad was  
 "built and the wagon-way made, up until the present  
 "time, or up to the time of the interference with it, not  
 "simply for the benefit of the two pieces of land lying  
 "on the opposite sides of the road, but as a part of the 10  
 "way from the house of the owner of this land out to  
 "the main street, the other parts of the way being upon  
 "his two pieces of land, and it may be that, having been  
 "used for so long a time in that way, a right has arisen  
 "to have it used for that way and for that purpose.

"Therefore I have concluded to say to you that the  
 "plaintiff has established a right to have that way used  
 "for that purpose, as a means of getting to the public  
 "street bounding a part of the land.

"The question remains whether that right of way 20  
 "was for the benefit of the owner of the whole tract, or  
 "whether it was a right that inhered in all portions of  
 "that land, and could be passed by conveyance of differ-  
 "ent portions of it, and I have concluded to hold that  
 "such right may be conveyed, and that the grantee to  
 "such a deed would have a right to have that way main-  
 "tained." (P. 49, lines 7 to 40).

He bases his opinion upon the case of *Brearley vs.*  
*The Delaware & Raritan Canal Co.*, Spenc. 236; also the 30  
 case of *Perry vs. Penn. R. R. Co.*, 26 Vr. 178.

The case of *Brearley vs. The Delaware & Raritan*  
*Canal Co.*, construes the 16th Section of the Act incor-  
 porating *The Delaware & Raritan Canal Co.*, which  
 reads as follows:

"And be it enacted, that it shall be the duty of the  
 "Company to construct and keep in repair, good and  
 "sufficient bridges or passages over the said canal and  
 "feeder, where any public or other roads shall cross the 40

“ same, so that the passage of carriages, horses, and cattle on said roads, shall not be prevented thereby, and also where the said canal or feeder shall intersect the farm or lands of any individual, to provide and keep in repair, a suitable bridge or bridges as aforesaid, so that the owner or owners, and others may pass the same.” Harr. Comp. Laws 1830. Sec. 16, p. 281.

For the purpose of more careful comparison, the respective Sections of the Canal Charter and the Central Railroad Charter are given below in parallel columns, their points of difference indicated :

	It shall be the duty of the	It shall be the duty of the
		<i>said</i>
	Company to construct and keep in repair, good and sufficient bridges or passages over <i>the said canal and feeder</i>	Company to construct and keep in repair good and sufficient bridges or passages over <i>or under the said railroad or roads</i>
20	where any public or other roads shall cross the same, so that the passage of carriages, horses and cattle on said roads shall not be <i>prevented</i> thereby; and also where the said	where any public or other roads shall cross the same, so that the passage of carriages, horses and cattle on <i>the said</i> roads shall not be <i>impeded</i> thereby; and also where the said
30	<i>canal or feeder</i> shall intersect <i>the</i> farm or lands of any individual, to provide and keep in repair <i>a suitable bridge or bridges as aforesaid</i> so that <i>the owner or owners, and</i>	<i>road</i> shall intersect <i>any</i> farm or lands of any individual, to provide and keep in repair <i>suitable wagon ways over or under said road</i> so that <i>he</i>
40	<i>others</i> may pass the same.	may pass the same.

The general identity of the statutes not only indicates indubitably that the Railroad Charter was modelled upon the earlier Canal Charter, but even justifies the conclusion that the Legislators incorporated the earlier statute into the latter *in toto*, with only such changes as were intentionally and advisedly made. Much consideration should be given this fact in the construction of the law, because there is therein contained a most weighty argument as to the intentions and purposes of the framers.

Aside from such formal changes as are necessary to make a statute framed for a canal adapted for a railroad, the closest inspection discloses only two alterations. One of these is the word "impeded" substituted for the earlier "prevented," a change without bearing on the present discussion. The other is of extreme importance, in that it indicates a well formed intent on the part of the Legislature to restrict the class of persons in whose favor the obligation is laid. It substitutes for "*the owner, or owners, and others*"—the obligees under the Canal Charter—the restrictive "*he*," the owner of the intersected lands. 10 20

The right to have a way maintained under the former statute accrues to third parties as well as to those directly interested as owners of intersected lands—"So that \* \* \* \* \* *others* may pass the same." The corresponding section of the Railroad Charter, otherwise so closely analogous, here verges widely, and confines the privileges of the way to the individual whose lands are intersected. Only one conclusion can be drawn from this modification, and that is that those whose duty it is to say what shall be the law, were of the mind that the earlier reading was too broad, and that in consequence they restricted the statute so that it could possibly include no other beneficiary than the owner of intersected farms or lands. 30

It is obvious that a ruling upon Section 16 of the Canal Charter could have little bearing upon a question arising under Section 9 of the Railroad Charter, when that question arises upon a point that constitutes a conspicuous difference between the respective statutes. 40

Brearley vs. The Delaware & Raritan Canal Co., is not a case treating upon the general question of ways intersected by railroad and canal companies. It is confessedly a ruling upon the 16th Section of the canal charter.

"Brearley vs. The Delaware & Raritan Canal Co., was a construction of the charter of this Company." Perry vs. Penn. R. R. Co., p. 186.

10 Nor does the decision go further than to hold that an individual who conveyed his lands to the Company by grant was entitled to no concessions unreserved in the grant, and was not entitled to redress under the statute.

The case of Perry vs. The Penn. R. R. Co., so far as it bears upon the matter in hand, is merely an affirmation of the decision in the Brearley case. And in its holdings it takes no advanced stand. "The deed of conveyance made by Jasper S. Scudder to the Canal Company brings this case within that decision (viz.: Brearley vs. The Canal Co.) The Plaintiff's case cannot be 20 "sustained under this provision of the Canal Company's "charter." Perry vs The Penn. R. R. Co. 26 Vr. p. 186.

Both decisions deal with instances wherein Section 16 of the canal charter does *not* apply; they are negative holdings under that Section. It would be illogical to allow these decisions force in granting affirmative relief under another statute of different import, even were they of a positive character, holding the Canal Company to 30 the burden of providing and maintaining ways.

It may well be observed that it is one thing to put stress upon a Company bound by statute to provide a way for the owner or owners of lands *and others*, and quite another thing to put a like stress upon a Company bound only to provide a way between the intersected lands of any individual "so that *he* may pass the same."

The learned Judge in stating to the jury as a matter of law that the plaintiff had established a right to have the way used as a means of getting to the public street,

appears to rest that conclusion largely on the reasoning contained in the paragraph just preceding. He says:

“ It appears in this case that this wagon-way  
 “ across the tracks of the Railroad Company has  
 “ been used for many years, probably from the time  
 “ the railroad was built and the wagon-way made,  
 “ up until the present time or up to the time of the  
 “ interference with it, not simply for the benefit of  
 “ the two pieces of land lying on the opposite sides 10  
 “ of the road, but as a part of the way from the  
 “ house of the owner of this land out to the main  
 “ street, the other parts of the way being upon his  
 “ two pieces of land, and *it may be that, having been*  
 “ *used for so long a time in that way, a right has*  
 “ *arisen to have it used for that way and for that*  
 “ *purpose.*

“ Therefore I have concluded to say to you that  
 “ the Plaintiff has established a right to have that  
 “ way used for that purpose, as a means of getting 20  
 “ to the public street bounding a part of that land.”  
 (Page 49, lines 18 to 33).

The gist of the paragraph is, apparently, that the right mentioned has become established by immemorial usage or prescription. To establish a right of this nature, the usage

“ must have been continued a sufficient length of  
 “ time, adverse, under a claim of right, exclusive,  
 “ continuous, and uninterrupted, and with the knowl- 30  
 “ edge and acquiescence of the owner of the estate,  
 “ in or over which it is claimed, and while such  
 “ owner was able, in law, to resist such enjoyment  
 “ if not well founded.” Washburn on Real Property  
 III., p 52, Sec. 2, 3rd ed.

An examination of the evidence will disclose that the facts do not support these requirements sufficiently to warrant the statement that as a matter of law a way exists by prescription. It was admitted at the trial that 40

there had been a private crossing since 1854; further than this there was no proof.

The direct testimony of Mr. Doughty, witness for Plaintiff (P. 25, lines 25, etc.):

“ Q. Was that lane or driveway well defined?

“ A. It was used constantly by the Miller family.

“ Q. Anyone else?

“ A. Anyone going there, it was a *private lane, private entrance.*”

There is no evidence indicating a use by any person other than the owner of intersected tracts earlier than the date of Marino's purchase, August 6, 1897. Therefore the claim of right of way by prescription in another than the owner of intersected lands fails to meet the essential requirement of twenty years duration.

The main obstacle however to the validity of a claim by prescription, is that the use the defendant admits, and  
20 which alone the plaintiff proves, was not a use that the Railroad Company *was able, in law, to resist*. The 9th Section of its charter was an effective bar; and in defending the present suit the Company is taking the first opportunity at its command to oppose an adverse right that it is not bound by its charter to respect.

I submit that the principle of prescription does not of right enter into the question. And, weakened by the loss of this element (of prescription or right accruing by long use) the conclusion of the learned Judge was error.

30 It may be well in this connection to consider also what it set forth at the beginning of this brief as the third point: *The Railroad Company in raising the embankment that interferes with the use of whatever right of way exists did not act of its own volition, but merely as the instrument of the Court of Chancery, acting as the conservator of the public welfare and interests.*

It would have been more to the interest of the Central Railroad not to have raised its tracks—there was a heavy expenditure with no consequent benefit. It should  
40 no more be held responsible for the inconvenience result-

ing from the work performed by it than a railroad contractor would have been held responsible for erecting the same embankment at the command and under the authority of the judicial and legislative departments of the State. The interests at stake were those of the New York & Philadelphia Traction Co., seeking a method whereby to cross the tracks of the Central Railroad, and the inhabitants of the town of Somerville together with the general public, in securing protection to property and life. Whether or not the Trolley Company, or the Town Commissioners of Somerville could be held responsible for resulting damage, is not a question to be here considered; suffice it to say that the Central Railroad in bearing the vast expense incident to the changes in its roadbed complied with the order of the Court of Chancery, doing that, and only that, which it was ordered to do, and was by law compelled to do. 10

Consequently, to hold the Railroad Company to the necessity of constructing a drive-way over the road-bed as it now exists, would be to compel a positive act not consistent with the negative, passive qualities attribute to an easement in its bearing on the servient tenement. 20

“ The legal question which arises in cases where a  
 “ right is claimed by prescription to have the ease-  
 “ ment maintained at the expense of the owner of  
 “ the servient tenement is one of some nicety. \* \*  
 “ \* \* \* The general rule is, that in case of an  
 “ easement arising by prescription, the duties im-  
 “ posed upon the owner of the servient tenement, 30  
 “ are passive and negative, to suffer the owner of the  
 “ dominant tenement to enjoy the easement, and to  
 “ allow him to enter, and amend, and repair; and  
 “ also to refrain from doing any act upon his own  
 “ premises which would interfere with the enjoy-  
 “ ment of the easement. Perry vs. Penn. R. R. Co.,  
 “ 26 Vr. 187.

I again repeat that the act committed by the Railroad Company was not one which it could refrain from com- 40

mitting; it was one that the Company was enjoined to perform at the instance of legal authorities acting by virtue of general powers, and under specific enactments of the legislature. If from that act damage has resulted, it is a damage for which the Company is not responsible.

#### SUMMARY.

I maintain therefore, that the Plaintiff in having at his  
 10 service the thoroughfare "Washington Place," had access to and from his lands, and did not of necessity require a passage over the Railroad at the termination of what is known as Cooper Street—an opening that had never been dedicated to, or accepted by the public; that the plaintiff has not established a right under Section 9 of the Railroad Charter that secures to him the privilege of maintaining or having maintained for him a right of way to cross the railroad at the point mentioned, and that having thus failed to establish his alleged rights  
 20 under the statute specified, he has therein failed to prove a state of facts that can support a verdict in his favor; and that neither the plaintiff nor anyone else can compel the Central Railroad Company of New Jersey as the owner of a servient tenement over which a right of way exists, to build or construct approaches or cross-ways to make convenient and practicable a use of the right—that being a positive act inconsistent with the passive qualities incident to a servient tenement.

ALVAH A. CLARK.

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# New Jersey Court of Errors and Appeals

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JOSEPH MARINO,

Defendant in Error,

*vs.*

THE CENTRAL RAILROAD COM-  
PANY OF NEW JERSEY,  
Plaintiff in Error.

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In Tort.

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## BRIEF OF DEFENDANT IN ERROR.

This suit was brought by the Defendant in Error 20  
against the Central Railroad Company of New Jersey,  
on the 21st day of August, 1901, for damages for wrong-  
fully obstructing and stopping up a way leading from a  
lot of said Marino, situate in the Township of Bridge-  
water, in the County of Somerset, to a certain highway  
called Somerset Street, in said Township, from October  
1st, 1898, to the beginning of this suit; and for pre-  
venting him from enjoying the said way, and from the  
benefit and advantage of it.

The case was tried in the Somerset Circuit Court, 30  
before Hon. Abram Q. Garretson, Judge of said Circuit  
Court, and a jury.

The Judge in closing his charge to the jury, directed  
them that their verdict should be for the plaintiff for six  
cents damages; such verdict was accordingly rendered.

The plaintiff in the trial below was prepared to prove  
the facts stated below. These facts were not disputed  
by the defendant, and after taking the evidence of sev- 40

eral witnesses, the taking of further testimony was discontinued, and the facts admitted and proved as follows:

That in 1854 and prior thereto, one Caleb Miller was seized of a large tract of land, of which, what is now the lot in question was then a part, but had not been severed; and that at that date there was an apparent and well defined way leading from the Miller dwelling house and barns to Somerset Street, and from its appearance, such way had existed long prior to that time (see also p. 10  
25 testimony—lines 15 to 20).

In 1852, the defendant had constructed a railroad through said tract, after condemnation proceedings, with lands of Miller on each side of said railroad; and the said way, being the way in question, continued as before. A suitable plank crossing with approaches was constructed at its intersection with said railroad. It was then used by the then owner, his servants, etc., and all others having occasion to use it, as the only way from his dwelling to and from the towns of Somerville and 20 Raritan (p. 26—lines 13 and 14.)

There is no dispute that this way was in continuous and open use, with a crossing at its point of intersection with the railroad, from 1854 to the time of the obstruction (also admitted) in 1898 (p. 34 of testimony—lines 3 to 40). [The date 1890 in the testimony, in this connection, is an error, such date in fact being 1898.]

The larger, or entire tract, passed by Will of Caleb Miller, probated November 8th, 1877, to Samuel W. Miller and Mary Miller, and they, by Deed dated July 20, 30 1878, conveyed to John Meehan about seventeen acres, being all that remained to Caleb Miller at the time of his death. On February 21st, 1881, the Will of John Meehan was admitted to probate; and Isabella Meehan, as executrix of John Meehan, by Deed dated August 4th, 1890, conveyed the said land to one Albert P. Cooper, excepting some lots sold between the railroad and Somerset Street; and August 6, 1897, said Cooper deeded to the plaintiff the said lot, to which the way is alleged to be appurtenant.

40 In 1890, Albert P. Cooper, the then owner of the

Miller tract south of the railroad, laid this property out into lots, and dedicated public streets as shown on Map in evidence, filed August, 1897. He also owned "a little piece of ground" on the north side of the railroad, over which the way passes. (p. 27—line 35).

The said way is covered by and co-existent with Cooper Street, (p. 6—lines 26 to 30; also p. 26—lines 25 to 30.) The railroad crossing still remains the same as to location and use (p. 6—line 142).

In October, 1898, the defendant below had raised its embankment about five feet, at the said point of intersection (p. 27—line 11), and this obstructed the way so that it was from that time impassable as a road-way; and cannot be traveled by foot, save with great inconvenience and discomfort (p. 7—line 25; also p. 27, line 31, etc). No crossing was constructed there at the time of the building of the embankment, and has not been since (p. 7—line 30).

That the defendant Company owned, possessed and occupied the line and strip of land intersected by said way, since 1852, and kept a suitable crossing at the point of intersection, until the erection of the embankment. (p. 34); (p. 27, l. 15 and 16).

There are three errors assigned; the alleged errors thereby being, that the Judge refused to direct a verdict for the defendant, the Central Railroad Company, and that judgment was rendered against the said Company, when it ought to have been given in its favor.

1. The motion to direct a verdict for the defendant was, on the ground that it does not appear that Cooper Street has ever been dedicated to, or accepted by the public.

The contention of the plaintiff Marino, is not based upon his right to the ingress and egress over Cooper Street, as a street, but upon his right to the way, which became a part of said Street, as indicated on the Map.

If the dedication over the line of the Company were not consummated, the right of way still remained; if it were, the private right of way was not merged, but merely suspended. This private right of way, is distinct from and independent of the right of passage to be acquired by the public.

Dodge v. Penn. RR. Co.

16 Stew. 358.

Booraen v. North Hudson C. RR. Co.

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13 Stew. Eq., 557.

O'Brien v. Central Iron & Steel Co.

L. R. A., Book 57, p. 508.

2. That by another street, the plaintiff had access to and from his lands.

It is submitted that where one party has a right of  
20 way through the land of another to a public road, the latter is not justified in closing it by the fact that there is another way to such road.

Manbeck v. Jones—42 Atl. Rep.—536.

3. The Court was also moved to direct a verdict for the defendant, on the ground that under Section 9 of the Charter of the Defendant Company, if the way was exist-  
30 ent at the time of the construction of the Railroad, the right to its maintenance was inherent in the then owner of the premises, and that if the lands were subdivided, the grantee of any subdivision could acquire no right under this Section of the Charter, because the reservation was an individual reservation, the language being "So that he may pass the same."

Under the first clause of this Section "9," it is provided that it shall be the duty of the Company to con-  
40 struct \* \* \* \* passages over or under the said

Railroad \* \* \* \* where any public or *other* road shall cross the same, so that, etc.

This private road or way falls within the scope of this clause. The evidence clearly shows that it is a formed way, or road leading to the mansion house from a public street, and has been such for forty years and more, and by the Map that it now connects with another street, Washington Place; that it crosses said Railroad. The right then, irrespective of the provision in the next clause—where the said road shall intersect any farm land—to have such passage constructed, would at least lie in abutting owners on such road. 10

Under the second clause, upon which it was moved that a verdict be directed as above, it is provided that where the said (rail) road shall intersect any farm, or lands of any individual [here it will be noted that the duty is imposed, whether there be a road or way or not connecting the intersected portions of the farm lands] to provide, etc., so that he may pass the same. The insistent is that this is an individual reservation to the owner alone. 20

So narrow a construction of this clause is not within its spirit, and the evident intent of its maker. If the individual owner alone had the right of the use and enjoyment of the suitable wagon way, and it could not be of general use to his family, and to those who might need to use it, the said clause would be abortive in obtaining the object evidently sought.

The public law of 1891, p. 109, Sec. 84, Vol. 2 G. S., p. 2661, applicable to this crossing makes similar provision, but omits the reservation named. 30

The right of way of the defendant Company over the land in question, was taken by condemnation proceedings in 1848, and said Section 9 of its Charter applies to lands so taken.

Brearly vs. Del. & R. Canal Co.

26 Vroom—78.

Perry v. the Penn RR. Co.

26 Vroom—178.

This case was tried upon an assumption that there was a duty imposed upon the defendant to construct a crossing, because of a duty arising out of the Company's Charter, by reason of the lands being intersected by the Railroad.

When the land was subdivided, the plaintiff as grantee, took the lot, with all the benefits and burthens which appeared at the time of the sale to belong to it, as between it and the property which the vendor retained.  
 10 The easement was necessary to the beneficial enjoyment of the land granted.

Seymour v. Lewis—2 Beasley—443.

Kelley v. Dunning—16 Stew—p. 68.

This rule is held to be well settled, and it is insisted that it applies to a benefit or right of crossing arising by reason of the Charter of the defendant, as well as to the right of easement by prescription.

It was the right and duty of the dominant owner to  
 20 make repairs.

Encyc. of Law—1st Ed.—Vol. 6, p. 149.

Because of the peculiar nature of the servient tenement the statute shifts that duty to the servient owner.

The defendant had opportunity at any time before user gave to the plaintiff's grantors a right of easement, to contest the claim that this driveway came within the provisions of the statute which requires the defendant  
 30 to provide a crossing; and it could have refused to construct a passage thereover.

If it permitted adverse user of its property to ripen into an easement, without stopping such use, it becomes a property right in the dominant owner; and the fact that the statute makes it a duty to construct, does not lessen its liability to subject itself to the servitude.

It is submitted that the user is still adverse and by right.

The statute does not, or was not intended to take  
 40 away or lessen any common law right that the land

owner might acquire, but rather to give him an added benefit.

If the defendant recognized the way as within the statute, and the consequent user becomes an easement, it cannot then allege that it was not a free agent. If it were aggrieved by the statute, the validity of the statute could have been tested.

The statute does not go to title, but simply imposes a duty where the conditions named exist. If the performance of that duty deprived the defendant of any right, performance could have been refused in time, upon proper grounds, and others would not have acquired rights; and if, because of the inaction of the defendant, adverse rights in the plaintiff, or his grantors have become perfected, then they are enforceable. 10

As evidenced by the Map Exhibit, that portion of the lands that is separated from the main tract lying north, is very small, and the main and principal user of the way in question was as a road to reach Somerset Street, and thence the adjoining towns of Somerville and Raritan, it being the only way of ingress and egress for that purpose (Joshua Doughty—page 25—line 10 to 25; and page 26—lines 15-16). The easement was there, aside from the defendant's charter, although the duty to construct a crossing was also imposed by it. 20

The plaintiff also founds his right of action upon this prescriptive right, to have the way kept open and the obstruction removed, from the fact that this has been an apparent and continuous easement for fifty and more years, and passed to Marino, the plaintiff when he acquired title to the lot by Deed and purchase, in 1897; that when the dominant estate was divided, it inured to the benefit of the several parts. 30

Enc. of Law—Vol. 6—1st Ed.—p. 152 (n).

Kelley vs. Dunning—16 Stew.—p. 68.

Brakely vs. Sharp—1 Stock—p. 9.

Seymour vs. Lewis—2 Beasley—p. 439.

Fetters v. Humphrey—3 C. E. Green—p. 260.

4 “ “ “ p. 471.

De Luxe vs. Bradbury—10 C. E. Green—p. 70.

Stuyvesant vs. Woodruff—1 Zab.—p. 133.

C. RR. Co. vs. Valentine—5 Dutch—p. 561.

Whalen vs. Manchester Land Co—36 Vr. p. 210.

That twenty years adverse user raises the conclusive presumption, and that if the owner of the tenement desires to defeat such presumption, the burden is upon him  
10 of showing that such user begun by permission, and not under claim of right.

Clement vs. Bettle—36 Vroom—p. 675.

Cobbe vs. Davenport—4 Vroom—p. 233.

4. The motion was also upon the refusal of the Court to direct a verdict, upon the ground that, by the Decree of the Court of Chancery, in evidence, the defendant had no choice with respect to what it should do \* \* \* \* \*

20 This Decree was made in accordance with the requirements of an Act of our Legislature, approved March 22, 1895, as to the mode in which said crossing should be made.

The defendant consented to the making of the Decree (Exhibit D—No. 1—p. 70) and also to do the entire work of elevating the tracks, depression of Somerset Street, etc. (Ibid—p. 69).

The Chancellor does not adjudge that a crossing be  
30 made, but when the circumstances arose requiring a crossing, he, under said Act, decreed its manner of construction. And if the defendant in building it caused damage to private property, its liability therefor, is a necessary incident of its existence as a Railroad corporation.

For the reasons given in the charge of the Court (State of Case—p. 50) the refusal to direct a verdict for the defendant upon this ground should prevail.

The plaintiff prayed an exception to the charge of the  
40 Court that only nominal damages should be recovered.

The contention of the plaintiff is, that by the construction of the road bed, that part of the easement upon which plaintiff's property abuts is destroyed, so that it could not be used by the plaintiff in connection with his lot.

Testimony is proper as to the value of the lot before the construction and afterwards.

This is not error, the witnesses having stated their knowledge of the property.

The damages is the difference in value of the lots, before the construction and immediately afterwards. 10

Spencer v. Metropolitan St. RR. Co.—L. R. A.

—Book 22—p. 672.

Where the use of a street is permanently obstructed by a Railroad, the damages will be the same as they would be in proceedings by the Company to condemn the property.

N. Y. C. & Hudson RR. Co. vs. Egever.

Book 14—L. R. A.—p. 383—note.

The defendant in error claims that for the reasons 20 given above, the judgment of the Circuit Court should be affirmed.

W. V. STEELE,  
Counsel of Defendant in Error.

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No. 53

JUNE T. 1903

## New Jersey Court of Errors and Appeals

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THE CENTRAL RAILROAD COMPANY OF NEW JER- SEY,	}	IN TORT.	10
Plaintiff in Error,			
<i>vs.</i>			
JOSEPH MARINO,	}		
Defendant in Error.			

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Transcript of Shorthand Notes of Testimony, etc.,  
taken on the trial of the above-stated case, on Monday,  
the Sixth day of October, 1902, before Hon. Abram Q. 20  
Garretson, Judge of the Somerset County Circuit Court,  
and a jury.

MR. W. V. STEELE, for the Plaintiff.

MR. JOHN L. CONOVER AND MR. ALVAH A.  
CLARK, for the Defendant.

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JOSEPH MARINO, the Plaintiff, sworn.

Direct Examination by Mr. Steele.

30

Q. Where do you live?

A. East Millstone.

Q. Where did you live in 1897?

A. In Somerville.

Q. What did you do that year in the way of pur-  
chasing land, if anything?

A. I bought of Mr. Cooper, part of Mr. Cooper's  
property on Cooper street.

40

Q. Where did that property lie?

A. I do not know whether I can describe it right; it is on the east side of Cooper street, I think.

Q. (Handing witness a paper). Will you look at that deed?

A. Yes, sir.

Plaintiff's counsel offered in evidence deed of Samuel W. and Mary V. Miller to John Meehan, dated July 20, 1878; also offered certified copy of the will of John Meehan.

Mr. Clark: There is no dispute about the plaintiff's title at all.

Mr. Steele: I will put it in.

I also offer the will of Caleb Miller. That should go in before the Miller deed to Meehan.

Then, after the will of Meehan, I have a deed of Isabella Meehan, executrix—

The Court: Which is the first one?

Mr. Steele: The will of Caleb Miller; then the deed of Samuel B. Miller and Mary Miller, as devisees and legatees of John Meehan.

Then the will of John Meehan. Then the deed of Isabella Meehan, executrix to Albert P. Cooper, dated August 4, 1890. Then the deed of Albert P. Cooper to Joseph Marino, dated August 6, 1897.

Mr. Clark: Since you have gone into particulars let us get the dates. When was Caleb Miller's will admitted to probate?

Mr. Steele: The eighth day of November, 1877.

Mr. Clark: When was the deed from Samuel W Miller and Mary Miller dated—that was the twentieth of July, 1878, I think you said.

When was the will of John Meehan admitted to probate?

Mr. Steele: The Twenty-first of February, 1881.

The Court: Do these all refer to the land in question?

Mr. Steele: The first to a larger tract, the Marino deed is a portion of the larger tract. 10

Mr. Clark: In the Meehan deed there are about seventeen acres.

The Court: That is the deed from Isabella Meehan, executrix, to Albert P. Cooper—that is seventeen acres you say?

Mr. Clark: No. Is there any question about the tract conveyed by John Meehan to the Millers containing about seventeen acres. 20

Mr. Steele: I suppose that is so, about that.

The Court: We have the papers here; let us see it. Let me see the deed from Samuel Miller and wife to John Meehan. (After examining the deed), "Containing about seventeen acres, being all that remained to Caleb Miller, deceased, at the time of his death, of his homestead farm." 30

Mr. Clark: And the deed from Isabella Meehan, executrix, to Albert R. Cooper, embraced the same land, excepting some lots which were sold off on the old York Road, I think, between the railroad and the turn-pike—Somerset street.

In other words, all the land south of the railroad which was conveyed to John Meehan by the Millers was still owned by Mrs. Meehan at the time of her conveyance to Cooper, and this lot is carved out of that land. 40

Is there any dispute about that?

Mr. Steele: There is no dispute about that.

The Court: There is no objection to these papers I suppose?

Mr. Clark: No.

10 The Court: They will be admitted in evidence.

Q. Then you may describe more fully the surface condition of the lot which you purchased, and the surrounding land at the time of the purchase—at the time you took your deed in 1897?

A. Well, the land itself was just as it is now, as far as the surface of the land is concerned.

The Court: Is that material. The question seems  
20 to be about the road.

You said something in your opening, Mr. Steele, about a map. Have you the map.

(Mr. Steele produces a map).

The Court: Is that map admitted by both parties.

Mr. Clark: Yes.

30 The Court: It is on file, I suppose.

Mr. Clark: No. Mr. Doughty made the map and if he says it is correct I am willing to accept it.

Q. What was the condition of the crossing or intersection of the street running in front of your lot, the lot in question, by the Central Railroad track?

A. I think that the tracks were always about not over a foot higher than the road, not over that.

40 Q. What approaches, if any, were there to this

crossing; what was the condition of the crossing; tell the jury what the crossing was, how it was built?

A. There was a planking on the Somerset street side leading to the place.

By Mr. Clark:

Q. A planking?

A. Not planking, curbing, I should say.

10

By the Court:

Q. Across the railroad?

A. Well, there were cinders and the planks on the track; well, enough to drive at any time.

Further Direct:

Q. To what extent was it planked as between the rails?

20

A. Yes, it was between the rails.

Q. Do you now recall the width, how wide was the crossing?

A. The planking part of it?

Q. Yes.

A. There was about, I could not say exactly the measurement, but I think it is twenty feet or forty feet, something of that sort—thirty feet; it was the width of the track and between the two tracks.

30

The Court: He doesn't seem to understand.

Q. I do not mean as to the width going crosswise, but the width of the planks lengthwise, as they ran in the direction the railroad ran?

A. Well, I should judge it was about forty feet.

Q. Forty?

A. Between thirty and forty feet; may be I am a little bit too high about that; I do not know now, I could not say but it was enough to drive a wagon.

40

Q. Where did this crossing lie with reference to Cooper street?

A. Right directly on Cooper street.

Q. On what street did your lot face?

A. Facing right on Cooper street.

It was admitted that the lot in question is lot No. 20 fronting on Cooper street on a map entitled "Wallace tract, owned by A. P. Cooper, Somerville, N. J., J. Doughty, Jr., C. E., February 18, 1896. Filed August 4, 1897, Frank W. Somers, Clerk."

Q. How long had you been acquainted with this land prior to your purchase?

A. I should say about twenty years.

Q. What was its condition and description during that twenty years or during the time that you knew it?

A. Well, it was a very good place then, that is all I can tell you, and a good street was running there or 20 lying there whatever you might call it.

Q. Running from what point to what point?

A. From Main street to the Wallace property, to the Washington Headquarters, as far as I know of.

Q. Where did Cooper street run with reference to that land, or didn't Cooper street include that driveway that you speak of?

A. Yes, sir.

Q. That driveway, then, was included within the bounds of Cooper street after Cooper street was laid 30 out?

A. That is right.

Q. What was the condition and description of Cooper street after the obstruction complained of was made?

A. Well, it was in such condition you could not drive in any more.

By the Court:

40 Q. What did they do there?

A. Why they cut the street down, I suppose five feet, the main street, and then they raised the track at the lowest calculation four and a half feet.

Q. The main street in what is called Somerset street.

A. Somerset street.

Further Direct :

Q. Was or was not the level of the street between 10  
the crossing and Main street the same?

A. It was the same on Cooper street.

Q. As before the embankment was made?

A. Yes, sir.

Q. What did this embankment consist of?

A. Cinders and the track, that is about all.

Q. To what height is it raised, and was it then raised, above the natural surface of the ground?

A. About four and a half feet; it might be more; I should judge four and a half feet. 20

Q. What has been done with this embankment at that point since it has been raised, with reference to the crossing of foot passengers or carriages?

A. Well, I don't know what has been done, nobody can go through there any more.

Q. You have seen it, have you not?

A. I have seen it yes, sir.

Q. Has anything been done to that with that view?

A. Nothing at all, it remains there now just as it was put there. 30

By the Court :

Q. Do the tracks run on top of it?

A. The tracks run on top of this cinder bed, yes, sir.

Further Direct :

Q. The railroad at the point then, from what you 40

say, is the same as it is at any other point of the railroad where there is no crossing?

A. I don't know whether it is or not.

Q. Well, that is the usual railroad there, is it not, without the crossing?

A. Yes.

Q. In what way did you reach your lot and go from it at the time that you purchased it and afterward; how did you go there, what streets did you take?

10 A. I would take Cooper street and go there; Main street and Cooper street.

Q. When you go there now how do you go, can you reach it in that way?

A. Well, you cannot reach it that way now, no, sir.

Q. What was the value of your lot at that time before this obstruction was put there?

Mr. Clark: For what purpose is that question asked?

20

Mr. Steele: On the question of damages.

Mr. Clark: I object to it as incompetent, immaterial and irrelevant.

Mr. Steele: I understand that the measure of damages is the value of the lot before and immediately after the obstruction.

30 The Court: I think I will take the evidence as to the damages.

Mr. Clark: You will allow me an exception, please?

The Court: Certainly.

A. \$2,000.00.

40 Q. What was its value immediately after the obstruction was put there?

A. I should judge about \$600.00.

Q. What kind of a road bed was there in this street before the street was laid out, within your knowledge, and after the street was laid out?

A. Cinders, I think.

Q. When you say cinders just describe to the jury so that they can tell the width and how the cinders were laid, if they were?

A. Well they were cinders, that is all I can tell, and they are the same way to-day yet. 10

Q. What width?

A. Well, I would say fifty feet as near as I can guess at it.

Q. Was or was not the road formed up.

A. Formed up? Yes.

Q. Rounded?

A. Rounded, just where the cinder bed is it has been rounded.

Q. For what length of time has that driveway been in that condition? 20

A. All the time that I know of it.

Q. Who lived upon the property, if you know, during the time that you have been acquainted with it?

A. Well, I think Mr. Cooper has lived in it, and also Colonel Huff has lived in it.

Q. Who were the parties who put the obstruction there?

A. The Central Railroad Company of New Jersey, as far as I know of. 30

Cross-examination by Mr. Clark:

Q. How do you know?

A. Well, I know that no one else has any right to touch those tracks.

Q. That is the only way you know is it? Now, Marino, after you leave the Railroad Company's line you approach Somerset street?

A. Yes, sir. No, sir, I approach still to Cooper, a little piece of Cooper. 40

Q. No, no, as you go from the Miller house across the railroad after you leave the railroad lines—Mr. Cooper owned land on the south side on the railroad lines did he not?

A. You mean near Main street?

Q. Yes.

A. He does own that yet, a little piece of it.

Q. That land the Central Railroad Company didn't have anything to do with, did they?

10 A. I don't suppose so, I do not know if they have or not.

Q. What you complain of is the raising of the tracks of the Central Railroad so that you cannot get over them, is that right?

A. That is right.

Q. When you say the road bed was formed up, do you mean there were no gutters on each side of the road bed on Cooper street before it was laid out as a street?

A. The tracks were not in the gutter—the tracks  
20 you mean?

Q. Do you mean there were no gutters on each side of the land where Cooper street now is before Cooper street was laid out?

A. Yes.

Q. Yes?

A. Well, I don't know as I understand what you mean.

Q. That is what I want to find out, whether you do or not. You said a little while ago that before Cooper  
30 street was laid out this land was formed up. Do you mean gutters had been—?

A. No, sir.

Q. Just cinders had been carted along there to drive on?

A. Cinders had been there in the centre of that street, what is supposed to be a street now.

Q. If the crossing was filled up on each side of the railroad on the Central Railroad land, would you be able to get to Main street then?

40 A. You cannot do it now.

Q. You cannot do it at all?

A. Then?

Q. Now?

A. Now you cannot get there at all.

Q. If the approaches to the railroad on the Central Railroad Company's land, on Cooper street, were filled up on each side of the line of the road, then you would not be able to get to Main street—

Objected to.

10

A. I think I understand.

Q. What do you understand the question to be.

A. I think you mean in regard to the road and Somerset street, if it was filled in, that is the land leveled again to the surface that you could go over the bank of the Central Railroad. Is that what you mean?

Q. If on each side of the railroad the approaches were filled to the line of the Central Railroad Company's land on the north and on the south so that you could 20 cross over the track, you would not then be able to get to Somerset street, would you?

A. Of course I could.

Q. How could you?

A. There would be a road to run up, it would be hilly.

The Court: I do not understand that myself.

Mr. Clark: The map, I suppose will explain, but it 30 is not proper that should be used.

The Court: Yes, it may be considered as being offered in evidence and admitted. That is the map that is filed?

Mr. Clark: Yes; it does not show the exact condition of things at this time, nor at the time of the purchase by Marino.

The Court: In what respect.

Mr. Clark: It shows the laying out of Washington place.

Mr. Steele: Well, that is not material.

Mr. Clark: I think it is on the question of damages, if you go into that question at all, as showing he  
10 has a method of getting out that is as good as he had before, and better.

Now, my inquiry is this (referring to map) these lines I now point to are the outside lines of the Central Railroad of New Jersey as I understand it, from this map; this little triangle still belongs to the Cooper tract and this little square (indicating) belongs to the Cooper tract. Now suppose the Central Railroad Company were to fill up this land from this point (indicating) to the track, and from this point (indicating) to the track,  
20 how could you get from that point (indicating) down to Somerset street?

Mr. Steele: I object to that. Even if that were so, we should only deal with that condition of affairs when we reach it and if there was any inconvenience, by reason of something else, that would not relieve the present situation.

The Court: The only question as far as I can see at  
30 the present time is whether the Central Railroad Company has filled up that crossing so that it cannot be crossed.

Mr. Clark: The question which was asked a moment ago and which it seems to me will occasion a good deal of trouble, before we get through with the case and which was admitted by the Court, was as to the difference in value.

40 Now suppose the Central Railroad has nothing to

do with the land beyond its own line and suppose by reason of changes which had been made in the highway beyond the line of the Central Railroad, it would be impossible to get to the highway, that the Central Railroad approaches on each side of the track were filled, would not that bear on the question of damages, which this man complains of as being occasioned by the Central Railroad?

The Court: That somebody else has damaged him? 10

Mr. Clark: Yes, that is what I mean.

The Court: Perhaps if the facts are understood that may clear it up.

Was Somerset street cut down?

Mr. Steele: Yes, by the Railroad Company.

The Court: Somerset street has been cut down 20  
below the end of Cooper street so as to go under the  
tracks of the Central Railroad?

Mr. Clark: Yes, sir.

The Court: The idea of your question is that if the Central Railroad Company should make a crossing over its tracks on its own land in Cooper street, then, when the property owner gets across those tracks towards Somerset street, he could not get into Somerset street? 30

Mr. Clark: Because of that retaining wall. That is my idea and I say that is proper on the question of damages.

The Court: That may be, but it might depend somewhat on who made the cut.

(Further discussion ensued.)

Mr. Clark: My point is this:

The plaintiff has sworn that the value of his property before the change was Two thousand dollars and that since the change it is Six hundred dollars.

Suppose we show a condition of things to exist so that it is impossible for him to get down to Somerset street. Even though the Central Railroad Company fixes the approaches to their track so that he could cross  
 10 their land the same as he could formerly, practically, but, by reason of a change of grade which the Board of Commissioners of Somerville have approved, his property cannot be used as formerly, does not that bear on the question of damages.

The Court: I think you may cross-examine about that.

Q. There is a retaining wall on the south side of  
 20 Somerset street is there not, running from the subway up past Cooper street?

A. Yes, sir.

Q. And that wall is how high?

A. I should judge about five feet, five or more.

Q. So that if you got across the railroad track at Cooper street and came down to Somerset street you could not get down to Somerset street unless you jumped down five feet?

A. You could not, but that wall is on private prop-  
 30 erty, I think.

Q. Well, that may be or may not be, it is there anyhow. Did you take that into consideration in your estimate of damages at all?

A. I didn't take anything into consideration.

Q. You didn't take anything into consideration?

A. Only I took into consideration the damages.

Q. How much did you pay for that lot?

A. Fifteen hundred dollars.

Q. When was that, in 1897?

A. 1897, I think or 1898, yes.  
 40

Q. And have you ever tried to sell it since?

A. No, I have not tried to sell it, but there have been offers made.

Q. What time in 1897 did you buy it, in July or August, didn't you?

The Court: The deed is dated August 6th.

Q. You knew at that time that the Central Railroad of New Jersey and the New York and Philadelphia Traction Company were making arrangements to run their road to Raritan, did you not? 10

A. I did not.

Q. You never knew anything about it at all.

A. I do not think it was talked over at that time.

Q. Had not the railroad been built from Bound Brook to Somerville at that time?

A. I do not think it had.

Q. And was it not running?

A. I do not think so; not at that time. I may have 20 forgotten, but I do not think it had.

Q. In other words you did know that they did propose to build a trolley road from Bound Brook to Raritan, did you not?

A. I did.

Q. And if it was running from Bound Brook to Somerville you knew that they proposed to extend it to Raritan didn't you?

A. I knew they were going to extend it to Raritan, yes, sir. 30

Q. And you knew they proposed to run it under the Railroad at the Raritan crossing.

A. No, sir.

Q. You did not?

A. No, sir, I did not know that at all, for sure.

That question came up afterwards, I think.

Q. You did not know anything about a permit being given in July, 1897, for that very purpose, did you?

A. No, sir.

Q. You never heard of that before. 40

A. I never heard of it.

Q. You estimate your damages at \$1,400; you mean by that your lot is worth fourteen hundred dollars more if you could start on Somerset street and go right up to the railroad and across the tracks?

A. Yes, sir.

Q. What would you estimate it if you could go across the line of the land of the Central Railroad, would it make any difference in your estimate of damages, I  
10 mean as occasioned by the Central Road?

A. Well, the damages would be fully as much.

Q. Suppose in other words, that you could go across from Somerset street right over the track, simply at an elevation of four feet or so; what would you then think your lot was damaged?

A. The lot would be damaged then.

Q. How much would it be damaged then?

A. Just as much.

Q. How much would your lot bring in the market  
20 if offered for sale to-day, or don't you know?

A. Well, I would not want it for \$600.00.

Q. Do you know of any lots sold in that locality at all?

A. Yes, sir.

Q. Do you know what they brought?

A. \$750 a piece.

Q. How long since?

A. During the time that I bought mine, and perhaps  
after. Before—

30 Q. Who bought them for \$750 a piece?

A. I do not know the names.

Q. How do you know then.

A. Mr. Hargrave got a lot there.

Q. From what you have been told, or were you  
present at the sale?

A. I was not present at the sale.

Q. Then you only know it from hearsay?

A. From hearsay.

40 Q. Then you do not know anything about it at all.  
There has been no public auction of lots there at all.

A. No, sir.

Q. The only sales have been private sales.

A. Private sales.

Re-direct Examination :

Q. If the Railroad Company ran their crossing under the railroad track instead of above and over the railroad track, then what would your approach be to Somerset street; would it be on the level of Somerset street or not? 10

A. I do not think it would, not as it is now, being that Somerset street has been cut.

Q. Would it or would it not come nearer to the level of Somerset street if the crossing was put under the railroad track?

A. It would be nearer the level, yes, I think so, in my judgment.

Q. What loss has been occasioned to you by reason 20 of this embankment.

Objected to.

The Court : This is vacant land, is it not?

Mr. Steele : Yes, sir.

The Court : There are no buildings on it?

Mr. Steele : Yes, sir. 30

The Court : What is the land used for?

Mr. Steele : Nothing.

The Court : It is vacant; for building purposes?

Mr. Steele : That is what I was getting at. 40

Q. What did you do immediately after the purchase of this land in reference to it?

A. I had plans and specifications drawn up to put up buildings there.

Q. What further did you do?

A. Then I had Mr. Doughty, the surveyor, survey it and bids put in to put up the buildings.

Q. Have you those plans and specifications here.

A. Yes, sir.

10 Q. (Producing paper). Are these them?

A. Yes, sir.

Mr. Steele: Do you object to them, Mr. Clark?

Mr. Clark: No.

Plaintiff's counsel offered the papers identified by witness in evidence.

20 Mr. Clark: I do not see how they are material or why it is necessary to cumber the case with them.

The Court: They may bear upon the question of damages. He says he proposed to improve his property and abandoned the idea because of this embankment, as I understand it.

Q. Did you proceed with the buildings you proposed to put on this lot?

30 A. I proceeded until I found out what they were going to do.

Q. What did you do then?

A. I could not do anything more than wait to see what further they intended to do, and I also wrote to the—sent a notice to the Superintendent of the Central Railroad in regard to it.

Q. What payments, if any, have you made in this lot during that time?

A. What?

Q. What expenses have been incurred by you upon this land and what revenue have you received?

A. I have not received any, but have put out some; taxes and one thing and another; those, and the surveying at that time and loss of interest.

Q. When was the embankment put up?

A. The embankment—I could not exactly tell the date. There was some done in 1898.

Q. What time in 1898?

10

Mr. Clark: Do you know anything about it at all?

A. I think the work was begun along in October of 1898, if I am right.

Re-cross Examination:

Q. Do you know whether it was in 1898 or 1895? 20

A. No, I think it was not in 1895.

Q. Where did you live in 1894?

A. I lived in Somerville.

Q. In 1895?

A. In Somerville.

Q. 1896?

A. Somerville.

Q. 1897?

A. Somerville.

Q. 1898?

30

A. Millstone, I think then—part of 1898—I lived in Somerville, too.

Q. At the time you bought this property Cooper street was laid out as it is now on that map, was it not?

A. Cooper street was laid out as it is now excepting the embankment has been done.

Q. I am speaking of the map, not of the embankment. And Washington street was laid out running off from Cooper street.

A. I think it was.

40

Mr. Steele: I object to that because even if there is another way to the lot, I do not think it is material.

The Court: It bears on the question of damages.

Mr. Clark: We can prove that by the map, I will not waste time.

10 DEMONT FRELINGHUYSEN, sworn for the plaintiff.

Direct Examination by Mr. Steele.

Q. Where do you live?

Witness: May it please the Court, the gentleman will have to stand nearer to me or I to him, or I wont be able to understand his questions.

20

Q. Where do you live?

A. I live in Somerville, sir.

Q. How long have you lived here?

A. I came here in 1827 from Morristown.

Q. Do you or do you not, and did you not know the Miller property at the time—how long have you known it?

A. I have known it since 1830.

30 Q. Will you describe to the jury the condition of the Miller tract as to access to it?

A. What is that?

Q. Will you tell the jury what the condition, the surface condition of the Miller tract was as to access to the buildings upon it, when you first knew it?

A. The Miller tract began at what was then the Pluckamin road. It is now—what is the name of that street—Mountain avenue?

Q. Mountain avenue, yes.

40 A. It commenced there and ran up to the line of the Van Arsdale line; it was subsequently the Dyking line.

and it is now, and has been since the Dyking line, the Cornell line, fronting on Easton avenue.

Q. With reference to the dwelling house of Mr. Miller and the Great Raritan road, the road that used to run from Somerville to Raritan. What have you to say as to what access they had from the dwelling house upon the Miller property, the mansion house, to the Raritan road.

A. You speak of the Raritan road?

Q. Yes. 10

A. It is bounded on the Easton Turnpike, that is not the Raritan Road.

Q. I speak of the dwelling house, with reference to the Raritan Road; how did they get from the dwelling house on the Miller tract to the Raritan Road?

A. I cannot answer that question; I can answer how they get from the Easton Road to the Miller property, but I cannot answer from the Miller property—from the Easton Turnpike to the Raritan Road, I cannot answer. 20

Q. By the Easton Turnpike you mean the road leading from Somerville to Raritan?

A. The Easton Turnpike; we all know where that is.

Q. Was or was there not a road leading from Somerville to Raritan at that time?

A. Yes, sir.

Q. How did they get from the dwelling house on the Miller property to that road running from Somerville to Raritan? 30

A. I cannot answer; I do not recollect any road there.

Q. Are you acquainted with the property as it now stands?

A. Yes, sir, casually.

Q. Do you know whether or not there is a road leading from the dwelling house now to the Raritan Road?

A. There is a road leading across there now to the Raritan Road, or street. 40

Q. How long has that road been there that you speak of, leading from the dwelling house to the Raritan Road, or Somerset Street?

A. I could not tell you the year, sir.

Q. About how long?

A. It may have been a dozen years and may have been a little longer than that.

Q. Have you a recollection of the place prior to the time that the Railroad Company laid its tracks?

10 A. Yes, since—

Q. And of the dwelling house?

A. Since 1830.

Q. And of the dwelling—Miller house?

A. That was there.

Q. How did they get from the Miller dwelling house to this road leading to Raritan if you remember, prior to the time of the Central Railroad?

A. There was at that time, sir, a road, a wagon way, which ran back of the Cornell property, originally,  
20 which is now the Robert property, ran perhaps opposite the Pluckamin Road, and I suppose they had to go from the Miller property, that is from Caleb Miller's property, to this to get across from the road leading to the Easton Turnpike and then go up a ways until they came to the intersection of the road which ran by the Millers; that is my recollection of it; I know of no other way.

Mr. Clark: It is understood that the testimony of this witness does not relate to this road.

30

Mr. Steele: Yes.

Mr. Clark: As it is understood that the testimony of this witness does not relate to this road, I have no questions.

JOSHUA DOUGHTY, sworn for the plaintiff.

Direct Examination by Mr. Steele.

(The qualification of this witness as a civil engineer is admitted.)

Q. Did you plot the Cooper property in the west end of this town?

A. Yes, sir.

10

Q. Is the map in evidence, a map of what was done?

A. Yes, sir.

Q. Do you know the Marino premises, the Marino lot there on Cooper street?

A. Yes, sir.

Q. Lot No. 20?

A. Yes, sir. It is marked No. 20.

Q. What is the street marked there, what does that indicate?

A. It is a street leading out from the north line of Washington Place to the south line of Somerset Street across the Central Railroad tracks.

Q. And the two parallel lines marked "C. R. R. of N. J." represent what?

A. The supposed right of way of the Central Railroad of New Jersey.

Q. "Somerset Street" enclosed in parallel lines and lettered, indicates what?

A. The street as now used between Somerville and Raritan.

30

Q. Has that street any other popular name?

A. It was the Great Raritan River Road, relaid.

Q. I mean at present; is it called the Raritan Road?

A. The Raritan Road, yes, sir.

Q. What property is on property marked "N. J. Memorial Society"?

A. The Washington Memorial Society.

Q. What is the distance lengthwise running up Cooper street from the north line of the Central Railroad

40

of New Jersey to Somerset street, that is the western side?

A. It is not marked, but it is about forty feet, I should judge.

Q. Do you know the Miller tract as owned by him and the Cooper tract as owned by him?

A. Yes, sir.

Q. Does that map show the tract?

A. Yes, sir.

10 Q. Does that tract run down to Somerset Street?

A. The Caleb Miller tract runs from the Raritan River to West End Avenue, or New Jersey Turnpike, which is not shown; it is the next street above Somerset Street.

By the Court:

Q. It is shown on the other map, is it not?

A. Yes, it is shown on that map.

20

Further Direct:

Q. What tract is that indicated upon that map?

A. It is a portion of the Albert Miller tract; there were some lots I think sold off before Meehan bought along on the south side of Somerset Street on the east side of that tract; they bought all south of Somerset Street excepting that which had been sold off before.

Q. That map then indicates the Meehan tract?

30 A. Yes, sir. Well—

Q. So far as the northern boundary is concerned?

A. So far as the northern boundary is concerned, yes, sir.

Q. Running to a line marked "Norton property"?

A. Running past the line marked—the Norton property? The west line of the Norton property is the west line of the Meehan property.

Q. And the Norton property is the property marked "Norton property" on the map?

40 A. Yes, sir.

Q. How long have you known that property?

A. You mean as a—

Q. Been acquainted with it and the conditions?

A. I was born right this side, my father owned the land on the east side, born on that property.

Q. How long ago can you remember this Meehan property and the Marino property geographically?

A. You mean by boundaries?

Q. I mean the surface conditions, its roads and ways? 10

A. As far back as I can remember. There has been very little change in the surface of it.

Q. How far back is that, giving the dates about?

A. I was born in 1844, I suppose it was probably fifty to sixty years—from 1850 to 1860 I travelled over the property.

Q. What was the mode of access to the dwelling house on that property and to Somerset street, as far as you can remember?

A. There was a lane starting about where Cooper 20 Street comes out on the Raritan Road, running down to the house and barn. The house is the present Wallace House and the barn was across Washington Place on the south side.

Q. Was that lane or driveway well defined?

A. It was used constantly by the Miller family.

Q. Anyone else?

A. Anyone going there, it was a private lane, private entrance.

Q. For what purpose was the property used by 30 Miller?

A. He had a still house on the other side of the brook; a cider mill and still house.

Q. People going to and from the distillery, I suppose—?

A. No, they would not go in that lane.

By the Court:

Q. They would not go in that lane.

A. No, sir.

By Mr. Clark :

Q. When you say the other side of the brook do you mean on the other side of the ravine?

A. Well, they would drive in here (indicating), this being the old still house down here. The front of the still house was on the other side of the brook, towards  
10 Raritan. Towards the west side of the brook, and they would drive in a lane right by the still house.

Further Direct :

Q. Was there any other way to the farm buildings and to the mansion house on that property, than by this land?

A. Not that I know of.

Q. That was the only approach for foot passengers,  
20 or for people on foot, or in wagons?

A. Oh well, they would walk across.

Q. Across the fields?

A. There was no roadway across the brook or ravine, across from the still house to the barn or house.

Q. Does or does not that land, where that lane was—is or is not the ground covered by that land included within the space now marked "Cooper Street" on that map?

A. Yes, sir.

30 Q. What kind of a crossing was there at the intersection of the driveway and the railroad?

A. A sufficient crossing, single planks, that is one plank long; the track was a little raised as near as I can remember, probably about a foot.

Q. How were the approaches graded to that foot of rise; if the tracks were raised a foot, how were the approaches to the track graded, gradually, or not?

A. Yes, gradually.

40 Q. How long was it planked; as long as you can remember or not?

A. Yes, as long as I can remember there was always planking across there. The Millers used it constantly, to come out to the street. The planks were probably fifteen or sixteen feet long.

Q. That would then be the width of the crossing?

A. Yes, sir.

Q. What is the present condition of the crossing and how long has its present condition existed?

A. The Railroad Company in building the subway raised the tracks over this crossing about three to four feet, making the embankment about five feet high at that point and I think—as near as I can tell it was in 1898, in August or September of 1898, I cannot tell the exact date. 10

Q. Did they or did they not make any crossing at that point of intersection?

A. No, sir, no crossing.

Q. The rails and the road then and the ties and all are without any crossing or without any provision made for the passage of wagons or foot passengers; is that so? 20

A. Yes, sir, there is no provision made.

Q. Have you noticed that place of intersection since the time that the tracks have been raised? That is have you seen it; have you noticed it?

A. Oh yes, I have been there a number of times.

Q. What have you to say as to whether it can be used for a wagon way?

A. It could not.

Q. Could a wagon or foot passenger cross there with convenience? 30

A. They could not get over it with a horse, without a wagon hardly. In the first place the retaining wall on the Somerset Street side is too high to get up on; the bank slopes from that, on the natural surface of the ground; then it crosses the Cooper property, a little piece of ground, and then the railroad embankment is four and a half feet high and it is a cinder bank.

Q. So that it is as a matter of fact impassable.

A. It is impassable.

Cross-examination by Mr. Clark:

Q. How high is that retaining wall across Cooper street?

A. I think in front of Cooper street it would average at least three feet; the bank then slopes up probably two feet more.

Q. Before it reaches the line of the Central Railroad?

10 A. Yes, sir, from the surface of the ground.

Q. Before it reaches the Central Railroad line?

A. Yes, sir, it would be five feet I should judge.

Q. And then there is a rise of about four feet you say?

A. Four feet.

Q. Do you remember whether the tracks had planks between them or just simply a plank on each side of the track?

20 A. In later years I think there was simply a plank on each side of the rails and filled in between with ballast.

Q. You mean a plank on each side of the rail?

A. Each side of the rail, yes, sir. There used always to be planks over the whole crossing.

Q. Have you any notion of how long that condition of things existed, or don't you know?

A. No, I do not know.

Q. You made that map in 1896?

A. February 18, 1896.

30 Q. You made it?

A. Yes, sir.

Q. It was filed when?

A. It was filed August 4, 1897.

Q. That is you laid out that land into building lots for Mr. Cooper?

A. Yes, sir.

40 Q. There is a street also which leads from Cooper Street, or at least nearby Cooper Street that does not appear on that map is there not, Washington Place. I heard you call it?

A. It is marked on the map Washington Place.

Q. On the map on file?

A. Yes, sir.

Q. Oh, yes, I see. When was that laid out?

A. About the same time.

Q. And Washington Place runs—

A. East and west.

Q. Its western line connects with—?

A. Connects with the western line continued for about one hundred feet across the Cornell property. 10

Q. Washington Place also connects with New Street on the east?

A. Yes, sir.

Q. So that these lots had a way, after this railroad construction, of going down Cooper street to Washington Place and so across New Street to the public highway?

A. Yes, sir. I think this other map shows—

Q. Does that map show the difference?

A. Yes, sir. 20

Q. Just put that up, please?

A. (Map exhibited).

Map referred to marked Exhibit P2.

Mr. Steele: This map is offered on the part of the defendant I suppose.

Mr. Clark: I will offer it if you do not want to. It is a little larger and will explain it a little better, that 30 is all.

Mr. Steele: Oh, well, it does not make any difference.

Q. I wish to call your attention to the location of New Street in connection with Washington Place?

A. Yes, sir.

Q. And P. No. 2 shows that connection, does it not?

A. Yes, sir, with the exception that the streets make 40

an angle about one hundred and fifty feet or something like that from the railroad line; it makes an angle on the lower side of the map.

Q. But that is the way it was laid out on the Cooper tract?

A. Yes, sir.

Q. So that persons owning lots on the Cooper tract who were prevented from crossing the railroad could go down Cooper street and down Washington Place and  
10 across New Street and across the Turnpike?

A. Yes, sir, by going to the west of Middagh Street and across to the Turnpike.

Q. Are there any buildings on this land which Mr. Cooper laid out into lots?

A. Yes, sir, the two first lots to the west of the line marked "Caleb Miller's east line" there are two lots—

Q. Distinguished as Nos. 14 and 13 on Map D1?

A. Yes, sir; then there is another building on either  
No. 5 or No. 6.

20 Q. How is the distillery distinguished on Map P 2?

A. It is marked in red ink.

Q. That is no longer there, is it?

A. No, sir.

Q. How are those lots occupied now?

A. They are occupied by the green house.

Q. What do the black shaded lines which I point to  
on Map P 2 indicate?

A. They are the brook.

Q. And there is a ravine, is there not?

30 A. Yes, sir.

Q. Between the Miller house and the—

A. And the distillery property.

Q. You were speaking a moment ago about the access and egress from the Miller distillery property, which you said ran out from Somerset Street and so up here somewhere (designating).

A. Yes, sir, the roadway comes in very near the west line of the Miller property, down pretty near the fence and down—

40 Q. Yes, I see?

A. In fact they occupied the whole lot, to drive over.

Re-direct Examination :

Q. Will you please tell us the distance by the scale from the Marino lot to Washington Place, to New Street, to Somerset Street, and on Somerset Street back to near the entrance to Cooper Street?

A. I do not understand you.

Y. If a person wanted to go to Raritan by the way of New Street what would be the distance from the Marino lot, the first distance? 10

Mr. Clark: From the Marino lot to where, Washington Place?

Q. The first distance would be from the middle of the Marino lot to Washington Place?

A. It would be about 1,700 feet.

Q. That is about what fractional part of a mile. 20

Mr. Clark: About a quarter of a mile.

Q. What is the distance from the Marino lot to Somerset Street direct over the crossing?

A. About one hundred feet.

(A discussion ensued between counsel after which the witness stated that Middagh Street was opened and could be driven upon.) 30

Q. At the time that the distillery was there upon the Miller property was there any other way to get to and from the dwelling house?

A. I do not remember of any driveway across there; of course there were paths across where you could walk and the like of that.

Q. What kind of a ravine was that you speak of?

A. A deep ravine probably forty feet across the top and running down to a ditch six or eight feet wide. 40

Q. And that ran all along the western portion of the Miller property?

A. No, it was on the east side of the distillery lot running from the Turnpike down on to the meadows.

Q. On the west side of the dwelling house?

A. The west side of the dwelling house lot.

Q. What have you to say as to whether that was filled with water at that time?

A. There was a spring of water that kept a running  
10 stream from the still house down below that.

Q. How wide was it where the running stream was?

A. They had a dam in it where the ravine was dammed off and when they wanted to use it they simply closed the dam and got water enough in there sufficient to wash the apples and the like of that, I think, that is what that was used for. When it was not in use the water was allowed to go down the brook.

Re-cross Examination :

20

Q. You said it was about seventeen hundred feet from the middle of the Marino lot on down to Somerset Street?

A. Yes, sir.

Q. Was that a measurement or a guess?

A. I got it on the map.

Q. What is the distance down that way (indicating) and so on to New Street?

A. It is not given on the map, but it would be about  
30 seven hundred and fifty feet, something like that.

Q. Do you mean that Washington Place is very much longer than Somerset Street?

A. No; if you start at the Marino lot and go to Washington Place and down Washington Place to New Street and then down to Somerset Street and back to the Marino lot you are more than doubling it.

Q. What is the distance from the middle of the Marino lot down to Washington Place?

A. One hundred and fifty feet.

40 Q. From there to New Street, what is the distance?

A. About six hundred feet.

Q. That is seven hundred and fifty; now how far is it from that corner to the corner of New and Somerset?

A. About four hundred and fifty.

Q. That is ten or eleven hundred feet?

A. Yes, sir.

Q. Was it a mistake when you said seventeen hundred and fifty?

10

The Court: He measured back again, he went back to the lot.

Q. It is ten or eleven hundred feet?

A. Yes, sir.

The Court: Twelve hundred feet exactly.

Q. And the distance the other way you say is about seven hundred feet?

20

A. Yes, sir.

Q. We can tell by the scale of the map, can't we, by measuring?

A. Yes, sir.

Q. It is fifty feet to the inch?

A. Yes, sir.

JAMES MEEHAN, sworn for the plaintiff.

30

Direct Examination by Mr. Steele:

Q. What is your profession?

A. Lawyer.

Q. Where do you practice?

A. In Somerville.

Q. Are you acquainted with what is known as the Meehan property?

A. You mean the property spoken of here as the Meehan property? Yes.

40

The Court: Is there any dispute that there has been a crossing there.

Mr. Clark: There has been a crossing there, I am willing to admit, since 1854.

Q. What have you to say as to whether there were gates or not, or whether the driveway was an open driveway or otherwise?

10 A. It was an open driveway from Somerset Street into the building.

Q. Were there any gates?

A. No gates.

Mr. Steele: Then it is admitted this is a driveway and was continuously used for such, since 1850.

Mr. Clark: Since 1854.

Q. What have you to say about repairs being made,  
20 during the time you lived on the property to the crossing?

A. Well, the planks between the tracks were from time to time replaced by the Railroad Company.

Q. That is the Central Railroad Company of New Jersey?

A. The Central Railroad Company of New Jersey, or the employees of the Central Railroad Company.

Q. When was that done?

Mr. Clark: We did it.

30

It is admitted that the way from the Miller house was used by the persons owning the property since 1854 until the time of the change of the grade in the railroad in 1890 as it now appears, and that the Central Railroad of New Jersey maintained that crossing during that time.

It is admitted that it was used by everybody who had business with Mr. Caleb Miller going back and forth as they pleased in and through that property.

HENRY REIMER, sworn for the plaintiff.

Direct Examination by Mr. Steele:

Q. What is your business?

A. Real estate broker and builder.

Q. Where do you live?

A. Somerville.

Q. Are you acquainted with, or do you know the Marino lot in West Somerville? 10

A. Yes, somewhat.

Q. Were you acquainted with it and its location and surroundings before the time the Railroad Company raised its embankment?

A. I was.

Q. Do you know its present situation?

A. I do.

Q. What, in your opinion, was the value of the lot before the embankment was erected? 20

Objected to.

Objection overruled.

Defendant's counsel prayed an exception.

Exception allowed. Let it be sealed and it is sealed accordingly. [L. S.]

30

A. About fourteen or fifteen hundred dollars.

Q. What was its value immediately after the obstruction, after the embankment was raised?

A. Well, I should say one-half.

Q. One-half less?

A. Yes, sir.

Cross-examination by Mr. Clark:

Q. Do you charge the difference in value entirely 40

to the embankment, the raising of the road, or are there other things occasioning the difference in value; in other words, has the value of town lots appreciated or depreciated?

A. It has depreciated.

Q. On account of less demand, has it not.

A. On account of less demand.

Q. Suppose there was no change in the railroad grade there at all, what would that lot bring in the market to-day, a three-cornered triangular lot, with the railroad running right by it, damages having been appraised for injuries suffered by fire, and all that, by reason of the condemnation proceedings; what would that lot bring from a person who wanted to buy it?

A. That is hard to tell.

Q. Would it bring seven hundred and fifty dollars to-day?

A. It is hard work to say what it would bring to-day, because there is very little property sold at present and what is sold, you might say, is quite going back, that is, on the price we used to get two or three years ago.

Q. Would it bring seven hundred and fifty dollars to-day under those conditions, if the railroad had not been raised and the passage way unobstructed?

A. Oh, yes.

Q. Do you think it would?

A. Yes, sir.

Q. Do you think it would bring more than that?

A. I think it would bring more than that, yes, sir.

Q. How much more than that would it bring?

A. Well, it would bring about—pretty near up to twelve hundred dollars or thirteen hundred dollars.

Q. You think then the property is not depreciated more than two or three hundred dollars on a twelve hundred dollar lot?

A. Oh, I should say pretty nearly about one-quarter depreciated.

By the Court :

Q. That is without reference to the embankment?

A. Without saying anything about the embankment.

Further Cross-examination :

Q. If this lot was formerly worth fourteen or fifteen hundred dollars it would now be worth ten or twelve hundred dollars? 10

A. Yes, about twelve hundred now without the embankment.

Q. You think the embankment has caused the lot to be depreciated in value or have the embankment, and the depreciation in value of real estate in town, because there is no demand for it, all combined caused the lot to be less in value?

A. You have two questions in one, have you not?

Q. You say the embankment has depreciated it in value? 20

A. I say the lots have depreciated on account of that embankment of the Central Railroad.

Q. Then do you say also that lots have depreciated in value because there is less demand for them, there is no sale?

A. Yes, I do say that, too.

Q. What proportion have lots depreciated because of want of demand?

A. About one-quarter. 30

Q. So that if this land was worth fifteen or fourteen hundred dollars before the embankment it would be worth from ten hundred and fifty to eleven hundred dollars now?

A. About.

Q. Can you tell me how much depreciation there has been in consequence of the embankment?

A. One-half of the actual value when it is worth about fourteen hundred dollars.

Q. Then what is the value of the lot now? 40

A. That depends.

Q. What would it bring in the market to-day? I understood you a moment ago to say about nine hundred dollars. Say whatever is correct, I may have misunderstood you?

A. No, it would bring perhaps about six hundred dollars.

Q. Six hundred dollars to-day?

A. Yes, sir.

10 Q. Then the figures you have given here are guess work. You mean this, if the conditions to-day were the same with reference to the railroad and the right of way out as they were at the time Marino bought, the land would bring ten hundred and fifty or eleven hundred dollars, a depreciation of one-quarter—

A. I said fourteen hundred, but since, of course the property has gone back and it would be about twelve hundred dollars.

20 Q. And then you think since the time of the raising of the embankment and the interference in the way it has gone back about six or seven hundred dollars more—or five hundred dollars more?

A. It is worth more, you say?

Q. No; the depreciation is five hundred dollars more—or less?

A. It is all of seven hundred dollars.

30 Q. Your own figures would show it to be only about six hundred dollars if you are correct in your statement as to the depreciation of one-quarter in the value of land, because of the general depreciation in value and no demand; the difference in the conditions existing in 1898 with reference to the demand for lots is very marked, is it not, there is very much less demand now than there was formerly, in 1898?

A. Oh yes, quite some.

Q. Brown's Woolen Mill was then in full blast and employed several hundred hands?

A. Yes, sir.

Q. That made a demand for building lots?

40 A. Not exactly; they did—

Q. Well, a demand was made by reason of it?

A. Well, I thought so myself, and I built quite some houses.

Q. And since that time there has been a change in the work at Brown's Mill so that there is no such demand is there?

A. No.

Q. Indeed the real estate market is dead here is it not?

A. Well, I don't want to go back on my own town. 10

Q. Do you know of any sales of land being made here for building purposes?

A. No, not any land particularly.

Q. That is what I am speaking about, any land?

A. No, not any land.

Q. Do you know of any demand for lots in town, do you know to-day a single customer for a lot in this town?

A. Not as I know of.

Q. Don't you know that if this lot was offered at 20 public sale to-day there would be no demand for it, you could get nobody there to buy it?

A. Oh yes, I would buy it myself.

Q. How much would you give for it?

A. That is a question.

Q. Will you say what you would give for it?

A. Well, I would like to get as cheap as I could.

Q. You would be the highest bidder provided you could get it cheap enough?

A. Yes. 30

Q. And you would only buy it because you thought you could make a lot of money out of it, and you would have to buy it very cheap at that?

A. Well, not a lot of money; sometimes I am satisfied with a very little profit.

Re-direct Examination:

Q. Are there any available lots for building purposes that you know of in town? 40

A. Not so many.

Q. Is not the number very limited?

A. Not so many right here; that is in this part of the town. Maybe if you go to what they call East Somerville there are quite a good many and Mr. Cornell has quite some too.

Re-cross Examination:

10 Q. Don't you know there are a number of lots here in town for sale, here in East Somerville and on the Raritan Road?

A. That is what I am speaking about.

Q. And up on Mountain Avenue and so on, up here on the street where—I do not know the name of the street—Summit Street, are they not selling reasonably there?

A. I do not know what the lots are worth there.

Q. You know there are a number of lots there  
20 offered for sale?

A. I do not know.

ABRAM B. HUFF, sworn for the plaintiff.

Direct-examination by Mr. Steele:

Q. You know the Marino lot in question?

30 A. I do.

Q. What have you to say as to its value before the putting up of the railroad embankment and after?

Mr. Clark: I would like to know whether he is acquainted with the market value of lots in this town.

The Witness: I am not a dealer, I only know what men tell me.

40 (After some discussion the witness was withdrawn.)

JAMES HYLAND, sworn for the plaintiff.

Direct Examination by Mr. Steele:

Q. Where do you live?

A. I believe it is on Washington Place—I live myself on New Street, I beg pardon.

Q. You own a property on Washington Place; is that a part of the Cooper tract and Miller tract?

A. It is partly fronting on it. 10

Q. Do you know the lot of Marino on Cooper street?

A. I know where it is located.

Q. Do you know its value—you are acquainted with the value of other land there, are you not?

A. Well, I know what I consider my own share ought to be worth, I am not much interested in anybody else's.

Q. What is the value of the Marino lot? 20

Objected to.

By Mr. Clark:

Q. Do you know anything about the value and selling prices in this community of your own knowledge?

A. Yes, sir.

Q. Anything besides your own lot?

A. Yes, sir.

Q. What other lots do you know about? 30

A. Lots east of me.

Q. On Washington Place?

A. Yes, sir.

Q. Nearer New Street than you are?

A. Nearer Washington Headquarters.

Q. West of you?

A. Yes, sir.

Q. How many lots have been sold there?

A. Well, quite a number; I should say ten or twelve along there. 40

Q. And you know about those sales, do you, of your own knowledge, or do you know only what you have been told about it?

A. All I know is what I heard they brought at the sale.

Q. Was it public sale or private sale?

A. Private sale generally.

Q. In giving your judgment of the value of property on Cooper Street you would be governed by what  
10 you heard these lots brought, would you?

A. Well, I should think so.

Mr. Clark: I submit, if your Honor, please, that is not competent.

Further Direct:

Q. You knew those lots before the Railroad Company made their embankment there, did you not?

20 A. Yes, sir.

Q. And had the same knowledge of it then as you have now?

A. Pretty much.

The Court: He may answer the question.

Defendant's counsel prays an exception.

Q. What was the value of that lot before the embankment was put there?  
30

A. Well, all I know in regard to that lot or any lot was that it was always considered worth \$25 a foot anywhere around the vicinity of Washington's Headquarters.

(A discussion then arose and the witness was withdrawn.)

JOSEPH MARINO, re-called for further cross-examination.

By Mr. Clark:

Q. You said you paid \$1,500 for this lot; did you buy it or exchange property for it?

A. Well, I—

Q. Answer my question.

A. It was bought. 10

Q. How did you pay for it?

A. By selling one property and bought the other.

Q. Who did you buy of?

A. Mr. Cooper.

Q. Who did you sell to?

A. Mr. Cooper.

Q. So you exchanged a house and lot for this property?

A. It was not an exchange; it was a sale.

Q. You call it a sale; you paid him with a house, 20 didn't you?

A. I paid him with a house and lot.

Q. No money passed, did it?

A. There was money due me on the house and—

Q. He paid you the difference between the house and lot and the lot, did he?

A. Yes, sir; I think I paid him some twenty dollars or eighteen some dollars, and I forget what the taxes and assessments were. 30

Plaintiff rests.

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Mr. Clark: If the Court please, I refer to the Act of 1847, pages 128 to 135 inclusive, referring especially to Section 9.

I also offer in evidence the condemnation proceedings of the land of Caleb Miller, from the files of the County Clerk's office.

I also offer in evidence the decree of the Court of 40

Chancery in the matter of the application of the New York & Philadelphia Traction Company to define the mode of crossing the Central Railroad of New Jersey in the Town of Somerville, Somerset County, N. J., filed July 20, 1897.

Defendant rests.

10

Defendant's counsel moved the Court to direct a verdict for the defendant on the ground that it does not appear that Cooper Street has ever been dedicated to or accepted by the public. Also that by another street the plaintiff had access to and from his lands.

Also on the ground that under Section 9 of the charter of the Central Railroad Company of New Jersey if the way was existent at the time of the construction of the railroad the right to its maintenance was inherent  
 20 in the then owner of the premises, and that if the lands were subdivided the grantee of any subdivision could acquire no right under this section of the charter because the reservation was an individual reservation, the language being, "So that *he* may pass the same."

Also on the ground that by the decree of the Court of Chancery of New Jersey in evidence, the Central Railroad Company had no choice with respect to what it should do. It was obliged to raise the roadbed, and if in  
 30 so doing damage was done to adjoining owners it was a damage for which the company was in no wise responsible and if the raising of the roadbed prevents the adjoining owners of lands from passing over the railroad, as it was formerly their custom, it is no fault of the railroad company because this change was not made for its benefit, and therefore, the plaintiff can recover no damages.

Adjourned until Wednesday, October 7, 1902.

SOMERVILLE, N. J. October 7, 1902

Case resumed.

The Court: I have concluded to hold that the plaintiff has a right of action, from the admitted facts 10  
in the case, as a matter of law, and that he will be entitled to recover nominal damages in any event, but will not be entitled to recover as damages the difference between the value of the property when he bought it and its value at the time of the commencement of the suit, and I will refuse to direct a verdict for the defendant, and will strike out the testimony as to the difference in the value of the property from the time he bought it until the suit was commenced.

20

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

Exception allowed; let it be sealed and it is sealed accordingly. [L. S.]

Defendant's counsel prays an exception to the refusal of the Court to direct a verdict for the defendant.

Exception allowed; let it be sealed and it is sealed 30  
accordingly.

[L. S.]

A. Q. GARRETSON, J. S. C.

CHAPTER

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## CHARGE.

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GARRETSON, S. C. J.

Gentlemen of the Jury—This suit is brought by Joseph Marino against the Central Railroad Company of New Jersey to recover damages for obstructing a way across the Central Railroad. In order that the plaintiff may recover he must establish that he has a right to have that way kept open. He is the owner of a lot of land on the south side of the Central Railroad Company which is a portion of a larger tract lying on both sides of the tracks of that company, the north and the south side; a portion of that tract that is on the north side of the railroad is bounded on Somerset Street, the main street in that locality, which is also called the Raritan Road. That tract of land was in the ownership of one person some years ago, and the plaintiff obtained title to this lot through subsequent owners of that tract, somewhere in the year 1897, his lot being wholly on the south side of the Central Railroad Company's tracks, the part on the north side remaining in the original owner or his grantees.

The charter of the Central Railroad Company of New Jersey granted in 1847 provides in the ninth section that it shall be the duty of the company "to construct and keep in repair good and sufficient bridges or passages over or under the said railroad or roads where any public or other road shall cross the same so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby; and also where the said road shall intersect any farm or land of any individual, to provide and keep in repair suitable wagonways over or under said road so that he may pass the same."

It appears that the Central Railroad Company under the several provisions of its charter, proceeded to

condemn a right-of-way across this piece of land which was a portion of a farm or lands of an individual. This condemnation took place in 1848, fifty-four years ago. As I understand the law of this State the section which I have read applies to lands that are taken by condemnation. We have a number of cases in New Jersey upon the subject; the first is that of *Brearley vs. The Delaware & Raritan Canal Company*, where the property owner sought to compel the company to build a bridge  
 10 across a canal which intersected his farmland, there being in the charter of the canal company a provision that the company should provide or keep in repair a suitable bridge or bridges so that the owner or owners and others could pass the same. In that case the plaintiff had sold the land to the canal company for the purpose of making a canal, and his deed contained no provision or reservation or any covenant to build a bridge, and the Court held that that section of the charter did not apply to cases where the company had acquired the land by conveyance  
 20 by deed; that the plaintiff had the power and the right, when he made his deed, to make provisions for a bridge, and if he did not do so he could not compel the company to build a bridge afterwards.

In the case of *Perry vs. The Pennsylvania Railroad Company*, reported in 26 *Vroom*, 178 the case of *Brearley vs. The Delaware & Raritan Canal Company* was considered. That was another case of a bridge across a canal, or a feeder to it, and in that case a bridge had been built and was afterwards abandoned and closed up, and  
 30 the judge who read the opinion in that case said that the principle on which the case of *Brearley* against the Delaware & Raritan Canal Company was founded was that the company by its charter was permitted to take lands by condemnation only in cases where such lands could not be obtained by agreement with the owner, and that the section of the canal company's charter with regard to keeping a bridge across the canal applied only when the lands acquired were obtained by condemnation. So in this case, applying this rule, where the lands are  
 40 acquired by condemnation the obligation of the com-

pany set out in the ninth section of the charter of the Central Railroad applies, and the company was bound to keep and maintain a suitable wagonway over its road where it divided this farm.

The next question arises is, having provided the wagonway, for what purpose was it provided?

It is urged, and I think with considerable reason and force, that it was provided for the use of the two pieces of land in one individual ownership, so that the owner might use the way for access to and exit from the divided parts of his land in the same way that he formerly used the land when it was lying in one tract. If that is so, then, when the ownership is severed and the lands on one side of the road are in one owner and the lands on the other side of the road in another owner, it might be questioned whether this right to have this wagonway maintained existed in the owner of either portion. 10

It appears in this case that this wagonway across the tracks of the railroad company has been used for many years, probably from the time the railroad was built and the wagon-way made, up until the present time, or up to the time of the interference with it, not simply for the benefit of the two pieces of land lying on the opposite sides of the road, but as a part of the way from the house of the owner of this land out to the main street, the other parts of the way being upon his two pieces of land, and it may be that, having been used for so long a time in that way, a right has arisen to have it used for that way and for that purpose. 20

Therefore I have concluded to say to you that the plaintiff has established a right to have that way used for that purpose, as a means of getting to the public street bounding a part of the land. 30

The question remains whether that right of way was for the benefit of the owner of the whole tract, or whether it was a right that inhered in all portions of that land, and could be passed by conveyance of different portions of it, and I have concluded to hold that such right may be conveyed, and that the grantee to such a deed would have a right to have that way maintained. 40

The point is also raised that this way has been stopped and obstructed by legal authority; that the legislature passed an act whereby when a steam railroad and a trolley road cross at grade the Chancellor shall devise a method of crossing, one above the other, and in pursuance of that law the Chancellor has made an order as to the crossing of this street, upon which portions of the lands of the owner of the whole tract bound, by which order it is directed that the street should be depressed and the railroad tracks elevated, and that this obstruction has occurred in carrying out that decree of the Chancellor. In that aspect there is also the question whether the legislature has the power to authorize such a mode of crossing without providing compensation to the abutting property owner, and if so, if injury to the property owner ensues by reason of such crossing, the owner of the property shall not be compensated for such injury. It seems to me, however, that perhaps that question is not properly within this case. The embankment across this way is not a part of the grade of the street, but an erection made in pursuance of a decree of the Chancellor in order to make effective the altered grade of the street. Nevertheless it is done on the land of the Central Railroad Company, and done in such a way as may injure the private property of this plaintiff, and therefore it seems to me that it is no answer to the plaintiff's claim to have that way kept open, and that probably the legislature could not authorize anybody to direct a private corporation, or a public corporation like a railroad, to change its grade where it affects private lands injuriously, without making compensation, and that if the company is obliged to make such change by the order of the Chancellor, the company may yet be required to pay for any damage done by it in carrying out such decree.

So that I have reached the conclusion that under the admitted facts in this case, as a matter of law, the plaintiff had the right to have this way kept open.

That being so the only question is one of damages. The primary object of this suit is to establish the

plaintiff's right, and in such cases the damages are ordinarily known as nominal damages—six cents damages.

I am unable to find in the testimony any evidence to show any other damage to the plaintiff. The difference in the value of the land at the time of the purchase by him and at the time of the commencement of this suit is not a criterion, or the measure of his damages. That is manifest when we consider that, having established his right to have the way opened, the legal means of enforcing that right exist, and when it is opened his land will be worth just as much as it was before that way was closed. 10

The Central Railroad, upon the right of the plaintiff to have this way open being established, may of its own motion provide a way, and the land should be worth just as much as it was before, so far as the evidence in this case shows, except perhaps the damage arising from inconvenience, but this being a vacant lot, lying there unimproved, not being used in any way and not requiring access across this place for its use during the time the embankment has been in existence prior to the commencement of this suit, it does not seem to me that anything beyond nominal damages has been proven. 20

So that in this case your verdict will be for the plaintiff for six cents damages.

Plaintiff's counsel prayed an exception to the charge of the Court that only nominal damages could be recovered.

30

Exception allowed; let it be sealed, and it is sealed accordingly.

[L. S.]



## SUMMONS.

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SOMERSET COUNTY, ss.:

THE STATE OF NEW  
JERSEY to the Sheriff 10  
of the County of Som-  
erset, aforesaid, GREET-  
ING:

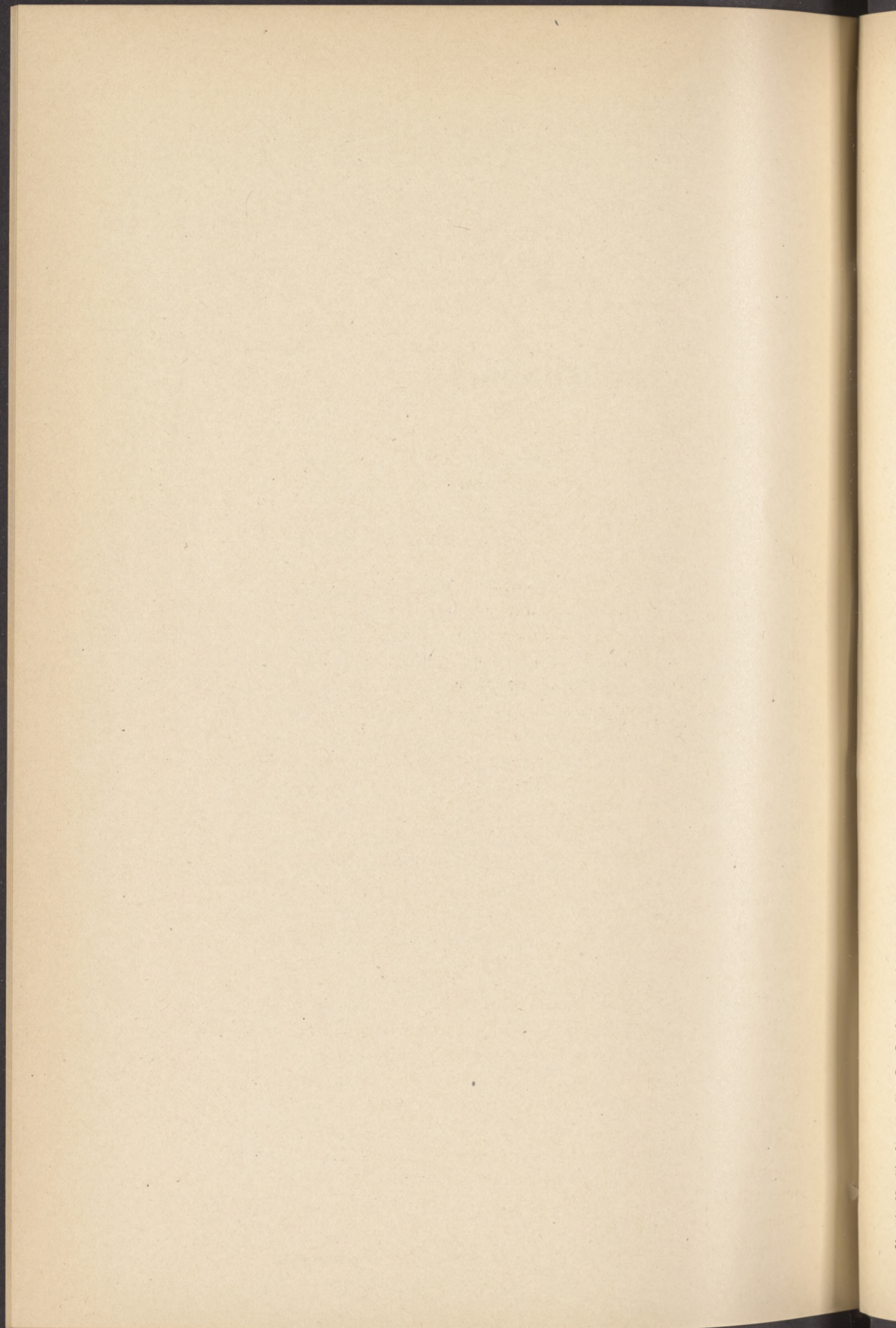
[L. S.]

You are hereby commanded to summon the Central Railroad Company of New Jersey, if in your county it may be found, so that it be and appear before our Circuit Court, to be holden at Somerville in and for the said County of Somerset, on the Third day of September, to answer unto Joseph Marino in an action of tort to his damage Two Thousand Dollars, as is said: And have you then there this Writ. 20

Witness, Abram Q. Garret-  
son, Esquire, a Judge of  
our said Circuit Court  
at Somerville aforesaid,  
the twenty-first day of  
August, in the year One  
Thousand Nine Hundred  
and One.

FRANK W. SOMERS, 30  
Clerk.

W. V. STEELE,  
Attorney.



## DECLARATION.

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SOMERSET COUNTY CIRCUIT COURT, as yet of  
 the Second day of September, in the year of our  
 Lord One Thousand Nine Hundred and One. 10

SOMERSET COUNTY, ss.:

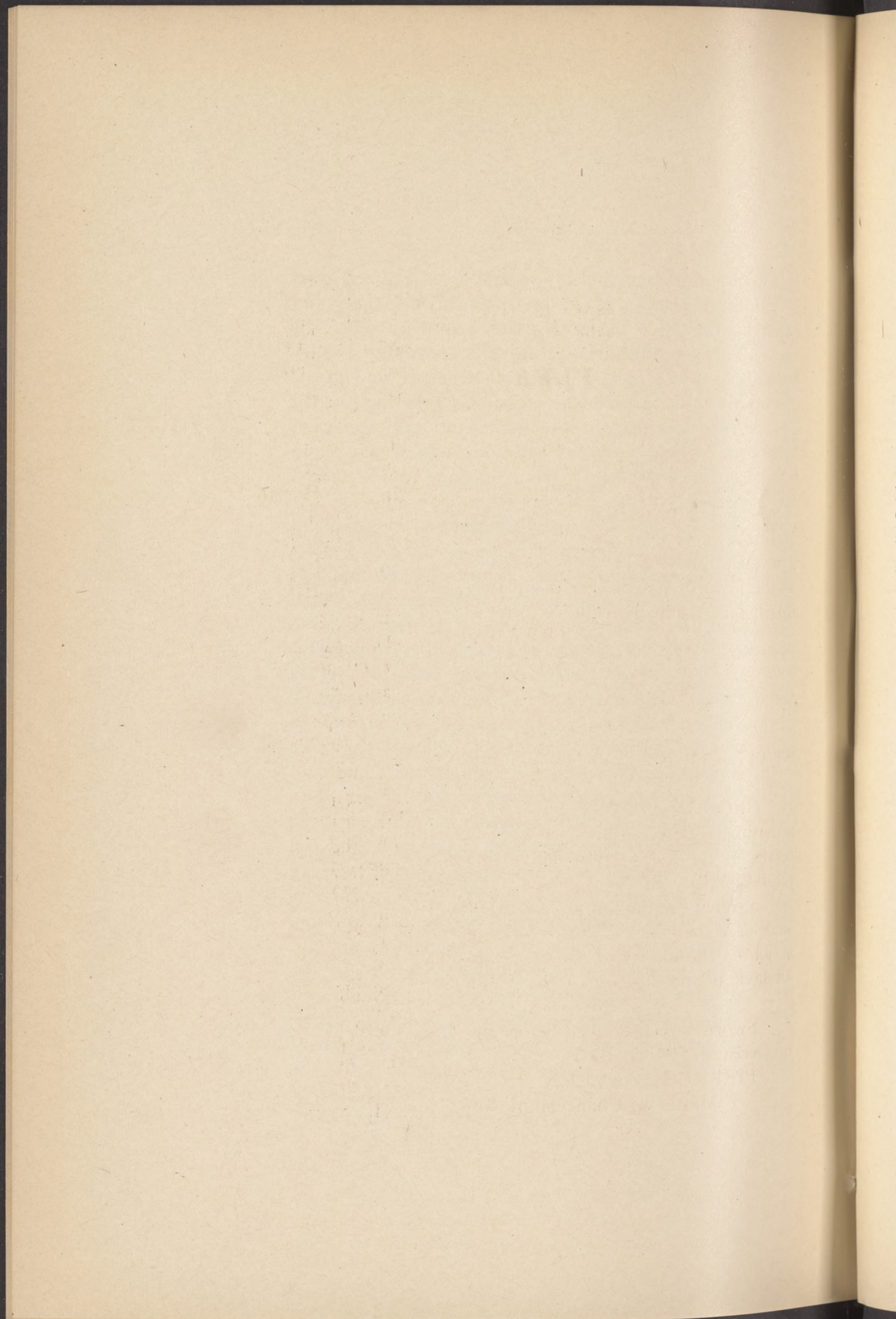
The Central Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, the defendant in this suit, was summoned to answer unto Joseph Marino, the plaintiff therein in an action in tort, and thereupon the said plaintiff by William V. Steele, his attorney, complains, for that whereas the said plaintiff before and at the time of the committing of the grievances by the said defendant, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and tract of land with the appurtenances, situate, lying, and being in the Township of Bridgewater in the county of Somerset aforesaid, and by reason thereof, he, the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said messuage and tract of land towards, unto, into, through and over a certain close in the township aforesaid, and from and out of the same towards, unto and into a certain highway called Somerset Street, in the township aforesaid, and so back again from the said highway towards, unto, and into, through, over and along the said close, and from and out of the same towards, unto, and into the said messuage and tract of land of the said plaintiff, for himself, and his servants, on foot, and with horses and carriages, to go, return, pass and repass, every year and at all times of the year, at his and their free will and

pleasure. Yet the said defendant well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst he the said plaintiff was so possessed of his said messuage and tract of land with the appurtenances as aforesaid, to-wit, on the First day of October, Eighteen Hundred and Ninety-eight, and on divers other days and times between that day and the commencement of this suit, at the township aforesaid in the county aforesaid, wrongfully and injuriously obstructed and stopped up the said way, and the said plaintiff by means thereof, could not, during the time aforesaid, or any part thereof, nor can he now, have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been and is by means of the premises, deprived of the use, benefit, and advantage thereof, to-wit, at the Township of Bridgewater aforesaid, in the county aforesaid: To the damage of the plaintiff Two Thousand  
 10 Dollars.

And for that whereas the said plaintiff before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of a certain other messuage and tract of land with the appurtenances, situate, lying and being in the Township of Bridgewater, in the County of Somerset aforesaid, and by reason thereof the said plaintiff during all the time aforesaid, ought to have had, and still of right  
 30 ought to have a certain way from and out of the said messuage and tract of land, unto, into, through and over a certain close in the township aforesaid, and from and out of the same unto and into a certain highway called Somerset Street in the township aforesaid, and so back again from the said highway, unto, into, through, over and along the said close, and from and out of the same unto and into the said messuage and tract of land of the said plaintiff for himself and his servants, on foot and  
 40 with horses and carriages, to go, return, pass and repass, every year and at all times of the year at his and their

free will and pleasure, as to the said messuage and tract of land and premises of the said plaintiff, belonging and appertaining. Yet the said plaintiff well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst the said plaintiff was so possessed of his said messuage and tract of land with the appurtenances as aforesaid, to-wit, on the First day of October, Eighteen Hundred and Ninety-eight, and on divers other days and times between that day and the commencement of this suit, at the Township of Bridgewater in the County of Somerset aforesaid, wrongfully and injuriously placed and erected divers large quantities of earth, stones, wood, timber and iron across the said way, and put and placed, and caused to be put and placed divers other large quantities of earth, stones, wood, timber, and iron in the said way, and kept and continued the said earth, stones, wood, timber, and iron so put, placed and erected in and across the said way as aforesaid, and also the other earth, stones, wood, timber and iron in the same way aforesaid, for a long space of time, to-wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the said plaintiff by means thereof could not during the time aforesaid, or any part thereof, nor can he now, have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been and is, by means of the premises deprived of the use, benefit, and advantage thereof, to-wit, at the Township of Bridgewater, in the County of Somerset aforesaid: To the damage of the said plaintiff Two Thousand Dollars, and therefore he brings his suit, etc.

WILLIAM V. STEELE,  
Attorney Plaintiff.



## PLEA.

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And the said defendant, The Central Railroad Company of New Jersey, by John L. Conover, its attorney, comes and defends the wrong and injury when, etc., and says: That it is not guilty of the wrongs and grievances above laid to its charge in manner and form as the plaintiff hath above complained against it, and of this it puts itself upon the country. 10

JOHN L. CONOVER,  
Attorney for Defendant.

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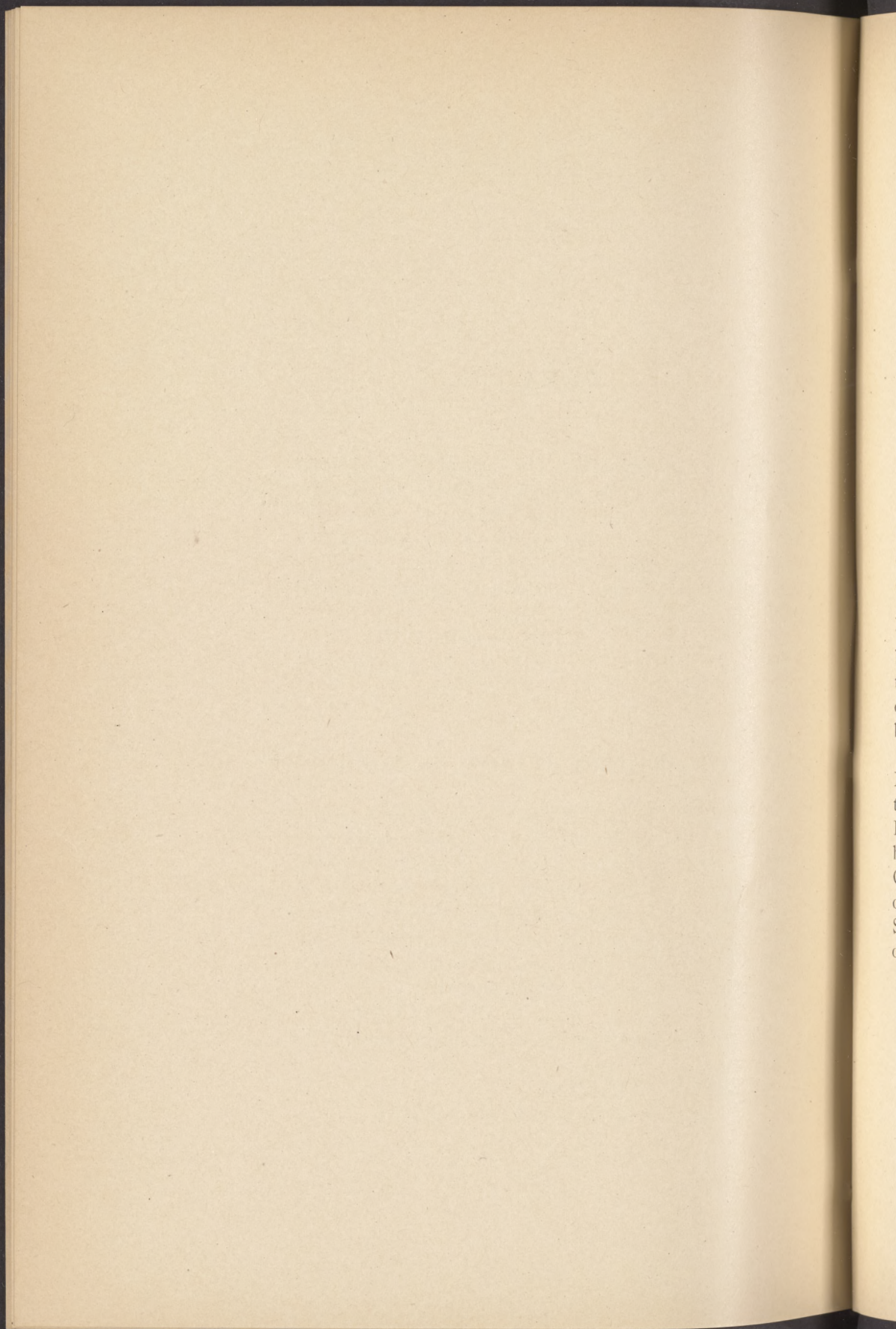
STATE, COUNTY AND CITY OF NEW YORK, ss.: 20

GEORGE O. WATERMAN, being duly sworn according to law, on his oath says: That he is the Secretary of the corporation defendant, The Central Railroad Company of New Jersey; that the above plea is not intended for the purpose of delay and he believes the said defendant has a just and legal defense to said action on the merits of the case, and that he makes this affidavit in the absence of the President.

G. O. WATERMAN. 30

Sworn and subscribed before me this Twentieth day of December, A. D. 1901.

PIERRE P. GAVERN,  
Master in Chancery of New Jersey.



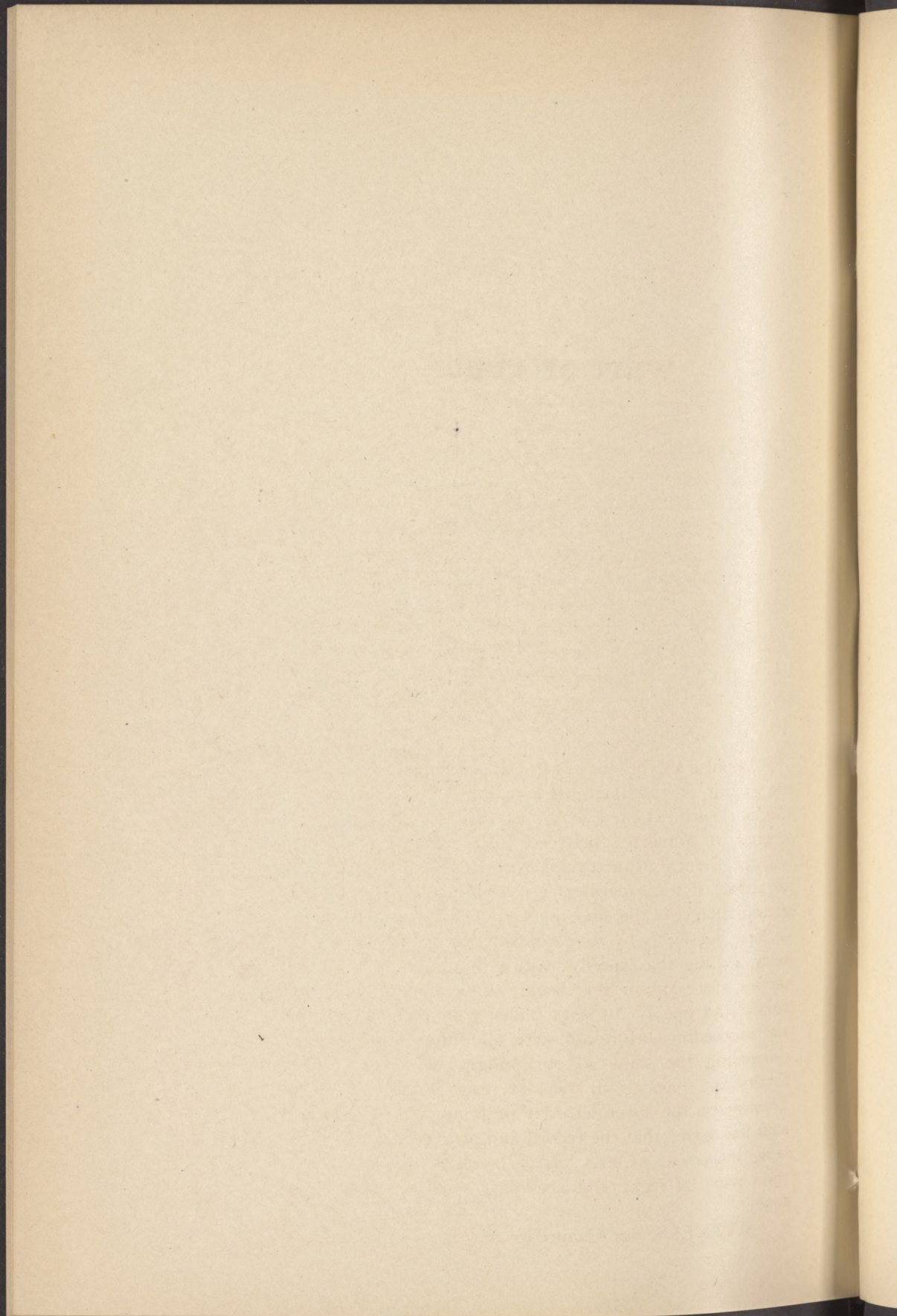
## JUDGMENT.

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Therefore, the Sheriff is commanded that he cause to come before the Judge of our Circuit Court, at Somerville, in the County of Somerset, on the Twenty-third day of September, Nineteen Hundred and Two, twelve, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also come who to speak the truth of the matter without constraint being chosen, tried and sworn, upon their oaths say that they find the defendant guilty and find for the plaintiff damages at the sum of six cents besides costs of suit to be taxed. 10

Therefore it is considered that the said Joseph Marino do recover against the said defendant aforesaid to the sum of Six Cents, and also the sum of Sixty-three Dollars and Eighty-two Cents for his costs and charges by him about his suit in that behalf expended, by the Court now here adjudged and with its assent, which said damage and costs, in the whole, amount to the sum of Sixty-three Dollars and Eighty-eight Cents, and the said defendant in mercy, etc. 20

Judgment signed December 10, 1902.



## WRIT OF ERROR.

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NEW JERSEY, ss.:

THE STATE OF NEW  
 JERSEY to Abram Q. 10  
 Garretson, Esq., Judge  
 of our Circuit Court at  
 Somerville in and for the  
 County of Somerset, or  
 such Justice of the Su-  
 preme Court of the State  
 of New Jersey as shall  
 hold such Circuit Court,  
 GREETING:

[L. S.]

20

Because in the record and proceedings, and also in the giving of judgment in a plaint, which was in our Circuit Court holden at Somerville, in and for the County of Somerset, between Joseph Marino, plaintiff, and the Central Railroad of New Jersey, defendant, of an action of tort, manifest error hath intervened to the great damage of the said the Central Railroad Company of New Jersey as by its complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly, to send under your seal, the record and proceedings aforesaid with all things touching and concerning the same to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the Twentieth day of January inst., together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done there-upon what of right and according to law ought to be done.

30

WITNESS, our Chancellor and President Judge of 40

our said Court of Errors and Appeals at Trenton aforesaid, the Seventh day of January, A. D., One Thousand Nine Hundred and Three.

S. D. DICKINSON  
ALVAH A. CLARK, Clerk.  
Attorney.

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10 The answer of Abraham Q. Garretson, Esquire, Judge of the Circuit Court, within named, the record and proceedings of the plaintiff whereof mention is within made with all things touching the same, I certify to the Judges of our Court of Errors and Appeals at Trenton, at the day and year within contained in a certain schedule to this writ annexed, as I am commanded.

## ASSIGNMENT OF ERRORS.

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Afterwards, that is to say, on the Twentieth day of January, in the year of our Lord Nineteen Hundred and Three, before the Judges of the said Court of Errors and Appeals, in the last resort in all causes, comes the said the Central Railroad Company of New Jersey, by John L. Conover, its attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving the verdict and judgment aforesaid, there is manifest error in this, to-wit: 10

FIRST. That the declaration aforesaid and the matters therein contained, are not sufficient in law for the said Joseph Marino to have his action against it, the said the Central Railroad Company of New Jersey. 20

SECOND. There is error also in this, to-wit: For that the said Judge of our Circuit Court, at Somerville, in and for the County of Somerset, before whom the said cause was tried, after the case was closed, and all the evidence had been heard, was requested to direct a verdict for the defendant, which said request the said Judge refused. 30

THIRD. There is error also in this, to-wit: For that by the record aforesaid it appears that the judgment aforesaid was rendered against the defendant, the Central Railroad Company of New Jersey, whereas it ought to have been given in favor of the Central Railroad Company of New Jersey.

Therefore, the said the Central Railroad Company of New Jersey prays that the judgment aforesaid, by 40

reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, may be reversed, annulled and held for nothing, and that the Central Railroad Company may be restored to all things which it has lost on account of the said judgment, and that the prosecutor of the said plea, in the name of the said Joseph Marino, may rejoin to the said errors, etc.

JOHN L. CONOVER,

Attorney for Plaintiff in Error.

ALVAH A. CLARK,

Of Counsel.

10

20

## In Chancery of New Jersey.

### EXHIBIT D, No. 1.

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In the Matter of the Application  
of the New York and Philadel-  
phia Traction Company to de-  
fine the mode of crossing the  
Central Railroad of New Jer-  
sey, in the Town of Somerville,  
Somerset County, New Jersey.

10

Decree.

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The New York and Philadelphia Traction Company, having presented its petition, verified by its Vice-President setting forth, among other things, that the line of its street railway, as located on Somerset street in the Town of Somerville, Somerset County, State of New Jersey, crosses the tracks of the Central Railroad of New Jersey, a steam railroad, where it is intersected by Somerset street in said town, and that the point at which said street railroad crosses the tracks of said steam railroad is 30 not within the limits of any city of this State, and praying the action of the Chancellor as to the mode in which said crossing should be made, in accordance with the requirements of an Act of the Legislature of the State of New Jersey, entitled, "An Act to regulate the crossing at points not within the limits of cities of this State of steam railroads by steam or electric railways hereafter to be constructed," approved March 22, 1895, and the matter now coming on to be heard in the presence of Garret D. W. Vroom, Solicitor for and counsel with the 40

Petitioner, and John L. Conover, Solicitor for said The Central Railroad Company of New Jersey, and the Town of Somerville, having received due notice of this application and hearing, and the proofs in the matter and the arguments of counsel having been duly considered, and the Chancellor being satisfied that an undergrade crossing of the steam railroad tracks will inflict the least injury upon the rights of said steam railroad company, and will increase the safety of travel by the cars of the Traction

10 Company and afford the greatest protection to the public.

The Chancellor does, upon this Twentieth day of July, in the year Eighteen Hundred and Ninety-seven, order, adjudge and decree, that the crossing of the New York and Philadelphia Traction Company over the tracks of the Central Railroad Company of New Jersey, a steam railroad as aforesaid, on Somerset street, in the Town of Somerville aforesaid, shall be by an undergrade crossing of such steam railroad tracks; that such a crossing will inflict the least injury upon the rights of the said

20 The Central Railroad Company of New Jersey steam railroad as aforesaid, and will increase the safety of travel by the cars of the Traction Company and afford the greatest protection to the public, and that such undergrade crossing shall be made as follows: The several tracks of the Central Railroad Company of New Jersey, where they now intersect and cross said Somerset street at grade, in said Town of Somerville, shall be elevated, so that the base of the rails after such elevation shall be

30 the base of the rails as they are at present; that said Somerset street shall be depressed in its entire width such a depth as will give a clearance of thirteen feet, between the surface of such street after depression and the underside of a bridge to be erected across said street to carry the tracks of said steam railroad at the new elevation; that the depression so to be made in said Somerset street shall be limited within the following distances, to-wit: Three hundred feet on the East side of

the steam railroad, measured from the centre of the right

40 of way thereof and two hundred and ninety feet on the

West side measured as aforesaid; all of which measurements and data herein referred to, as well also the angle of crossing, the profile of old and new elevations of the steam railroad tracks, and Somerset street, and the location and dimensions of proposed bridge are shown upon a plan hereto attached and made a part of this decree.

And whereas the elevation of the several tracks of The Central Railroad Company of New Jersey, as well as the depression of Somerset street at its intersection with said tracks, is a work requiring great care to insure the safety of the traveling public on the Central Railroad of New Jersey, and it is both proper and desirable that such work be done as an entirety; and the said The Central Railroad Company of New Jersey having consented to do the entire work, it is further ordered that the elevation of the steam railroad tracks and the depression of Somerset street, including the construction of a bridge across said Somerset street, to carry the tracks of said steam railroad, be done by The Central Railroad Company of New Jersey, and that the cost and expense which the said The Central Railroad Company of New Jersey shall incur and sustain in such elevation, depression and construction shall be borne and paid by the said The Central Railroad Company of New Jersey and the said The New York and Philadelphia Traction Company in the following proportions, viz.: Two-thirds thereof by the said The Central Railroad Company of New Jersey, and one-third thereof by the said The New York and Philadelphia Traction Company, such one-third, however, not to exceed the sum of ten thousand dollars; that before the said The Central Railroad Company of New Jersey shall be required to proceed with such elevation of tracks, depression of street and construction of bridge as aforesaid, the said The New York and Philadelphia Traction Company shall pay to the said, The Central Railroad Company of New Jersey, the sum of ten thousand dollars as a condition precedent to the performance of such work, to be held by said Railroad Company as a special deposit until such time as such work shall be fully and

completely done and performed, when said Railroad Company shall be entitled to appropriate and take therefrom an amount equal to one-third of the cost and expense which it shall have incurred and sustained in the performance of such work, not exceeding said sum of ten thousand dollars; and in case the one-third of such cost and expense shall not equal said sum of ten thousand dollars, then to return to said New York and Philadelphia Traction Company the difference between the one-third  
 10 of such cost and expense and said sum of ten thousand dollars.

And it is further ordered that the elevation of the steam railroad tracks, the depression of Somerset street and the construction of a bridge over said Somerset street to carry the several tracks of the steam railroad at the new elevation shall be done in such manner as to cause the least public inconvenience and damage consistent with the character of the work to be done, and that either of the parties hereto shall be at liberty upon  
 20 two days' notice to the others to apply to the Chancellor for a further order respecting a full and true compliance of any provision herein contained, on an allegation that the same is not being fully observed, kept, done or performed.

By the Statute,

H. C. PITNEY,

Master.

I hereby consent for and on behalf of The Central  
 30 Railroad Company of New Jersey to the making of the foregoing decree.

JOHN L. CONOVER,

Solr. of The Central Railroad Co. of N. J.

The Board of Commissioners of Somerville consent to this decree and by resolution have authorized the President to sign such consent.

J. J. BERGEN,

Pres. Board of Comrs. of Somerville.

40 Copy of Map omitted.

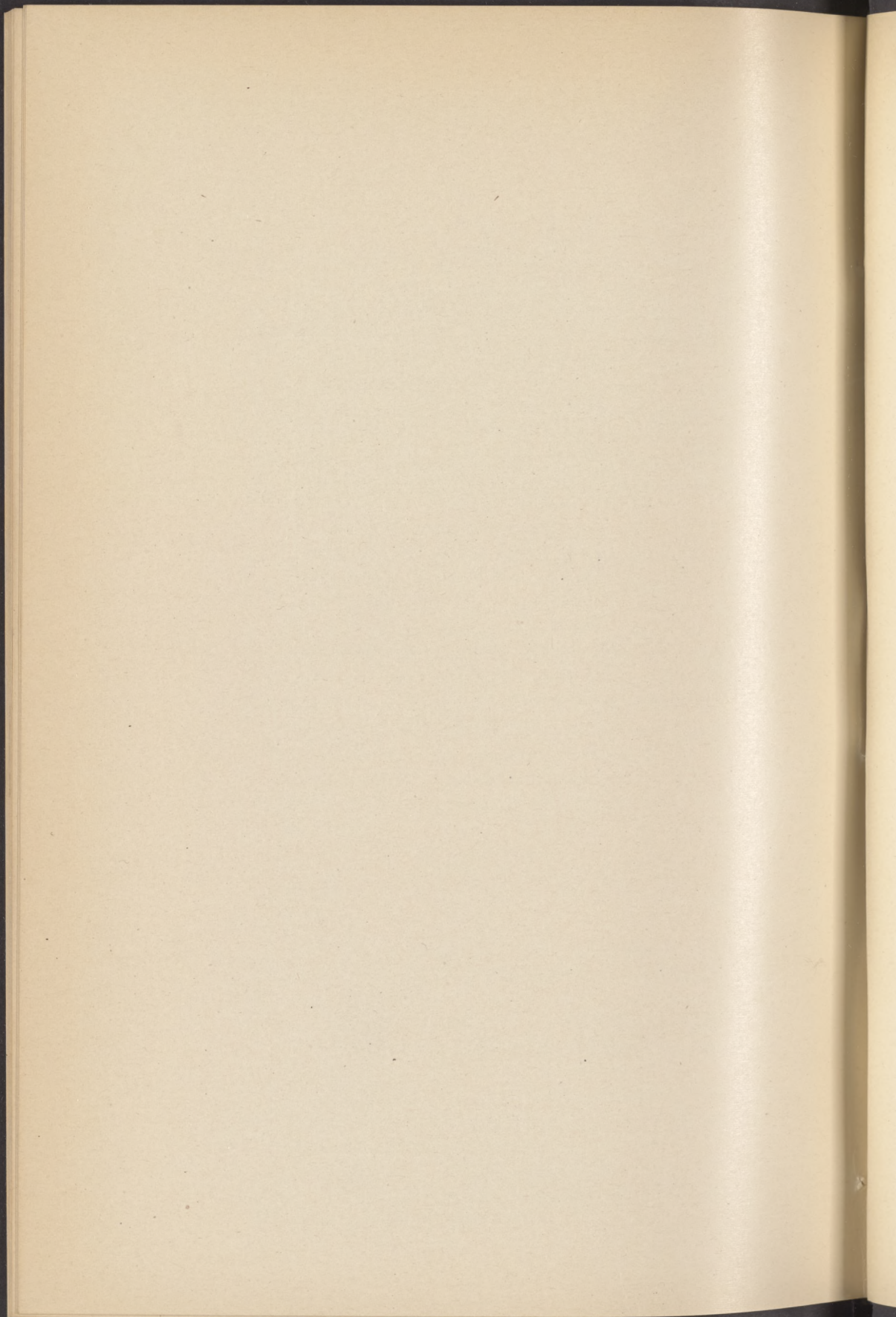
I, Edward C. Stokes, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Final Decree in the cause wherein. In the matter of the application of the New York and Philadelphia Traction Company to define the mode of crossing The Central Railroad of New Jersey in the Town of Somerville, Somerset County, New Jersey, now on the files of my office. 10

(SEAL)

In Witness Whereof, I have hereto set my hand and seal of said Court, at Trenton, this Fourth day of October, A. D. Nineteen Hundred and Two.

E. C. STOKES,

Clerk. 20



## EXHIBIT D, No. 2.

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*To the Honorable Henry W. Green, Esq., Chief Justice  
of the Supreme Court of the State of New Jersey:*

William J. Lewis, alleging himself conscientiously scrupulous of taking an oath, being duly affirmed saith, that he is the Chief Engineer of the Somerville and Easton Railroad Company, and the proper agent of the Company, to designate the land required for the use of the said Company in the construction of the said railroad, and that the following is a correct and particular description of the land owned by Caleb Miller, of the Township of Bridgewater, in the County of Somerset, and State of New Jersey, and occupied by the said Caleb Miller, and that the said lands is situate in the Township of Bridgewater, in the County of Somerset, and State aforesaid, required for the use of the said Company for the construction of the said railroad over the land of the said Caleb Miller, and for which the said Company cannot agree with the said Caleb Miller for the purchase thereof, to-wit:

Beginning at a stake in the centre line of the said Railroad, and in the line of Joshua Doughty, thence north sixty-one (61) degrees west 491 feet to the middle of the Flemington Road, and including 20 feet in width upon each side and adjoining to said centre line of said Railroad, containing forty-five hundredths (45-100ths) of an acre of land, and which centre line of course has been designated by the Engineers of the said Company in the location of the route of the said Railroad, throughout the said land of the said Caleb Miller.

WILLIAM J. LEWIS.

Affirmed and subscribed this twenty-fifth day of January, 1848, before me.

HENRY W. GREEN, Ch. Just.      40

I do hereby assign Monday, the Seventh day of February next, at 3.00 o'clock in the afternoon of that day at my office, in the City of Trenton, for the appointment of three disinterested, impartial and judicious Freeholders, not residents in the said County of Somerset, Commissioners to examine and appraise the said lands so as aforesaid required by the said "The Somerville and Easton Railroad Company," in the construction of their said road, and to assess the damages, and I do hereby  
 10 direct the said Company, by its Secretary, to give notice thereof in writing, and of the foregoing proceedings, to the said Caleb Miller, at least six days prior to the time so assigned as aforesaid by serving such notice on the said Caleb Miller personally, or by leaving the same at his residence or his usual place of abode, with some white person of the age of fourteen years or upwards.

Given under my hand, at the City of Trenton, this Twenty-fifth day of January, Eighteen Hundred and  
 20 Forty-eight.

HENRY W. GREEN, C. J.

*To Caleb Miller:*

Sir, you are hereby notified that "The Somerville and Easton Railroad Company" have upon the affirmation of William J. Lewis, their Chief Engineer, given in writing to Henry W. Green, Esq., Chief Justice of the Supreme Court of the State of New Jersey, a particular description of your land situate in the Township of Bridgewater, in the County of Somerset and State of New Jersey,  
 30 which said lands are required for the use of said Company, in the construction of the said Railroad, which by law they are authorized to make—and having made known to the said Chief Justice that the said Company or its agents cannot agree with you for the purchase thereof, have applied to the said Chief Justice for the appointment of three disinterested, impartial and judicious Freeholders, not resident in the said County of Somerset, to examine and appraise the said lands and assess the damages, and that the said Chief Justice has assigned Mon-  
 40 day, the Seventh day of February next at 3.00 o'clock

in the afternoon of that day, at his office in the City of Trenton, as the time and place for the appointment of said Commissioners, at which time and place you can attend if you see fit to make such objections and suggestions relative to the said appointment as you may be advised is proper to be made.

GEO. H. PEGRAM, Secretary.

Dated January 26, 1848.

Lewis H. Taylor, being duly sworn saith, that he served on Caleb Miller personally a notice of which the above is a copy on the Twenty-seventh day of January last past. 10

LEWIS H. TAYLOR.

Sworn and subscribed before me this Seventh day of February, A. D. 1848.

HENRY W. GREEN, Ch. Just.

NEW JERSEY, ss.

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*Henry W. Green, Esq., Chief Justice of the Supreme Court of the State of New Jersey, to Samuel B. Halsey, James S. Hulmes and James Langstaff.*

GREETING:

Whereas on the Twenty-fifth day of January last past The Somerville and Easton Railroad Company gave in writing to me, the said Henry W. Green, Chief Justice as aforesaid, under the affirmation of William J. Lewis, the Chief Engineer of the said Company, and their proper agent for this purpose, a particular description of certain lands required by them, in the construction of their Railroad in words following, to-wit: "The following is a correct and particular description of the land owned by Caleb Miller, of the Township of Bridgewater, in the County of Somerset and State of New Jersey, and occupied by the said Caleb Miller. And that the said lands are situate in the Township of Bridgewater, in the County of Somerset and State aforesaid, required

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for the use of the said Company for the construction of said Railroad over the land of the said Caleb Miller, and for which the said Company cannot agree with the said Caleb Miller for the purchase thereof, to-wit: Beginning at a stake in the centre line of the said Railroad and in the line of Joshua Doughty; thence north sixty-one (61) degrees west four hundred and ninety-one (491) feet to the middle of the Flemington Road, and including twenty (20) feet in width upon each side and adjoining to said centre line of said Railroad. Containing forty-five (45) hundredths of an acre of land, and upon which centre line of course has been designated by the Engineers of the said Company in the location of the route of the said Railroad throughout the said land of the said Caleb Miller, and made application to me for the appointment of Commissioners to examine and appraise the said lands, and to assess the damages pursuant to the act of incorporation of the said Company hereinafter mentioned. Whereupon the said Henry W. Green, Chief Justice as aforesaid did assign Monday, the Seventh day of February instant, at 3.00 o'clock in the afternoon of that day at my office, in the City of Trenton, for the appointment under my hand and seal of three disinterested, impartial and judicious Freeholders, not resident in the said County of Somerset, Commissioners to examine and appraise said lands so as aforesaid required by the Somerville and Easton Railroad Company, and to assess the damages and directed that the said Company should give notice in writing thereof and of the foregoing proceedings to the said Caleb Miller at least six days prior to the time so assigned as aforesaid by serving such notice on the said Caleb Miller in person, or by leaving the same at his usual place of abode with some white person of the age of fourteen years or upwards and whereas on this the said Seventh day of February above mentioned and assigned at my office as aforesaid it is proved by affidavit to my satisfaction and hereunto annexed, that notice in writing of the said proceedings and of the time and place so assigned was served on the said Caleb Miller personally, according to the directions so

made by me as aforesaid full six days prior to the time so assigned.

Now therefore, by virtue of the power and authority and pursuant to the directions to me given in and by the Act entitled "An Act to Incorporate the Somerville and Easton Railroad Company," the Twenty-sixth day of February, in the year of our Lord One Thousand Eight Hundred and Forty-seven, I do hereby appoint you the said Samuel B. Halsey, James S. Hulme and James Langstaff, three disinterested, impartial and judicious Freeholders as aforesaid Commissioners to examine and appraise the said land, and assess the damages to be paid by the said Company for the said lands so required as aforesaid pursuant to the provisions of the above recited Act upon ten days notice in writing of the time and place which you shall appoint for such examination appraisal and assessment to be given to this said Caleb Miller by serving such notice on him personally, or by leaving the same at his usual place of abode with some white person of the age of fourteen years or upwards, and you are hereby authorized to do and perform all things which in and by the said Act or otherwise by law to you as Commissioners as aforesaid do appertain and ought by you to be done and performed.

Given under my hand and seal, at the City of Trenton, this Seventh day of February, A. D. 1848.

(SEAL)

HENRY W. GREEN, C. J.

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Be it remembered, that on the Fourteenth day of April, Eighteen Hundred and Forty-eight, personally appeared before me one of the Justices of the Peace in and for the County of Somerset, Samuel B. Halsey, James S. Hume and James Langstaff, the persons appointed in the foregoing commission, the said James Hume alleging himself conscientiously scrupulous of taking the oath, being duly affirmed, and the said Samuel B. Halsey and James Langstaff were severally sworn faithfully and impartially to examine the matters in question under said

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commission, and to make a true report according to the best of their skill and understanding.

SAMUEL B. HALSEY,  
JAMES S. HULME,  
JAMES LANGSTAFF.

Sworn, affirmed and subscribed before me the day and year above written.

JAMES TAYLOR,  
Justice of the Peace.

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*To Mr. Caleb Miller:*

Take notice that the Commissioners appointed by the Honorable Henry W. Green, Chief Justice of the Supreme Court of the State of New Jersey pursuant to the directions of an Act entitled, "An Act to Incorporate the Somerville and Easton Railroad Company," to examine and appraise the land owned by you, and occupied by yourself for the use and construction of said Railroad, and to assess the damages, will meet at the Public

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House of Jacob A. Fritts, in the Village of Somerville, in the County of Somerset, on Friday, the Fourteenth day of April next at ten o'clock in the forenoon of that day, then to proceed to view and examine the said land, and to make a just and equitable estimate and appraisal of the value of the same and assessment of damages.

GEORGE H. PEGRAM,  
Secretary, Etc.

Dated March 22, 1848.

30 SOMERSET COUNTY, ss.

Lewis H. Taylor, being duly sworn, saith, that on the Twenty-fourth day of March, Eighteen Hundred and Forty-eight, he served the original notice, of which the above is a copy upon Caleb Miller, by delivering the same to him personally, at his residence in Somerville.

LEWIS H. TAYLOR,

Sworn and subscribed the 14th April, 1848.

JAMES TAYLOR,

Justice of the Peace.

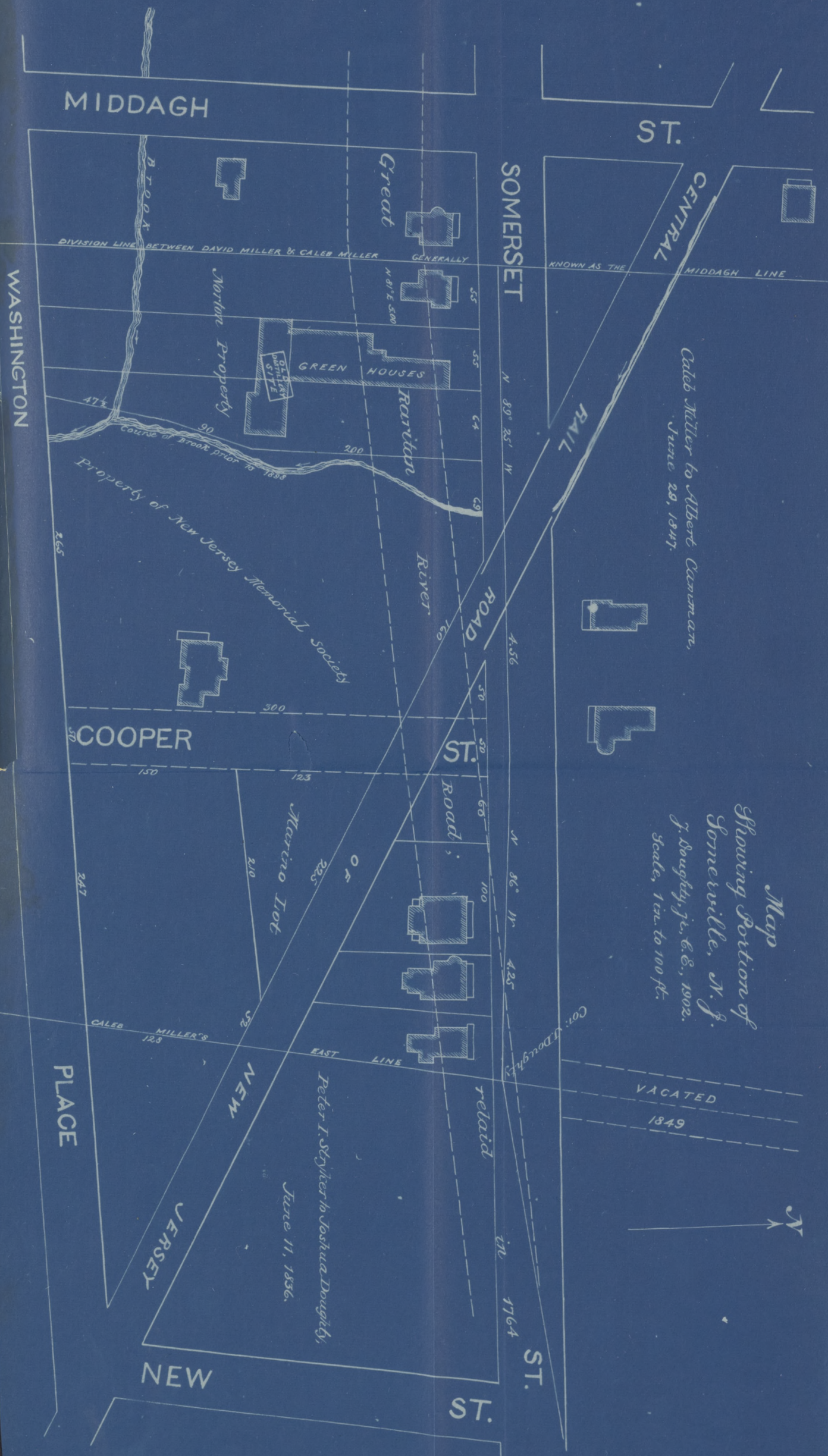
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*Know all Men by these Presents,* That we, Samuel B. Halsey, of the County of Morris, and James S. Hulme and James Langstaff, of the County of Burlington, in the State of New Jersey, the Commissioners named in the foregoing Commission, having met at the Public House of Jacob A. Fritts, in the Village of Somerville, in the County of Somerset, on the Fourteenth day of April, Eighteen Hundred and Forty-eight, at ten o'clock in the forenoon of that day pursuant to notice given, due proof being made to us of the service of said notice in conformity with the directions of the said Commission to us directed, a copy of which said notice and affidavit of the service thereof we have caused to be appended hereto, and having first taken and subscribed an oath and affirmation before James Taylor, Esq., a person duly authorized to take and administer the same, faithfully and impartially to examine the matter in question and to make a true report according to the best of our skill and understanding, a copy of which said oath and affirmation is hereto annexed, did in the presence of Benjamin Williamson, who appeared on behalf of the said Company, and of the said Caleb Miller, the owner of the said land and premises proceed to view and examine the land and premises mentioned and described in the said commission and to make a just and equitable estimate and appraisement of the value of the same and assessment of damages to be paid by the said Company for such lands and damages aforesaid, and after having first viewed and examined the said premises, and heard the allegations of the parties and duly considered the same. We do report that the sum of Four Hundred and Fifty Dollars for the value of the lands aforesaid, and the sum of Three Hundred and Fifty-eight Dollars and Twenty-five Cents for the damages aforesaid be paid by the said Company, making together the sum of Eight Hundred and Eight Dollars and Twenty-five Cents for the said lands and damages aforesaid.

In testimony whereof we have hereunto set our hands

and affixed our seals this Twenty-second day of April,  
Eighteen Hundred and Forty-eight.

SAMUEL B. HALSEY, (SEAL)  
JAMES S. HULME, (SEAL)  
JAMES LANGSTAFF. (SEAL)



ST.

SOMERSET

MIDDAGH

WASHINGTON

CENTRAL

*Caleb Miller to Albert Cumman,  
June 29, 1847.*

DIVISION LINE BETWEEN DAVID MILLER & CALEB MILLER

KNOWN AS THE MIDDAGH LINE

*North Property*

GREEN HOUSES

*Great*

*Ravition*

*River*

ROAD

*Property of New Jersey Memorial Society*

COOPER

ST.

*Map  
Showing Portion of  
Somerville, N.J.  
J. Dougherty, Jr., E.C., 1902.  
Scale, 1 in. to 100 ft.*

*Martino Tiot*

ROAD

*Col. J. Dougherty*

VACATED  
1849

PLACE

NEW

EAST LINE

*Peter I. Stryker to Joshua Dougherty,  
June 11, 1856.*

*re-laid*

NEW

ST.

ST.



