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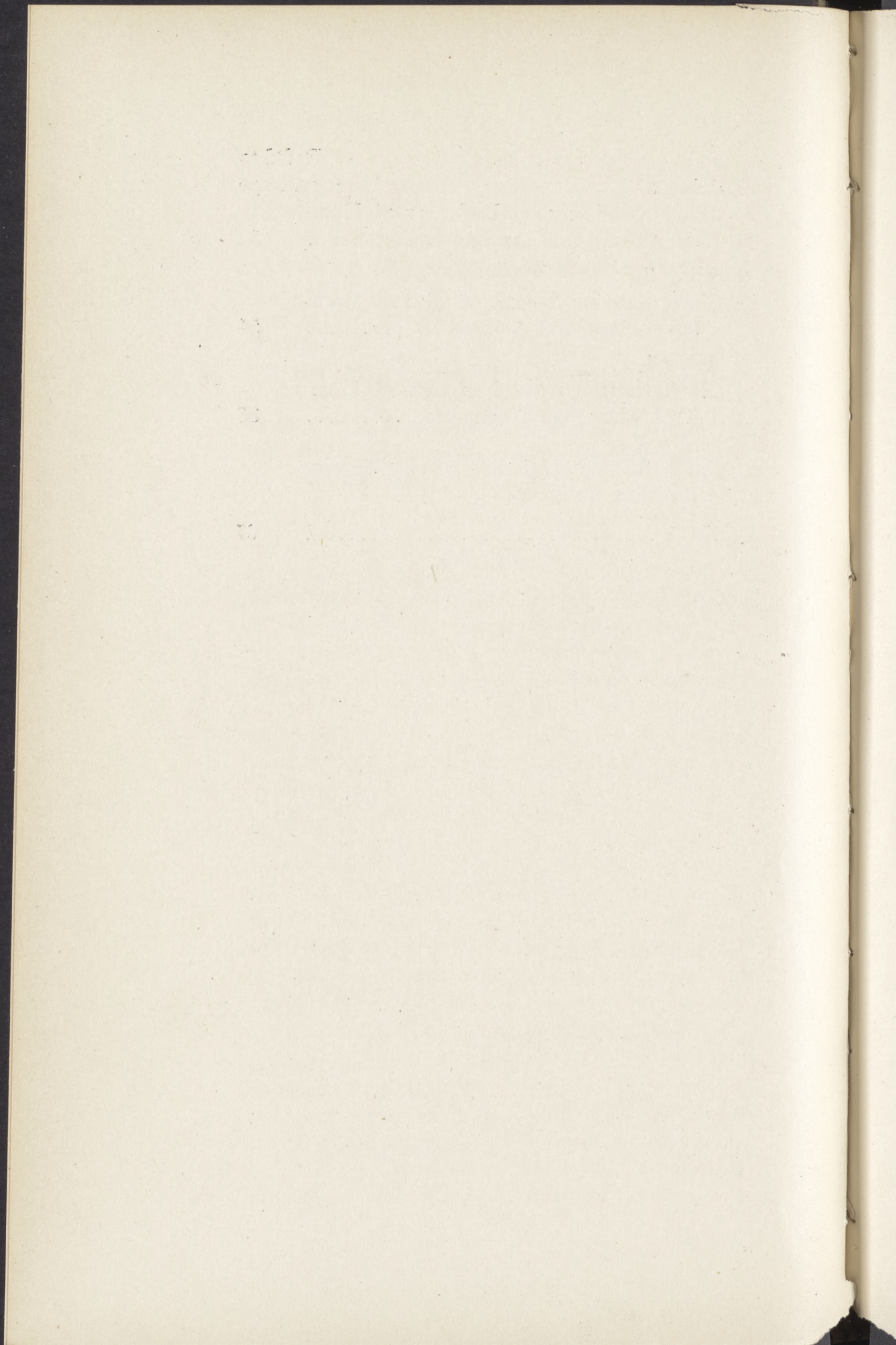
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Bill of Complaint.

**Bill of Complaint as Amended by Order
Bearing Date December 15, 1914.**

Filed November 24, 1914.

In Chancery of New Jersey. 10

*To his Honor Edwin Robert Walker, Chancellor
of the State of New Jersey:*

Humbly complaining showeth unto your Honor
your orator Public Service Railway Company,
a corporation of the State of New Jersey:

1. Your orator became incorporated under
and by virtue of the laws of the State of New
Jersey by a certificate of consolidation and mer- 20
ger bearing date the thirtieth day of July, in
the year of our Lord one thousand nine hundred
and seven, duly filed and recorded in the office
of the Secretary of State on the twentieth day
of August, in the year of our Lord one thousand
nine hundred and seven, as by reference thereto
will appear, and to which your orator prays
leave to refer, whereby North Jersey Street
Railway Company; Jersey City, Hoboken and
Paterson Street Railway Company and United 30
Street Railway Company of Central Jersey, be-
ing street railway and traction companies, were
merged into a new corporation, called Public
Service Railway Company.

2. Ferry Street and Hamburg Place Railroad
Company was incorporated on the twenty-second
day of April, in the year of our Lord one thou-
sand eight hundred and eighty, under the general
railroad act, and on the fifth day of April, in
the year of our Lord one thousand eight hun- 40

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dred and ninety-two, consolidated with the Newark and South Orange Horse Car Railroad Company under the name of Newark and South Orange Railway Company, and some time in the year one thousand eight hundred and ninety-three, under and by virtue of an ordinance of the City of Newark, passed on April fourteenth, in the year of our Lord one thousand eight hundred and ninety-three, built a double track street railway in Hamburg Place, in the City of Newark, in connection with its street railway that ran to South Orange, and that thereafter, to wit, on the second day of October, in the year of our Lord one thousand nine hundred and seven, said Newark and South Orange Railway Company was merged into your orator Public Service Railway Company, since which time your orator has carried on and operated said street railway.

3. That said railway in Hamburg Place is a necessary part of your orator's railway system running from the heart of the City of Newark to South Orange, in the County of Essex, and is used by many thousands of inhabitants of Essex County every day, your orator operating thereover cars at varying intervals of time from every two and one-half minutes a part of the day, to every five minutes after ten o'clock at night, a total of two hundred and ninety-eight cars every twenty-four hours.

4. That your orator has been notified by James F. Frazer and Sam D. Burchenal, trading as Frazer and Burchenal, contractors, who claim to have a contract with the Passaic Valley Sewerage Commission for the building of a sewer in and below the surface of said Hamburg Place, that it is the purpose of said contractors to enter Hamburg Place and tear up your orator's

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railway tracks for the purpose of building said sewer, and thereby stop the operation of your orator's said railway; the portion which they propose to tear up being one hundred and thirty-seven feet in length, the location in question being shown and the tracks indicated on the map or plan hereto attached and made a part hereof. 10

4-A. And your orator further shows that it has been informed and believes that the said Frazer and Burchenal made and entered into a contract with the Passaic Valley Sewerage Commissioners, dated on or about the tenth day of June, nineteen hundred and thirteen, to construct a section of a sewer in Hamburg Place, at or near its junction with Avenue L, in the City of Newark, and beneath or partly beneath the street railway tracks of your orator, and claim the right, under and by virtue of that contract, to remove or cause to be removed the tracks of your orator during the construction of said section of said sewer; but your orator shows and insists that by virtue of said contract, which is the only authority of the said Frazer and Burchenal to construct said section of said sewer, it is their duty and obligation to maintain the tracks of your orator while constructing the same, in order that the public service of transporting passengers, in which your orator is engaged, may be continued thereon without interruption; and if necessary in order to maintain the service in which your orator is engaged the said Frazer and Burchenal are required under and by virtue of said contract to erect a temporary street railway structure in order that the service in which your orator is so engaged shall not be interrupted. 20
30
40

Bill of Complaint.

4-B. And your orator further shows and charges that even if the Passaic Valley Sewerage Commissioners had the right to remove, or authorize the said Frazer and Burchenal to remove or cause to be removed, the tracks of your orator pending the construction of said section
10 of said sewer, they have not attempted to exercise that power, or to authorize the said Frazer and Burchenal to do so.

5. Your orator has notified the said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, that they must not in any wise interrupt the operation of your orator's said railway and disturb your orator's business, not only because of the great loss and damage to your orator, but also the inconvenience to the
20 public by the stopping of the operation of its cars, insisting that the said contractors had no right so to do, but in response thereto the said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, claim the right and authority to do the same and threaten to start at once and remove your orator's said street railway tracks; and that they have written and sent your orator a letter, a copy of which is as follows:

30 "New York City, November 21, 1914.
Public Service Corporation and Public Service Railway Company, 759 Broad Street, Newark, New Jersey.

Gentlemen:

We desire to confirm the written notice given to you by our attorney Mr. Samuel H. Evins under date of October 26, 1914, the statements made by him and us at the various conferences with Mr. Roberts and Mr.

Bill of Complaint.

Bergen, and the statements made by Mr. Faulks this morning at his conference with Messrs. Bergen and Armstrong, and to repeat that we are and for some time have been ready to proceed with the work of constructing the central portion of section 6 of the Passaic Valley Sewer at Hamburg Place in the vicinity of Avenue L in the City of Newark, and that in order to do this it will be necessary for your tracks and overhead wires to be removed temporarily for a distance of approximately 150 feet at the junction of Hamburg Place and Avenue L, and also to remove your dead end track east of Avenue L. Owing to the size of the necessary excavation and the nature of the soil it will in our opinion be unsafe to operate cars at this point while the work is being carried on, and we are informed and believe that under the circumstances it is your duty to remove the wires and tracks at the point mentioned in order that the work may proceed. The delay thus far incurred has already caused us a considerable amount of unnecessary expense.

We also renew our offer that if you will promptly remove the tracks and wires for the required distance at the point mentioned, and replace them when the surface of the street is restored, we will pay the necessary expense of this work if a court of competent jurisdiction or an arbitrator to be agreed upon shall determine that we are liable for the same, and that in order to secure such payment we will at once furnish a satisfactory surety company bond.

Bill of Complaint.

10 We hope that you will decide to comply with our request but cannot wait longer than until Tuesday evening of next week for you to do so. We beg to advise you that unless you commence the removal of the tracks and wires on or before Wednesday morning, November 25, 1914, at seven o'clock, it is our intention to then begin the removal of the same so far as may be necessary to enable us to proceed with our work.

Any communication with reference to this matter may be sent to our New Jersey counsel, Messrs. Lindabury, Depue & Faulks.

Yours truly,

Frazer & Burchenal."

20 6. Your orator further shows that it is entirely feasible for the said contractors, in the building and construction of the said sewer, to do the same without in any wise interfering with your orator's said railway tracks; and they can do so by either tunnel construction or the temporary support of said tracks during the excavation for said sewer. The said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, admit this can be done, but claim
30 such work would be more expensive for them than it would be in case of the removal of your orator's railway tracks; they being entirely regardless of the loss and cost to your orator.

7. Your orator further shows that an average number of about fifty thousand people daily use the said cars of your orator upon the branch of said railway of which this is a part, and that if the continuity of your orator's railway is broken and your orator is not permitted to continue the operation of said railway it will be a
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Bill of Complaint.

source of great annoyance, inconvenience and delay to a large part of the traveling public, and the contractors insisting that your orator's tracks be removed is simply meant and intended to save expense to the said contractors in doing the said work.

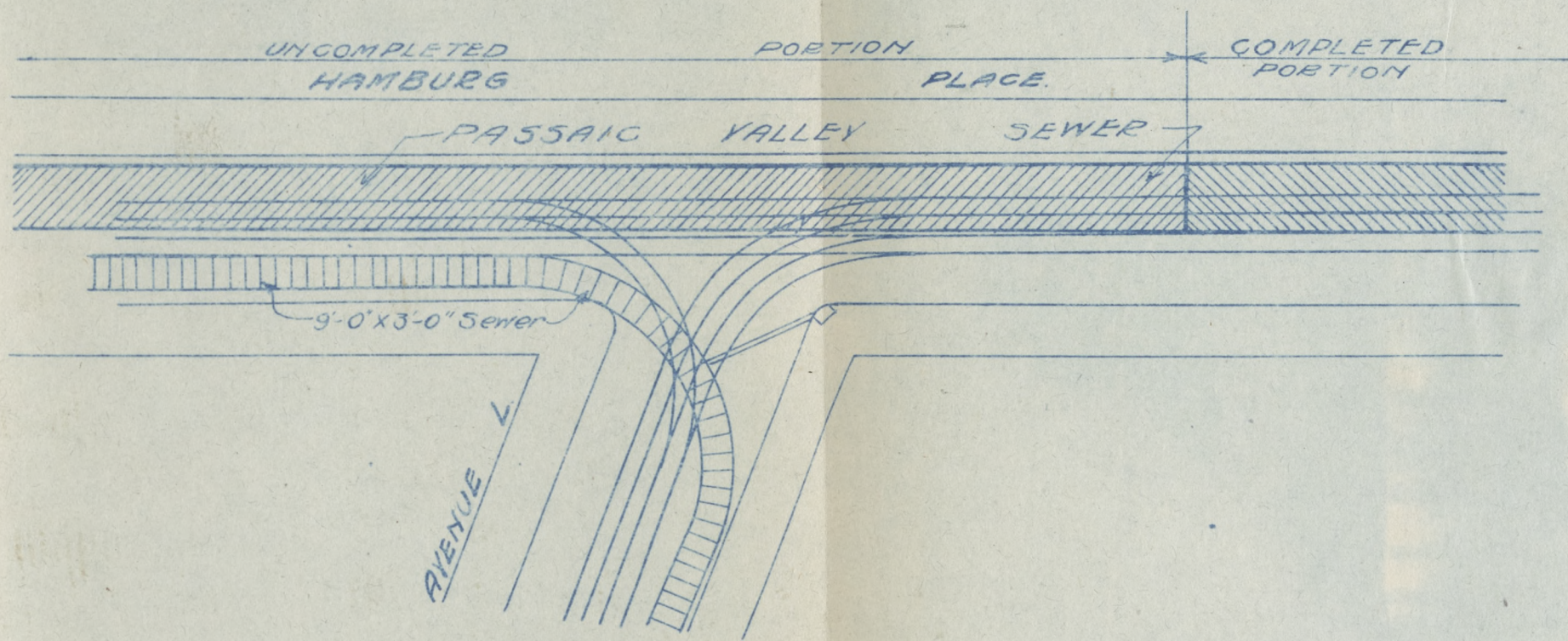
8. Your orator further shows that if its tracks on Hamburg Place shall be removed, as threatened by the said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, for the purpose aforesaid, they can not be re-laid on said highway until after the expiration of more than three months, as they admit, and that the said threatened acts of the said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, are an invasion of the property, rights and franchises of your orator; will cause serious inconvenience to many thousands of people daily in the use of your orator's railway; it will damage and destroy your orator's railway and its property; and it will be an invasion of the rights and franchises of your orator in the use of its railway in the said highway without warrant of law, and will be an irreparable injury to your orator.

9. All which actings, doings and pretences of the defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof and forasmuch as your orator is without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are properly cognizable and relievable:

Bill of Complaint.

10 To the end, therefore, that the said James
F. Frazer and Sam D. Burchenal, trading as
Frazer & Burchenal, and Passaic Valley Sewerage
Commissioners may, to the best and utmost
of their and each of their knowledge, remem-
brance, information and belief, full, true and
perfect answer make to all and singular the
20 matters aforesaid, but without oath, which is
hereby waived, and that as fully and particu-
larly as if the same were here repeated and
they thereto distinctly interrogated, and that
they and each of them, their and each of their
agents, servants and employes, and each and
every of them, may be restrained from removing
or in any way interfering with the tracks of your
orator's railway so as to prevent the passage
of your orator's cars thereon, or to do any-
20 thing except construct the said sewer in such a
way and manner as will permit your orator's
railway to continue to be operated in and along
said Hamburg Place; and that your orator may
have such other and further relief in the premises
as the nature of the case may require and as
shall be agreeable to equity and good conscience.

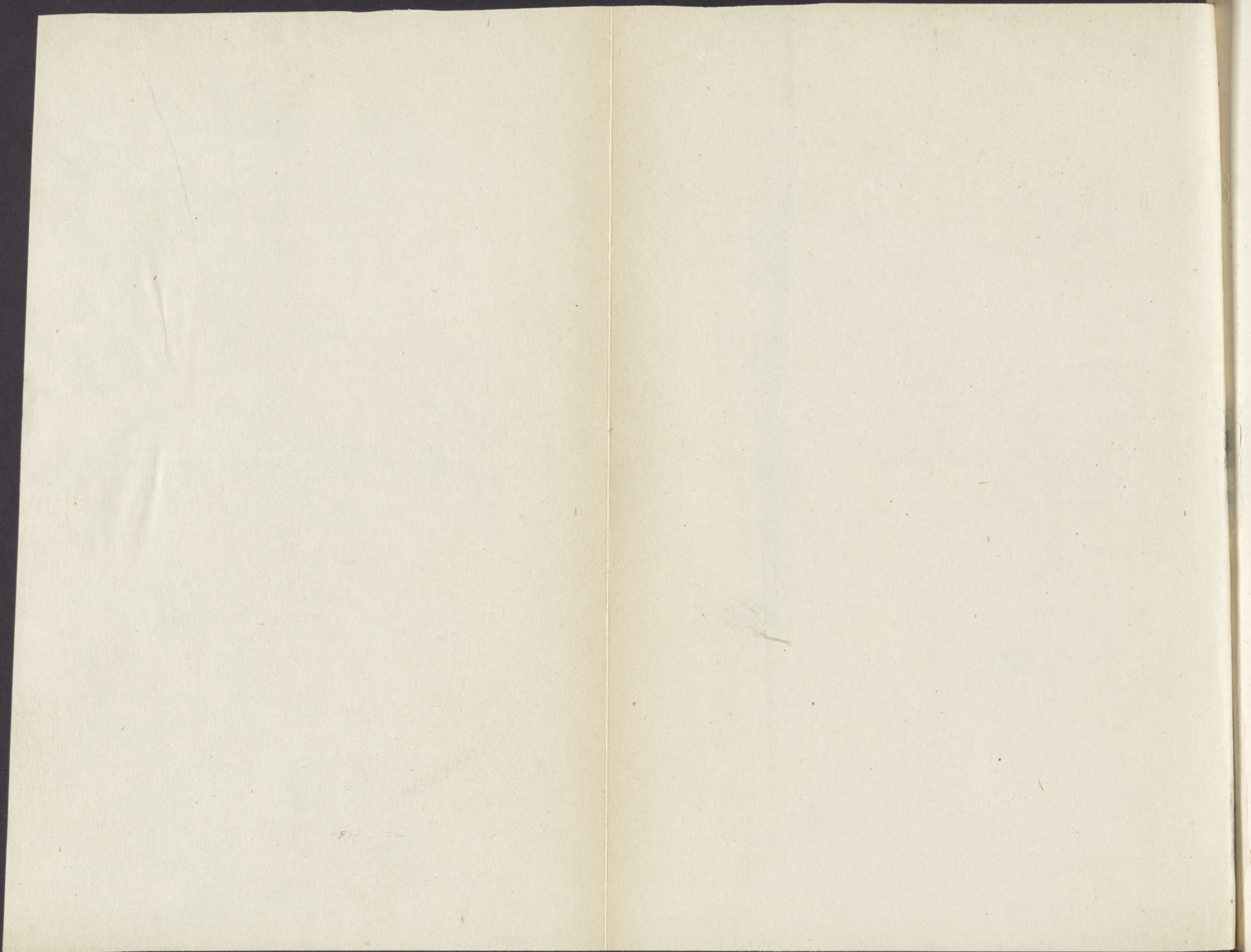
30 11. May it please your Honor, the premises
considered, to grant unto your orator not only
the State's writ of injunction, issuing out of and
under the seal of this honorable court, to be
directed to the said James F. Frazer and Sam
D. Burchenal, trading as Frazer & Burchenal,
and Passaic Valley Sewerage Commissioners, re-
straining them and each of them, their and each
of their servants, agents and employes from
removing the tracks and railway of your orator,
or in any wise interfering therewith so as to
prevent the continuity of service of your orator's
40 cars in Hamburg Place as aforesaid, but also the
State's writ of subpoena issuing out of and un-



SKETCH SHOWING PROPOSED
 PASSAIC VALLEY SEWER
 IN HAMBURG PLACE AT
 AVENUE L
 SCALE 1"=40'

NOV. 20 1914

13386A



Affidavit of George J. Roberts.

der the seal of this honorable court, to be directed to the said James F. Frazer and Sam D. Burchenal, trading as Frazer & Burchenal, commanding them by a certain day and under a certain penalty to be expressed, to be and appear before your Honor in this honorable court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience. 10

And your orator, as in duty bound, will ever pray, &c.

FRANK BERGEN,

Solicitor for and of Counsel with Complainant.

20

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

GEORGE J. ROBERTS, of full age, being duly sworn according to law, on his oath saith that he is First Vice President and in direct charge of the operation of the street railways of Public Service Railway Company, the complainant in the foregoing bill of complaint named, and is the agent of said complainant in this behalf; that the matters and things stated and set forth in the foregoing bill of complaint are true, as this deponent verily believes; deponent further saith that he is a regularly graduated professional engineer of more than twenty-five years experience; that he has had experience for many years in the building, construction and operation of railroads and street railways; that it is true that complainant was incorporated and the railway built and came into the possession and has 30 40

Affidavit of George J. Roberts.

10 been operated by the complainant, as set out in
 the first and second paragraphs of said bill;
 and that it is of the character and operated as
 is set out in the third paragraph of said bill;
 that deponent has been informed by the de-
 20 fendants, as is stated in the fourth paragraph
 of said bill; that complainant has notified the
 defendants, as stated in the fifth paragraph of
 said bill; and have received a letter, a copy of
 which is set out in said paragraph of said bill;
 deponent further saith that as such engineer
 he is acquainted with public work such as the
 defendants as contractors propose doing in the
 building of the said sewer, and states that the
 same can be conducted and carried on either
 by tunnelling or by support of the railway of
 complainant, so as not to interfere with its
 30 traffic and business, provided the defendants
 will exercise proper care and make the neces-
 sary expenditures to secure the safety of said
 railway; that the railway is in use as is stated
 and set out in the seventh paragraph of said
 bill; that if, as demanded by the said defend-
 ants, complainant is compelled to take up its
 railway tracks, or they are permitted to be
 taken up and removed by defendants, it will
 cause the damage and injury asserted in said
 bill, beside involving the complainant in expen-
 ditures at the rate of many thousands of dollars
 annually to keep in operation its cars on that
 portion of the railway not disturbed or removed.

GEO. J. ROBERTS.

Sworn and subscribed before me
 this 23rd day of November, A. D.,
 1914.

(SEAL)

WILLARD L. HAYWARD,

Notary Public of N. J.

Commission expires Dec. 10, 1918.

Affidavit of Martin Schreiber.

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

MARTIN SCHREIBER, of full age, being duly sworn according to law on his oath saith that he is Engineer of Maintenance of Way of Public Service Railway Company, the complainant in the foregoing bill of complaint named; that the matters and things stated and set out in said bill are true as he verily believes; that he is acquainted with the work of construction of the sewer for the Passaic Valley Sewerage Commission that it is proposed to have laid in Hamburg Place; that as an engineer he knows what is requisite for the construction thereof; that it is entirely feasible to build and construct said sewer without interfering with the railway tracks of the complainant laid therein so as to prevent the regular operation of its cars thereon and thereover; that the map attached to the said bill of complaint correctly shows the location of the tracks at the place in question of the complainant's railway and the relative position of the sewer therein; that by tunnel construction or by the building of a temporary bridge or support the tracks of the railway could be maintained and its cars operated thereon during the progress of the work of construction of said sewer, requiring on the part of the contractors the taking of such measures and the expenditure of such money as would be necessary for that purpose; that the removal of the tracks on Hamburg Place would break the continuity of the line of railway of the complainant and interfere with the service, and be a great loss and detriment to the complainant.

MARTIN SCHREIBER.

Affidavit of Martin Schreiber.

Sworn and subscribed before me
this 23rd day of November, A. D.,
1914.

(SEAL) WILLARD L. HAYWARD,
Notary Public of N. J.
Commission expires Dec. 10, 1918.

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Answer of Defendant, Passaic Valley Com.

Answer of Defendant, Passaic Valley Sewerage Commissioners.

Filed December 21, 1914.

Passaic Valley Sewerage Commissioners, one of the defendants in the above entitled cause, to the bill of complaint of Public Service Railway Company, answering says: 10

1. That it is a body politic and corporate, organized pursuant to the provisions of Chapter 102 of the Laws of the State of New Jersey for the year 1903.

2. That under authority of Chapter 10 of the Laws of 1907 it entered into contract with the Mayor and Common Council of the City of Newark and fourteen other municipalities lying within the Passaic Valley Sewerage District, for the construction of a main intercepting sewer and appurtenances, to serve said municipalities and to intercept and remove the sewage of said municipalities from the waters of the Passaic River; that part of the sewer so contracted to be constructed is located within the limits of Hamburg Place in the City of Newark, at the point stated in complainant's bill of complaint; that on or about the 22nd day of August, 1913, the Passaic Valley Sewerage Commissioners entered into contract with James S. Frazer and Selden D. Burchenal, partners trading as Frazer & Burchenal, for the construction of the central portion of Section 6 of the said main intercepting sewer, including that part of the sewer in Hamburg Place at the point stated in the bill of complaint. 20 30

3. That the said contract with Frazer & Burchenal, which is expressly made a part of this answer by reference thereto, states that the 40

Answer of Defendant, Passaic Valley Com.

sewer at the point in question in Hamburg Place in the City of Newark is required to be constructed by the said Frazer & Burchenal by the open cut method, as shown by the plans and specifications, and in accordance with the agreements contained in said contract to be performed
 10 by the said Frazer & Burchenal.

4. That Passaic Valley Sewerage Commissioners, in adopting the open cut method of constructing said sewer in said Hamburg Place at said point, exercised the discretion committed to it by the Legislature of New Jersey, upon a consideration of the cost of the construction of said sewer by said method as compared with the cost of its construction by the tunnel method, as well as of the interruption to the use of the
 20 public street known as Hamburg Place necessarily resulting from the method of construction so adopted; and Passaic Valley Sewerage Commissioners says and insists that its said determination and exercise of discretion is reasonable and is exclusively within its jurisdiction, and final and conclusive.

5. That the said Passaic Valley Sewerage Commissioners in and by said contract made express provision for the protection and main-
 30 tenance of the public utilities existing in the public streets through which the said sewer was to be constructed, including said portion of Hamburg Place in the City of Newark; and expressly refers to the following provisions of the said contract:

Art. IV, Section 2. "The contractor shall furnish and do everything, except as herein otherwise provided, necessary to complete the work in accordance with the terms of
 40 the contract and with the requirements of

Answer of Defendant, Passaic Valley Com.

the engineer thereunder. He is to make all provisions necessary to maintain and protect existing structures of whatever kind, and to repair all damages done to such structures."

Section 18. "Care shall be taken not to move, without the consent of the engineer, 10
any sewers, tunnels, water or gas pipes, or other structures crossing these or running parallel or near them. They shall be sustained securely in place until the work is completed. Whenever it is necessary to interfere with said structures the contractor shall maintain their respective services, and if necessary for that purpose shall lay temporary water, gas or other pipes. He shall repair all damages done to any 20
of said structures and shall keep them in repair until six months after the completion of the work on the section. He shall leave them in as good condition as they were previous to the commencement of the work."

6. Passaic Valley Sewerage Commissioners further answering say that the work of construction of the said intercepting sewer for the sewage of the Passaic Valley is one of the 30
highest public importance; that in the performance of the work it is exercising the discretion committed to it by the Legislature of the State, and that in the portion of the work involved in the controversy in this suit the exercise of the said discretion in making the said contract with Frazer & Burchenal is reasonable.

Affidavit of William M. Brown.

This defendant therefore prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

RIKER & RIKER,
Solrs. for said Defendant.

10 ADRIAN RIKER,
Of Counsel.

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

20 WILLIAM M. BROWN, being sworn, says that he is a civil engineer by profession, and has specialized in sewerage construction and operation; that a very considerable part of his professional life has been spent in connection with the Metropolitan Sewerage District in the City of Boston, Massachusetts, that this work was started in 1890 and that he was connected with it from that time until the month of March, 1912, in the position of assistant to the Chief Engineer until the year 1895, and from that time to March, 1912, as Chief Engineer in charge of the work; that in March, 1912, deponent severed his connection with the Metropolitan Sewerage Commission and became Chief Engineer of the Passaic Valley Sewerage Commissioners, which position he now holds; that the Metropolitan Sewerage District comprises a territory of about two hundred square miles and includes twenty-five municipalities of the State of Massachusetts, having an aggregate population of about a million inhabitants; that the cost of the sewerage works has been about sixteen million dollars, and the sewers actually in opera-

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Affidavit of William M. Brown.

tion have a discharge capacity of six hundred million gallons a day; that these sewers serve a territory having a population similar to that of the Passaic Valley.

That as Chief Engineer of the Passaic Valley Sewerage Commissioners he has had charge of the preparation of the working plans, specifications and contracts for the construction of the said main intercepting sewer for the Passaic Valley Sewerage District; that in the preparation of the plans, specifications and contracts he has always had regard for the convenience of public travel in the streets through which said sewer was to be constructed; that for the most part the said sewer is constructed in tunnel in the City of Newark, where the travel on the public streets is considerable, and where the interruption of street traffic would result in serious loss and injury; that the plans for said sewer in the parts of the city where the traffic is light provide for its construction by the open trench method, the determining consideration being the greater economy in the construction of the sewer by the open trench method, as compared with the tunnel method.

That the plans and specifications for the construction of Section 6 of the sewer, including the part in Hamburg Place in Newark at the intersection of Avenue L, were prepared under the direction of this deponent, and that the method of construction specified for this section of the city was the open trench method; that in advertising for bids for the construction of Section 6 of the sewer the said section was divided, in the first place, into two parts, designated respectively as the northerly portion of section 6 and the southerly portion of section

Affidavit of William M. Brown.

6; that the northerly portion included the portion of Hamburg Place in controversy in this suit; that the said northerly portion of said section 6 immediately adjoined on the north a section of the sewer under construction in tunnel, and that upon opening the bids for the
10 construction of the northerly portion of said section it was found that the contractor constructing the adjoining section of the sewer in tunnel proposed to build the northerly portion of section 6 in tunnel at a price including a charge of \$128.50 per linear foot for the excavation necessary for said work; that another bid was made under said advertisement for the construction of said northerly portion of section 6 in tunnel, including a charge of \$175.00
20 per linear foot for said excavation; that a much lower bid was received for the construction of the sewer by the open trench method, involving a charge for the necessary excavation of twenty-seven dollars per linear foot; that the lowest bidder upon the award of the contract to him failed to qualify by the due execution of the contract, and it became necessary to readvertise said northerly portion of section 6, upon which advertisement bids were received
30 and the contract awarded upon a specification of the open trench method of construction; that the lowest bidder again failed to qualify by the execution of the contract, and it became necessary to readvertise for the construction of the said portion of section 6; that thereupon the whole of section 6 was divided into three portions, designated respectively as the northerly portion, central portion and southerly portion of section 6; that the central portion of section
40 6 includes that part of Hamburg Place, which is

Affidavit of William M. Brown.

in controversy in this suit; that upon the advertisement of said section bids were received and the contract awarded to the firm of Frazer & Burchenal, the lowest bidder at a price for excavation of seventy dollars per linear foot.

That this deponent is satisfied, from a consideration of the bids submitted, that the construction of the sewer by the tunnel method through the central portion of section 6 would have resulted in an increase of the cost of this section considerably above one hundred thousand dollars. 10

This deponent is familiar with the point of intersection of Hamburg Place and Avenue L in the City of Newark, and has observed the extent of public travel at said point; that the said public travel is very inconsiderable, and that the inconvenience and interruption from said travel caused by the construction of the sewer by the open trench method is of very small importance. 20

That in the preparation of the form of contract adopted by the Passaic Valley Sewerage Commissioners, this deponent endeavored to have due regard to the convenience of the public and to the maintenance of the service of the public utilities, which might be involved in the sewer construction; that the travel over the lines of the Public Service Railway Company at the corner of Hamburg Place and Avenue L at this season of the year is very small and unimportant, and that in his opinion it can readily be provided for in a number of different ways; that it is perfectly feasible to construct a temporary track for the short distance necessary to avoid the excavation for the sewer while the 30 40

Affidavit of William M. Brown.

work is in progress; that it is also feasible to transfer passengers across the portion of the railway interrupted by the excavation without serious inconvenience to the passengers or serious expense to the company.

10 This deponent further says that he estimates the cost of constructing the three hundred feet of sewer remaining to be constructed by Frazer & Burchenal at the point in question in tunnel to be more than twenty thousand dollars, and that the cost of supporting the tracks in their present location during the construction of the sewer by the open trench method would about equal the cost of the tunnel construction.

20 This deponent further says that delay in the performance of the work involved in this suit will result in increasing the inconvenience to the public and the loss to the railway company, by reason of the increase of public traffic at the point in question in the spring and summer months.

WILLIAM M. BROWN.

Sworn to and subscribed
before me, this 18th day
of December, 1914.

30

DANIEL J. BRENNAN,
Notary Public of New Jersey.

Answer of Defendants, Frazer & Burchenal.

**Answer of Defendants, Frazer & Burchenal,
as Amended by Order Bearing Date
December 15, 1914.**

Filed December 7, 1914.

The joint and several answer of JAMES S. FRAZER and SELDEN D. BURCHENAL (erroneously termed James F. Frazer and Sam D. Burchenal), the defendants in the above entitled cause, to the bill of complaint of Public Service Railway Company, complainant. 10

These defendants answering unto so much and such parts of the complainant's bill of complaint as they are advised it is material and necessary for them to make answer unto, say:

1. They have no knowledge or information as to the truth of the allegations contained in paragraphs 1 and 2 of the said bill of complaint, and leave the complainant to make such proof thereof as it may deem advisable so to do. 20

2. They deny each and every allegation contained in paragraph 3 of the said bill of complaint in so far as the same relates to the portion of the complainant's railway existing at the location shown on the blue print attached to the said bill of complaint. 30

3. They admit that unless the complainant will temporarily remove the tracks and overhead wires of the portion of its railway existing at the location mentioned in the fourth paragraph of the said bill of complaint, it is their intention to remove such tracks and wires at such location in order that they may complete the section of the sewer hereinafter mentioned. They also admit the giving by them 40

Answer of Defendants, Frazer & Burchenal.

to the complainant of the notice set out in paragraph 5 of the said bill of complaint.

10 3a. They admit that they entered into a contract with the said Passaic Valley Sewerage Commissioners as stated in paragraph 8 hereof, and that they claim the right under and by virtue of that contract to remove or cause to be removed approximately 150 feet of the railway tracks of the complainant at the point shown on the blue print annexed to the said bill of complaint, and they deny that by virtue of the said contracts, or otherwise, it is their duty and obligation to maintain the tracks of the said street railway while constructing the section of the sewer mentioned in the 8th paragraph hereof. They also deny that they are required
20 under and by virtue of said contract, or otherwise, to erect a temporary street railway structure in order that the service in which the complainant is engaged shall not be interrupted. Except as herein admitted, they deny each and every allegation of paragraph 4a of the said bill of complaint.

3b. They deny each and every allegation of paragraph 4b of the said bill of complaint.

30 4. They deny each and every allegation contained in paragraph 6 of the said bill of complaint save that they admit that it is an engineering possibility to perform the work referred to by tunnel construction or by temporary support of the complainant's tracks during the excavation for such sewer, but they say that the cost of such construction or support and the risk to the property and passengers of the complainant and the employes of the defendants engaged in the construction of such sewer would be such as to ren-
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Answer of Defendants, Frazer & Burchenal.

der either of such methods dangerous, impracticable and unreasonable.

5. They deny each and every allegation contained in paragraph 7 of the bill of complaint in so far as the same relates to the above mentioned portion of the complainant's railway.

6. They admit that the building of the portion of the said sewer to be constructed at the above mentioned location will require approximately three months' time, but they deny each and every other allegation contained in paragraph 8 of the said bill of complaint. 10

7. They deny each and every allegation contained in paragraph 9 of the said bill of complaint.

Further answering the defendants say as follows: 20

8. Prior to the 22nd day of August, 1913, the defendants examined the contract, specifications, plans and profile submitted by the Passaic Valley Sewerage Commissioners of the State of New Jersey (the said Commissioners being a corporation organized and existing under and by virtue of the provisions of Chapter 10 of the Session Laws of the State of New Jersey for the year 1907, and then and now engaged in the construction of the important and public improvement commonly known as the Passaic Drainage Sewer, to which Act they beg leave to refer) covering the central portion of Section 6 of such sewer from Station 26+00 to Station 40+00, that is, from a point in Hamburg Place in the City of Newark about 300 feet south of the grade crossing of the Central Railroad Company of New Jersey northerly through the said Hamburg Place to a point therein northwesterly of Ave- 30 40

Answer of Defendants, Frazer & Burchenal.

- nue L, a total distance of 1,400 lineal feet, and made a proposal to the said Commission for the construction of the said portion of such sewer. Thereafter, and on or about the 22nd day of August, 1913, the said proposal having been accepted by the said Commission,
- 10 the defendants entered into a contract with the said Commission for the construction of such portion of the said sewer by the open cut method in accordance with the said proposal, contract, specifications, plans and profile, reference to all of which is hereby made for their full contents and effect, with the same force and effect as if the same were set out at length herein. There-
- 20 after, in pursuance of the said contract, the defendants entered upon the performance of the work covered thereby, and prior to the filing of the said bill of complaint had constructed the said section of said sewer through Hamburg Place from said station 26+00 to a point in said Hamburg Place about 350 feet easterly from said Station 40+00, when it became necessary for them to discontinue the work on account of the presence of the complainant's street railway tracks and overhead wires at the location shown on the said blueprint.
- 30 9. Prior to that time and on or about the 26th day of October, 1914, and at divers times before such date, the defendants notified the complainant that in order to enable them to proceed with the work of constructing such section of said main sewer in accordance with the terms and provisions of the said contract, specifications, plans and profile, it would be necessary for the complainant to temporarily remove said tracks and wires or to permit the same to be temporarily re-
- 40 moved at such location, and requested the com-

Answer of Defendants, Frazer & Burchenal.

plainant to arrange for such removal or to permit the defendants to effect the same, but the complainant has uniformly refused either to remove said tracks and overhead wires or to permit the same to be removed.

10. The size of the excavation necessary to permit of the construction of the said section of said sewer, and the character of the soil at and near such location, are such as to render it extremely dangerous and impracticable and unreasonable to construct or attempt to construct the same at said point while the trolley cars of the complainant are being operated thereover, and for the same reasons the cost of constructing such sewer at said location without the temporary removal of the said tracks and wires would be so great as to make either of said methods not only impracticable and unreasonable, but prohibitive.

11. The portion of the complainant's railway existing at such location is used only to a small extent and the proposed temporary discontinuance thereof would cause but slight inconvenience to a very small part of the portion of the traveling public customarily using the said railway. In so far as any such inconvenience may so result, the same is required in and should be subservient to the great advantage which will inure to the public generally from the completion and operation of the said sewer which is imperatively required for the protection of the health and comfort of a large portion of the inhabitants of the State of New Jersey. The said section of the said sewer will constitute an integral and important part of the main Passaic Drainage sewer, the construction of which has for a long time been sought by the State of New Jersey. Contracts have been entered into with the said Com-

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Answer of Defendants, Frazer & Burchenal.

mission by the City of Newark and by not less than 14 other municipalities of such State for the construction of such sewer, and several millions of dollars have already been spent or contracted to be spent in the necessary work of completing the said public improvement. The contract, plans, specifications and profile under which the said section of such sewer is being constructed by these defendants, have been framed and adopted by the said Commission as those which are required in the public interest with the consent and approval of all of the said municipalities, including the City of Newark, all of which such municipalities are contributing to the expense of the construction of such main sewer.

12. By the terms of the said contract the defendants are required to complete the work covered thereby not later than May 1, 1915, and the time now remaining is not more than is required for such purpose. In and by the said contract it is provided that the defendants shall not disturb the surface of the highway at such location between the 1st of May and the first Monday in September in any year. Between November 1st and May 1st the work of construction at such location can be carried on and completed with the least possible inconvenience to the traveling public and the complainant. The work of completing the unfinished portion of the said section of such sewer in accordance with the terms and provisions of such contract will not require that the tracks and wires at such location shall be removed or discontinued for more than three months. The tracks and wires of the complainant at such location are in part dead-end lines which are used only for the storage and switching of cars at the time baseball games are played

Answer of Defendants, Frazer & Burchenal.

at the baseball park, the entrance to which is a short distance to the west of such location. The remaining portion thereof is not as alleged in the bill of complaint part of any loop between the heart of the City of Newark and South Orange, but is near the easterly end of the complainant's said railway, and the proposed temporary removal of the tracks and wires at the said location will result in inconvenience only to the very small number of passengers who are ordinarily carried beyond such location in cars operated there over at much less frequent intervals than is stated in the said bill of complaint. 10

13. If the defendants are enjoined or prohibited from completing their said work in the manner provided for by the said contract, specifications, plans and profile, they will be unable to complete the same. The completion of such work in either of the manners alleged by the said bill of complaint to be feasible would necessarily involve the public in an expense largely in excess of that at which the defendants have contracted to do such work. 20

The defendants pray to be hence dismissed with their costs and charges in this cause most wrongfully sustained. 30

JAMES S. FRAZER,
SELDEN D. BURCHENAL. 30

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Defendants.

Answer of Defendants, Frazer & Burchenal.

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

10 JAMES S. FRAZER being duly sworn according to law on his oath says that he is one of the defendants in the foregoing answer named; that he has read the said answer, and that each and every of the matters stated therein is true.

JAMES S. FRAZER.

Subscribed and sworn to before me this first day of December, 1914.

HALSEY M. BARRETT,
Master in Chancery of New Jersey.

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

SELDEN D. BURCHENAL, being duly sworn according to law on his oath says that he is one of the defendants in the foregoing answer named; that he has read the said answer, and that each and every of the matters stated therein is true.

SELDEN D. BURCHENAL.

30 Subscribed and sworn to before me this first day of December, 1914.

HALSEY M. BARRETT,
Master in Chancery of New Jersey.

Affidavit of James S. Frazer.

Affidavits in Behalf of Frazer & Burchenal.

Filed December 1, 1914.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

JAMES S. FRAZER, being duly sworn, deposes and says: 10

I am one of the above named defendants and am a contracting engineer, with offices at No. 80 Maiden Lane, in the Borough of Manhattan, City of New York. I received my technical education as civil engineer in the Delaware College, and have been in active practice of my profession for eleven years, during which time I have been engaged in railroad survey work on the New York, Westchester & Boston Railroad, Pennsylvania Railroad, New York Central, South Shore Traction and have been engaged as engineer in the construction of the concrete piers for the Pennsylvania Railroad Company at Baltimore, and have been engaged as an engineer in the construction of the Hudson & Manhattan Railroad and on the layout and construction of the foundation of the power house in Jersey City of the Hudson & Manhattan Railroad, and have been engaged as chief inspector of construction tunnels in the construction of the Pennsylvania Tunnel, North River division, and have been in the engineering contracting business for about four years. 20 30

Prior to August 22nd, 1913, in company with the defendant, Seldon D. Burchenal, (erroneously above referred to as "Sam D. Burchenal"), I examined contract and specifications No. 26, and the plans and profiles relating thereto, of the Passaic Valley Sewerage Commissioners of the 40

Affidavit of James S. Frazer.

State of New Jersey, covering the central portion of section 6 of the main intercepting sewer, from Station 26+00 to Station 40+00—that is, from a point in Hamburg Place in the City of Newark, State of New Jersey, about three hundred feet south of the grade crossing of the

10 Central Railroad of New Jersey, thence northerly through said Hamburg Place to a point northwesterly of Avenue L, a total distance of fourteen hundred linear feet.

After such examination said Burchenal and myself made a bid for the work covered thereby, and thereafter on the 22nd day of August, 1913, made and entered into a contract for the construction of said sewer in accordance with said bid, specifications, plans and profiles, as appears

20 by said plans and profiles attached hereto and hereby made a part hereof.

Said contract provided for the excavation of a trench between the points above referred to, and the construction therein of a concrete sewer, having an interior diameter of one hundred and fifty (150) inches, together with brick masonry in manholes and appurtenant work, and the refilling of the said trench.

The said contract provided that we were to be

30 paid for earth excavation and refilling of the trench at the rate of seventy (\$70.00) dollars per lineal foot; for concrete masonry in the trench Portland cement mortar, forty-five hundred (4500) cubic yards, at the rate of eight (\$8.00) dollars per cubic yard; for brick masonry in manholes Portland cement mortar, and appurtenant work, fifty (50) cubic yards, at fifteen (\$15.00) dollars per cubic yard; for rock excavation in trench, three hundred (300) cubic yards,

40 at three (\$3.00) dollars per cubic yard.

Affidavit of James S. Frazer.

Said contract further provided that the work of building the sewer should be completed on or before May 1st, 1915, and that "no portion of the work in Hamburg Place between Jabez Street and Avenue L, shall be executed in the interval between May 1st and Labor Day. During this time the street surface shall be unbroken and the traffic uninterrupted." The latter provision being inserted, as I am informed and verily believe, for the purpose of permitting the street railway line to be operated during the baseball season; the entrance to the baseball park being located a short distance westerly of Station 40+00; that being the only season, as I am informed and verily believe, when there is traffic of any consequence on said railway line in the immediate vicinity of said last mentioned point.

I am informed and verily believe that the contract of Ryan & Reilly with the Passaic Valley Sewerage Commissioners for the section immediately adjoining the central portion of section 6 on the west, and between the said central portion of section 6 and the built-up portion of the City of Newark, contains a similar provision, and that notwithstanding such provision, the complainant discontinued entirely the operation of the portion of its said street railway line on Hamburg place from Avenue L, to a point about three hundred and fifty (350) feet westerly thereof, during the period between December, 1913, and Labor Day, 1914, while said Ryan & Reilly were constructing a portion of said sewer for a distance of about two hundred and fifty (250) feet running from Station 40+00 in a westerly direction toward the heart of the City of Newark.

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Affidavit of James S. Frazer.

That thereafter the said Burchenal and myself entered upon the performance of the said contract on our part to be performed, and constructed the said sewer to a point about three hundred and fifty (350) feet, more or less, easterly from Station 40+00, when it became necessary for us to discontinue our work of excavation, on account of the presence of the street railway tracks and overhead wires claimed to be owned or controlled by the complainant herein.

That on the 26th day of October, 1914, and at divers times prior thereto, we notified the complainant through the Public Service Corporation, that it would be necessary for the complainant to remove said tracks and overhead wires, or to permit same to be removed, in order to permit the construction of said sewer, in accordance with the plans and specifications therefore, but the complainant has refused to remove said tracks or overhead wires, or to permit same to be removed by the defendants.

From a point a few hundred feet from the westerly end of our section of the sewer so far as same has been built, we have in building said sewer encountered very dangerous and treacherous soil. It consists of filling, below that a light clay, below that a coarse gravel and below that quick sand. The soil is faulty and breaks and caves in without warning. After reaching a point of an average depth of twenty (20) feet, the material to be excavated became so soft as to be of the consistency very thick soup. A considerable amount of water is encountered in the trench, which has to be carried off by a pump and flume; the water so pumped from the trench being carried some distance, is run into settling basins in order that the quick sand carried by

Affidavit of James S. Frazer.

the water may settle and be removed and thereby prevent the water outlet from being choked.

In constructing said trench for the last few hundred feet, it has been necessary to sheathe with interlocking steel sheet piling and wooden sheet piling supported by 10 inch by 10 inch cross braces, placed at intervals of two or three feet vertically, and ten feet horizontally, as is shown in the photograph marked Exhibit "A" attached to the affidavit of Frederick Lavis, hereto annexed. 10

Since encountering the quick sand as herein before set forth, it has been necessary for us to excavate the trench (by) means of constructing transverse bulkheads in said trench at distances varying from six to twenty feet and averaging about twelve feet, and to carry the excavation down in successive stages between these bulkheads until the necessary depth is reached. The excavated material is then taken out by means of buckets, carried on a cableway running along over the center of the trench, as is shown in the photograph above referred to, and in photographs marked "C" hereto attached and hereby made a part hereof. The sheathing and timbering in the trench has settled about seven feet below the surface of the street and has in some instances settled so unevenly as to cause the braces on one side to be much lower than on the other, as is shown in photograph "D" hereto attached and made a part hereof. 20 30

Furthermore, the ground has caved in and settled on both sides of the trench to distances varying from ten to twenty feet. This is especially true of the ground to the south of the trench shown in photograph "A," where great cracks running parallel with the trench have opened in 40

Affidavit of James S. Frazer.

the ground to a distance of upwards of twenty feet since the excavation of that part of the trench was commenced.

10 Between the point which we have now reached in the construction of our section of the sewer and Station 40+00 and for some distance to the west thereof, the street is not built up, there being only two or three small wooden buildings in the neighborhood, one being on the northwesterly corner and the other on the northeasterly corner of Avenue L and Hamburg place, and the other being located about fifty (50) feet southwesterly from Station 40+00.

20 On reaching our present location, as shown in photograph marked "A," we moved one tower of our cableway to a point near the westerly end of the completed work, and started to move the other to a point west of Station 40+00, but were unable to do so owing to the presence of the overhead trolley wires, and the street railroad tracks; thereupon we requested the Public Service Corporation to remove said tracks and overhead wires so that we could proceed with our work. Since that time our counsel and ourselves have made a number of visits to the officers of the Public Service Corporation and the attorney for 30 the complainant herein, and endeavored to persuade them to comply with our request. At first it was suggested to us that our request would be complied with if we paid the expense of removing and replacing the said tracks and wires. We replied that we had been advised by our counsel that we were under no obligation to bear such expense, in view of the fact that the sewer was a public work to be carried on in a public street, and that we had the right to construct the sewer 40 without paying for the removal or support of

Affidavit of James S. Frazer.

railroad tracks. We proposed, however, that if the Public Service Corporation would remove the tracks and wires and permit us to proceed with our work that we would give a bond conditioned for the payment of the necessary expense of the removal and restoration of such tracks and wires, if it should be determined by a court of competent jurisdiction, or an arbitrator to be agreed upon, that we were liable therefor. This offer was refused and we were finally told that the complainant would not remove the street railway tracks nor overhead wires, nor permit us to interfere with them in any way, but that we would have to do the work either by an air pressure tunnel, or, if done by open cut, the tracks would have to be supported by a platform, so that the cars could continue their operation without hindrance during the progress of the work.

I am informed by the said Burchenal that he has made a boring of seventeen feet in the westerly end of our trench, after same had reached a depth of thirty (30) feet, and even then did not reach hard material. I saw the work of excavation being carried on by Ryan & Reilly just west of Station 40+00, and saw pipes carried down to a depth of twelve and one-half (12½) feet below the bottom of their trench, after the same had reached a depth of thirty (30) feet, or a total distance of forty-two and one-half (42½) feet, without encountering any hard material. Judging from the soil in which we have for some time been excavating our trench, and the soil in which Ryan & Reilly were excavating in the construction of their section at the location last mentioned, and from the borings shown on the map of the Passaic Valley Sewerage Commissioners

Affidavit of James S. Frazer.

submitted herein, and hereby made a part hereof, I must assume that the same character of soil is the same from our present location to the end of our work, Station 40+00.

10 The suggestion made by the complainant that we do the work by air pressure tunnel is not, in my opinion, reasonable or feasible, because the expense of doing so would be prohibitive from a business standpoint and would involve a risk to the men engaged in the work and to the persons using the street above same.

We have provided ourselves with necessary machinery, plant and equipment, lumber, cement and coal suitable to properly carry on our work. The only other thing necessary for us to procure being the labor.

20 If we are required to do the work by air pressure tunnel we would first have to acquire a plant of a totally different character, which would involve prohibitive expense and delay.

The average price per running foot for completed sewer which we are to receive is about ninety-six (\$96.00) dollars.

30 I am informed by the said Burchenal and one of my counsel, Samuel H. Evins, that Mr. Roberts, first vice-president of the complainant company, told them a short time ago that he had tried to ascertain from Booth & Flynn, who are doing tunnelling work some distance to the west of our excavation, what they would charge per lineal foot to dig a tunnel under their tracks at a point between Station 40+00 on Hamburg place and Avenue L, and that he was informed that one hundred and fifty (\$150) dollars per running foot was the lowest price that they would make.

40 It therefore follows that if we did the work by the tunnel method, we would not only lose the

Affidavit of James S. Frazer.

profit on the three hundred and fifty (350) feet of sewer to be completed, but would have to pay an addition thereto at least fifty-four (\$54.00) dollars a running foot. In my opinion, neither character of the locality nor the traffic warrants any such expense or risk. While it is impossible to say what it would cost to erect a structure that would safely carry the railway traffic during the construction of the sewer, we would have to assume that the pile supports on either side of the trench would have to be driven into the ground to a depth of upwards of fifty (50) feet and that steel girders would have to be provided. 10

It would take at least a month, and possibly two months to build the structure suggested, and aside from the very great cost of constructing and maintaining such a support, it would necessitate even greater expense, delay and difficulty in constructing the sewer under such a platform. The cableway which we have been using for excavating and for carrying heavy timbers in the trench could not be used on account of the overhead wires, and because of the interference by the supporting structure. It would increase the difficulty in driving the sheet piling and the vibration of the cars in running over the said trench would certainly make it very difficult to prevent the sides of the trench from caving in. Furthermore, the cost of back-filling and concreting would be very largely increased. In my opinion the cost of labor alone in doing the work by that method would be practically doubled, which would in itself involve an expenditure of upwards Fifteen Thousand (\$15,000) Dollars for labor alone, over and above what it would cost for labor under the method which we have previously adopted. 20 30 40

Affidavit of James S. Frazer.

Said Burchenal and myself have both been at the work constantly. Mr. Burchenal having been in active supervision of the work from its beginning.

10 Furthermore, if we were to adopt the method suggested, it would be impossible for us to complete the work within the time specified in the contract.

I am familiar with the conditions and with the soil in which we have been working, and it is my opinion that it would not only involve a prohibitive expense to build the sewer while the cars are being operated over same, but that it would seriously endanger persons riding in the trolley cars and those working in the trench.

20 I have personal knowledge concerning the traffic and other conditions surrounding the location where the work is being performed, and know that the suggestion made by the complainant of sustaining their tracks or doing the work by tunnelling is wholly unreasonable and without any justification. That the discontinuance of their tracks would, from my observation of the traffic of their cars and the number of passengers carried, cause little or no inconvenience to the traveling public in that neighborhood.

30 I am informed and believe that the said Hamburg Place and Avenue L, hereinabove referred to, are, and have been, since a long time prior to the passage of the act creating the Passaic Valley Sewerage Commission, public highways, duly dedicated, accepted and used as such in the City of Newark, State of New Jersey, and that the Passaic Valley Sewerage Commission was duly created by an act of the State of New Jersey, Chapter 10 of the Laws of 1907, and that
40 under said act, and the acts amendatory thereof

Affidavit of Selden D. Burchenal.

and supplemental thereto, the said commission was duly authorized to make the contract hereinabove referred to, and to cause the said sewer mentioned in said contract to be constructed in said Hamburg Place at the places specified in said contract.

JAMES S. FRAZER.

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Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,
*Commissioner of Deeds, No. 93,
New York City.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK. }*ss.*

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SELDON D. BURCHENAL, being duly sworn, deposes and says: I am of full age and a civil engineer with offices at No. 80 Maiden Lane, in the Borough of Manhattan, City of New York.

I have been in the contracting business for about eight years, having had experience as engineer in construction work of railroads and tunnels, among others, the Illinois Central, Chicago, Rock Island & Pacific Railroad, Long Island Railroad, New York Central Railroad, New York, New Haven & Hartford Railroad, and the North River Division of the Pennsylvania Tunnels.

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I have been in charge of the work since its beginning, and am familiar with every detail thereof and with the surrounding conditions. In my opinion as an engineer, the only reasonable, practicable way of constructing the sewer is by

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Affidavit of Selden D. Burchenal.

open cut method adopted by the commission, and that the suggestion of the complainant to construct it by means of an air pressure tunnel, or under a platform supporting the tracks of the street railway, are unreasonable and prohibitive from a business and engineering standpoint.

10 I have read the annexed affidavits of James S. Frazer and Frederick Lavis, both verified yesterday, and same are true to the best of my knowledge, information and belief.

I believe that the opinions therein expressed are correct and that the reasons given therefor fully justify the same.

20 On the 25th day of November, 1914, I made a boring at the westerly end of our trench after same had reached a depth of upwards of thirty (30) feet, and although the pipe used in boring was driven to a depth of upwards of seventeen (17) feet below the bottom of our said trench, that is to say, upwards of forty-seven (47) feet from the street level, I did not even then encounter any hard material.

I have examined the photographs attached to the affidavits above referred to, and same are correct photographs of the work and location which they purport to represent.

30 I have read the annexed affidavit of Thomas James Priestley hereto attached. I was present during the greater part of the time that said observations were being made, and verily believe the records attached to said affidavit are correct in every respect, and that the street railway traffic at the times therein mentioned was normal.

40 Hereto attached and made a part hereof is a locality map, obtained by me from the State of New Jersey Passaic Valley Sewerage Commis-

Affidavit of Selden D. Burchenal.

sion, showing, among other places in the City of Newark, Hamburg Place, Avenue L, Magazine Street and East Ferry Street.

To acquire a plant that would enable the remainder of the portion of the sewer which is covered by the defendant's contract to be constructed by the Air Tunnel method the defendants would have to expend not less than \$25,000. A material part of the equipment needed for such Air Tunnel work would have to be installed on concrete foundations and such a plant could not be obtained and put in operation in less than two months' time. 10

The statements referred to in the affidavit of James S. Frazer as made by Mr. Roberts, the first vice-president of the complainant, with reference to the cost of doing the work by the Air Tunnel method at the lowest price could be obtained therefor were made in my presence and were as stated by Mr. Frazer as stated in his affidavit. From my experience I believe that the price named by Mr. Robert, namely \$150 per lineal foot, is the cheapest price at which the work could be sublet or done under any other contract. 20

SELDON D. BURCHENAL. 30

Sworn to before me this 1st
day of December, 1914.

G. L. FERGUSON,
Notary Public of New Jersey.

Affidavit of Frederick Lavis.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } ss.

FREDERICK LAVIS, being duly sworn, deposes and says:

10 I am a civil engineer, with offices at No. 50 Church street, in the Borough of Manhattan, City of New York, I have practiced civil engineering for the past twenty-five years, during which time I have acted as engineer in charge of the construction of a number of railways in the United States and South America. During the construction of the Pennsylvania Railway Tunnels under the Hudson River, I was the engineer for the Pennsylvania Railroad Company, in charge of one section of the work.

20 I know Mr. James S. Frazer and Mr. Seldon D. Burchenal, the defendants in the above entitled action.

At the request of the said James S. Frazer I examined the plans, specifications and contract for the building of the central portion of section 6 of the main intercepting sewer, said contract having been made between the Passaic Valley Sewerage Commissioners and the above named defendants, and being known as Contract No. 26.

30 Said plans and specifications called for the excavation of an open cut or trench from Station 26+00 to Station 40+00; that is to say, from a point in Hamburg Place about 300 feet south of the grade crossing of the Central Railroad of New Jersey; thence westerly through said Hamburg Place to a point west of Avenue L, a total distance of 1,400 linear feet, and the construction therein of a concrete sewer having an interior diameter of one hundred and fifty (150) inches,

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Affidavit of Frederick Lavis.

together with certain brick masonry in man-holes and appurtenant work, and the re-filling of said trench.

In order to construct this sewer it will be necessary to excavate a trench at least thirty (30) feet deep and approximately twenty (20) feet wide.

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On the 24th day of November, 1914, at the request of Mr. James S. Frazer, and in company with him and the above named Seldon D. Burchenal, and Percy H. Ashmead, another engineer, I examined the work now being done by the said Frazer & Burchenal, in constructing the said sewer at a point on Hamburg Place a short distance easterly from the intersection of Hamburg Place and Avenue L. Such examination showed, among other things, an excavation approximately twenty (20) feet in width and about thirty (30) feet in depth; the plans showing that the bottom of the trench is about twenty (20) feet below mean low water.

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The soil in which said trench is excavated consists of filling, below that light clay, below that coarse sand, and below that water bearing material consisting of very fine sand with a mixture of clay commonly called quick-sand. There was a great deal of water in the trench, which was being carried off by means of a pump and flume. Although no excavating was being carried on at the time, a considerable amount of quick-sand was to be found in the water pumped from the trench. The trench was sheathed on both sides with interlocking steel sheet piling, and with wood sheet piling supported by braces running across the trench, as shown in the annexed photograph marked "A." Each side of the trench had sunk, as shown by the annexed

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Affidavit of Frederick Lavis.

photograph "A" about seven feet below the level of the street, and the ground had caved in for a distance of approximately ten feet on both sides of the trench.

10 I made an examination of the ground through which the trench had been dug for several hundred feet, also that through which it is to be dug according to the plans, and of the location of the tracks of the street railway on Hamburg Place and Avenue L, at and near the intersection of the said Hamburg Place and Avenue L.

20 I have been informed by Messrs. Frazer & Burchenal that the soil in which the said trench has been constructed for the last few hundred feet is of the same character as that which was open at the time I examined the same; that that portion of the sewer built by Ryan & Reilly, immediately adjoining the section being constructed by the defendant at Station 40+00 was built in similar soil, and that during the excavation in such soil the excavated material, after reaching a point about twenty (20) feet below the surface, consists of quick-sand of a texture a little thicker than very thick soup.

30 I am further informed by the said Burchenal that at said point where he is now working, after reaching a depth of thirty (30) feet, he made a boring about seventeen (17) feet below the bottom of the trench, and even then did not reach hard material. He further informed me that in the trench constructed by Ryan & Reilly, near Station 40+00, he saw pipes sunk to a point twelve and one-half feet below the bottom of the trench, after the same had reached a depth of thirty (30) feet, and even then no hard material was encountered.

Affidavit of Frederick Lavis.

I am further informed by the said Frazer & Burchenal that the only method by which they have been able to successfully construct the trench in the soft material above described, was in sections by the erection of bulk heads across said trench at distances varying from six to twenty feet, (and at an average of about twelve feet). 10

I have been told by the said Frazer that it has been suggested by the railway company operating trolley cars on Hamburg place at its intersection with Avenue L, that the trolley tracks be supported for the operation of the cars during the construction of the sewer thereunder, or that the work of excavation be done by an air-pressure tunnel, and I have been asked by the said Frazer for my opinion as to the feasibility of doing the work by either of said methods. 20

It is, of course, possible from an engineering standpoint to do the work by either of the methods suggested, but from my examination of the soil and locality, and from the statements made to me by the said Frazer & Burchenal as hereinbefore set forth, it is my opinion as an engineer that the only reasonable or practicable method of constructing the sewer at the locality in question is by the open cut method adopted by the Commission, with the tracks removed during the work of construction. It is my opinion as an engineer that the adoption of either of the methods suggested, that is, by air pressure tunnel or by supporting the tracks during the work of construction, would be unreasonable, and from a business or engineering standpoint, impracticable and prohibitive. It would be possible to maintain a temporary support or platform over 30 40

Affidavit of Frederick Lavis.

the trench by driving piles on either side of the trench and on the sides of the street railroad tracks at the junction of Hamburg place and Avenue L, and by placing girders across the trench from one row of piles to another, and to erect thereon a platform for the operation of the cars. In order to do this, however, it would be necessary to drive piles to a sufficient depth to obtain adequate support, which it must be assumed would be to a depth of at least fifty (50) feet, and probably more.

The cost of erecting and maintaining such a temporary platform or support would be considerably increased by reason of the fact that there is a curve in the railroad tracks from Hamburg place to Avenue L. In erecting such a temporary platform or support it would be necessary to support the overhead wires of the trolleys and also the poles carrying the electric light, power cables, telegraph and telephone wires, shown in photograph "B," hereto attached and made a part hereof, in addition to the sub-surface structures shown on the said plans, on Hamburg place at its intersection with Avenue L, which would add considerably to the cost. Because of the uncertain soil conditions, and the uncertainty of obtaining adequate support, the cost of constructing and maintaining such a temporary support during the construction of the sewer can be approximately estimated only after making a large number of borings on either side of the trench, and on the sides of the railroad lines at the intersection of Hamburg place and Avenue L. No such borings have been made, but the cost of erecting such a temporary platform or support has been estimated by me upon the assumption that in the course of such work,

Affidavit of Frederick Lavis.

every condition would be found to be favorable, and that solid material would be reached at a depth of fifty (50) feet below the surface of the street in all places where piles would have to be driven. That estimate shows a minimum cost of approximately Twelve Thousand (\$12,000) Dollars for the structure alone, including nothing for its maintenance and for the increased cost of constructing the sewer itself, nor the cost of removing the platform or piles when the work is completed. 10

To procure the necessary material and erect such a structure would require not less than a month or six weeks.

If the tracks are maintained in their present position with the overhead wires, etc., the equipment now provided could not be used, and in my opinion the labor cost of excavating, building of the sewer, and back-filling the trench would certainly be at least fifty per cent. over that which is involved in the method which has heretofore been employed by the defendants in their work, and might easily be seventy-five per cent. or more, in excess of such cost. 20

The character of the material heretofore described as quick-sand is such that its stability is materially decreased by any jarring or vibration, such as would undoubtedly be set up by the passage of trolley cars over any structure which might be erected. Such vibration would materially increase the difficulty of holding the soil in place and would increase the danger of a probable cave in of the sides of the trench. In my opinion any attempt to maintain trolley traffic on a structure over the trench during the building of the sewer would involve a serious danger to the men working in the trench. 30 40

Affidavit of Percy H. Ashmead.

In my opinion it would cost more to build and maintain the supporting structure and build the sewer during the operation of the road than it would cost to build the sewer by air pressure tunnel method, and that the cost of employing either method, from either business or engineering standpoint, under the circumstances, would be wholly unreasonable and prohibitive.

I am not connected in business or otherwise with either of the defendants herein.

FREDERICK LAVIS.

Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,

Commissioner of Deeds, No. 93, N. Y. City.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

PERCY H. ASHMEAD, being duly sworn, deposes and says:

I am a consulting civil engineer with offices at No. 35 Nassau street, in the Borough of Manhattan, City of New York, and have practiced my profession for twenty-six years; having received my technical education as civil engineer at Lehigh University. My practice has included the work of chief engineer upon the construction of steam railways in the United States, South America and China. I also acted as engineer on the construction of the Chicago Drainage Canal.

I have read the annexed affidavit of Frederick Lavis, verified this day, and with him made an

Affidavit of Alfred Priestley.

examination of the contract, plans and specifications therein mentioned and also as therein stated, was with him on the occasion of his visit to the defendants' work, and with him made an examination of the work, soil, and conditions surrounding such work, and heard the statements with reference to the same made by the said Frazer & Burchenal, as stated in his said affidavit. 10

I calculated with Mr. Lavis in making up the estimate referred to in his affidavit. The statements of fact and opinion and the reasons given for such opinions stated in Mr. Lavis' said affidavit are true of my own knowledge, information and belief.

I am not connected in business or otherwise with either of the defendants herein. 20

PERCY H. ASHMEAD.

Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,
Commissioner of Deeds, No. 93, N. Y. City.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss. 30

ALFRED PRIESTLEY, being duly sworn, deposes and says:

I am twenty-five years of age and reside at Newark, N. J.

At the request of Messrs. Frazer & Burchenal, the above named defendants, I was present at the intersection of Magazine Street and East Ferry Street, in the City of Newark, State of 40

Affidavit of Alfred Priestley.

New Jersey, between the hours of 12 o'clock noon on Friday, November 27th, 1914, and 1:20 P. M. and from 2:31 P. M. to 6:05 P. M., and on November 28th, 1914, from 7:06 A. M. to 5:26 P. M., and saw every street railway car that came to said point, that is, from Avenue L, through Magazine Street to its intersection with East Ferry Street, and saw every street railway car that left last mentioned point and ran along Magazine Street into Avenue L, at said times.

I noted the number of each car, the direction in which it was going, counted the passengers in each car as same arrived at said point, and also counted the number of passengers in each car departing from said point, and made a record of the same which is hereto attached and made a part hereof and is true of my own knowledge. In the column marked "Car No." appears the correct number of the car; in the column marked "No. of Pass. A." appears the correct number of passengers leaving said car on arriving at said intersection of Magazine Street and East Ferry Street, and the column marked "Arrived" appears the hour at which the car arrived at said last mentioned point.

In the column marked "Departed" is a correct statement of the time at which the cars departed from said point, and in the column marked "No. of Pass. B." appears the number of passengers who were in the cars leaving by way of Avenue L.

During the hours that I was observing said cars as aforesaid, none of the cars which arrived at East Ferry Street from Avenue L, via Magazine Street, proceeded beyond said last mentioned point, but returned by the route by which

Affidavit of Alfred Priestley.

they had come; except one, an official car, and did not carry any passengers.

I was also present at a point on Hamburg Place near its intersection with Avenue L, in said City of Newark, State of New Jersey, between the hours of 5:44 P. M. and 6:48 P. M. on the 28th day of November, 1914, and saw every street railway car that ran from Hamburg Place and into Avenue L, and every street railway car that ran from Avenue L and into Hamburg Place, at said times. (10

I noted the number of each car, the direction in which it was going, counted the passengers in each car, and the passengers who left each car at the intersection of Hamburg Place and Avenue L, and made a record of the same, which record is hereto attached and made a part hereof, and same is true of my own knowledge. In the column marked "Car No." appears the correct number of the car; in the column marked "East-West" appears the direction in which the car was going; "E" denoting that the car was going along Hamburg Place and into Avenue L, and "W" denoting that the car was going along Avenue L and into Hamburg Place. Under the column marked "Arrived" appears the hour at which the car came to a stop at or passed the intersection of said avenue and place; under column "No. of Passengers" appears the number of passengers in the car, and under column "Passengers Discharged" appears the number of passengers who were discharged by said car at said last mentioned point. 20 30

ALFRED PRIESTLEY.

Affidavit of Edward Veit.

Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,
Commissioner of Deeds, No. 93, N. Y. City.

10 STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

EDWARD VEIT, being duly sworn, deposes and
says:

I am upwards of twenty-one years of age,
and am employed by Messrs. Frazer & Bur-
chenal at their plant at Hamburg Place near its
intersection with Avenue L, at the City of New-
ark, State of New Jersey.

20 At the request of Messrs. Frazer & Burchenal,
the above named defendants, I was present at a
point on Hamburg Place near its intersection
with Avenue L, in said City of Newark, State of
New Jersey, between the hours of 7 P. M. on
November 27th, 1914, and 7 A. M. on November
28th, 1914, and between the hours of 6:55 P. M.
and 8:32 P. M. on November 28th, 1914, and
between the hours of 6:30 P. M. November 29th,
1914, and 7:13 A. M. November 30, 1914, and
30 saw every street railway car that ran from Ham-
burg Place into Avenue L, and every street rail-
way car that ran from Avenue L into Hamburg
Place, at said times.

I noted the number of each car, the direction
in which it was going, counted the passengers in
each car, and the passengers who left each car
at the intersection of Hamburg Place and Ave-
nue L, and made a record of the same, which
record is hereto attached and made a part hereof,
40 and is true of my own knowledge. In the column

Affidavit of Frederick Linden.

marked "Car No." appears the correct number of the car; in the column marked "East-West" appears the direction in which the car was going, "E" denoting that the car was going along Hamburg Place and into Avenue L, and "W" denoting that the car was going along Avenue L and into Hamburg Place. Under the column marked "Arrived" appears the hour at which the car came to a stop at or passed the intersection of said Avenue and Place; under column "No. of Passengers" appears the number of passengers in the car, and under column "Passengers Discharged" appears the number of passengers who were discharged by said car at said last mentioned point. 10

EDWARD VEIT. 20

Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,
Commissioner of Deeds, No. 93, N. Y. City.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss. 30

FREDERICK LINDEN, being duly sworn, deposes and says:

I am twenty-four years of age and reside at No. 27 Court street, Newark, N. J.

At the request of Messrs. Frazer & Burchenal, the above named defendants, I was present at a point on Hamburg Place, near its intersection with Avenue L, at the City of Newark, State of New Jersey, between the hours of 7:06 A. M. and 6:26 P. M. on the 29th day of November, 40

Affidavit of Frederick Linden.

1914, and saw every street railway car that ran from Hamburg Place into Avenue L, and every street railway car that ran from Avenue L into Hamburg Place, at said times. I noted the number of each car, the direction in which it was going, counted the passengers in each car, and the passengers who left each car at the intersection of Hamburg Place and Avenue L, and made a record of the same, which record is hereto attached, and made a part hereof and is true of my own knowledge. In the column marked "Car No." appears the correct number of the car; in the column marked "East or West" appears the direction in which the car was going; "E" denoting that the car was going along Hamburg Place and into Avenue L, and "W" denoting that the car was going along Avenue L and into Hamburg Place. Under the column marked "Arrived" appears the time at which the car came to a stop at, or passed the intersection of said Avenue or Place. Under the column marked "No. of Pass." appears the number of passengers in the car, and under column marked "Pass. Disch." appears the number of passengers who were discharged by said car at said last mentioned point.

30 On November 28th, 1914, at Hamburg Place and Stockton Street, three blocks west of Avenue L, Newark, I boarded a street railway car, No. 2463, going in the direction of Avenue L, at about 1:34 P. M., and asked the conductor, No. 3059, if said car went to South Orange. The conductor said that it did not. I asked him if I could not take the car and get a transfer for South Orange at East Ferry street; he said I could not. By this time the car had reached a point near Avenue L. The conductor told me to

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Affidavit of Frederick Linden.

get off the car and take the car going in the opposite direction, that is in a westerly direction along Hamburg Place.

At about 1:42 P. M. of the same day at Hamburg Place and Stockton Street, three blocks west of Avenue L, I boarded a street railway car, No. 2444, going in an easterly direction, where substantially the same conversation took place as before. The conductor's number on this car was 2979. 10

At about 2:57 on the same day, at Hamburg Place and Houston Street, six blocks west of Avenue L, I boarded car No. 1140, bound east on Hamburg Place, where substantially the same conversation took place. The conductor's number of this car was 2997.

On the same afternoon at about 3:07 at Hamburg Place and Gotthardt Street, five blocks west of Avenue L, I boarded a car, No. 2448, easterly bound along Hamburg Place, and had a conversation with the conductor, (No. 3067). I paid my fare and rode on the car to Magazine Street and East Ferry Street, and received the annexed transfer, made a part hereof, from which it appears that same could only be used on cars going east along East Ferry Street, and could not be used going toward South Orange. 20 30

FREDERICK LINDEN.

Sworn to before me this 30th
day of November, 1914.

ANNA E. SMITH,
Commissioner of Deeds, N. Y. City.

Affidavit of Thomas James Priestley.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } ss.

THOMAS JAMES PRIESTLEY, being duly sworn, deposes and says:

10 I am twenty-one years of age and reside at Chicopee, Massachusetts.

At the request of Messrs. Frazer & Burchenal, the above named defendants, I was present at a point on Hamburg Place near its intersection with Avenue L, in the City of Newark, State of New Jersey, between the hours of 7:05 A. M. and 12:47 P. M. and from 1:13 P. M. to 7 P. M., on the 27th day of November, 1914, and from 7 A. M. to 12:20 P. M. and from 12:45 P. M. to 2:30 P. M. on the 28th day of November, 1914, and saw every street railway car that ran from
 20 Hamburg Place into Avenue L, and every street railway car that ran from Avenue L into Hamburg Place at said times.

I noted the number of each car, the direction in which it was going, counted the passengers in each car, and the passengers who left each car at the intersection of Hamburg Place and Avenue L, and made a record of the same, which record is hereto attached and made a part here-
 30 of and is true of my own knowledge. In the column marked "Car No." appears the correct number of the car; in the column marked "East-West" appears the direction in which the car was going. "E" denoting that the car was going along Hamburg Place and into Avenue L, and "W" denoting that the car was going along Avenue L and into Hamburg Place. Under the column marked "Arrived" appears the hour at which the car came to a stop at or passed the
 40 intersection of said Avenue and Place; under

Affidavit of Thomas James Priestley.

column "No. of Pass." appears the number of passengers in the car, and under column "Pass. Disc." appears the number of passengers who were discharged by said car at said last mentioned point.

THOMAS JAMES PRIESTLEY.

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Sworn to before me this 28th
day of November, 1914.

ANNA E. SMITH,

Commissioner of Deeds, No. 93, N. Y. City.

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Affidavit of Thomas B. Bryson.

Complainants Answering Affidavits.

Filed Dec. 8, 1914.

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

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THOMAS B. BRYSON, of full age, being duly sworn according to law, on his oath deposeth and saith: That he resides in the city of New York, in the State of New York; that by profession he is a civil engineer; that he is a graduate of the engineering school of Cornell University of the State of New York, of the class of 1894, having received the degree of civil engineer; that since his graduation he has practiced his profession in Pennsylvania, New England and in New York, having been located in New York for the last fifteen years. That for several years he was engineer for the O'Rourke Foundation Company, a company that is largely engaged in building tunnels, foundations for high buildings, bridges, and so forth. That at the present time he is, and for the last three years has been vice-president of Holbrook, Cabot & Rollings Corporation, having offices in the city of New York and in the city of Boston, said corporation being engaged in general contracting work. Deponent has full charge of all work of the said corporation, which does a business of from three million to five million dollars per year; that at the present time said corporation is engaged in constructing a section of the New York subway; a pier in the river at the foot of Forty-sixth street in the city of New York; a large concrete foundation work at Turner's Falls, in the state of Massachusetts, and works at other places.

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Affidavit of Thomas B. Bryson.

Deponent further says that he has examined the plans and the site of the proposed work of the defendants in this case at Hamburg Place and Avenue L in the city of Newark, and that in his opinion as an engineer the section of the sewer to be constructed by the defendants in the above stated cause at or near the junction of Hamburg Place and Avenue L can be constructed without disturbing the tracks of the street railway of the complainant or interfering with traffic thereon, in either one of two ways, namely: either by making an open cut and supporting the tracks of the complainant, or by means of a tunnel. That deponent has been informed, and believes the same to be true, that approximately fourteen hundred feet of the said sewer have already been constructed in Hamburg Place by means of tunneling under the tracks of the railway of the complainant, without disturbing the surface of the street or interrupting the traffic on the said street railway of the complainant. 10 20

Deponent further says that in case the sewer should be constructed by means of an open cut the earth on either side of the cut must be supported by steel sheet piling, which should be driven low enough to prevent material from the outside of the piling to flow under it into the trench. This sheet piling, supported in the customary manner by bracing from one side to the other, would sustain the earth on either side and girders could then be laid across the top of the sheet piling, supported on either side thereof by timbers, to sustain the street railway above the excavation; or stock iron "I" beams could be used for girders, which would not be injured by their use temporarily for that purpose, and could be subsequently sold for approx- 30 40

Affidavit of Reginald H. Keays.

imately their original cost. If these girders should be laid not more than eight feet apart they would sustain the railway of the complainant without any longitudinal timbers between the girders and the ties; if laid more than eight feet apart the railway could be sustained by
 10 timbers under the ties of the railway and resting on the girders, and running longitudinally with the railroad. Stock iron girders could readily be obtained of any length desired for this purpose, and it would not be necessary, in this deponent's judgment, to drive piling to support the street railway tracks, and deponent does not think that that would be either the most economical or the best practical method of doing the work.

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THOMAS B. BRYSON,

Sworn and subscribed to this
 third day of December, A. D.,
 1914, before me.

(SEAL) F. M. UNDERHILL,
Notary Public,
 Commission expires Feb. 11, 1919.

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

REGINALD H. KEAYS, of full age, being duly sworn according to law, on his oath deposeth and saith: that he is a graduate of the engineering school of Cornell University, of the class of 1895, with the degree of civil engineer; that since that time he has been in the constant practice of his profession as a civil engineer,
 40 mainly in heavy construction work, and the con-

Affidavit of Regina'd H. Keays.

tract end of such work; that in such experience he has been works manager for the Hudson Companies on the Hudson River tunnel work, and engineer for the Degnon Contracting Company for the last seven years, until recently; that said Degnon Contracting Company has during the said seven years built the Wallkill siphon of the Catskill aqueduct, being part of the New York City water supply system, with which work this deponent was connected; that deponent is now chief engineer of the New York and New Jersey Construction Company, which is at present engaged in the building of section number three of the Passaic Valley sewer, which includes a tunnel across Newark Bay. 10

Deponent further says that he has examined and is familiar with the plans of the proposed work of the defendants in this case at Hamburg Place and Avenue L in the City of Newark, and has also examined the site of said work; that it is entirely feasible and practicable, in the performance of said contract by the defendants, to do the same without interfering with the traffic of the complainant's street railway in Hamburg Place. This work may be done either by tunnel construction, or, if desired, by open cut work, supporting the tracks. That by far the neatest and best way to build the same is by tunnel construction, and it could thus be done without in any wise interfering with the surface of the street; that building the same by open cut work and carrying the street railway tracks could be done by driving steel sheet piling on each side of the tracks, or heavy wooden interlocking piling to a sufficient depth, and across the tops of the rows of sheet piling spanning the trench there could be placed heavy wooden or steel beams, which could be spaced close 20 30 40

Affidavit of Thomas J. Wasser.

enough together so that no stringers would be necessary under the tracks; or, if spaced further apart, could be used in conjunction with stringers under each rail of the tracks; that the choice would be merely a matter of economy. That in either of these cases—tunnel or open cut work—
 10 it is entirely feasible and practicable from an engineering or contracting standpoint to do this work in this way.

REGINALD H. KEAYS.

Sworn and subscribed to this
 2nd day of December, A. D.,
 1914, before me.

(SEAL) F. M. UNDERHILL,
Notary Public,
 20 Commission expires Feb. 11, 1919.

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

THOMAS J. WASSER, of full age, being duly sworn according to law, on his oath deposes and saith that he resides in Jersey City, in the county of Hudson and State of New Jersey, and
 30 is county engineer for the county of Hudson; that he has been engaged in engineering for twenty-one years, during which time he has built and constructed the bridges over the Hackensack river between Jersey City and Kearny, which included abutments, subterreanean work and foundations; that he has built a viaduct in Hoboken, which is a large engineering work requiring concrete and masonry, and a large number of other municipal improvements and
 40 structures, all of which necessitated the digging

Affidavit of Thomas J. Wasser.

of foundations, and shoring and caring for excavation.

Deponent further says that he has examined the plans of the sewer proposed to be constructed by the defendants in this case for the Passaic Valley Sewerage Commissioners on Hamburg Place at Avenue L in the City of Newark, and has also personally inspected the site of such work; that he has read the affidavits of the defendants in this case; that in the opinion of deponent it is entirely feasible and practicable to build and construct said sewer at the point in Hamburg Place selected without interfering with the traffic of the street railway of the complainant there constructed and operated; that this can be done by either tunnel construction similar to approximately fourteen hundred feet (as he has been informed) of construction which has already been done on said Hamburg Place and in other parts of said Sewerage Commissioners' construction; or by open cut construction, carrying the railway of the complainant there over on supports. In the opinion of deponent the former method would be less costly had it been continued, and the best method of construction. With the open cut construction it would be necessary to drive steel interlocking sheet piling, and brace it from side to side, and across the top of the piling place steel "I" beams spaced about eight feet between centers, of sufficient strength to carry the street railway of the complainant or by placing stringers on these "I" beams, and then supporting the ties by the stringers. The spacing of these beams could be regulated by their size. Deponent further says that if the sheet piling is driven to a proper bearing and properly shored

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Affidavit of Martin Schreiber.

there would be no danger of settlement due to seepage. With open cut construction sheet piling would be necessary even if the railway were not in the street.

THOMAS J. WASSER.

- 10 Sworn, and subscribed to this
3rd day of December, A. D.,
1914, before me.

(SEAL) F. M. UNDERHILL,
Notary Public,
Commission expires Feb. 11, 1919.

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

- 20 MARTIN SCHREIBER, being duly sworn according to law, on his oath saith that he has already made an affidavit which is attached to the bill of complaint herein; that he has read the affidavits filed on behalf of the defendants herein, and that he has also read the affidavits of Thomas B. Bryson, Reginald H. Keays and Thomas J. Wasser, the engineers who had made affidavits for the complainant; that he entirely agrees with the statements in such affidavits of said Thomas B. Bryson, Reginald H. Keays and Thomas J. Wasser, and the conclusions reached by the several affiants therein as to the entire practicability and feasibility, both from an engineering and a practical standpoint, of building the said sewer by means of tunnel construction, or by an open cut and support of the railway tracks, in either of which cases traffic of the railway need not be interrupted; and that support of the tracks can be readily made in
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- 40 the manner suggested in the affidavits of the

Affidavit of Martin Schreiber.

said Thomas B. Bryson, Reginald H. Keays and Thomas J. Wasser. That to require the complainant company to remove its railway as the defendants have demanded and continue the operation of its railway as required by its franchise obligations by increasing the service by additional cars to supply those not permitted by reason of such operation to continue to the end of the route, would cost the complainant company much more than it would cost the contractors in properly doing their said work to support, in addition, the tracks of the complainant company; and in this no consideration is given whatsoever to the loss of revenue by the complainant company from the interruption and interference of traffic, nor the inconvenience suffered by the traveling public. In the necessary work to properly support the sides of the street in open tunnelling proper sheathing must be driven to a point insuring safety, and at such point the support of the sheathing, if it be either steel interlocking sheet piling or wood sheet piling by cross bracing which is required, would afford either at the top of such piling or on the soil at either side of it sufficient support for girders, which could be of stock size steel "I" beams, to carry the railway; so that the only additional cost to the defendants would be the labor of installing such "I" beams. If they were spaced so far as to require wooden girders the additional cost would be for the supply of such wooden girders; but in case of the girders and the "I" beams there would be no necessary loss to the defendants, because they could be used thereafter at a value practically their cost price.

Deponent further says that the point, including the curve, shown on the map attached to

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Affidavit of Martin Schreiber.

the bill, on Hamburg Place at Avenue L is such that it will break the continuity of the line of return of the complainant's railway cars as shown in and by said bill, and that said point is a considerable distance from the terminus of the said line, which will leave, if such interruption is permitted, that portion of said line without any railway service, or else the imposition upon the complainant of the necessity of operating separate cars thereon and therealong. to afford service which is now performed by the regular cars of said line without additional cost. That the firm of Ryan & Reilly had a contract for a portion of said sewer in Hamburg Place, and started the said work by means of an open cut, and found that such work was impracticable and sublet their contract, or it was taken over in some way by the firm of Booth & Flynn, who at that time was building by means of the tunnel system a portion of said sewer to connect with the Ryan & Reilly contract, about two miles in length, and that they thereupon continued said work down Hamburg place a distance of about fourteen hundred feet. Deponent further says that work is being done elsewhere in the city of Newark, both by open cut and the support of street and tracks, and by means of tunnel construction; so that both plans are entirely practicable and feasible; from an engineering standpoint.

MARTIN SCHREIBER.

Sworn and subscribed to this
4th day of December, A. D.,
1914, before me.

(SEAL) F. M. UNDERHILL,
Notary Public,
Commission expires Feb. 11, 1919.

Affidavit of Harry C. Donecker.

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

HARRY C. DONECKER, of full age, being duly sworn according to law on his oath saith that he is the assistant general manager of Public Service Railway Company; that for the period of twenty-four hours from midnight of December 2nd to midnight of December 3rd, he caused an accurate count to be kept of the passengers riding in the cars of Public Service Railway Company at the corner of Hamburg Place and Avenue L, and had the same tabulated and indicated on regular charts showing the east and westbound cars, blue prints whereof are attached hereto and made a part hereof. That operated at such point for the twenty-four hours were three hundred and fourteen cars; that the actual number of passengers eastbound in said cars at said point was four hundred and ninety-four, and the actual number of passengers westbound were four hundred and seventy-eight, a total of nine hundred and seventy-two. That these cars are through line cars coming from South Orange, and necessarily pass this point to reach the end of the line, which is a distance of seventy-four hundredths of a mile therefrom, and from there return. That if the continuity of the tracks is broken at this point it will necessitate constructing somewhere further up the line a proper turning point to return said cars. Deponent further says that, as has already been shown by affidavits filed in this cause, the use of the said cars on the said line averages about fifty thousand people daily, and that anything causing the disturbance of the operation of said line will affect that many of the public; besides cutting off the use daily for

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Affidavit of Walter G. Preuster and others.

the number which travel at that point; that as deponent believes the day's count taken by him as hereinbefore stated shows an average day. That if the track is permitted to be severed a portion of the line would be without any railroad service whatever; unless there be installed and operated additional cars on said line which would cost many thousands of dollars annually. But if the present cars and the continuity of service is maintained this service can be fully and completely rendered without such cost.

H. C. DONECKER.

Sworn and subscribed to this
4th day of December, A. D.,
1914, before me.

20 (SEAL) F. M. UNDERHILL,
Notary Public,
Commission expires Feb. 11, 1919.

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

30 WALTER G. PREUSTER, ROBERT BERTRAM, RICHARD KANE and WILLIAM J. CREMENS, being duly sworn according to law, on their respective oaths say that they are employed in the transportation department of Public Service Railway Company; that they took an accurate count of the number of passengers in the cars of the South Orange Line of the Public Service Railway Company passing Hamburg Place and Avenue L in the City of Newark from midnight, December 2nd, to midnight, December 3rd; that from midnight, December 2nd, to six o'clock in the morning of December 3rd, the count was kept by Walter G.

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Affidavit of Walter G. Preuster and others.

Preuster; that from six o'clock in the morning of said day to twelve o'clock noon it was kept by William J. Cremens; that from twelve o'clock noon until six o'clock in the evening it was kept by Robert Bertram, and that from six o'clock in the evening until midnight it was kept by Richard Kane; that they each respectively kept a full and accurate count, and the record thereof is truly stated on the sheet charts attached to the affidavit of Mr. Harry C. Donecker, assistant general manager of Public Service Railroad Company. 10

WALTER G. PREUSTER
 ROBERT BERTRAM
 RICHARD KANE
 WILLIAM J. CREMENS

Sworn and subscribed to this 20
 4th day of December, A. D.,
 1914, before me.

(SEAL) F. M. UNDERHILL,
Notary Public,
 Commission expires Feb. 11, 1919.

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Conclusions of Vice-Chancellor Emery.

**Conclusions of Vice-Chancellor Emery on
Application for Preliminary Injunction.**

Filed December 31st, 1914.

On application for preliminary injunction.

10 Heard on bill, amended bill, answers and affidavits.

Mr. Frank Bergen for complainant.

Mr. Frederick J. Faulks, and Mr. Samuel H. Evins (of the N. Y. Bar) for defendants Frazer, et al. (Lindabury, Depue & Faulks, Solrs.)

Mr. Adrian Riker for defendant Sewage Commission. (Riker & Riker, Solrs.)

(CONCLUSIONS)

20 EMERY, V. C.

In this case I will announce orally the conclusions I have reached, leaving written conclusions or opinion to be filed hereafter, if necessary.

It is important, in the public interest, that the question of a preliminary injunction should be disposed of at once. There are one or two preliminary questions. One of them relates to the nature of the jurisdiction of the Court of Equity in cases of this kind. I think it rests on two familiar rules applying to that court. One is the ground of irreparable injury, and the other is the ground of the control of the management of a common easement. The injury is of a character that is usually classed with these so-called irreparable injuries. This is a technical legal phrase, meaning, as Judge Dixon defined it in *Hart vs. Leonard*, 15 Stew., 416, 420, an injury for which the damages that may be re-

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40 covered according to legal rules do not afford

Conclusions of Vice-Chancellor Emery.

adequate compensation. Any considerable interference to public travel comes within the class which are called irreparable injuries. I had occasion to consider the equitable jurisdiction in this class of cases in the late case of *Public Service Railway vs. Westfield*, which was considered in the Court of Appeals also. 10 Buch. 295; on appeal, *Ibid*, 662. It was not suggested at the argument by counsel on either side, but it occurred to me, that this is also one of those cases where there is a common easement connected with the service of the public in streets and there is also a dispute in relation to the use of the street in the respective rights of the parties. In such cases there is a right of control by the Court of Equity of the use which shall be made in common. The Public Service Railway Company claim a permanent or continuous right to the use of a portion of the surface of the public street for the purpose of public travel. The Sewage Commission and the contractors under them claim the right to the temporary disturbance of the surface of the street, including the removal of the railway tracks, for the purpose of exercising the right to construct a sewer. Questions arise here in relation to the extent of both rights, and it is a case where not only on the ground of control of a common easement, but also on the additional ground that this is the one court which by reason of its flexible procedure will be able to control and preserve the substantial rights of the parties *pendente lite* and pending the final disposition of the question of their rights. It cannot be done in any other way. So that I think it is one of those cases that comes clearly within the equitable jurisdiction, and this is apparently the view of all counsel, for on both

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Conclusions of Vice-Chancellor Emery.

sides, by the record, the bill and answers, the question of legal rights has been submitted to the Court of Equity without objection on either side. Both sides have by the bill and answers submitted the question of their legal rights in the street, so that on the record there is no
 10 difficulty in considering these legal rights so far, at least, as is necessary in order to dispose of this preliminary application.

This is an application for a preliminary injunction, and the general scope of that remedy is, that it goes so far, and no farther than is necessary to preserve as far as practicable the rights of both parties pending the final determination, and subject to the final decision and decree. The bill is based on the complainant's right to maintain and operate a street railway
 20 in Hamburg Place at the point in question, but it is not claimed that the right is absolute against all interference whatever, against other uses of the street that may be directed, either by the state immediately through legislative act, or by a delegation of its powers to a public body. Complainant's rights and franchises in the street are subject to the right of the state, either directly or by its agents, for that purpose, to interfere with and interrupt the travel
 30 over the complainant's railway so far as is necessary to promote other public service, such as sewers, for which the use and control of the street may be necessary. The right to lay sewers and drains and to lay gas and water pipes in a highway are privileges annexed as incidents by usage or custom to the right of the public in a highway. *State vs. Laverack*, 4 Vroom 201 (Sup. Ct. 1870), *Beasley, Ch. J.*, p. 206; *Stoudinger vs. City of Newark*, 1 Stew.
 40 187, 191; *Affd.* on appeal, *Ibid.* 446 (1877). The

Conclusions of Vice-Chancellor Emery.

general principle of the right to interfere with the surface of the street, where necessary for the construction of a sewer, is not disputed.

The questions in this case which are disputed by the parties are (1) what is the meaning of the word "necessary", and (2) who is to be the judge finally of what is "necessary", and to establish the limits of interference? 10

The State in this case has expressly given to the Sewage Commission powers of such interference. I refer to the statute now, for the reason that its terms were not specially referred to on the argument, and apparently the statute itself does not give an absolute right of interference, but gives a right with an express qualification. I refer to page 164 of the Laws of 1903, Chapter 102. Section 7 of this original act gives express power "to construct the sewer under, over or across any street * * * in such manner, however, as not to unnecessarily obstruct or impede travel or navigation." That is the language of the grant. That is the same language used in the act of 1907, section 5, except that by some apparent clerical error the language in the latter act is "in such manner as not *necessarily* to impede". There may possibly be a mistake in the section as published in the Pamphlet Laws. But I take it that the two acts together give the power to interfere, but with the limitation that the interference with travel must not be unnecessary. The commissioners must in the first instance construe that limitation, and it appears by their answer and also by their affidavits, that on this question of interference with travel they have, in directing the construction of their sewer, considered that question as having a bearing on the method or manner of construction at different points. 20 30 40

Conclusions of Vice-Chancellor Emery.

And in reference to what must be considered by the commission upon this question of obstructing and impeding travel, my view now is that that would include travel on the public streets by means of the street railway as well as other kinds of travel. In the first place, the
10 only reason the street railway has any right on the public streets is because it is a part of the public travel, and this is the basis on which they get the right to occupy the streets without payment of compensation to owners of land. The street has been dedicated to public travel, and travel by street railway is a method of public travel. And in the second place, in a good many of the streets the travel by the street car constitutes the bulk of public travel. So that
20 the commissioners would be obliged to consider that method of travel in connection with other travel on the streets when they come to decide upon the method of constructing their sewers. It appears by the affidavit of their engineer, Mr. Brown, that this has been their practice, and that in certain parts of the City of Newark, considering the question of obstruction of travel, they have required tunnel construction, so that the construction would interfere little, if at all, with travel. For this particular location now
30 in question they have considered the question of public travel and the obstruction of it, and in determining the question of what interference was necessary at this location for the purpose of carrying out the work which they were incorporated to do, that is, the construction of the sewer, they have determined that the construction shall be by the open cut method. One of the main reasons, if not the main reason, in connection with the establishment of that method
40 was the addition to the expense which would

Conclusions of Vice-Chancellor Emery.

be required by reason of the tunnel construction. In view of the entire situation they have determined that interference to a certain extent and by the open cut construction is necessary, and they claim that they have the right to take into account the expense of the other method of construction in connection with the amount of travel that is disturbed, in determining the necessary interference with public travel for the purpose of carrying out the main work directed by the statute, the construction of a sewer under certain limitations as to cost. 10

The first point in dispute on the record here between the complainant and the commission or the contractors claiming under the commission, is whether a necessary interference with travel does not mean necessary in the sense that it cannot be done otherwise, as an engineering or physical fact. My present view is that the words "necessary interference" mean "reasonably necessary", in view of the whole duties imposed on the commissioners by the act and of the whole scope of the act, and that they are therefore entitled to interfere to the extent that would be reasonably necessary, taking the matter of expense as one to be considered. The extent to which the commission have interfered, according to their claim made on the record at the hearing, is this—I call attention to it here specially because the contractors on their part insist that the interference is greater than the commission now say the interference is—the commission by their answer say that, claiming only the right to interfere so far as is reasonably necessary, in order to carry out the act, they have determined upon the open cut method construction, but in order not to unnecessarily interfere with travel by the open cut construc- 20 30 40

Conclusions of Vice-Chancellor Emery.

tion, they have provided by their contract for such construction for the continuance of the service of public travel during the removal of the tracks by the open cut method. They say by their answer that this is what they intend to do and that they have done so by the contract.

10 This answer of the Sewage Commission is important in two aspects: first, as showing the judgment of the commission as to the extent of interference that is reasonably necessary, that is, not an absolute discontinuance of travel at the point where the open cut section is provided, but an interference which, while it will remove those tracks during the construction, will also provide for the continuance of travel during the time of construction. Now, the complainant has the right, so far as the commission is concerned,

20 to accept that judgment of the commission as intending to provide for a continuance of travel during the construction. If it should turn out eventually by the final decision on the contract that the contract has not, as between the contractors and the commission, provided for this, that would not, according to my present view, affect the right of the complainants to claim that the interference should be on that basis; that is, providing for the temporary accommoda-

30 tion. The commission insist that by the proper construction of their contract such maintenance is provided for, and they refer to the clauses in the contract in which in general terms it is provided that the public service shall be maintained: Article 4, section 2, and also section 18, "Wherever it is necessary to interfere with any existing structures (in the public streets) of whatever kind, the contractors shall maintain their respective service." The commission say "we have acted and our action is

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Conclusions of Vice-Chancellor Emery.

put in the formal shape of a contract, and we have there provided and we intended to provide for the continuance of the service." If this contention or admission of the commission were all there were in the case relating to the question of the amount of interference provided for, then inasmuch as the contractors claim under the commission and have no rights that are superior to the rights of the commission, the only question to be disposed of would be, whether the complainant's rights against the interference are as extensive as claimed in their bill. The claim apparently made by the bill is, that the interference must be "necessary", in the sense or meaning that the sewer could not from an engineering or physical point of view be constructed without interference, and that the matter of expense, or at least such expense as would be incurred, is not an element in determining the necessity. My present view is that complainant's rights are not so extensive as claimed in the bill, and that their rights are only such as are consistent with an interference "reasonably necessary", and that I could not give any preliminary injunction based on their having a clear right to a broader kind of service and freedom from interruption. It is possible that on final hearing that broad claim may be determined to be their right, but my present view is that it is not their right, and certainly this right is not so clear that an interlocutory injunction should go.

But this complication arises in reference to the admission or contention of the Sewage Commission as to their decision or determination upon this point of the provision they have made for maintaining the service of travel during construction: The commission do this work not

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Conclusions of Vice-Chancellor Emery.

directly but by contract. They do not act by ordinance, as does a common council; their final action is the contract evidencing their determination, and from my reading of the statute, I take it that is the only method provided for their action. They have made a contract and thus have acted. The contractors now insist, by their answer and on the hearing, that by the proper construction of the contract the contractor is not required to maintain the provision for service of travel on complainant's railway pending the construction. The general expressions in the contract in which the phrase is used, the "contractors shall maintain the public service and shall not interfere with any existing structures", and which are relied on by the commission and complainant, do not, as contractors insist, by the proper legal rules applicable to the construction of contracts, extend so far as to include street railway service as a branch of the public service referred to. And their insistence upon that claim is, that this phrase is used in connection with other specified public service, such as gas, water and light, and therefore by the rules of construction applied to contracts, the provision for maintenance must be limited to the services specified and those structures of the character specially mentioned. That is the contractor's claim in reference to the contract. It at once introduces in this case a complication which is perhaps an additional reason for the final control of the whole question by a Court of Equity, because the complainant whose rights are interfered with, being here and presenting by this bill its legal rights, may be protected either to the particular extent it claims or to a narrower

Conclusions of Vice-Chancellor Emery.

extent. The court on final hearing may give them just the right they are entitled to, and no more and no less. On the other hand, the commission who are here professing to have acted for the purpose of securing the rights of the complainant and all the rights the commission consider complainant to be entitled to, presents its contract as the measure of the duty it intended to perform and as a performance of its full duty. If their whole duty has not been performed by the contract, and on the final hearing in this case it should be determined that the contract did not provide for the whole of their duty, then so far as the complainant is concerned, the final question will be, is not the commission bound to do that so far as the complainant is concerned, by protecting it against such interference as was not reasonably necessary. And if on the final hearing the claim of the contractors should be sustained, that this action of the commission, which is the only action by which they are bound, does not provide for the maintenance of travel, then the question would arise, is not the complainant, as against the commission, and also as against the contractors claiming under it, entitled to a decree that such protection should be afforded. And as between the commission and the contractors, if the commission in making the contract with its contractors to take possession of the streets and to do this work, has made no provision for the maintaining of the public service—if that should be decided finally to be the construction of the contract—then as between them and the contractors, the equities might be decided as upon an obligation on the part of the commission to furnish to the contractors the means for carrying out its contract

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Conclusions of Vice-Chancellor Emery.

and performing its duty. So on the final decree of this case, if the contractors' claim as to the construction of the contract should be finally decided in their favor, it would settle the equities as between the commission and the contractors in reference to imposing any additional
10 duty on them in reference to the construction of the sewer, and the interference with complainant's travel. This is for the reason that, according to my present view, the complainant is entitled to be protected against any interference not reasonably necessary, and such protection would include provision for temporary accommodation of travel.

That being the situation as to the issues involved for the final determination, the question is as to the order which should be made on
20 interlocutory injunction to preserve the rights of all parties, so that on the adjustment by final decree they may be protected. And I think it is clear that on reading the affidavits the question upon which the complainant and the contractors have finally split is as to the expense: Who is obliged to pay the expense of this alteration, if made? The final disposition of that question should be left for the final
30 decree in the cause on disposing of all equities. But it is a case where the continuance of the public service of both kings cannot be left for the argument on final decision, and therefore the question is, on the record as it now appears, on this application for temporary injunction, who should, in the first instance, incur that expense. On the whole status of the case as it appears on the records and affidavits now, my view is that the contractors should in the first instance incur this expense and provide for the
40 protection of travel, by way of maintaining a

Conclusions of Vice-Chancellor Emery.

temporary accommodation, and that their right to be reimbursed such expense, either from the complainants, if they are not entitled to be protected at all, as the contractors claim, or by claim against the commission for imposing on them in the construction of the sewer a work that was not included in the contract, would be settled by final decree at the hearing. The right to reimbursement from either one or the other, if their claim is finally established that it is not included in the contract, would be then decided. This can be worked out, as I think, by an injunction under the bill, and I give counsel the suggestion for the order for injunction. 10

The bill and the answer show that the contractors propose to tear up this track and remove it if the complainants did not remove it within a certain time fixed. That removal contemplated only the absolute discontinuance of travel. There was no suggestion in their letter about removing the track in connection with or for the purpose of providing any other track at that locality during the interruption. Their whole offer and their claim—as the claim is put here very fairly—is, “we claim the obligation on the part of the railway company to remove their tracks at their own expense, and to discontinue all service at that location while we are building the sewer, and to put back the tracks at their own expense when we are through.” That is the claim as made, not only in the letter, but also in the answer and on the argument. And then the threat follows: “If you don’t remove on that basis, then we will remove the tracks, allow travel so far as we are concerned to be discontinued until the sewer is finished and leave you to put the tracks 20 30 40

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back." I think the contractors should be enjoined from tearing up the tracks, as threatened in the letter; that is, in connection with the claim that they have the absolute right to tear them up and leave travel interrupted, but that the injunction should not operate to prevent them from interfering or taking up the tracks in connection with and for the purpose of carrying out the provisions for a temporary accommodation while the tracks are taken up. For instance, suppose the offer had been in this case, "we now call on you to remove the tracks and offer to pay the expense, and also the expense of providing temporary accommodation, and if you do not within a reasonable time undertake to remove the tracks and provide temporary accommodation, we shall have to do it at our own expense." That is a different kind of an offer to tear up the tracks from the other, and it is an offer which would protect all the rights the complainant has, according to my present view. The offer on the part of the contractor, either to do the necessary work themselves or have the complainants do it at their expense, take up the tracks, and then replace the tracks, offering to pay the expense, if accepted, would allow this construction to be carried on, and in order to preserve the contractors' right at the final hearing, the order should contain the further provision that any such offer made and any action or payments made in carrying out such offer, should not prejudice the complainant's right on final hearing to claim from either of the parties, reimbursement of the whole or any part of the money expended. The order may be required to be worked out with some care, but I think counsel can get my view of the scope of it.

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The provision for a temporary side track is a method which all parties agree on, I think, as one method of temporary accommodation of travel. Mr. Brown in his affidavit says there may be others, but before signing the order I would reserve the right to the parties to be heard, if they do not agree on the terms of the offer. This may be settled finally by the court, if the parties do not agree.

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*Order for Preliminary Injunction.***Order for Preliminary Injunction.**

Filed December 30, 1914.

10 This matter coming on to be heard upon the order to show cause why a preliminary injunction should not issue, heretofore made herein, and upon the bill, answers and affidavits filed by the respective parties, in the presence of Frank Bergen, of counsel with complainant, Lindabury, Depue and Faulks of counsel with the defendants Frazer and Buchenal, and Adrian Riker of counsel with the defendant Passaic Valley Sewerage Commissioners, and the Court having heard the same;

20 It is, on this twenty-eighth day of December, in the year of our Lord one thousand nine hundred and fourteen, on motion of Frank Bergen, solicitor for the complainant,

30 ORDERED that a writ of injunction do issue out of and under the seal of this court to be directed to the said James F. Frazer and Selden Burchenal, trading as Frazer and Burchenal, their agents, employees, servants and workmen, commanding them and each of them to desist and refrain from tearing up, disturbing or interfering with the street railway tracks of the complainant in Hamburg Place and Avenue L in the city of Newark, as proposed is their letter to the complainant bearing date the twenty-first day of November, nineteen hundred and fourteen, set out in said bill; provided, however, that the said defendants Frazer and Burchenal, shall be at liberty to construct a single track street railway around the proposed open cut for the section of the sewer which they have contracted to construct, said single track street railway to
40 be connected with the railway of the complain-

Order for Preliminary Injunction.

ant in said Hamburg Place north of the proposed excavation therein, and also with the street railway of the complainant on Avenue L east of the said proposed excavation, so that the street railway service of the complainant may be maintained during the construction of said section of the said sewer; and thereupon the said Frazer and Burchenal may remove the tracks of the complainant so far as is reasonably necessary to construct said sewer by the open cut method; but before constructing said single track street railway and its connections and removing the existing tracks as aforesaid, the said defendants Frazer and Burchenal shall give to the complainant an opportunity to construct said single track and connections and remove said existing tracks at the expense of said defendants Frazer and Burchenal, and upon completion of the work of constructing said single track and connections and removing said existing tracks the actual cost of such construction and removal shall be paid to the complainant by said Frazer and Burchenal.

AND IT IS FURTHER ORDERED that when the said section of said sewer has been constructed in pursuance of said contract, the said single track and connections shall be removed and the present tracks of the complainant restored to the location now occupied by them by the said defendants Frazer and Burchenal, provided that the complainant shall first be given an opportunity by the said defendants Frazer and Burchenal to remove the said single track and connections and restore the present tracks of the complainant to the location now occupied by them, at the expense of the said defendants Frazer and Burchenal.

Order for Preliminary Injunction.

AND IT IS FURTHER ORDERED that the said defendants Frazer and Burchenal before removing or disturbing the tracks of the complainant shall give a bond to the complainant in the sum of four thousand dollars, with surety to be approved by a special master of this court or
10 by the solicitor of the complainant, for the payment of the cost of said work if done by the complainant.

AND IT IS FURTHER ORDERED that such offer or tender by the defendants Frazer and Burchenal, and any action or payments thereunder, shall be considered as made and taken under this order, which is made for the purpose of regulating and controlling *pendente lite* the use and possession of the public street for the construction of the sewer by the open cut method,
20 interfering only so far as is reasonably necessary with the public travel on the complainant's present line of railway, and that such actions or payments under this order are without prejudice to the final determination of the contractor's liability to such expense as against either the complainant or the Passaic Valley Sewerage Commissioners, or to their right on such final
30 determination to claim and demand the repayment or reimbursement of the same from either the complainant or the said commissioners, or to their right to be relieved from any obligation given to complainant by bond or otherwise to secure the complainant for the payment of such expense.

Stipulation as to Facts on Final Hearing.

AND IT IS FURTHER ORDERED that the parties hereto and any of them are at liberty to apply to the court from time to time for further order and direction in the premises, if desired.

Respectfully advised,

E. R. WALKER, 10
C.

JOHN R. EMERY,
V. C.

Stipulation as to Facts on Final Hearing. 20

Filed June 13, 1916.

IT IS STIPULATED AND AGREED that the above stated cause shall be heard on final hearing upon the bill, answers and affidavits heretofore filed.

Dated April 17, 1916.

FRANK BERGEN,
Solicitor and counsel with complainant. 30

LINDABURY, DEPUE & FAULKS,
Solicitor and counsel with defendants Frazer and Burchenal.

RIKER & RIKER,
Solicitor and counsel with defendant Passaic Valley Sewerage Commissioners.

*Stipulation of Facts.***Stipulation of Facts.**

Filed June 21, 1916.

IT IS HEREBY STIPULATED AND AGREED that the work of removing the tracks of the complainant in the above stated cause at Hamburg Place in the city of Newark was commenced December 30, 1914, and completed in a few days thereafter; and the work of restoring the tracks was commenced on September 17, 1915, and completed on May 10th last. The complainant elected to do the work of removing and restoring the tracks itself, as authorized by the order of this court made on the 28th day of December, 1914.

Dated June 21, 1916.

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FRANK BERGEN,
Solicitor for complainant.

LINDABURY, DEPUE & FAULKS,
Solicitors for defendants Frazer and Bur-
chenal.

RIKER & RIKER,
Solicitors for defendant Passaic Valley Sewer-
age Commissioners.

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Opinion of Vice-Chancellor Howell.

Opinion of Vice-Chancellor Howell.

Filed June 23, 1916.

On final hearing on bill, answer, replication and proofs.

Mr. Frank Bergen for the complainant. 10

Mr. Frederick J. Faulks for the defendants Frazer, et al.

Mr. Adrian Riker for Passaic Valley Sewerage Commissioners.

MEMORANDUM.

HOWELL, V. C.

The bill of complaint in this case is an injunction bill. It seeks to restrain the defendants from interfering with its street railway on Hamburg Place in the city of Newark. The allegations of the bill are that prior to August 22, 1913, the complainant and its predecessors in title were operating a street railway in Hamburg Place, and that on that day the defendants Frazer and Burchenal, as partners trading as Frazer & Burchenal, entered into a contract with the Passaic Valley Sewerage Commissioners to construct a section of its intercepting sewer longitudinally in Hamburg Place near Avenue L. The contract provided that the work should be done by the method known as the open cut method, which contemplated an open ditch of sufficient width to permit of the removal of the excavated earth and the construction of the sewer at the bottom of the trench. The complainant's railway is alleged by the bill to be a necessary part of its railway system, that it is used by many thousands of people every day, the cars thereon being operated at 20 30 40

Opinion of Vice-Chancellor Howell.

varying intervals of time from two and a half minutes during a part of the day and every five minutes at other times; of this there is no denial. The tracks lie in the middle of the street and the plan of the construction of the sewer locates it in the middle of the street, but
10 many feet below the surface. On November 21, 1914, the defendants Frazer and Burchenal wrote a letter to the complainant in which they notified it that in the construction of a portion of said sewer it would be necessary for the complainant's tracks and overhead wires to be removed temporarily for a distance of approximately 150 feet at the junction of Hamburg Place and Avenue L and also to remove a dead end track east of Avenue L, and owing to the
20 size of the necessary excavation and the nature of the soil it would be unsafe to operate cars at that point while the work is being carried on, and claimed that it was the duty of the complainant to remove the wires and tracks aforesaid in order that the work on the sewer might proceed. By the same letter they renewed their offer that if the complainant would promptly remove the tracks and its wires for the required distance at the point mentioned and replace them when the surface of the street should be
30 restored they would pay the necessary expense thereof if a court of competent jurisdiction or an arbitrator should determine that they were liable therefor, to procure which they would furnish a satisfactory bond, and the complainant was notified that unless it commenced the removal of the tracks and wires on or before the morning of November 25, 1914, it was their intention to begin the removal of the same so far as it might be necessary to enable them to
40 proceed with their work. On November 24,

Opinion of Vice-Chancellor Howell.

1914, the bill was filed to restrain Frazer and Burchenal from carrying out their threat to remove the complainant's tracks and overhead wires. On the filing of the bill an order was made requiring these defendants to show cause why an injunction should not issue to restrain them from carrying out their threat, and at the same time the defendants were enjoined until the further order of the court from taking up or in any wise interfering with the railway tracks of the complainant to the extent of any interruption of the operation of the street railway across, thereon or thereover. Upon the return day of this order for a continuance thereof, argument was had before Vice Chancellor Emery, and on December 28, 1914, it was ordered that a writ of injunction should issue against the said Frazer and Burchenal enjoining them from tearing up, disturbing or interfering with the street railway tracks of the complainant in Hamburg Place and Avenue L, as proposed in the letter above mentioned, but providing that the said defendants should be at liberty to lay a single track street railway around the proposed open cut for the section of the sewer which they had contracted to construct, such single track railway to be connected with the railway of the complainant on Hamburg Place north of the proposed excavation, and also with the same railway on Avenue L east thereof, so that the street railway service of the complainant might be maintained during the construction of the said section of the said sewer, and that thereupon the said defendants might remove the tracks of the complainant so far as it should be reasonably necessary to construct said sewer by the open cut method, but that before constructing the said

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Opinion of Vice-Chancellor Howell.

single track railway and its connections and removing the existing tracks as aforesaid, the said defendants should give to the complainant an opportunity to construct said single track and connections and remove said existing tracks at the expense of the defendants Frazer and

10 Burchenal, and that when said sewer should have been constructed the said single track and connections should be removed and the present tracks of the complainant restored to the location now occupied by them, by the defendants Burchenal and Frazer, provided that the complainant should first be given an opportunity by the said defendants to remove the single track and connections and restore the present tracks at the expense of the said defendants, and that

20 the said defendants before removing or disturbing the tracks of the complainant should give a bond to the complainant in the sum of \$4,000, with surety, conditioned for the payment of the cost of said work, if done by the complainant. The said order further provided that all proceedings in relation to the matter should be considered as made and taken under the provisions of the said order which it stated was made for the purpose of regulating and controlling *pendente lite* the use and possession of the public

30 street for the construction of the sewer by the open cut method, interfering only so far as should be reasonably necessary with the public travel on the complainant's present line of railway, and that such action or payment under this order should be without prejudice to the final determination of the contractors liability to such extent as against either the complainant or Passaic Valley Sewerage Commissioners or to their right on such final determination to claim

40 and demand the repayment or reimbursement of

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the same from either the complainant or the said commissioners or their right to be relieved from any obligation given to complainant by bond or otherwise to secure the complainant for the payment of such expense; and leave was given to all the parties to apply to the court from time to time for further orders and directions. 10

The single track for the accommodation of the complainant's business, as provided for in said order, was constructed by the complainant, was used by it until the completion of the said section of the sewer, which was in or about September, 1915. The work of restoring the complainant's tracks to their former condition and situation is finished, and as I understand the fact the total expense of both displacing and restoring tracks has been paid by the complainant. 20

It therefore appears that the present controversy is over the question who shall pay for the removal and restoration of the complainant's street railway at the point in question. The decision of this point requires an examination into the rights, duties and obligations of the several parties to the transaction.

There is nothing in the case to show when or by what means the complainant obtained the right to lay tracks and prosecute its business in Hamburg Place, nor is there anything to show the extent, duration or character of any such right as it may possess. I shall assume, however, inasmuch as no question is made about it that the complainant is lawfully in possession of the portion of the street occupied by its tracks, and that it has a right given to it by some paramount authority to operate its railway over the said tracks, and that it has such rights and franchises for its purposes in the said 30 40

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street as give it a standing to file the present bill.

10 The defendants Frazer and Burchenal derive all their rights in the street from the contract of August 22, 1913, hereinbefore referred to, made made between them and the Passaic Valley
15 Sewerage Commissioners, and the Commissioners derive all their rights from two statutes, the first one being P. L. 1903, page 158, and the other being P. L. 1907, page 22. By section 7 of the act of 1903 said commissioners were given power to construct any sewer or drain by it to be made or constructed under or over any water course, under or over or across or along any street, turnpike, railway, canal, highway or other way, and in or upon private or public
20 land, and in or upon lands of the State and under water of the State, in such manner, however, as not unnecessarily to obstruct or impede travel or navigation, and may enter upon and dig up any street, road, highway or private or public lands, either in or without the said sewerage district, for the purpose of constructing or laying sewers or drains upon or beneath the surface thereof, and for maintaining and operating the same, and in general may do all acts or
25 things necessary, convenient and proper to carry out the purposes of this act.

30 By section 5 of the act of 1907 the Commissioners were given power to construct an intercepting sewer or sewers and the necessary appurtenances thereto to the point or points of discharge and disposal determined by said contract, and for this purpose to pass through or partly through territory situated within the bounds of any other municipality than those contracting with it for the construction of said work, and full
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power to construct such intercepting sewer or sewers and its appurtenances along, over and under any water course or under or over or along or across any street, turnpike, road, railroad, highway, or other way or public park or grounds, and in or upon private or public land under water; in such way and manner, however, as not necessarily (unnecessarily?) to obstruct or impede travel or navigation, and to enter upon or dig up any street, highway or private or public land for the purpose of constructing said work and appurtenances, and for repairing and maintaining the same, and in a general way to do all other acts and things necessary, convenient and proper in connection with the making and maintaining of the improvement contemplated by the act, and that the highways dug up and disturbed should be restored to their former condition as near as might be.

It is difficult to conceive a broader grant of powers or a more specific designation of the particular things which the State in its sovereign capacity has authorized these commissioners to do. The authority of the Commissioners to act in the premises and to employ agents to carry out its purposes and plans such as the defendants Frazer and Burchenal is not disputed or even questioned. The complainant admits all that is claimed for the power of the State to construct underground sewers in streets which are already occupied by private individuals and corporations exercising the franchises for the benefit of the public. They admit that under the present legislation on the subject the State by its municipal agencies has the right to construct the sewer in question or authorize its construction by all means in its power; but it claims

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that the State agency in performing the work has exceeded the authority and power committed to it in that it has attempted to violate and has violated the single limitation upon its power, that limitation being a requirement that it shall not unnecessarily obstruct or impede travel. I think

10 there can be no doubt about what is meant by the word "travel." It includes all the methods ordinarily in common use by which people on foot and with horses, wagons and power trucks may traverse Hamburg Place or other public streets of the State. It certainly includes travel by means of the street cars operated by the complainant over its tracks in the last named street, *Hendry v. North Hampton*, 72 N. H. 351, 56 Atl. 922, and the question is therefore whether

20 the method of building the sewer adopted by the Commissioners and fastened upon the defendant contractors by their contract is or is not an unnecessary obstruction to travel. Vice Chancellor Emery in the opinion written by him on the decision of the motion for a preliminary injunction interpreted the word "necessarily" according to one of its milder meanings. In *Chicago I. & L. Railway Co. v. Baugh*, 175 Ind., 419; 94 N. E., 571, it was said that the word "necessary"

30 "had no fixed meaning or character peculiar to itself, that it is flexible and relative, that it is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity; that it may mean something which in the accomplishment of a given object can not be dispensed with, or it may mean something reasonably useful and proper and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object

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sought and is a relative and comparative term depending on its application to the object sought, the character of and reasons for the convenience as public or private and its adoption to the public needs or public convenience, and especially is this true where it is based upon a condition or state of affairs in which the public are directly interested and as to which a public duty is imposed upon a public instrumentality, as a railroad. 10

The learned Vice Chancellor's interpretation of the idea of reasonableness seems to me to express exactly what the Legislature must have had in mind when it provided that the work authorized should not unnecessarily interfere with travel. The limitation upon the power of the Commissioners therefore is that in performing the work contemplated by the statute and in formulating plans therefor they must provide for the construction of the work in such way and manner as not unnecessarily to obstruct travel. 20

If they have violated this limitation then they have exceeded their authority, and if they have exceeded their authority they can not enforce their plans and methods of construction upon the complainant. The idea of what is reasonable under all the known circumstances must be kept before us. 30

What would be reasonable in one place or under one set of circumstances might be the very opposite in another place and under other circumstances. Would it be reasonable or would it be a reasonable exercise of the right given to the Commissioners to completely tear up the tracks of the complainant at the point in question and leave them torn up for a period of three months during the inclement weather of winter? The proposition of the de- 40

Opinion of Vice-Chancellor Howell.

fendant's answer was that the work would require the use of the street for a period not to exceed three months. We now know that the work occupied about eight months. Suppose that by ordinary diligence the work of constructing the sewer under the complainant's contracts were known beforehand to occupy the period of three months, and that the track of the complainant would have to remain torn up for that period, would that be a reasonably necessary obstruction to the public travel? If there were no method by which such an interruption could be avoided it certainly would be an unreasonable obstruction; and this must have been in the contemplation of the Legislature at the time it was formulating the statute in question. In such an event it would in my opinion be the plain duty of the contractors and the Sewerage Commission at their own expense to so arrange their work as to avoid the interference. This argument leads to a decision of the point in favor of the complainant and justifies the interference of this court on either of two grounds, viz., the restraining of a continuing trespass amounting to an irreparable injury, or the regulation of conflicting easements in the property of the public.

The contract between the Sewerage Commissioners and the contractors contains this covenant on the part of the contractors: "To make all provisions necessary to maintain and protect existing structures of whatever kind; to repair all damage done to such structures," and that "care shall be taken to avoid injury to gas and water pipes, sewers, drains and other structures," and that "care shall be taken not to move without the consent of the engineer any

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sewers, drains, water or gas pipes or other structures, and in crossing these or in running parallel with or near them they shall be sustained securely in place until the work is completed. Whenever it is necessary to interfere with said structures the contractor shall maintain their respective services, and, if necessary for that purpose, shall lay temporary water, gas or other pipes." There are other expressions of the same character, all of which are relied upon by the complainant as covenants inserted in the contract for its benefit. I do not think that these covenants were made for the benefit of the complainant, but were inserted for the security of the Commissioners. There is nothing to indicate that it was the intention of the contractors or the Sewer Commissioners to make a contract for the benefit of third persons. These covenants come within the rule laid down in *Styles v. Long*, 38 Vr., 413, and 41 Vr., 301. These expressions while they can not be made the basis of a decree are useful in the case, however, for the purpose of showing not that the contract was one which could be taken advantage of by third parties, but rather that the Sewerage Commissioners did not contemplate any interference with the public travel.

I place my decision, however, squarely upon the somewhat peculiar use of the word "necessary." It is quite apparent from the testimony that methods might have been employed by the contractors in the construction of the work which would have prevented much of the inconvenience that would arise from the interruption of travel by suspending the railway operations for a period as long as three months. So far as I can see, the statements of the complainant's wit-

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Opinion of Vice-Chancellor Howell.

nesses on this point are not controverted. The engineers on the part of the contractors admit that some other plan might have been used, but object to it on the score of increased expense. Whether that consideration should affect the decision when we are dealing with the rights of
10 the public I will not attempt to decide.

I will advise a decree directing that the actual cost of taking up the tracks, of laying temporary tracks and of restoring the situation after the finishing of the sewer shall be paid by the contractors. If the amount can not be agreed upon by counsel I will refer the matter to a Master to ascertain the same and report.

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Final Decree.

Final Decree.

Filed June 28, 1916.

The above entitled cause coming on to be heard on the bill, answers, replication and proofs, in the presence of Frank Bergen of counsel with the complainant, Lindabury, Depue & Faulks of counsel with the defendants Frazer and Burchenal, and Adrian Riker of counsel with the defendant Passaic Valley Sewerage Commissioners, and the court having heard the arguments of counsel and considered the same, and being of the opinion that the complainant is entitled to relief;

IT IS, on this 27th day of June, 1916, on motion of Frank Bergen, solicitor of complainant, by Edwin Robert Walker, chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, that the said chancellor by virtue of the power and authority of this court doth hereby ORDER, ADJUDGE and DECREE that the reasonable actual cost to the complainant of removing its tracks in Hamburg Place and Avenue L in the city of Newark, New Jersey, and of laying a temporary track and of restoring the original tracks and removing the temporary track after construction of the section of the trunk sewer built by the defendants Frazer and Burchenal in Hamburg Place at Avenue L, be paid by the said defendants Frazer and Burchenal, and that the matter be referred to William T. Day as master to ascertain the amount of the reasonable actual cost of such removal, laying and removal of such temporary track and restoration of complainant's tracks, and report thereon with all convenient speed to this court.

Notice of Appeal.

Notice of Appeal.

Served July 15, 1916.

Filed July 6, 1916.

The defendants, James S. Frazer and Selden D. Burchenal, trading as Frazer and Burchenal, hereby appeal from the decree made by this court in the above-entitled cause on June 27, 1916, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 10

LINDABURY, DEPUE & FAULKS,
*Solicitors for and of Counsel with
Defendants, Frazer and Burchenal.*

Dated July 3rd, 1916.

I conceive there is good cause for appeal in the above-stated cause. 20

J. EDWARD ASHMEAD,
*Of Counsel with Defendants,
Frazer and Burchenal.*

Service acknowledged this fifth day of July, 1916.

FRANK BERGEN,
*Solicitors for and of Counsel with Complainant,
Public Service Railway Company.* 30

RIKER & RIKER,
*Solicitors for and of Counsel with Defendants,
Passaic Valley Sewerage Commissioners.*

Petition of Appeal.

Petition of Appeal.

Filed July 24, 1916.

New Jersey Court of Errors and Appeals

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Between

PUBLIC SERVICE RAILWAY COMPANY,

Complainant-Appellee,

and

JAMES S. FRAZER and SELDEN
D. BURCHENAL, trading as
FRAZER AND BURCHENAL,

Defendants-Appellants,

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and

PASSAIC VALLEY SEWERAGE COMMISSIONERS,

Defendants-Appellees.

*On Bill,
etc.*

*Petition of
Appeal.*

To the Honorable the Court of Errors and Appeals of the last resort in all causes:

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The petition of James S. Frazer and Selden D. Burchenal trading as Frazer and Burchenal, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 27th day of June, 1916, wherein Public Service Railway Company was complainant, and your petitioners, and Passaic Valley Sewerage Commissioners, were defendants, in this respect,

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to wit, that said decree orders and adjudges that

Petition of Appeal.

the reasonable actual cost to the complainant of removing its tracks in Hamburg Place and Avenue L in the City of Newark, New Jersey, and of laying a temporary track and of restoring the original tracks and removing the temporary track after construction of the section of the trunk sewer built by the defendants Frazer and Burchenal in Hamburg Place at Avenue L, be paid by the said defendants Frazer and Burchenal, and that the matter be referred to William T. Day, as master to ascertain the amount of the reasonable actual cost of such removal, laying and removal of such temporary track and restoration of complainant's tracks, and report thereon with all convenient speed, and further that the defendants Frazer and Burchenal pay the costs of the complainant after the same shall have been taxed.

And your petitioners humbly appeal from the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that your petitioners should have been relieved from the payment of each and every of the sums which were by said decree ordered, adjudged and decreed to be paid by it, and from the reference to William T. Day, Esquire, as master, as provided in said decree.

Your petitioners therefore pray that the said decree of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

LINDABURY, DEPUE & FAULKES,
Solicitors for and of counsel
with Frazer and Burchenal,
Defendants-Appellants.

*Answer to Petition of Appeal.***Answer of Respondent, Public Service
Railway to Petition of Appeal.**

Filed July 27, 1916.

10 The answer of the above named Complainant-
Respondent, Public Service Railway Company,
to the petition of appeal of the above named de-
fendants-appellants, James S. Frazer and Sel-
den D. Burchenal, trading as Frazer and Bur-
chenal.

20 This respondent, not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer there-
to, nevertheless, says and admits that a final de-
cree was, on the 27th day of June, 1916, made
and entered in the Court of Chancery, in the
cause for that purpose mentioned in the said
petition, as is therein stated; but as to the sub-
stance and form thereof, this respondent prays to
refer thereto when the same shall be produced.
And this respondent is advised and believes that
the said final decree is agreeable to equity, and
it prays that the same may be affirmed, with
costs to be adjudged to this respondent.

30 **FRANK BERGEN,**
Solicitor for and of counsel with
Complainant-Respondent,
Public Service Railway Company.

Answer to Petition of Appeal.

**Answer of Respondent, Passaic Valley
Sewerage Commissioners to Petition
of Appeal.**

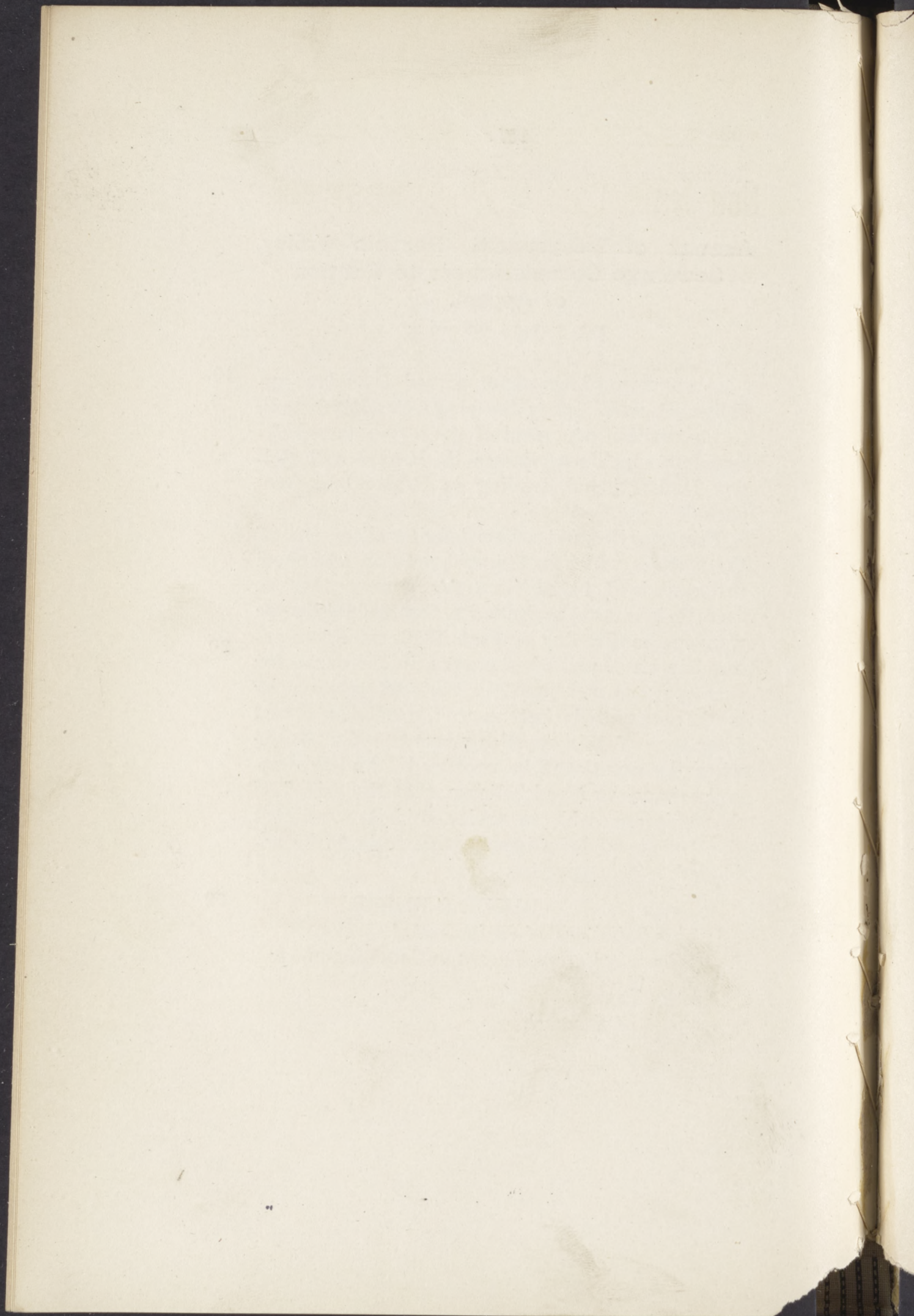
Filed July 26, 1916.

The answer of the above named defendant-appellee, Passaic Valley Sewerage Commissioners, to the petition of appeal of the above named defendants-appellants, James S. Frazer and Selden D. Burchenal, trading as Frazer and Burchenal. 10

This appellee, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a final decree was, on the 27th day of June, 1916, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this appellee prays to refer thereto when the same shall be produced. And this appellee is advised and believes, that the said final decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this appellee. 20

RIKER & RIKER, 30
*Solicitors of Defendant-Appellee,
Passaic Valley Sewerage Commissioners.*

ADRIAN RIKER,
of Counsel.



New Jersey Court of Errors and Appeals

Between

PUBLIC SERVICE RAILWAY COM-
PANY,

Complainant-Respondent,

and

JAMES S. FRAZER and SELDEN

D. BURCHENAL, Trading as

FRAZER & BURCHENAL,

Defendants-Appellants,

and

PASSAIC VALLEY SEWERAGE
COMMISSIONERS,

Respondents.

On Bill, &c.

*On Appeal,
&c.*

Brief for Respondent, Passaic Valley Sewerage Commissioners.

I. Authority is vested in the Passaic Valley Sewerage Commissioners in their discretion to construct the sewer at the point in question in this suit by the open cut method, without making any provision for the support or removal of the tracks of the complainant-respondent by the contractors.

It may be deemed important to ascertain definitely the legal propositions involved in the opinion of Vice-Chancellor Emery upon the application for the preliminary injunction granted by him in this case.

We apprehend these to be as follows:—

1. The jurisdiction of the Court of Chancery is based—

- (a) Upon the doctrine of irreparable damage.
- (b) That the adjustment of common easements is also involved.

He further notes that no objection was made by any of the parties to the jurisdiction of the court.

2. That the Passaic Valley Sewerage Commissioners have the right “to interfere with the surface of the street when necessary for the construction of the sewer.”

3. The word “necessarily” as used in Section 5, Chapter 10, of the Laws of 1907, must be taken to mean “unnecessarily.”

4. That the words “necessary interference” mean “reasonably necessary.”

5. That the actual exercise of the discretion of the Commissioners is embodied in the written contract with Frazer and Burchenal, the appellants in this case.

The conclusions of the learned Vice-Chancellor, above summarized, whatever else may be said of them, cannot be taken as overruling the law as laid down in other cases in this State by implication, and where such a result is not necessary.

The conclusion, therefore, that the Passaic Valley Sewerage Commissioners have a right to interfere with the surface of the street where “reasonably necessary” for the construction of the sewer is not necessarily inconsistent with the statement of the law made in the case of *Pfeifer*

v. *The Commissioners*, 82 N. J. Eq. 169, in the following language:

“Again, it is well understood that the public domain and all the property of the public is subject to the direction and control of the legislature, and that whatever damage is caused to the individual by the action of the legislature in regard thereto is *damnum absque injuria*. This body may authorize the erection of what would otherwise be a nuisance in the busiest streets of our public cities, and nobody could claim damages therefor, no matter to what extent he is injured.”

We take it that Section 5 of Chapter 10 of the Laws of 1907 gives to the Commissioners full power and authority to use and occupy the public streets for the purpose for which they appear to have occupied Hamburg Place (the erection and maintenance of a structure occupying a very considerable part of the surface of the street, and used in connection with the shaft to reach the tunnel in course of construction under Hamburg Place).

Nor is it proper to import into the word “necessary” as used by the learned Vice-Chancellor, any different intent than that approved by the Court of Errors and Appeals in this State in *New Jersey Railroad Company v. Hancock*, 35 N. J. L., 537 (545). The Court there says:—

“It seems plain that the embarrassment has arisen from the uncertain meaning in this connection of the word ‘necessary.’ The word necessary, in this use, is so far from being contra-distinguished from the word convenient that the former term comprehends much that, in strictness, is embraced in the latter term. Power necessary to a

corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one. Referring to the term 'necessary,' Chief Justice Marshall says: 'Does it always import an absolute physical necessity so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.' "

To the same effect is *Olmsted v. Morris Aqueduct Company*, 47 N. J. L., 311 (328).

Nor do we understand that the conclusion of the Vice-Chancellor must be taken to overrule the law as stated by Backes, Vice-Chancellor, in the case of *Berdan v. Passaic Valley Sewerage Commissioners*, 82 N. J. Eq., 235, approved and adopted by the Court of Errors and Appeals upon appeal.

The Vice-Chancellor in that case quotes with approval the following "equitable" principle:—

"No principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of

subordinate, political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. And the fact that the court would have exercised the discretion in a different manner will not warrant it in departure from the rule."

Vice-Chancellor Howell in his opinion upon the final hearing agreed that the words "necessary interference" meant *reasonably necessary*, but that the interference in this case was not reasonable, and hence it was the duty of the contractors of the Passaic Valley Sewerage Commissioners to arrange for the work at their own expense.

With the interpretation of "necessary interference" as *reasonably necessary* we agree, but we also maintain that the interference was *reasonable*. The term *reasonable* rests discretion upon the Commissioners, as well as the term "necessary" does.

In *Conn. Inc. Co. v. Com.*, 133 Mass., 161, 163, the Court says:

"The power to determine what callings, franchises, or privileges, or, to use the language of the Constitution, 'commodities' shall be subjected to an excise, and the amount of such excise, belongs exclusively to the legislature. The provision that it must be 'reasonable' was not designed to give the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining, not only what

commodity shall be subjected to excise, but also the amount of excise, and the standard or measure to be adopted as the foundation of the proposed excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right."

In our opinion it was entirely within the discretion of the Commissioners as to how the work was to be done—whether by the trench method or any other method, taking into consideration the expense of any other method but the trench method, the amount of traffic at the point in question, and the cost of the removing and restoring of the tracks. Unless there be an abuse of this discretion, and here there clearly is no abuse, a judicial tribunal cannot call the action unreasonable.

In *Oakley v. Atlantic City*, 63 N. J. L., 127, it is laid down, page 137:

"In the absence of fraud or palpable abuse of discretion on the part of the municipal authorities in the exercise of power granted by the legislature, the only question for judicial cognizance is whether there has been any violation of legal principles or neglect of prescribed formalities in entering into the engagement which is the subject of controversy."

We, therefore, submit that it was entirely within the power of the Passaic Valley Sewerage Commissioners to have caused the sewer to be constructed in the public street in question by the open cut method, and without making any provision for the support or maintenance of the Public Service Railway tracks, or of any of the

other utilities maintained in the street, and that the exercise of the discretion committed by the law to the Commissioners is not subject to review by any court, except upon the sole ground of fraud, which is defined in the cases to include such wanton disregard of others' rights as to amount to fraud.

II. The Passaic Valley Sewerage Commissioners in the exercise of the discretion committed to them have in fact provided in their contract with Frazer and Burchenal for the support and maintenance of the Public Service railway tracks.

Vice-Chancellor Emery says in his conclusions:—

“The commission do this work not directly but by contract. They do not act by ordinance, as does a common council; their final action is the contract evidencing their determination, and from my reading of the statute, I take it that is the only method provided for their action. They have made a contract and thus have acted.”

Under this statement of the learned Vice-Chancellor, which we take to be unquestionably sound, we are unable to see upon what theory the intent of the Commissioners can be ascertained in any other way than from the consideration of the contract itself; and we are, therefore, unable to reconcile those parts of the opinion which seem to rely upon the answer of the Passaic Valley Sewerage Commissioners in this cause as interpreting the intent of the contract in question; especially are we unable to see how the opinions of the Chief Engineer, Mr. Brown, if in fact different from the legal import of the words of the contract, can be taken to control it in any respect.

This view seems to us to be important. In case it should be concluded that the contract does not require Frazer and Burchenal to maintain Public Service Railway tracks, if that is the legal interpretation of the words of the contract, then for the purposes of this suit that must be taken to have been the intention of the Passaic Valley Sewerage Commissioners and to constitute the exercise of their discretion, which exercise of discretion is not subject to review by any court.

Our own view, however, is that the contract does require the contractors, Frazer and Burchenal, to support and maintain the railway tracks in question.

The answer of the Commissioners sets out the language of Section 2 (page 12) of the printed contract, by which the contractor is expressly required "to make all provisions necessary to maintain and protect existing structures of whatever kind; to repair all damage done to such structures."

That the word "structures" is broad enough to include railway tracks cannot be questioned.

In the case of *Frelinghuysen v. Morristown*, 76 N. J. L., 271 (275), Swayze, J., says:—

"In one sense a sewage disposal works may be called a structure."

The definition of the word in the dictionaries extends the meaning so as to include any artificial body consisting of parts joined together, and in the context of the contract under consideration the word is joined-up with pipes, sewers and drains.

The conclusion, therefore, seems to be necessary that under this section of the contract the contractors were required to maintain and pro-

tect the railway of the complainant-respondent at the point in question. Nor can we believe that the broad terms of this section are limited or defined by subsequent clauses in the contract. If this broad provision did not exist in the contract some doubt might exist whether the connection in which the words "other structures" are used in other parts of the contract might not exclude street railways upon the principle stated by Justice Swayze in *Frelinghuysen v. Morristown* (*supra*), as follows:—

"Words, like men, are known by the company they keep; and the word 'structure' is here found in company with crematories and pest houses. It must mean some structure of like character; that is, some sort of a building."

In the contract the words "other structures" are found in connection with the words gas, water pipes, sewers and drains. It seems to us manifest that the "company" in which these words "other structures" are here found—or in other words the genus—is public utilities existing in public streets, and that a street railway is clearly of the same genus or company as gas, water pipes, sewers and drains.

It is further to be noted, however, that the subsequent sections in which the words "other structures" appear are more limited in the duty imposed upon the contractors than the second section in which the general duty is imposed by the contract to support and maintain all structures of every kind. Thus by Section 16 (page 16) the contractor is required to avoid injury to gas and water pipes, sewers and drains and other structures. Section 18 (page 17) care shall be taken not to move, without the consent of the engineer, any sewers, tunnels, water or

gas pipes, or other structures crossing these or running parallel or near them. They shall be sustained securely in place until the work is completed. Whenever it is necessary to interfere with said structures the contractor shall maintain their respective services, and if necessary for that purpose shall lay temporary water, gas or other pipes.

We think there is manifest in these latter sections a special solicitude for the maintenance of the service of those utilities which are essential to the safety and health of the public; the utilities specifically involving water supply required for domestic use and for protection against fires, gas required for the proper lighting of the streets and private residences, and sewers and drains necessary for the protection of the health of the public. The contract, therefore, emphasizes these particular services, and requires a more particular and stringent duty on the part of the the contractors than that imposed by the second section of the contract in question above referred to.

We urge this view without, however, intending in any way to modify the statement already made that the use of other structures in connection with the utilities, specifically referred to in the subsequent clauses, does in fact include the Public Service Railway at the point in question, as being of the same genus as these services specifically mentioned.

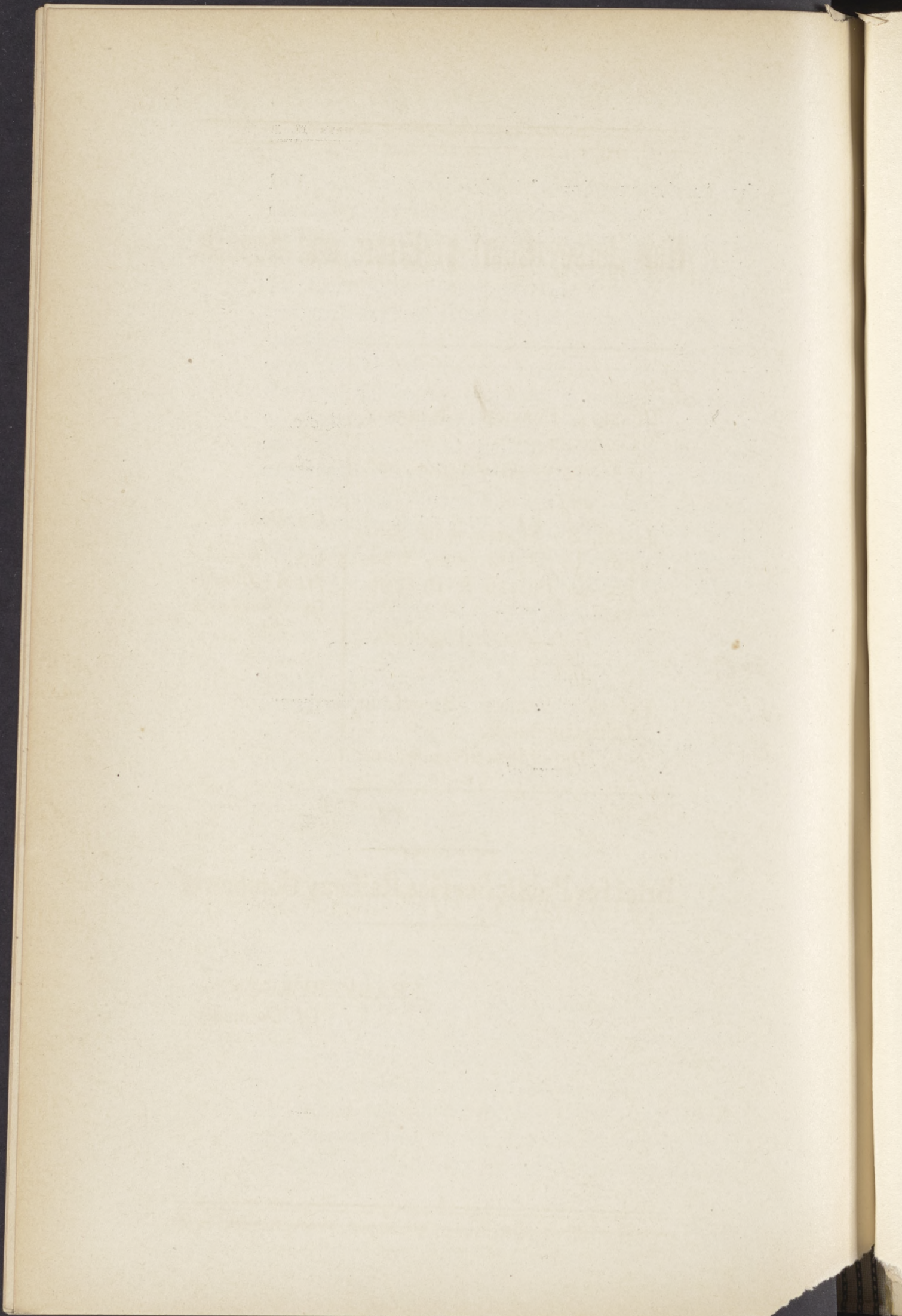
Upon consideration, therefore, of the whole matter, including the scope of the conclusions of the learned Vice-Chancellor upon the granting of the preliminary injunction, we submit that it was within the power of the Commissioners to have thrown the whole burden of maintaining the railway upon the complainant-respondent;

that in the exercise of their discretion they had the power to require the contractors to assume this duty and relieve the complainant-respondent of it; that their determination is embodied in the contract and must be read in the words of the contract; that the contract in fact does impose the duty upon the contractors of maintaining the railway in question; but that if this view is incorrect upon a consideration of the legal effect of the contract, then the duty remains in the complainant-respondent to support its own tracks at its own expense, and in no event can the cost of constructing and maintaining the temporary tracks directed by Vice-Chancellor Emery be legally imposed upon the Passaic Valley Sewerage Commissioners.

Respectfully submitted,

RIKER & RIKER,
*Solicitors for Respondent, Passaic
Valley Sewerage Commissioners.*

ADRIAN RIKER,
Of Counsel.



New Jersey Court of Errors and Appeals

Between

PUBLIC SERVICE RAILWAY
COMPANY,
Complainant-Respondent,

and

JAMES S. FRAZER and SEL-
DEN D. BURCHENAL, trad-
ing as FRAZER & BURCHE-
NAL,

Defendants-Appellants,

and

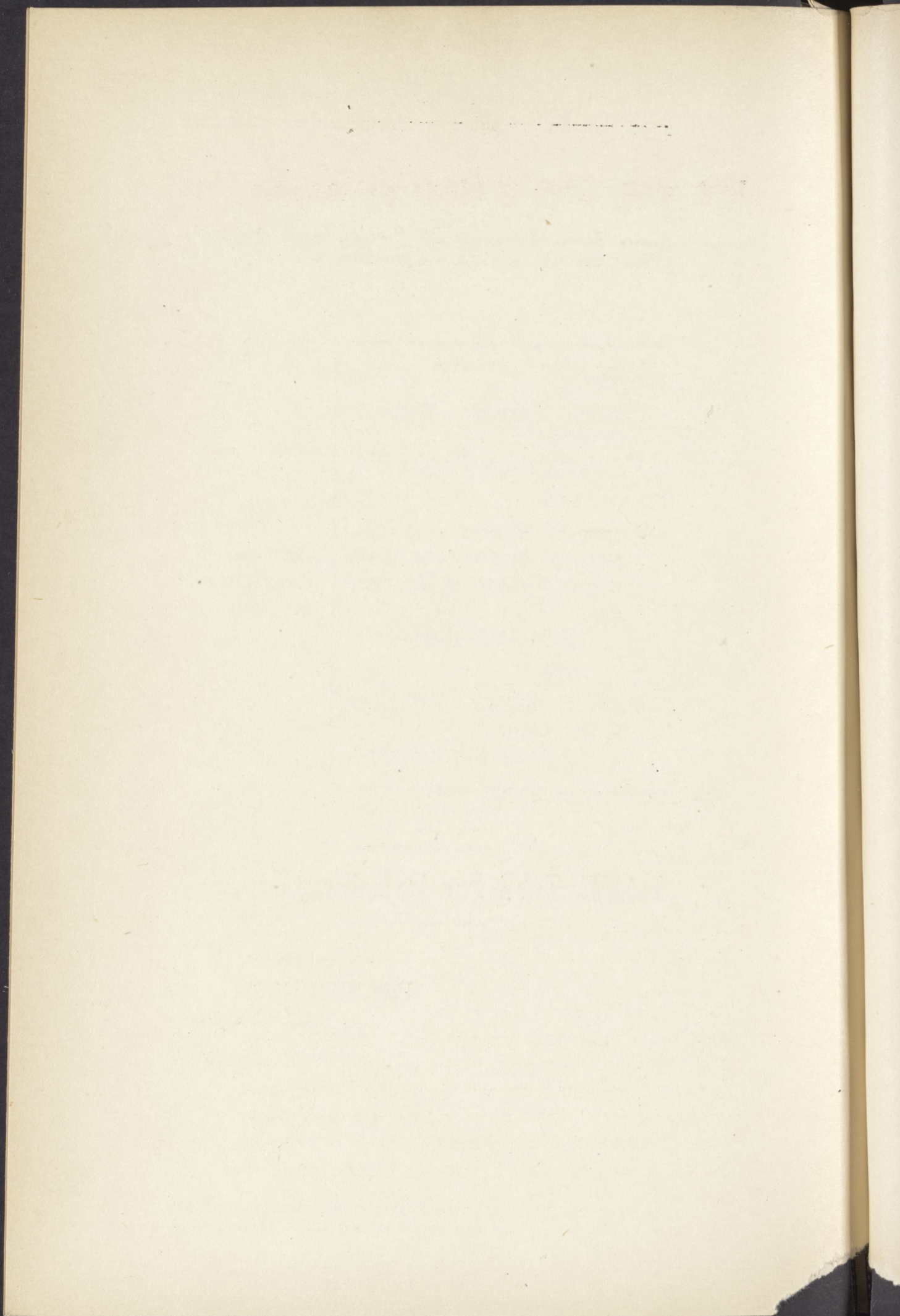
PASSAIC VALLEY SEWERAGE
COMMISSIONERS,
Defendant-Respondent.

On Bill, etc.

*On Appeal
from Decree
in Chancery.*

Brief for Public Service Railway Company.

FRANK BERGEN,
Of Counsel.



New Jersey Court of Errors and Appeals

Between

PUBLIC SERVICE RAILWAY
COMPANY,

Complainant-Respondent,

and

JAMES S. FRAZER and SEL-
DEN D. BURCHENAL, trad-
ing as FRAZER & BURCHE-
NAL,

Defendants-Appellants,

and

PASSAIC VALLEY SEWERAGE
COMMISSIONERS,

Defendant-Respondent.

On Bill, etc.

*On Appeal
from Decree
in Chancery.*

Brief for Public Service Railway Company.

Statement of the Facts.

The complainant owns and operates a street railway in Hamburg Place and Avenue L in the city of Newark, as indicated on the map annexed to the bill and appended opposite page 8 of the printed case. In August, 1913, Frazer and Burchenal, the appellants, entered into a contract with Passaic Valley Sewerage Commissioners for the construction of a sewer in Hamburg Place at and along the point where Avenue L joins Hamburg Place. On November 21st, 1914, Frazer and Burchenal gave written notice to the complainant that unless it should commence the removal of its tracks and wires from Hamburg Place where the sewer was to be constructed, on or before November 25th following, they would begin the removal of the

same themselves and proceed with the work of constructing the sewer (case, pp. 4 to 6). On November 23rd the bill in this case was filed for injunction, and an order to show cause was made, with a restraining provision. On December 30th an order for preliminary injunction was made by the late vice chancellor Emery upon terms stated therein (case, p. 84). Subsequently the case was heard by the late vice chancellor Howell on bill, answers, and the affidavits used before vice chancellor Emery (case, p. 87).

The Legal Questions.

A large part of the brief for the appellants in this case is devoted to an effort to maintain points of law that have never been disputed by the complainant—the street railway company—and are not disputed now by the other respondent, the Passaic Valley Sewerage Commissioners.

The complainant does not deny the power of the legislature to require a street railway company to remove its tracks from a public highway temporarily *when necessary* to permit a sewer or other common municipal improvement to be constructed beneath the surface. Nor does the complainant insist that it can maintain a suit for its own benefit on the contract made by Frazer & Burchenal and the Passaic Valley Sewerage Commissioners.

The complainant's position is this: (1) The statute authorizing the construction of the sewer did not confer on the sewerage commissioners power to require the removal of the street railway tracks, except **when necessary** to permit the construction of the sewer; (2) it was not necessary to remove the street railway tracks in order

to construct the sewer in Hamburg place; and (3) the sewerage commissioners did not undertake to require the complainant, or to empower Frazer & Burchenal, to remove the tracks; on the contrary, the **commissioners required the appellants to maintain the tracks and the service which they were rendering to the public.**

In section 2 of article IV of the contract between Frazer & Burchenal and the sewerage commissioners it is provided that the contractors shall—

“make all provisions necessary to maintain and protect existing structures of whatever kind, and to repair all damages done to such structures.” (Case, p. 15.)

Section 18 of article IV further provides that—

“Care shall be taken [by the contractor] not to move, without the consent of the engineer, any sewers, tunnels, water or gas pipes, or other structures crossing these or running parallel or near them. They shall be sustained securely in place until the work is completed. Whenever it is necessary to interfere with said structures *the contractor shall maintain their respective services,* and if necessary for that purpose shall lay temporary water, gas or other pipes. He shall repair all damages done to any of said structures and shall keep them in repair until six months after the completion of the work on the section. He shall leave them in as good condition as they were previous to the commencement of the work.” (Case, p. 15.)

It is true the contract between the sewerage commissioners and Frazer & Burchenal provided for the construction of the sewer by the open cut method; but that method did not make

it necessary to remove the tracks. The removal of the tracks would have enabled Frazer & Burchenal to construct the sewer at less cost, provided the tracks had been removed and restored by the street railway company at its own expense.

The effort of the contractors was to compel the complainant to expend a considerable sum of money in removing and replacing its tracks, so that they might make more money than if they had performed their contract according to its terms.

It appears in the affidavit of Mr. Schreiber (case, p. 65), and it is not contradicted by anyone, that to have removed the tracks of the company, as the contractors proposed, and to have operated the railway to the ends of the excavation by means of extra cars, would have cost the company more than the cost to the contractors to support the tracks.

The contract prohibits Frazer & Burchenal from doing the work between May 1st and the first Monday in September (printed contract, p. 26). They undertook to do it in November, expecting to complete it in three months thereafter,—that is, during the most inclement part of the year. In fact the contractors took more than seven months to perform the work (case, p. 88). Two hundred and ninety-eight cars passed daily the point where the work was to be done, on a headway of two and a half to five minutes (case, p. 2), and carried, by actual count, 972 passengers (case, p. 67). To compel the passengers in winter to alight from the cars on both sides of the excavation and make their way as best they could over the excavated material, timber, rubbish, &c., would have been not only an unnecessary and unrea-

sonable interference with the business of the company, but a very serious annoyance to a large number of people.

The contractors desired to do the work by means of a cable suspended lengthwise over the sewer, so that material excavated from one place could be carried by buckets suspended from the cable and deposited over the completed part of the sewer. They proposed to dig wells a few feet square, braced with sheet piling, and as the excavated material was raised from one of the wells or holes it would not be necessary to deposit it on the side of the street and subsequently handle it again. That method they say, and it is probably true, would have cost less than to support the tracks and work under them.

During the argument on the return of the order to show cause it was suggested by counsel for the complainant that the street railway tracks might be removed and a single track laid around the site of the proposed excavation and used while the work was going on, the double tracks to be restored after the work should be completed. That suggestion was made simply to accommodate Frazer & Burchenal, when it was quite manifest that the vice chancellor would have granted an injunction exactly according to the prayer of the bill if the company had insisted upon it. When the suggestion was made counsel for the complainant coupled it with a statement that the expense of removing the tracks, laying a single track, and restoring the double tracks after the work was finished, should be paid by Frazer & Burchenal; but finally it was decided that Frazer & Burchenal should remove the tracks, construct the single tracks, and replace the double tracks at their

own expense, or give to the complainant an option to do so at the appellants' expense (the complainant being better equipped to do that work), the ultimate liability to be determined on final hearing. In order further to accommodate Frazer & Burchenal the company decided to do the work, and upon rendering a bill for the expense payment was promptly refused. That was their way of treating a neighborly effort of the complainant to accommodate them and save them money.

The Passaic Valley Sewerage Commissioners were organized pursuant to chapter 102 of the laws for the year 1903, page 158, and the contract in question was made in pursuance of section 5 of chapter 10 of the laws of 1907, page 22, which authorized the commissioners to construct the sewer "under or over or along or across any street, turnpike, road, railroad, highway or other way, or public park or grounds, and in or upon private or public land under water; in such way and manner, however, as not *necessarily* [*unnecessarily*] to obstruct or impede travel or navigation," and the provisions in the contract, to which reference has been made (^{*supra*} ~~*post*~~, p. 3), and other provisions as well, were designed to prevent any unnecessary interference with utilities engaged in serving the public.

In section 12, page 15 of the printed contract, it is provided that "the contractor shall furnish, put in place and maintain such sheeting, bracing, etc., as may be required to support the sides and roof of the excavations (whether above or below sewer grade), and to prevent any movement which could in any way injure the masonry, diminish the width necessary for proper drainage, or otherwise injure or delay the work."

In section 16, page 16, there is another provision declaring that care shall be taken by the contractor "to avoid injury to gas and water-pipes, sewers, drains, or other structures."

And finally, in section 20, on page 20, the contract states that—"All surfaces and all structures in the vicinity of the work shall be protected, and if injured shall be repaired or replaced."

These extracts from the contract seem to make it perfectly clear that the sewerage commissioners did not intend or undertake to confer upon Frazer & Burchenal the right to remove or compel the street railway company to remove the tracks on Hamburg Place.

It was entirely practicable to construct the sewer without removing the tracks. It was so stated by Thomas B. Bryson, an engineer of long experience in such work, as follows:

"In case the sewer should be constructed by means of an open cut the earth on either side of the cut must be supported by steel sheet piling, which should be driven low enough to prevent material from the outside of the piling to flow under it into the trench. This sheet piling, supported in the customary manner by bracing from one side to the other, would sustain the earth on either side, and girders could then be laid across the top of the sheet piling, supported on either side thereof by timbers, to sustain the street railway above the excavation; or stock iron 'I' beams could be used for girders, which would not be injured by their use temporarily for that purpose, and could be subsequently sold for approximately their original cost. If these girders should be laid not more than eight

feet apart they would sustain the railway of the complainant without any longitudinal timbers between the girders and the ties; if laid more than eight feet apart the railway could be sustained by timbers under the ties of the railway, and resting on the girders, and running longitudinally with the railway. Stock iron girders could readily be obtained of any length desired for this purpose, and it would not be necessary in deponent's judgment, to drive piling to support the street railway tracks, and deponent does not think that that would be either the most economical or the best practical method of doing the work." (Case, pp. 59 & 60.)

Similar statements appear in affidavits of other engineers. See affidavits of Reginald H. Keays (case, pp. 61-2); Thomas J. Wasser (case, pp. 63-4); Martin Schreiber (case, pp. 64-5, and p. 11), and George J. Roberts (case, p. 10).

Frazer & Burchenal in order to make a profit, or to increase their profit, have no right, in law or in equity, to cast on the street railway company a part of the expense of the work which they contracted to do. It is their duty to perform their contract as it is written. *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L., 240.

Every one of the authorities cited by counsel for Frazer & Burchenal in which interruption of street railway traffic was justified rests on the *necessity* for doing so. Indeed, the word "necessity" appears in nearly every opinion in the cases relied on by the appellants, and in the few cases in which that word does not appear an equivalent expression is employed.

The law is no doubt correctly stated in the following cases:

Clapp v. City of Spokane, 53 Fed., 515, holds that a city may be restrained from constructing a sewer in such a way and manner as to damage a street railway, when it could be constructed without causing such damage.

In *Milwaukee Street Railway Co. v. Adlin*, 85 Wis., 142, 55 N. W., 181, defendants, contractors of the city, were restrained from paving in such a way as to interfere with the operation of the railway. The use of the street is primarily for public travel, and while to do the paving without stopping the cars was to increase the price, the price was held to be a matter of contract, and *the fact of the increased cost was not to be considered.*

In *Des Moines City R. R. Co. v. City of Des Moines*, 90 Ia., 770, 26 L. R. A., 767, city contractors, by direction of the city, ordered the railway company to remove its tracks. It was held that where the sewer could be constructed without such removal an attempt to do so would be unreasonable and should be restrained.

It is true that the street railway company, yielding to the importunities of another firm of contractors a year before did remove its tracks from another part of Hamburg place in order to diminish the cost of constructing another section of the same sewer, and the tracks were out of the street from December, 1913, until Labor Day, 1914,—that is, for nine months (case, p. 31). The experience in that instance convinced the street railway company that it was improper for it to assume such a responsibility without a more adequate reason than that contractors might make more profit from their contract than its

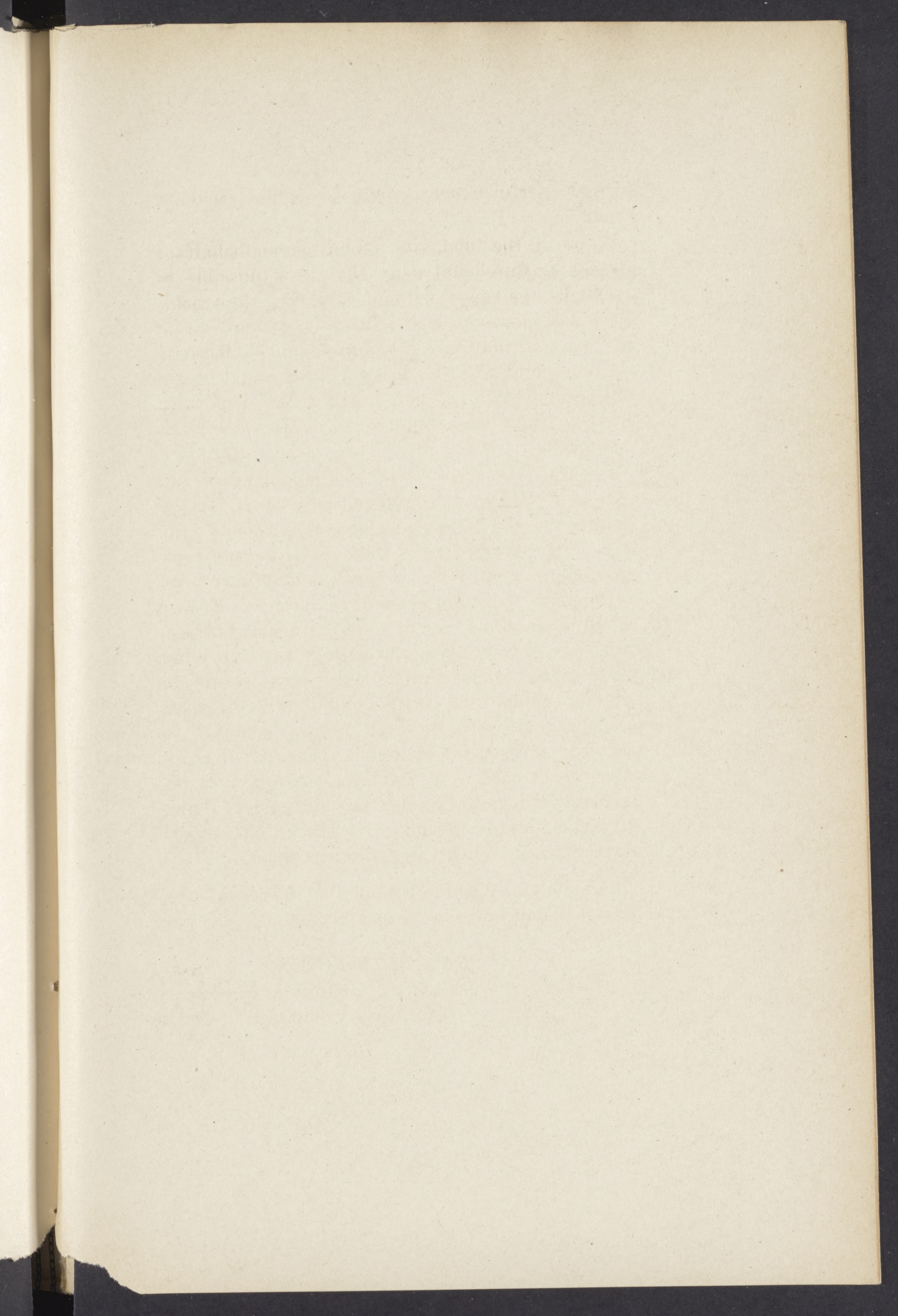
proper performance would probably yield to them.

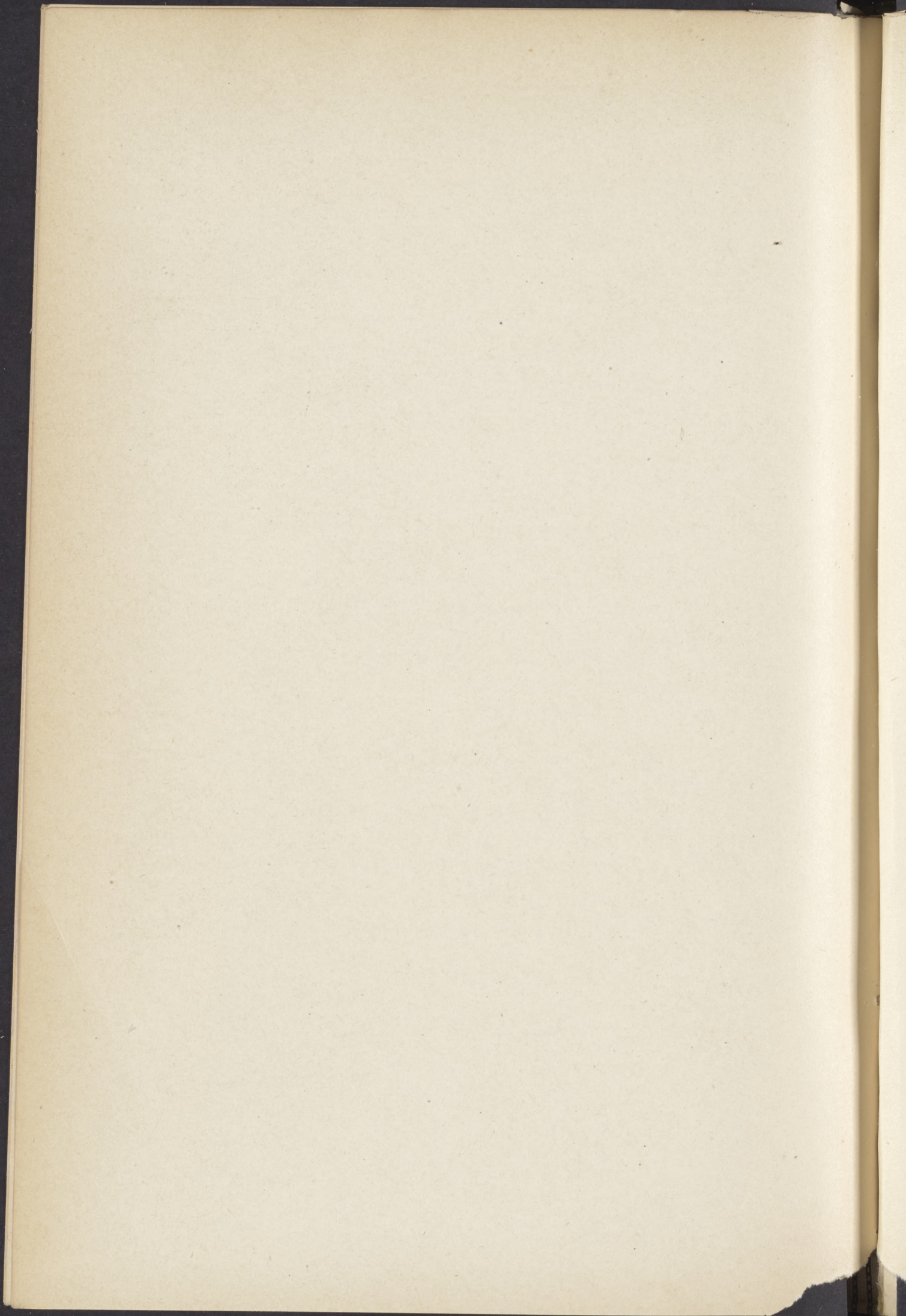
None of the affidavits submitted on behalf of Frazer & Burchenal deny that it is possible to construct the sewer without removing the tracks. They say, however, that it would cost more to do the work in that way. The appellants' affidavits on that point were made by Frazer and Burchenal, the appellants, and one by Mr. Frederick Lavis, which was endorsed by Mr. Percy H. Ashmead.

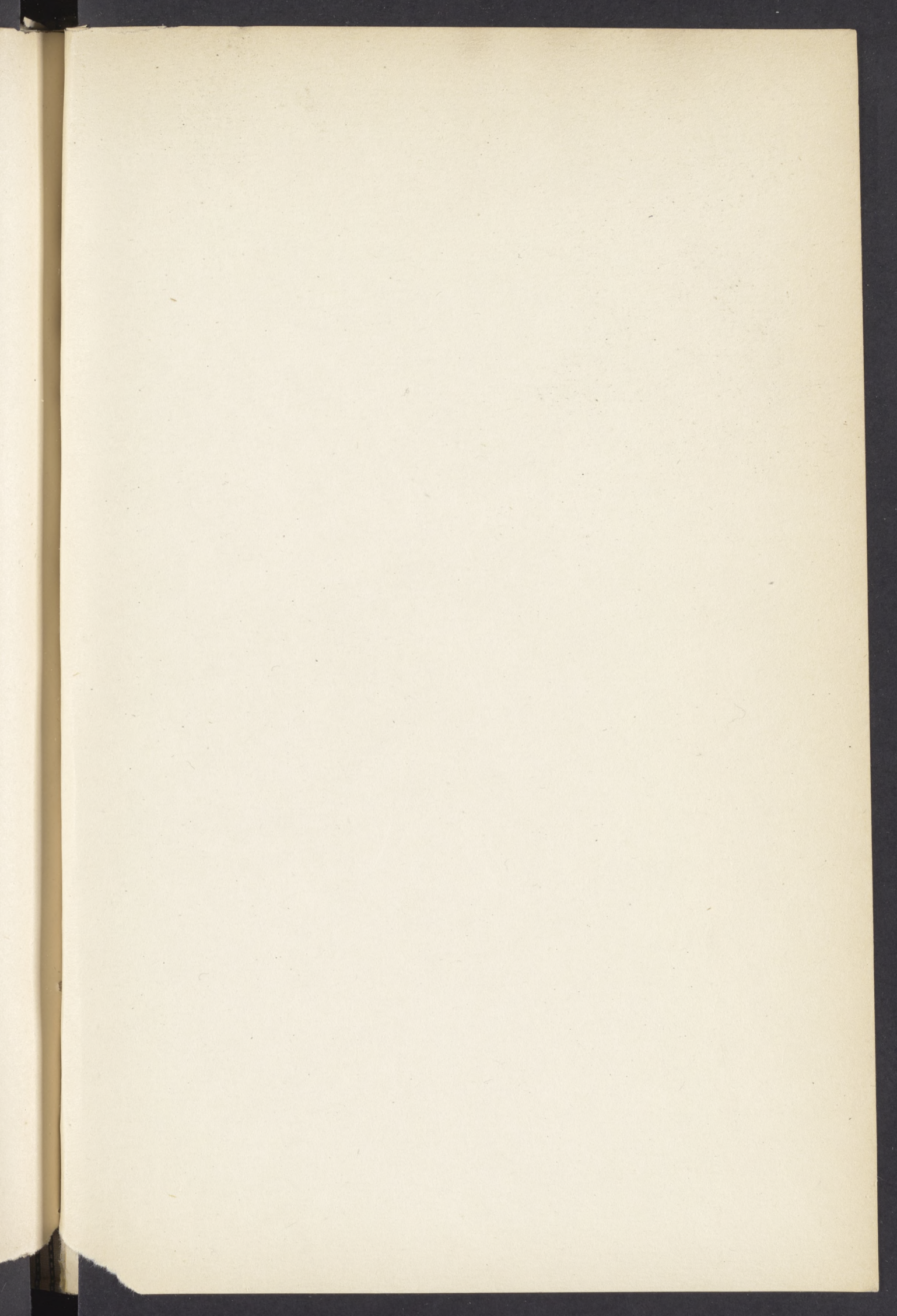
I think a correct view of the obligation incurred by Frazer & Burchenal is set forth in the opinion of the late vice chancellor Emery (pp. 76-8 of the case), that is, that the sewerage commissioners, whatever their powers may have been in the matter, did not attempt to authorize Frazer & Burchenal to remove the tracks, but required them to construct the sewer without doing so, and that wherever it should be necessary to interfere temporarily with a public utility Frazer & Burchenal were required by the contract to maintain the service at their expense; that is, in the present case, if it had been necessary to remove the tracks, they must pay the cost of doing so, and of laying a temporary track, and restoring the tracks when the work was done.

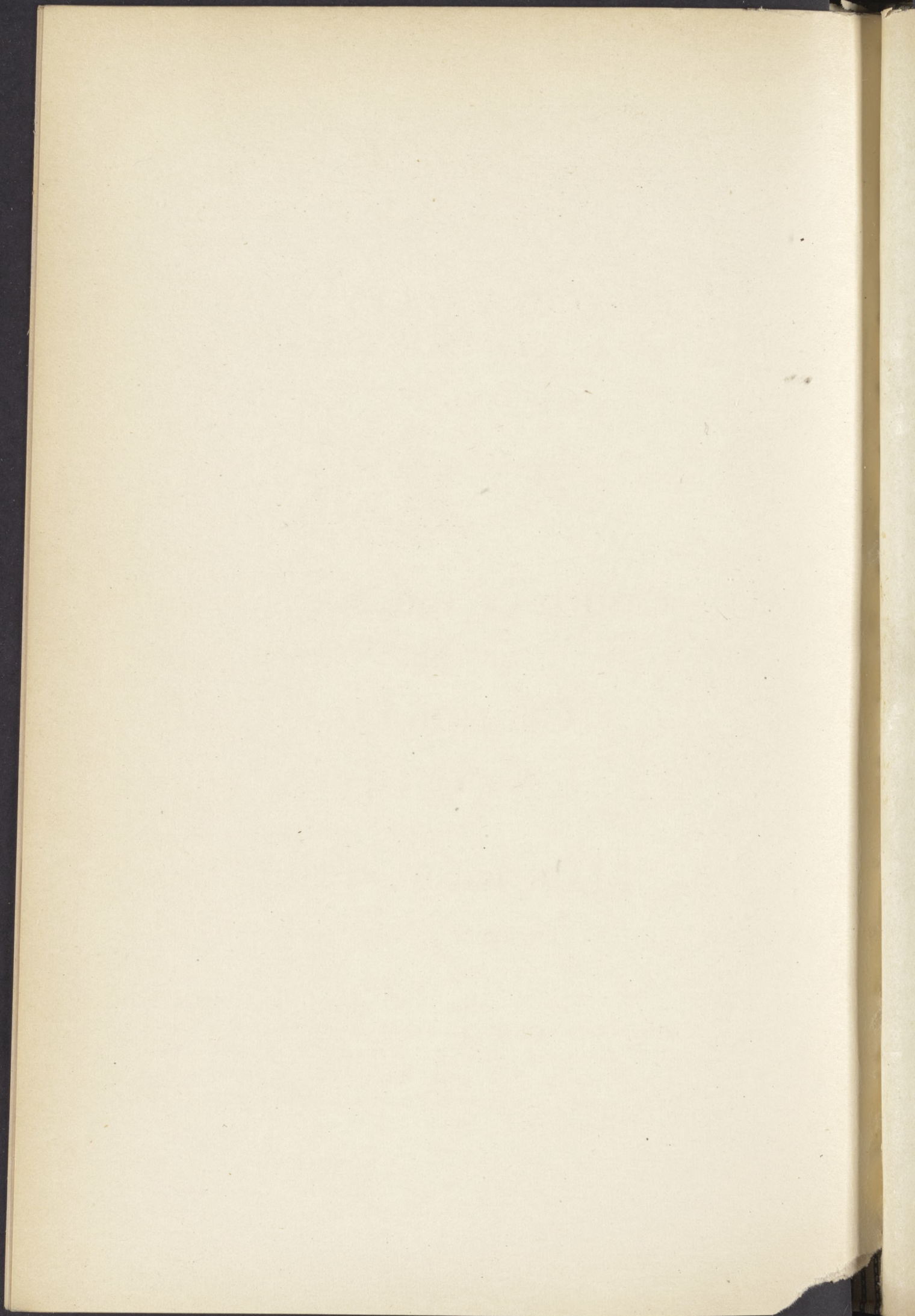
I respectfully submit that the decree of the court of chancery should be affirmed.

FRANK BERGEN,
*Counsel for Public Service
Railway Company.*









26

STATE OF NEW JERSEY

PASSAIC VALLEY SEWERAGE
COMMISSIONERS



Contract and Specifications
for Building the
Central Portion of
SECTION 6
OF THE
Main Intercepting Sewer

Station 26 + 00 to Station 40 + 00

From a point in Hamburg Place about 300 feet south of the grade crossing of the Central Railroad of New Jersey, thence northerly through the said Hamburg Place to a point near Avenue L---a total distance of 1,400 linear feet.

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Notice to Contractors

Notice is hereby given that the Passaic Valley Sewerage Commissioners have designated Tuesday, the twenty-ninth day of July, nineteen hundred thirteen, at two o'clock in the afternoon, as the time when they will meet at their usual place of meeting, Essex Building, Clinton Street, Newark, New Jersey, to receive proposals in writing for constructing the Central Portion of Section 6 of the Main Intercepting Sewer in the City of Newark.

All bids must be made upon the blank form of proposal annexed hereto and should give the price of each item of the proposed work, both in writing and in figures, and be signed by the bidder with his business address and place of residence.

Each bid must be accompanied by a certified check drawn upon a National Bank or a Trust Company established in the City of Newark or the City of New York, for two thousand dollars (\$2,000), payable to the Passaic Valley Sewerage Commissioners, such check to be returned to the bidder, unless forfeited under the condition herein stipulated. This check should not be enclosed in the sealed envelope containing the bid, but should be delivered to the Passaic Valley Sewerage Commissioners or their Clerk, who will give a proper voucher for the deposit.

A bond in the sum of twenty thousand dollars (\$20,000) and in form approved by the Passaic Valley Sewerage Commissioners, with two or more sureties, or with a surety company as surety, will be required for the faithful performance of the contract. Sureties must be satisfactory to the

Passaic Valley Sewerage Commissioners, and individual sureties must be residents of New Jersey.

The party to whom the contract is awarded will be required to present forthwith to the Passaic Valley Sewerage Commissioners the names of the sureties or surety to be offered, and to execute the contract and furnish the bond, duly executed, with satisfactory sureties or surety, within six days (not including Sunday) from the date of mailing of a notice from the Passaic Valley Sewerage Commissioners to the bidder, according to the address given by him, that the contract is ready for signature; and, in case of his failure or neglect so to do, the Passaic Valley Sewerage Commissioners may, at their option, determine that the bidder has abandoned the contract, and thereupon the proposal and acceptance shall be null and void, and the check accompanying the proposal shall be forfeited to the Passaic Valley Sewerage Commissioners.

QUANTITIES.

All bids will be compared on the basis of the Engineer's Estimate of Quantities of work to be done, as follows:

Item 1.—Earth excavation and refilling, in trench, for 150-inch concrete sewer	1,400 linear feet.
Item 2.—Concrete masonry, in trench, Portland ce- ment mortar	4,500 cubic yards.
Item 3.—Brick masonry, in manholes, Portland ce- ment mortar and appurtenant work....	50 cubic yards.
Item 4.—Rock excavation, in trench	300 cubic yards.

The quantities are approximate only, being given as a basis for the comparison of bids, and the Passaic Valley Sewerage Commissioners do not expressly or by implication agree that the actual amount of work will correspond there-

with, but reserve the right to increase or decrease the amount of any class or portion of the work as may be deemed necessary by the Engineer.

It is the purpose of the Passaic Valley Sewerage Commissioners not to award the contract to any bidder who does not furnish evidence satisfactory to them that he is responsible, and that he has sufficient capital, ability, experience and plant to enable him to prosecute the same successfully, and to complete it within the time named in the Contract.

The attention of bidders is especially called to Articles X, XI, XIV and XV, in the proposed form of contract.

The Passaic Valley Sewerage Commissioners reserve the right to reject any or all bids, or to accept any bid should they deem it to be for their interest so to do.

PASSAIC VALLEY SEWERAGE COMMISSIONERS.

FRANCIS CHILD,

Chairman.

JOHN S. GIBSON,

Clerk.

OFFICE OF THE PASSAIC VALLEY SEWERAGE COMMISSIONERS,
31 Clinton St., Newark, N. J., June 10, 1913.

PROPOSAL FOR CONSTRUCTING CENTRAL PORTION OF
SECTION 6 OF THE

Passaic Valley Main Intercepting Sewer

IN

NEWARK, NEW JERSEY.

To the Passaic Valley Sewerage Commissioners:

The undersigned, as bidder, declares that the only persons or parties interested in this proposal as principals are named on page 8; that the proposal is made without collusion with any other person, firm or corporation; that he has carefully examined the location of the proposed work, the annexed proposed form of contract and bonds and the drawings therein referred to; that he proposes and agrees, if this proposal is accepted, to contract with the Passaic Valley Sewerage Commissioners in the form of the copy of the contract deposited in the office of the Passaic Valley Sewerage Commissioners, to provide all necessary machinery, tools, apparatus and other means of construction, and to do all the work and furnish all the materials specified in the contract, in the manner and time therein prescribed, and according to the requirements of the Engineer as therein set forth, and that he will take in full payment therefor the following sums, to wit:—

Item 1.—For earth excavation and refilling, in trench, above sewer grade, for 150-inch concrete sewer, and including excavations and refilling for manholes, branches and all other structures appertaining to the sewer not otherwise specified; for furnishing, excavating for and laying under-drain; for disposal of material by removal or by refilling of trenches, rolling, ramming, and watering when required, including sheeting and shoring, bridging and fencing, and removal of same; for all diking; for all pumping or bailing, or otherwise disposing of water; for all protection and restoration of buildings, fences, existing sewers, cisterns, culverts, water pipes, gas pipes, house drains, etc.; for removal, maintenance and replacement of plank or timber roadway and grade-crossing gates, etc., as specified in Article IV, Section 19; for all resurfacing of streets, accommodation and protection of travel; and for all incidental work, the

sum of

Seventy Dollars

(*\$ 70 00*) per linear foot.

Item 2.—For all concrete masonry, in trench, in place, made with Portland cement mortar, including all plastering of same, all forms, and all setting of iron work; and for all

incidental work, the sum of

Eight Dollars

(*\$ 8 00*) per cubic yard.

Item 3.—For all brick masonry, in manholes, laid with Portland cement mortar, including all plastering, all temp-lets, and all setting of iron work; and for all incidental

work, the sum of

Fifteen Dollars

(\$. $\frac{15}{100}$) per cubic yard.

Item 4.—For all rock excavation, in trench or in excavations for special structures, as outlined in Article IV, Section 15, including disposal of material by removal or otherwise as may be required; and for all incidental work, the

sum of

Three Dollars

(\$. $\frac{3}{100}$) per cubic yard.

Item 5.—For all lumber and for all sheeting and shoring, in trench or in excavations for special structures, left in place by order of the Engineer, the sum of twenty dollars (\$20) per thousand feet B. M. so left in place up to 200 thousand feet B. M. will be paid. If more than 200 thousand feet B. M. is left in place by order of the Engineer the fair market value of the quantity in excess of that amount will be paid.

If lumber so used for sheeting and shoring is required to be cut, and one-half or more in length is so left in place, the whole amount of such lumber will be included in the measurement and paid for; if less than half of the whole length is left in place, double the amount left in place will be paid for.

Lumber used for sheeting and shoring and not required to be left in place by the Engineer will not be paid for.

Item 6.—For extra work, if any, performed in accordance with Article XVI of the annexed form of Contract, the reasonable cost of the work as determined by the Engineer, whose determination shall be final, plus 15 per cent. of such cost.

If this proposal shall be accepted by the Passaic Valley Sewerage Commissioners, and the undersigned shall fail to contract as aforesaid, and to give a bond in the sum of twenty thousand dollars (\$20,000) in form and with sureties or surety satisfactory to the Passaic Valley Sewerage Commissioners, within six days (not including Sunday) from the date of the mailing of a notice from the Passaic Valley Sewerage Commissioners to him, according to the address herewith given, that the contract is ready for signature, then the Passaic Valley Sewerage Commissioners may at their option determine that the bidder has abandoned the contract, and thereupon the proposal and acceptance shall be null and void, and the certified check for two thousand dollars (\$2,000) accompanying this proposal shall become the property of the Passaic Valley Sewerage Commissioners; otherwise the accompanying check shall be returned to the undersigned. (Signature of bidder, with residence and business address.)

Frayer & Burchenal.....

J. S. Frayer.....

S. D. Burchenal.....

1. Madison Av. New York, N.Y......

Date *July 29, 1913*.....

The names and residences of all persons and parties interested in the foregoing bid, as principals, are as follows:

Notice: Give first and last name in full, and in case of corporations, give names of President, Treasurer and Manager.

James S. Frayer
610 West 115th St New York, N.Y.

Selden S. Burchenal
2790 Bway, NYC

The bidder is requested to state below what work of a character similar to that included in the proposed contract he has done, and give references that will enable the Passaic Valley Sewerage Commissioners to judge of his experience, skill and business standing.

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If the bidder can give the names and addresses of the proposed sureties or surety company that will sign the bond, he is requested to do so below; the names will not be made public.

The Little Guaranty and Surety Co.

84 William St

New York, N.Y.

Proposed Form of Contract
State of New Jersey
Passaic Valley Sewerage Commis-
sioners

CONTRACT FOR THE CONSTRUCTION OF THE CENTRAL POR-
TION OF SECTION 6 OF THE PASSAIC VALLEY MAIN
INTERCEPTING SEWER IN THE CITY OF NEWARK, NEW
JERSEY.

Passaic Valley Sewerage Commissioners, a body corpor-
ate, organized under the laws of the State of New Jersey,
herein acting without personal liability to any member
thereof, and

Frazier and Burchenal.....

hereinafter designated as the Contractor, agree as follows:

ARTICLE I. The Contractor shall do all work and fur-
nish all tools, labor and materials, except as hereinafter
specified, necessary or proper for performing and complet-
ing the work herein specified.

ART. II. The word "Commissioners" shall mean the
Passaic Valley Sewerage Commissioners or any board or
officer duly authorized to act in the execution of the work
covered by the contract.

rk to
done.

initions.

The word "Engineer" shall mean the person holding the position or acting in the capacity of Chief Engineer to the Passaic Valley Sewerage Commissioners.

Wherever in the specifications or upon the drawings the words "as directed," "as required," "as permitted," or words of like effect, are used, it shall be understood that the direction, requirement or permission of the Engineer is intended, and similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by or acceptable or satisfactory to the Engineer.

ART. III. All work under this contract shall be done to the satisfaction of the Engineer, who shall in all cases determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for hereunder, and shall decide any questions which may arise as to the fulfillment of this contract on the part of the Contractor, and his determination and decision thereon shall be final and conclusive; and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.

Engineer
to decide.

ARTICLE IV. SPECIFICATIONS.

SECTION 1. The work known as the central portion of Section 6 of the Passaic Valley Main Intercepting Sewer is located in the City of Newark, and consists of a concrete sewer extending on Hamburg Place, about 300 feet south of the grade crossing of the Central Railroad of New Jersey, thence northerly through the said Hamburg Place to a point near Avenue L—a total distance of about 1,400 feet, together with all structures appertaining thereto. Its location and general character are shown on a set of drawings consisting of a title page and three drawings, in the office of the Commis-

Location and
general
description.

sioners, entitled "State of New Jersey, Passaic Valley Sewerage Commissioners, Main Intercepting Sewer, Contract Drawings, Northerly Portion of Section 6, City of Newark," signed by William M. Brown, Chief Engineer, dated January 20, 1913, and bearing Accession Numbers B 1490 to B 1492 inclusive and B 1494.

The work is to be constructed in accordance with working drawings to be furnished from time to time by the Engineer.

SECT. 2. The Contractor shall furnish and do everything, except as herein otherwise provided, necessary to complete the work in accordance with the terms of the contract and with the requirements of the Engineer thereunder. He is to make the requisite excavations for building the sewer, branches, and all other appertaining structures; to strip all loam; to do all ditching, tunneling, diking, pumping, bailing and draining, and furnishing and laying of underdrain, if required; to do all sheeting, shoring, bracing and supporting; to do all fencing, lighting and watching; to make all provisions necessary to maintain and protect existing structures of whatever kind; to repair all damage done to such structures; to provide all bridges, fences or other means of access to houses or other premises; to construct all foundations, all brick, cement, stone and timber work; to set in place all iron work; to build all roadways and refill all trenches and other excavations; to clean away all rubbish and surplus material; to furnish all materials (except those mentioned as furnished by the Commissioners), tools, implements and labor required; to take up, relay, maintain and repair existing plank or timber roadway on Hamburg Place; and to do all other things necessary to build and put in complete working order the specified section of sewer.

SECT. 3. All iron work, such as manhole frames and covers, and manhole steps, will be furnished by the Commissioners, and will be delivered as near the work as can be conveniently done, and the cost of placing the same in the work shall be included in the price bid per cubic yard for brick masonry and for concrete in trench.

Certain
ironwork
furnished by
Commissioners

SECT. 4. The Contractor shall, at his own expense, convey the materials furnished by the Commissioners from where they are delivered, and store the same in the vicinity of the works. He shall be responsible for loss incurred or damage done to materials furnished by the Commissioners from the time of their delivery until the work is accepted.

Contractor
responsible for
materials.

SECT. 5. The plots of borings, pipes and other underground objects are supposed to be approximately correct, but should they be found to be otherwise, or should the Contractor encounter quicksand, springs, demoralized rock or other difficulties, he shall have no claim on that account, it being understood that the Commissioners do not warrant the plot of underground objects to be even approximately correct.

Boring plots
not warranted

SECT. 6. All work, during its progress and on its completion, shall conform to the lines and levels given by the Engineer, and shall be built in accordance with the contract drawings and directions given from time to time by him, subject to such modifications and additions as shall be deemed necessary by him during its execution; and in no case will any work in excess of the requirements of the drawings and specifications be paid for unless ordered in writing by the Engineer.

Work to conform to lines,
grades, etc.

Modifications.

SECT. 7. The Contractor shall not (except after consent from the proper parties) enter or occupy with men, tools or materials any land outside the rights-of-way shown on the contract drawings.

Private
lands.

The Contractor shall, whenever so required by the Engineer, erect and maintain fences, along the roadway and around the grounds occupied by him, of such a character as will be sufficient for the protection of the adjoining property.

SECT. 8. Wherever it is necessary to cross roads or railroads the Contractor shall, at his own expense, provide suitable and safe bridges or other sufficient crossings for the accommodation of the travel on said roads; and shall maintain the same in good and safe condition until the roads can be restored to as good condition as before, when he shall remove all bridges and other temporary expedients, and shall restore said roads to a condition suitable for use; all to be satisfactory to the Engineer. The Contractor shall give reasonable notice to the owners of railroads and private ways before interfering with them.

SECT. 9. The Contractor shall provide watchmen, red lights and fences at his own expense, and take all such other precautions as may be necessary to protect life and property, and shall be liable for all damage occasioned in any way by his act or neglect, or that of his agents, employees or workmen.

EXCAVATION.

SECT. 10. The Contractor shall use bucket excavators as far as possible in streets and private lands, and confine his surface operations to within reasonable distances of the trench and shaft locations. The Contractor shall provide such forms, spikes, nails, troughs for plumb lines, etc., and such assistance as may be required by the Engineer for giving lines, grades, etc., and the Engineer's marks shall be carefully preserved. Hoisting and working shall be suspended for such reasonable time as the Engineer shall deem necessary to transfer lines into excavations, and the Con-

temporary
bridges or
crossings.

notice to
owners of
railroads and
private ways.

precautions.

excavating
machines.

tractor shall make no claim on that account. All surfacing material within the location of the work, including loam, pavements, paving gravel, cinder road material, broken stone, etc., shall be removed and kept separate, as may be directed, to be again used in repaving or resurfacing the streets, roads or grounds, as directed by the Engineer.

Care of surface materials.

SECT. 11. The trench and other excavations in which the sewer and appurtenances are to be constructed shall be excavated in all cases in such manner and to such depths and widths as will give suitable room for building the structures they are to contain, and for bracing and supporting, pumping and draining.

Trench, etc.

SECT. 12. The Contractor shall furnish, put in place and maintain such sheeting, bracing, etc., as may be required to support the sides and roof of the excavations (whether above or below sewer grade), and to prevent any movement which could in any way injure the masonry, diminish the width necessary for proper drainage, or otherwise injure or delay the work; all slides shall be at his cost.

Sheeting and bracings.

If the Engineer is of the opinion that at any point sufficient or proper supports have not been provided, he may order additional supports at the expense of the Contractor, and the compliance with such orders shall not relieve or release the Contractor from his responsibility for sufficiency of such supports.

Additional supports.

SECT. 13. The sewer grade referred to in the specifications is as follows: Where a timber foundation is used, it is the under side of the ribs or sills or pile caps. Where no timber foundation is used, it is the under side of the masonry or concrete indicated on the plans.

Sewer grade.

SECT. 14. All materials shall be so placed as not to endanger the work, and so that free access may be had at any time to all parts of the excavations, and to all hydrants and

Piling of materials.

water gates and other valves in the vicinity. They shall be kept neatly piled, so as to inconvenience as little as possible the public travel or the adjoining tenants. Reasonable provisions, satisfactory to the Engineer, shall be made for travel on streets, roads, railroads and private ways.

SECT. 15. Only such ledge or rock as, in the opinion of the Engineer, requires blasting for its removal, and boulders of one-half cubic yard or more in volume, which are removed from the trench or excavations for special structures, will be estimated as rock excavation.

Rock, in trench, will be measured and paid for from the surface to a depth of 16 inches below the bottom of the inside of the sewer, and for a width three feet greater than the inside width of the sewer, and the special structures as shown on contract plans. If the Contractor excavates rock in trench or other excavations, to greater depths or widths than shown on the drawings, he shall refill this excess depth or width with dry rock packing or concrete at his own expense, to the satisfaction of the Engineer.

SECT. 16. In rock excavation, it is especially required that the blasting shall be conducted with all possible care, so as to avoid injury to persons and property; that the rock shall be well covered and sufficient warning shall be given to all persons in the vicinity of the work before blasting; that care shall be taken to avoid injury to gas and water pipes, sewers, drains or other structures; that caps or other exploders shall not be kept in the same place in which dynamite or other explosives are stored, and not more than 100 pounds of explosives shall be stored in the vicinity of the work at any time, except by special permission of the Commissioners; and that no blasting shall be done on Sunday, and on weekdays blasting shall not be done between the hours of 6:30 p. m. and 6:30 a. m., except by special permission of the Engineer.

The Contractor shall, in addition to observing all city or town ordinances relating to storage and handling of explosives, as required in Article X, also conform to any further regulations which the Commissioners or their Engineer may deem necessary in this respect.

Handling of explosives.

SECT. 17. The Contractor is to furnish sufficient pumping plant, and is to provide and maintain drainage in the trench and other excavations satisfactory to the Engineer; water is not to be allowed to rise on any masonry until mortar has set to the satisfaction of the Engineer, and no stream of water shall be allowed to flow over the masonry until such time as the Engineer may direct.

Drainage.

All water pumped or bailed from the trench or other excavations shall be conveyed to a suitable point of discharge in a manner satisfactory to the Engineer.

Disposal of water.

SECT. 18. Care shall be taken not to move, without the consent of the Engineer, any sewers, drains, water or gas pipes, or other structures; and in crossing these or in running parallel with or near them they shall be sustained securely in place until the work is completed.

Care of existing structures.

Whenever it is necessary to interfere with said structures, the Contractor shall maintain their respective services, and if necessary for that purpose shall lay temporary water, gas or other pipes. He shall repair all damages done to any of said structures, and shall keep them in repair until six months after the completion of the work on the section. He shall leave them in as good condition as they were previous to the commencement of the work.

If so directed by the Engineer, permanent changes of location of said structures, not indicated on the plans or in the specifications, shall be made by the Contractor to meet the requirements of the sewer and appurtenances, and new work shall be added when necessary to leave all in good working

Changes in location.

order. The cost of such permanent changes, not indicated on the plans or in the specifications, is to be paid for as extra work, on the valuation of the Engineer and depending upon his decision as to whether the work done is or is not included in the work required of the Contractor under this contract. Any damage done or caused to said pipes or other existing structures by act or neglect on his part is to be paid for by the Contractor.

SECT. 19. The Contractor shall remove the existing plank or timber roadway on Hamburg Place from a point near Avenue L to beyond the grade crossing of the Central Railroad of New Jersey, and relay the plank or timber roadway upon a foundation prepared, by regrading or otherwise, along the northerly side of Hamburg Place between the limits above stated. The removal of this plank or timber roadway, from its present position to the new location designated, shall be done as one piece of work, at such a time, either at night or on Sunday, as to be of least inconvenience to traffic, and at a time prior to the disturbance of the street surface for any construction work hereunder. At the completion of the construction work and at a suitable time after the refilling and settlement of trenches and other excavations, the Contractor shall remove the plank or timber roadway from its temporary location along the northerly side of the street and relay it in its original location. The Contractor shall maintain this roadway in its temporary location and replace it in its original location, at the completion of his work, in a condition at least equal to that in which he found it and acceptable to the Engineer. The Contractor shall furnish for the maintenance and for the replacement such new plank, railroad ties or timber material as may be required.

The Contractor shall arrange with the Central Railroad of New Jersey, at his own expense, for the removal and replacement of the grade-crossing gates and the gate-tender's

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house at Hamburg Place and plank crossing of tracks, so as to admit the transference of traffic to the northerly side of Hamburg Place during the construction of the work under this contract.

Payment for the work done and materials furnished under this section shall be included in that made under Article XVIII, Item 1.

FILLING.

SECT. 20. The sewer in trench shall be backfilled with such of the excavated material and in such order as may be from time to time directed by the Engineer. Wherever he deems the excavated material unsuitable, he may require the Contractor to furnish suitable material, to be paid for in accordance with Article XVIII, Item 6, unless otherwise provided for. The backfilling up to the springing line of the sewer shall be done before the arch is turned, and the bracing inside the sewer shall be left in place until the removal is directed by the Engineer. The backfilling must be brought up evenly on both sides of the sewer, so that no unbalanced pressures can be thrown upon the masonry. The sewer invert and its side walls shall be braced, if so required, and the work of backfilling shall be so conducted as not to disturb the masonry.

Refilling below
sewer grade
etc.

The surfacing of ground and streets and elsewhere shall in all cases be left in as good condition as it was previous to the commencement of the work; when of gravel or broken stone, it shall be well rolled with a heavy roller; and the whole work of refilling and resurfacing shall be done, as far as possible, in a manner to prevent after settlement.

Responsibility
for surface
repairs.

The Contractor shall keep the surface over and along the trench excavation in a safe and satisfactory condition for a period of six months after the work contemplated in this

contract is completed, and shall be responsible for any accident that may occur on account of the defective condition of such surface.

All surfaces and all structures in the vicinity of the work shall be protected, and if injured shall be repaired or replaced. All trees in the vicinity shall be protected. The Contractor shall assume all risk and damage, if any, from loss or injury to trees in the vicinity of the work.

As the work progresses, all rubbish or refuse and all unused materials and tools shall be removed at once from the ground. Wherever the clearing of rubbish or the repairing of street surfaces, fences or other damage is neglected, the Engineer will give notice to that effect to the Contractor; and if said rubbish be not removed or said repairing be not done within three days thereafter, or if the Contractor does not at once take the necessary precautions to ensure safety to travel, the Engineer may employ other parties to do such work, and the expense thus incurred will be deducted from any moneys due or that may become due the Contractor.

SECT. 21. No excavated material except road surfaces and a limited amount of sand and gravel to be used for masonry, the limit of which shall be determined by the Engineer, shall be left on streets or other surfaces, but such material shall be either backfilled or carted away as fast as taken out. Surplus material shall be removed by the Contractor unless claimed by the Commissioners or others entitled thereto.

MATERIALS AND WORKMANSHIP.

CEMENT.

SECT. 22. Portland cements shall be used in the work. They shall be of the best American brands. They shall be subject to inspection and rigorous tests by the Engineer.

In general, tests will conform to the methods recommended by the Committee of the American Society of Civil Engineers in "Uniform Tests of Cement." Tests.

None shall be used or remain on the work but that which has been approved by the Engineer.

The Contractor shall at all times keep in store at some convenient point near the work a sufficient quantity of cement to allow ample time for tests to be made without delay to the work of construction. Storage.

The Engineer shall be notified at once of each delivery of cement. It shall be stored in tight buildings, and each cask or package must be raised several inches above the ground by blocking or otherwise.

MORTAR.

SECT. 23. Mortar shall be prepared by mixing cement in perfect condition with clean, moderately coarse, sharp sand, free from foreign matter, and clean water, all to be of quality satisfactory to the Engineer. Compositio

Unless otherwise directed by the Engineer, these ingredients shall be mixed in the following proportions: For concrete work, one part of cement to two parts of sand; for brick work, in manholes, one part of cement to three of sand. Standard proportions

When ordered by the Engineer, the above proportions shall be varied, and he shall make what in his judgment is a fair compensation for each change. The mortar shall be freshly mixed for the work in hand. No mortar shall be used that has become hard and set. Change in proportion.

CONCRETE.

SECT. 24. Concrete shall be composed of clean screened gravel or broken stone, four parts, mixed with mortar of the quality and quantity above described. The concrete shall be mixed in approved mechanical mixers, unless, for small amounts, otherwise permitted by the Engineer. Compositio

The mixing in each batch shall be first dry and then of the wet materials to the satisfaction of the Engineer.

The gravel or broken stone shall vary in size from $\frac{1}{4}$ inch in diameter to $1\frac{1}{2}$ inches in diameter, and its size shall vary so that, in the mixture of one part of cement, two parts of sand and four parts of stone, the void spaces in the stone shall be completely filled with mortar.

The concrete when placed in the trench must be so manipulated, compressed and tamped as to form a compact, dense concrete of the best quality, with all the interstices between the stones entirely filled with mortar. Should voids be discovered when the forms are taken down, the defective work is to be removed and the space refilled with rich concrete or mortar within 24 hours thereafter, in a manner satisfactory to the Engineer. After the concrete is in place, care shall be taken to prevent any stress therein tending to injure it.

Centers satisfactory to the Engineer, made to fit the curves and shapes of the work, and satisfactory moulds and forms shall be provided and used by the Contractor, and when they lose their proper dimensions or shapes they shall be replaced by others. They shall be clean when used. They shall be satisfactorily supported and shall remain in place a time satisfactory to the Engineer, before striking.

The forms shall be set true to lines; shall be firmly secured, so that they will not get out of place while the masonry is being laid; shall be smooth, and so tight that none of the liquid in the mortar can escape.

When the work is done under such conditions that mortar in the masonry is liable to freeze, the Contractor shall at his own expense thoroughly heat the concrete materials and the water, and shall thoroughly protect the masonry from damage by rain and frost before and after laying. No work shall be done on masonry when the physical conditions are such, in the opinion of the Engineer, that good work cannot be secured.

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In joining new concrete masonry to old, such provisions shall be made of steps, dovetails or other devices as may be prescribed, and the old masonry shall be thoroughly cleaned and roughened before the new is joined to it. Bonding.

The quantity of concrete to be paid for will be determined by number of cubic yards actually built in conformity to the plans and the orders of the Engineer. Measurement

Where excavations in trenches or other excavations are made outside the limits defined on plans, they shall be filled by the Contractor at his own expense by rock filling, concrete satisfactory to the Engineer, or gravel filling, as directed.

BRICK MASONRY.

SECT. 25. The sewer manholes shall be built of brick laid in Portland cement mortar, one part cement to three parts sand, of size and dimensions shown on contract drawings. When used.

The brick shall be of fair quality, of compact texture, with crushing strength not less than 5,000 pounds per square inch. Quality of brick.

They shall equal samples of brick in the Engineer's office marked "Samples of Brick for Use in Manholes in the Passaic Valley Main Intercepting Sewer."

Competent mechanics shall be employed for laying this work. Competent mechanics.

The outside of the manholes shall be plastered with $\frac{3}{8}$ -inch thickness of Portland cement mortar, of the quality used in laying the manholes. The quantity of brickwork to be paid for will be determined by measurements or estimates of number of cubic yards actually built in conformity to the drawings and to the orders of the Engineer. Plaster coat.
Measurement

IRONWORK IN MASONRY.

network
be built
masonry.

SECT. 26. The Contractor shall build into the masonry wherever required, and in the manner directed, ironwork that may be furnished by the Commissioners, consisting of manhole steps and manhole frames and covers.

yment.

The price for the work is to be included in the price bid for concrete and brick masonry.

STRUCTURES.

foundations
itions.

SECT. 27. The foundation of the sewer, in trench, and for special structures and connecting sewers, may be earth or timber, according to local conditions. The precise character of the foundation and the section at any given point cannot be determined in advance, but will be decided upon by the Engineer as occasion demands.

ainage of
cavation.

SECT. 28. Where required by the Engineer, drainage shall be effected by an underdrain pipe below the sewer. The underdrain shall be of ample size to safely provide for the drainage as found in the trench or other excavations, and shall be laid to line and grade given by the Engineer. It shall be Akron or equivalent drain pipe, straight and sound; it shall be carefully bedded and surrounded by broken stone or gravel, and the joints made tight enough to prevent gravel or sand from passing through. If necessary, the joints shall be wound with thin cloth.

yment for
ainage.

The whole cost of excavation, furnishing, laying, winding and refilling around the pipe is to be included in the price bid per linear foot of trench (Article XVIII, Item 1).

ainage
ecautions.

SECT. 29. The Contractor must exercise great care to prevent the material under this sewer from washing away, and the pumps must be shifted frequently to avoid drainage from too long a distance.

All drainage pipes must be led to drainage wells outside the trench, and after pumps are shut down the drains must be securely sealed off at the wells. Pump wells.

The masonry work shall be satisfactorily watertight; in addition to the general good quality of the concrete in the sewer, the whole upper face of the concrete, in the trench, shall be thoroughly plastered with a $\frac{3}{8}$ -inch thickness of standard Portland cement mortar. The cost of this plastering is to be included in price bid per cubic yard of concrete. Watertight masonry.
Sewer to be plastered.

SECT. 30. The inside of the sewer shall be scraped and neatly pointed and left sound and smooth. Cleaning sewers.

As fast as the work is completed the sewer shall be carefully cleaned and kept free from all refuse or rubbish.

GENERAL SECTIONS.

SECT. 31. Whenever the Contractor is not present in any part of the work where it may be desired to give directions, orders may be given by the Engineer, and shall be received and obeyed by the superintendent or foreman who may have charge of this particular work in reference to which orders are given. Orders.

SECT. 32. Necessary sanitary conveniences for use of laborers on the work, properly secluded from public observation, shall be constructed and maintained by the Contractor in such manner and at such points as shall be approved by the Engineer, and their use shall be strictly enforced. Sanitary regulations.

The buildings, shanties or other structures for housing the men will be permitted only at such places as the Engineer shall approve, and the sanitary condition of the grounds in or about such shanties or other structures must at all times be maintained in a manner satisfactory to the Engineer. Shanties.

aning up.

SECT. 33. On or before the completion of the work, the Contractor shall, without charge therefor, thoroughly clean the interior of the sewer, tear down and remove all buildings and other temporary structures built by him, remove all rubbish of all kinds from grounds which he has occupied, and leave the line of work in clean and neat condition.

spirituous
ors.

SECT. 34. The Contractor shall neither permit nor suffer the introduction or use of spirituous liquors upon or about the work embraced in the contract or upon any of the grounds occupied by him.

wings and
ifications.

SECT. 35. The drawings and specifications are intended to be explanatory of each other, but should any discrepancy appear or any misunderstanding arise as to the import of anything contained in either, the explanation of the Engineer shall be final and binding on the Contractor.

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ssions.

Any corrections of errors or omissions in plans and specifications may be made by the Engineer when such correction is necessary for the proper fulfillment of their intention as construed by him.

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ART. V. The Contractor shall commence work within ten days after the execution of this contract by the Commissioners, at such points as the Engineer may direct, and shall thereafter continue it at such points and in such order of precedence as the Engineer may from time to time direct.

No portion of the work in Hamburg Place between Jabez Street and Avenue L shall be executed in the interval between May 1st and Labor Day. During this time the street surface shall be unbroken and the traffic uninterrupted.

The rate of progress shall be such that the whole work shall be performed in accordance with the terms of this contract on or before May 1, 1915, unless and except as any part may be delayed under the provisions of Article IX.

Rate of progress.

The time in which the whole of this contract is to be performed, and the work is to be completed, is of the essence of this agreement.

Time for completion.

ART. VI. The Commissioners and the Engineer, agents, and employees of the Commissioners, may, for the purposes already specified, and for any other purposes, enter upon the work and the premises used by the Contractor, and the Contractor shall provide safe and proper facilities therefor. The other Contractors of the Commissioners may also, for all the purposes which may be required by their contracts, enter upon the work and the premises used by the Contractor.

Access to work.

Any differences or conflicts which may arise between the Contractor and other Contractors of the Commissioners in regard to this work shall be adjusted and determined by the Engineer.

ART. VII. The inspection of the work shall not relieve the Contractor of any of his obligations to fulfill his contract as herein prescribed, and any defective work shall be made good and unsuitable materials may be rejected, notwithstanding that such work and materials have been previously overlooked by the Engineer and accepted or estimated for payment. If the work or any part thereof shall be found defective at any time before final acceptance of the whole work, the Contractor shall forthwith make good such defect, in a manner satisfactory to the Engineer, and if any material brought upon the ground for use in the work, or selected for the same, shall be condemned by the Engineer as unsuitable, or not in conformity with the specifications,

Defective work.

the Contractor shall forthwith remove such materials from the vicinity of the work. Nothing in this contract shall be construed as vesting in the Contractor any right of property in the materials used after they have been attached or affixed to the work or the soil, but all such materials shall, upon being so attached or affixed, become the property of the Commissioners.

ART. VIII. The Contractor shall employ only competent men to do the work, and whenever the Engineer shall notify the Contractor, in writing, that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or otherwise unsatisfactory, such a man shall be discharged from the work, and shall not again be employed on it, except with the consent of the Engineer.

ART. IX. The Commissioners may delay the beginning of the work or any part thereof if they shall not have obtained possession of the land in or upon which the same is to be performed. The Contractor shall have no claim for damages on account of such delay, but shall be entitled to so much additional time wherein to perform and complete this contract on his part as the Engineer shall certify in writing to be just.

ART. X. The Contractor shall keep himself fully informed of all existing and future State and National laws and municipal ordinances and regulations in any manner affecting those persons engaged or employed in the work, or the materials used in the work, or in any way affecting the conduct of the work, either with respect to hours of labor or otherwise and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. If any discrepancy or inconsistency is discovered in the drawings, specifications or contract for this work in relation to any such law, ordinance, regulation, order or decree, he

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shall forthwith report the same to the engineer in writing. He shall at all times himself observe and comply with, and shall cause all his agents and employees to observe and comply with, all such existing and future laws, ordinances, regulations, orders and decrees; and shall protect and indemnify the Commissioners and their officers and agents against any claim or liability arising from or based on the violations of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

ART. XI. The Contractor shall give his personal attention constantly to the faithful prosecution of the work, shall keep the same under his personal control and shall not assign, by power of attorney or otherwise, nor sublet the work or any part thereof, without the previous written consent of the Commissioners, and shall not, either legally or equitably, assign any of the moneys payable under this agreement, or his claim thereto, unless by and with the like consent of the Commissioners.

Contractor
to sublet or
assign.

ART. XII. The Engineer may make alterations in the line, grade, plan, form, dimensions or materials of the work or any part thereof, either before or after the commencement of construction; if such alterations diminish the quantity of work to be done, they shall not warrant any claim for damages or for anticipated profits on the work that may be dispensed with; if they increase the amount of work, such increase shall be paid for according to the quantity actually done and at the price stipulated for such work under this contract.

Alterations.

ART. XIII. The Contractor shall take all responsibility of the work, and take all precautions for preventing injuries to persons and property in or about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what was esti-

Liability of
contractor,
indemnity,

mated or expected, or on account of the weather, elements or other cause; and he shall assume the defense of, and indemnify and save harmless, the Commissioners and their officers and agents, from all claims relating to labor and materials furnished for the work; to inventions, patents and patent rights used in doing the work; to injuries to any person or corporation received or sustained by or from the Contractor and his employees in doing the work, or in consequence of any improper materials, implements or labor used therein; and to any act, omission or neglect of the Contractor and his employees therein.

abandonment.

ART. XIV. If the work to be done under this contract shall be abandoned, or if this contract or any part thereof shall be sublet without the previous written consent of the Commissioners, or if the contract or any claim thereunder shall be assigned by the Contractor otherwise than as herein specified, or if at any time the Engineer shall be of opinion, and shall so certify in writing to the Commissioners, that the conditions herein specified as to the rate of progress are not fulfilled, or that the work, or any part thereof, is unnecessarily or unreasonably delayed, or that the Contractor has violated any of the provisions of this contract, the Commissioners may notify the Contractor to discontinue all work or any part thereof; and thereupon the Contractor shall discontinue such work or such part thereof as the Commissioners may designate, and the Commissioners may thereupon by contract or otherwise, as they may determine, complete the work, or such part thereof, and charge the entire expense of so completing the work or part thereof to the Contractor; and for such completion the Commissioners for themselves or their contractors may take possession of and use or cause to be used in the completion of the work or part thereof any of such materials, animals, machinery, implements and tools of every description as may be found upon the line of said work.

Commissioners
complete

All expenses charged under this article shall be deducted and paid by the Commissioners out of any moneys then due or to become due the Contractor under this contract, or any part thereof; and in such accounting the Commissioners shall not be held to obtain the lowest figures for the work of completing the contract or any part thereof, or for insuring its proper completion, but all sums actually paid therefor shall be charged to the Contractor. In case the expenses so charged are less than the sum which would have been payable under this contract if the same had been completed by the Contractor, the Contractor shall be entitled to receive the difference; and in case such expenses shall exceed the said sum, the Contractor shall pay the amount of the excess to the Commissioners.

ART. XV. The Contractor shall pay to the Commissioners all expenses, losses and damages, as determined by the Engineer, incurred in consequence of any defect, omission or mistake of the Contractor or his employees, or the making good thereof, and shall also pay for each and every day that he shall be in default in completing the work, as herein provided, the sum of twenty dollars (\$20), which sum is hereby agreed upon, not as a penalty, but as the damages which the Commissioners will daily suffer by reason of such default.

Commission
to be paid
damages.

ART. XVI. The Contractor shall do any work not herein otherwise provided for, as authorized by resolution of the Commissioners, and when and as ordered, in writing, by the Engineer or his agents specially authorized thereto in writing (provided that extra work estimated to cost less than \$100 need not be authorized by the Commissioners), and shall, when requested by the Engineer so to do, furnish itemized statements of the cost of the work ordered and give the Engineer access to accounts, bills and vouchers relating thereto. If the Contractor claims compensation for extra work not ordered as aforesaid, or for any damage sustained, he shall, within one week after the beginning of any such

Extra work.

work or of the sustaining of any such damage, make a written statement of the nature of the work performed or damage sustained, to the Engineer, and shall, on or before the fifteenth day of the month succeeding that in which any such extra work shall have been done or any such damage shall have been sustained, file with the Engineer an itemized statement of the details and amount of such work or damage; and unless such statements shall be made as so required, his claim for compensation shall be forfeited and invalid, and he shall not be entitled to payment on account of any such work or damage.

The determination of the Engineer shall be final upon all questions of the amount and value of extra work.

ART. XVII. The Commissioners may keep any moneys which would otherwise be payable at any time hereunder, and apply the same, or so much as may be necessary therefor, to the payment of any expenses, losses or damages incurred by the Commissioners, and determined as herein provided, and may retain, until all claims are settled, so much of such moneys as the Commissioners shall be of opinion will be required to settle all claims against the Commissioners and their officers and agents, specified in Article XIII, and all claims for labor on the work and also all claims for materials used in the work, or the Commissioners may make such settlements and apply thereto any moneys retained under this contract. If the moneys retained under this contract are insufficient to pay the sums found by the Commissioners to be due under the claims for labor and materials, the Commissioners may, at their discretion, pay the same, and the Contractor shall repay to the Commissioners all sums so paid out. The Commissioners may also, with the written consent of the Contractor, use any moneys retained, due or to become due under this contract, for the purpose of paying for both labor and materials for the

work, for which claims have not been filed in the office of the Commissioners. While it is understood that the security required to be given by the Contractor is furnished by the Contractor by his giving the bond accompanying this contract, the Commissioners may, nevertheless, if they shall deem it just and equitable so to do, cause any moneys retained, due or to become due to be held and applied to the payment for labor or materials for which security is required under the provisions of said section.

ART. XVIII. The Commissioners shall pay and the Contractor shall receive as full compensation for everything furnished and done by the Contractor under this contract, including all work required but not included in the items hereinafter mentioned, and also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstruction or difficulty encountered in the prosecution of the work, and for all risks of every description connected with the work, and for all expense incurred by or in consequence of the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and the whole thereof, as herein provided, as follows:

Prices for
work.

Item 1.—For earth excavation and refilling, in trench, above sewer grade, for 150-inch concrete sewer, and including excavations and refilling for manholes, branches and all other structures appertaining to the sewer not otherwise specified; for furnishing, excavating for and laying under-drain; for disposal of material by removal, or by refilling of trenches, rolling, ramming, and watering when required, including sheeting and shoring, bridging and fencing, and removal of same; for all diking; for all pumping or bailing, or otherwise disposing of water; for all protection and restoration of buildings, fences, existing sewers, cisterns, culverts, water pipes, gas pipes, house drains, etc.; for removal,

maintenance and replacement of plank or timber roadway, grade-crossing gates, etc., as specified in Article IV, Section 19; for all resurfacing of streets, accommodation and protection of travel; and all other incidental work, the sum of ..

.....
Seventy Dollars.....

(*\$ 70.⁰⁰*.....) per linear foot.

Item 2.—For all concrete masonry, in trench, in place, made with Portland cement mortar, including all plastering of same, all forms, and all setting of iron work; and for all

incidental work, the sum of

Eight Dollars.....

(*\$ 8.⁰⁰*.....) per cubic yard.

Item 3.—For all brick masonry, in manholes, laid with Portland cement mortar, including all plastering, all templates, and all setting of iron work; and for all incidental

work, the sum of

Fifteen Dollars.....

(*\$ 15.⁰⁰*.....) per cubic yard.

Item 4.—For all rock excavation, in trench or in excavations for special structures, as outlined in Article IV, Section 15, including disposal of material by removal or otherwise as may be required; and for all incidental work, the

sum of

Three dollars

(*\$ 3.00*) per cubic yard.

Item 5.—For all lumber used and for all sheeting and shoring, in trench or in excavations for special structures, left in place by order of the Engineer, the sum of twenty dollars (\$20) per thousand feet B. M. so left in place up to 200,000 feet B. M., will be paid. If more than 200,000 feet B. M. is left in place by order of the Engineer, the fair market value of the quantity in excess of that amount will be paid. If lumber so used for sheeting and shoring is required to be cut, and one-half or more in length is so left in place, the whole amount of such lumber will be included in the measurement and paid for; if less than half of the whole length is left in place, double the amount left in place will be paid for. Lumber used for sheeting and shoring and not required to be left in place by the Engineer will not be paid for.

Item 6.—For extra work, if any, performed in accordance with Article XVI, the reasonable cost of the work, as determined by the Engineer, whose determination shall be final, plus 15 per cent. of such cost.

ART. XIX. The Engineer shall, once in each month, make an estimate in writing of the total amount of the work done to the time of such estimate, and the value thereof. The Commissioners shall retain fifteen per cent. of such esti-

Estimates and payments.

mated value as part security for the fulfillment of this contract by the Contractor, and shall monthly pay to the Contractor, while carrying on the work, the balance not retained as aforesaid, after deducting therefrom all previous payments and all sums to be kept or retained under the provisions of this contract. No such estimate or payment shall be required to be made when, in the judgment of the Engineer, the total value of the work done since the last estimate amounts to less than five thousand dollars (\$5,000). Payment may at any time be withheld if the work is not proceeding in accordance with the contract. The Commissioners may, if they deem it expedient so to do, cause estimates to be made more frequently than once each month, and they may cause payments to be made more frequently to the Contractor. The Commissioners may at their option retain, temporarily or permanently, a smaller amount than as aforesaid, and may cause the Contractor to be paid, temporarily or permanently, from time to time during the progress of the work, such portion of the reserve as they deem prudent.

The Engineer shall, as soon as practicable after the completion of this contract, make a final estimate of the amount of work done thereunder and the value of such work; and the Commissioners shall, within sixty-five days after such final estimate is so made, and is approved by the Commissioners, pay the entire sum so found to be due hereunder, after deducting therefrom all previous payments and all amounts to be kept and all amounts to be retained under the provisions of this contract, including the five per cent. of the amount of the contract to be retained as hereinafter provided for the making of repairs. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

ART. XX. The Commissioners may retain out of the moneys payable to the Contractor under this contract the sum of five per cent. on the amount thereof, and may ex-

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pend the same, in the manner hereinafter provided for, in making such repairs on said work as the Engineer may deem expedient.

If, at any time during a period of six months from the date of the final completion of the work contemplated in this contract, as determined by the Engineer, any part of such work shall, in the opinion of the Engineer, require repairing, the Engineer may notify the Contractor, in person or by mail, to make the required repairs. If the Contractor shall neglect to make such repairs to the satisfaction of the Engineer within three days from the date of giving or mailing such notice, then the Engineer may employ other persons to make the same. The Commissioners shall pay the expenses of the repairs out of the sum retained for that purpose. And upon the expiration of the said period of six months, provided that the work shall at that time be in good order, the Contractor shall be entitled to receive the whole or such part of the sum last aforesaid as may remain after the expense of making the said repairs, in the manner aforesaid, shall have been paid therefrom.

It is, however, agreed that the Commissioners may apply or keep the sum so retained to or for the payment of other claims arising and made payable by the Contractor under the provisions of this contract, but remaining unsatisfied.

ART. XXI. Neither the inspection of the Commissioners, or Engineer, or any of their employees, nor any order, measurement or certificate by the Engineer, nor any order by the Commissioners for the payment of money, nor any payment for, nor acceptance of, the whole or any part of the work by the Engineer or Commissioners, nor any extension of time, nor any possession taken by the Commissioners or their employees, shall operate as a waiver of any provision of this contract, or of any power herein reserved to the Commissioners, or any right to damages herein provided; nor

Waiver.

shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach. Any remedy provided in this contract shall be taken and construed as cumulative, that is, in addition to each and every other remedy herein provided; and the Commissioners shall also be entitled as of right to a writ of injunction against any breach of any of the provisions of this contract.

ast payment
to terminate
ability of
Commissioners.

ART. XXII. No person or corporation, other than the signer of this contract as Contractor, now has any interest hereunder, and no claim shall be made or be valid, and neither the Commissioners, nor any member or agent thereof, shall be liable for, or be held to pay, any money, except as provided in ARTICLES XI, XIV, XVIII, XIX and XX. The acceptance by the Contractor of the last payment made as aforesaid, under the provisions of ARTICLE XX, shall operate as and shall be a release to the Commissioners and every member and agent thereof, from all claim and liability to the Contractor for anything done or furnished for, or relating to, the work, or for any act or neglect of the Commissioners or of any person relating to or affecting the work, except the claim against the Commissioners for the remainder, if any there be, of the amounts kept or retained as provided in ARTICLE XVII.

In Witness Whereof, the said Passaic Valley Sewerage Commissioners have caused their corporate seal to be hereto affixed, and these presents to be signed by its Chairman and Clerk, and the said

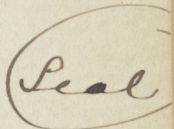
Frayer & Burchenal

the Contractor, hereunto set *their hand* S., in triplicate, this *22* day of *August* in the year nine teen hundred and thirteen.

PASSAIC VALLEY SEWERAGE COMMISSIONERS,

Francis Child

Chairman.



Attest:

John D. Gibson
Clerk.

Frayer & Burchenal

James Stanley Frayer
Selden D. Burchenal
Contractor.

Attest:

.....
Wm. Lavin Taylor to *S. D. Burchenal*
Samuel H. Ewins to *James Stanley Frayer*

BOND.

KNOW ALL MEN BY THESE PRESENTS, That

Frazier and Burcheval, James

Stanley Frazier and Selden

D. Burcheval

1. Madison Ave, New York, N.Y. as principal,

and *The Title Guaranty & Surety Company*

a corporation organized under the

Laws of the State of

Pennsylvania as surety,

are held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of twenty thousand dollars (\$20,000) lawful money of the United States of America, to be paid to the Passaic Valley Sewerage Commissioners, for which payment, well and truly to be made, they bind themselves and their respective heirs, executors and admin-

istrators *successors and assigns* ..

jointly and severally, firmly by these presents.

WHEREAS, the said principal.. has made a contract with the Passaic Valley Sewerage Commissioners bearing date

the... *22*... day of *August*.., nineteen hundred

and thirteen, for constructing the central portion of Section 6 of the Passaic Valley Main Intercepting Sewer in the City of Newark in New Jersey:

Now, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said principal.. shall well and truly keep and perform all the obligations, agreements, terms and condi-

tions of this said contract on *their*.....part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used, in carrying out of said contract, then this obligation shall be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, we hereunto set our hands and seals on this *22*.....day of *August*....., nineteen hundred and thirteen.

Frazer & Burchenal.... (Seal)

James Stanley Frazer.. (Seal)

Selden D. Burchenal.... (Seal)

The Title Guaranty & Surety Company (Seal)

By *Fred C. Williams*..... (Seal)
attest *Vice President*

Richard K. McLaughlin.. (Seal)

Attest:

Resident Asst Secretary

.....
Wm. Gavin Taylor to S. D. Burchenal
Samuel W. Evans to James Stanley Frazer

and fifteen for constructing the central portion of the
of the Passaic Valley Main Interlocking Tower in the
City of Newark in New Jersey:

Now, the Commission on this occasion is glad
That the said principal, shall well and truly keep and
perform all the obligations, agreements, terms and condi-

tions of this said contract on part to be
kept and performed and shall also pay for all labor per-
formed and furnished and for all materials used in carry-
ing out of said contract, and this obligation shall be valid
otherwise it shall remain in full force and effect.

In WITNESS WHEREOF, we hereunto set our hands and

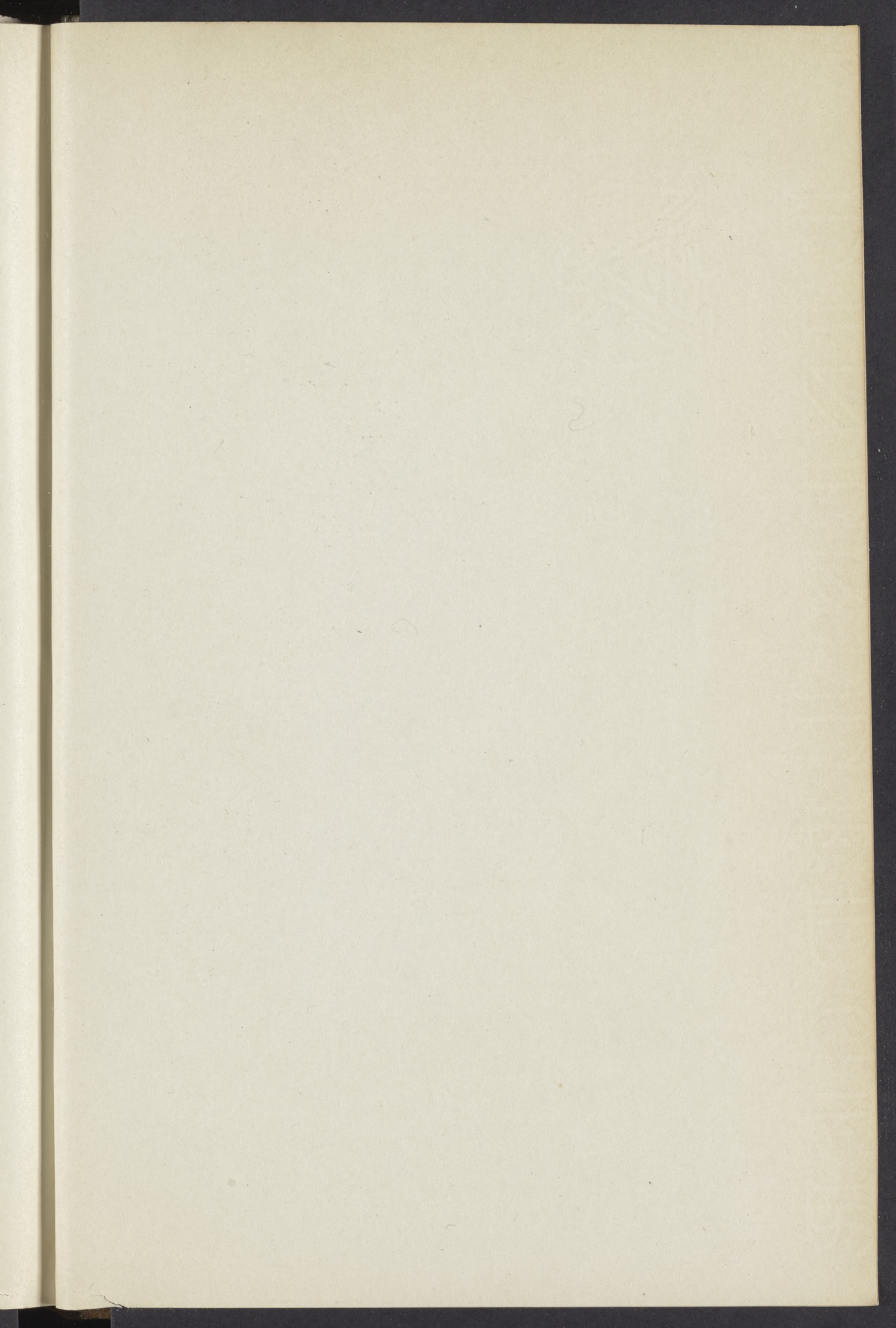
seals on this day of 19.....

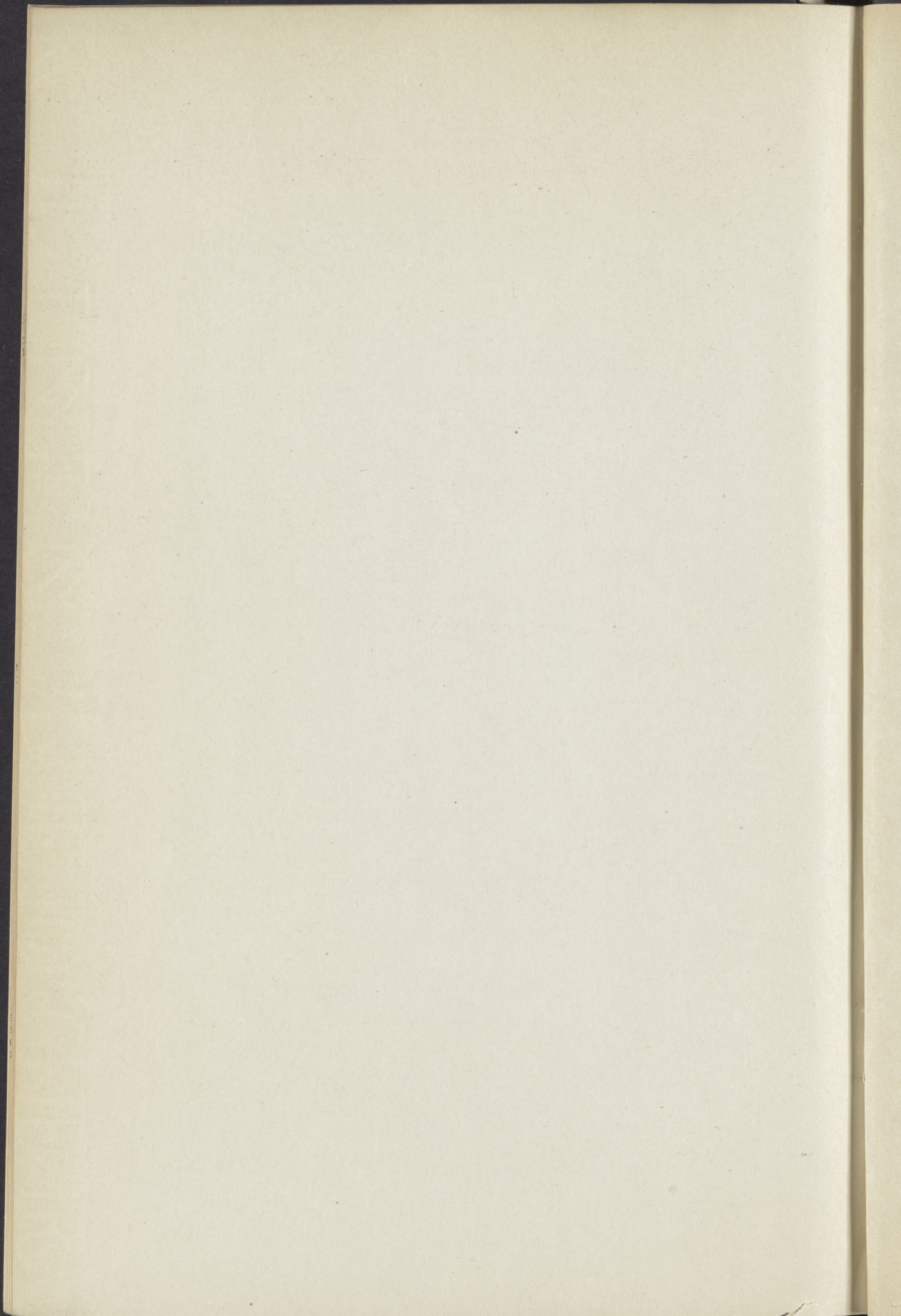
Witnessed and attested:

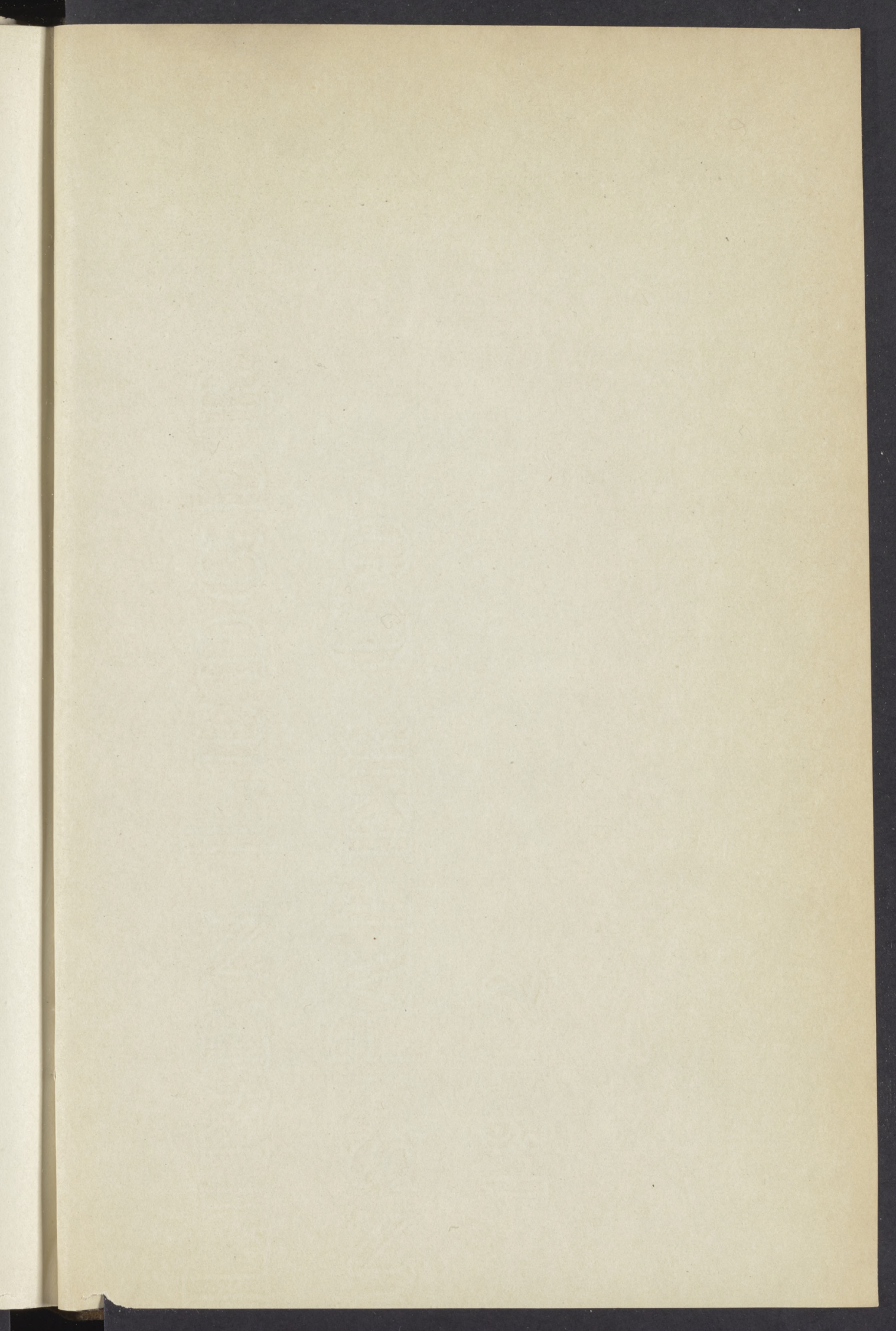
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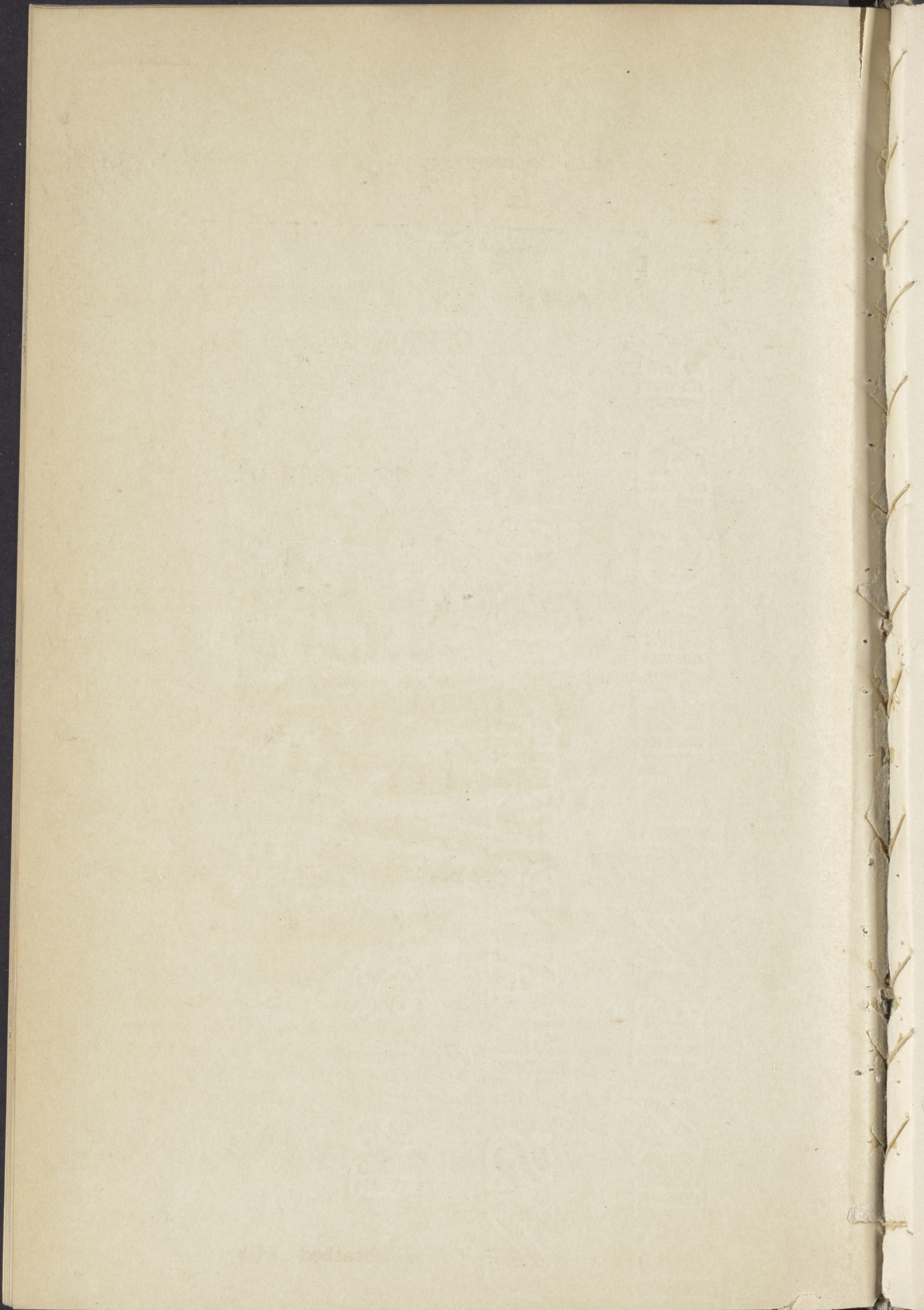




EXHIBIT A

Photograph showing trench sheathed with piling.



EXHIBIT B

Photograph showing poles carrying electric light and other wires.



EXHIBIT C

Photograph showing cable-way for removing excavated material.

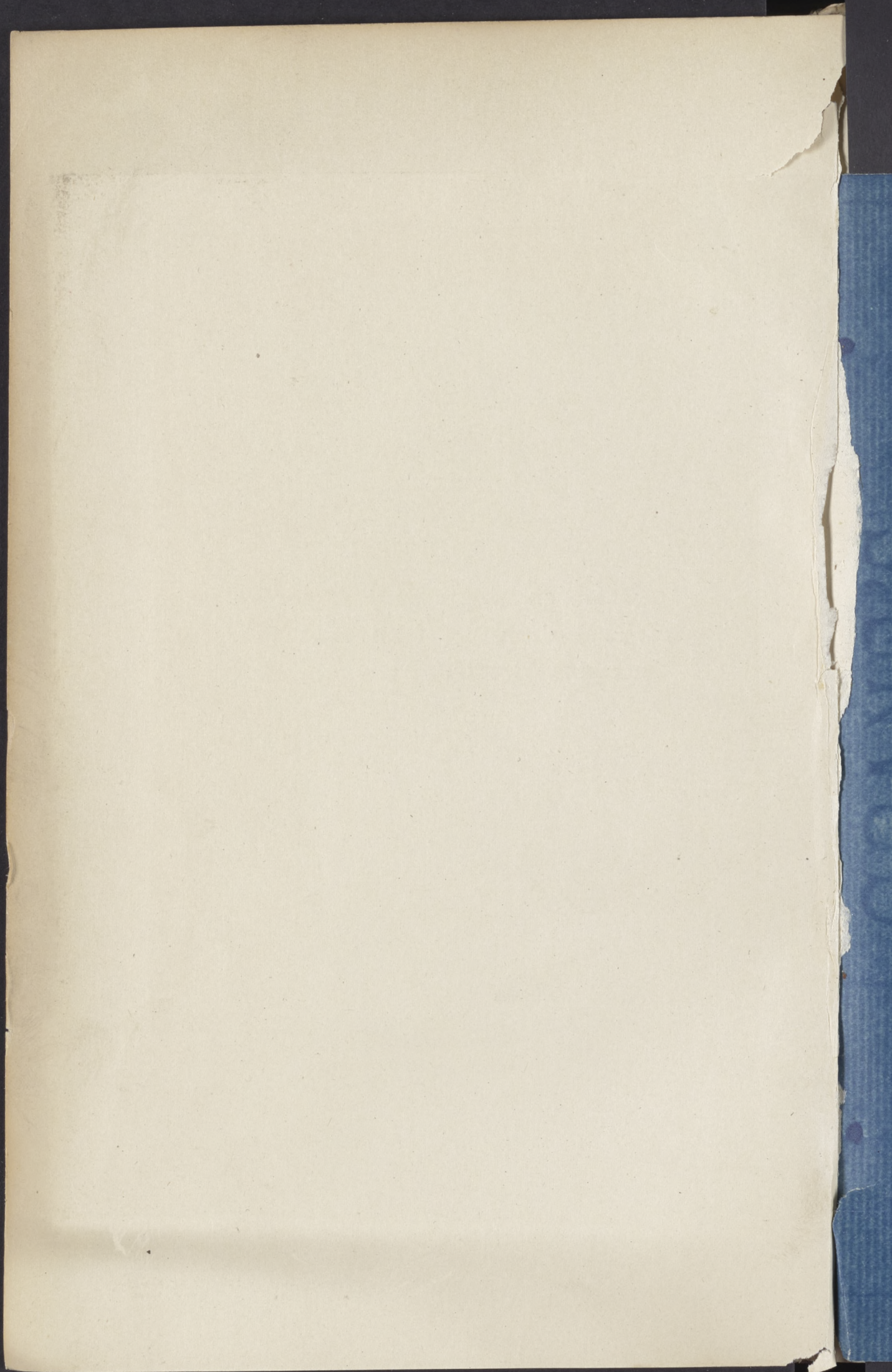


EXHIBIT D

Photograph showing settling of trench.

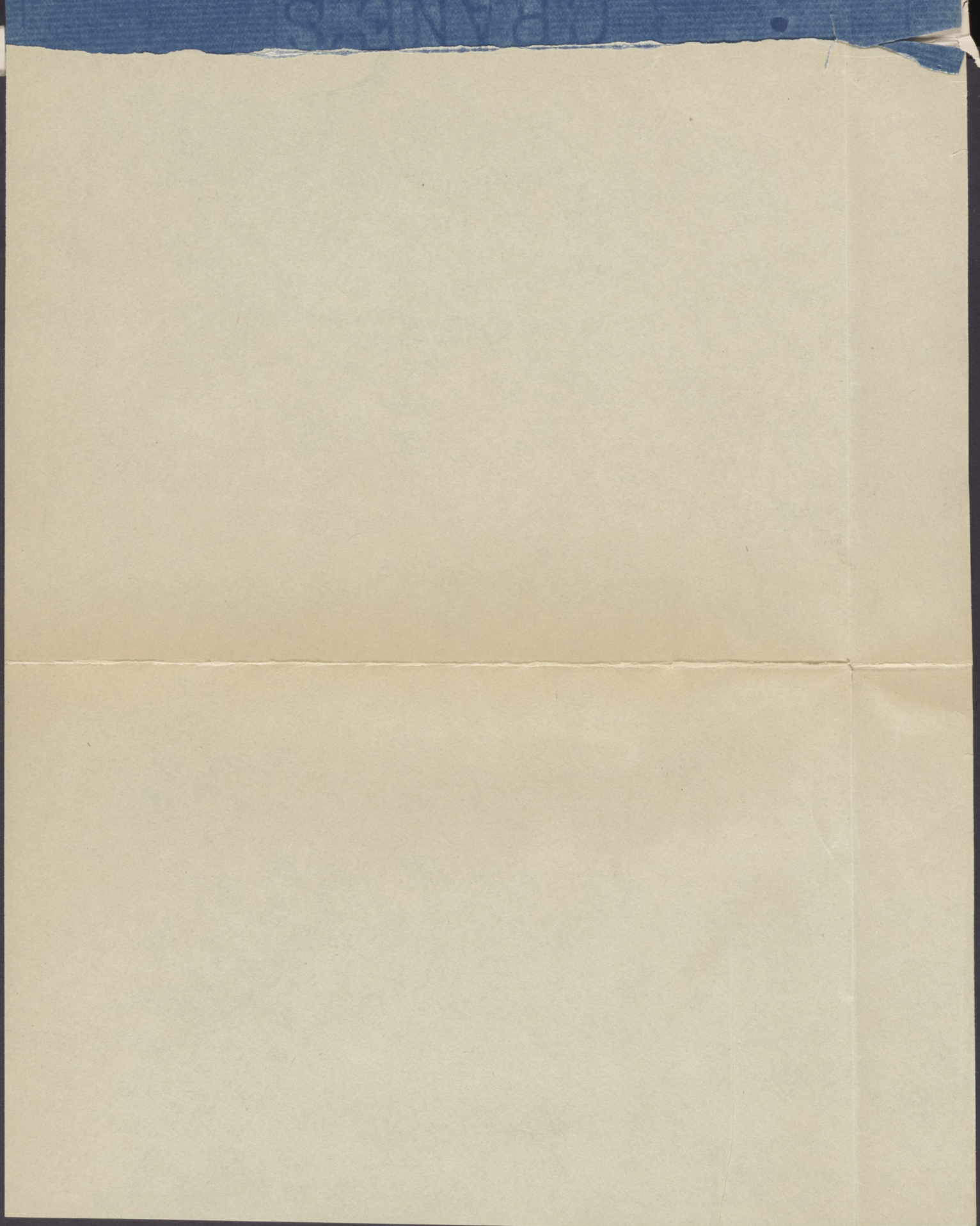
EXHIBIT 1.

**Chart showing record of cars arriving
at and departing from East Ferry and
Magazine Streets.**

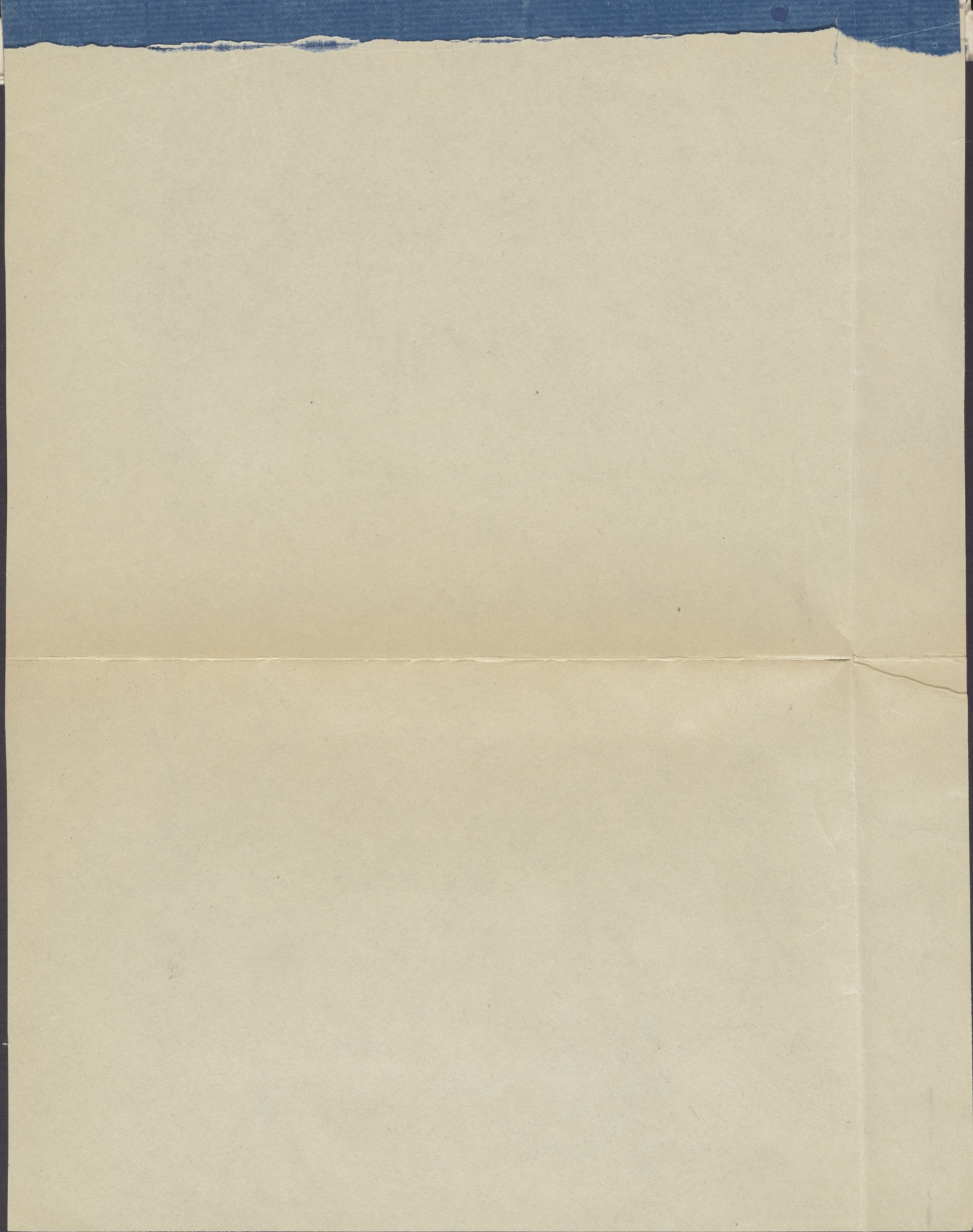


East Ferry & Magazine Sts.

Car Number	No. Pass.	Arrived	Depart.	No. Pass.	Car Number	No. Pass.	Arrived	Depart.	No. Pass.
2459	-		12-00-00	1	2444	0	3-46-10	3-50-50	1
2457	-		12-65-55	0	1131	3	3-58-20	4-00-45	0
2322	0	12-10-35	12-14-03	0	2450	0	4-02-50	4-05-30	0
1132	0	12-15-45	12-20-55	0	2456	0	4-09-45	4-12-30	6
1131	0	12-23-20	12-27-20	0	2460	0	4-17-10	4-20-35	1
2468	0	12-32-50	12-35-15	0	2465	0	4-24-20	4-29-50	0
2452	0	12-38-10	12-43-10	0	2457	0	4-32-05	4-36-45	1
2453	0	12-46-05	12-50-45	0	2474	1	4-40-45	4-44-05	0
2465	0	12-53-08	12-57-40	0	1132	1	4-48-40	4-49-30	0
2446	4	1-01-30	1-05-00	0	2461	1	4-53-45	4-54-10	0
Private Car		1-02-30	MADE LOOP	OFFICIAL	2464	0	4-59-20	5-01-05	1
2474	0	1-10-05	1-12-40	0	2459	0	5-11-30	5-12-35	0
1133	0	1-16-50	1-20-10	0	1119	0	5-18-10	5-19-00	0
LUNCH					2454	1	5-22-05	5-24-10	1
1132	0	2-31-00	2-36-10	1	2322	1	5-25-40	5-27-20	0
2465	0	2-38-10	2-42-12	1	1185	0	5-29-50	5-31-50	0
2468	0	2-48-00	2-50-00	1	757	0	5-33-45	5-37-20	3
2474	0	2-55-50	2-58-20	0	2472	1	5-42-20	5-43-30	0
2453	0	3-03-35	3-05-25	1	1125	0	5-44-25	5-46-15	0
2449	0	3-08-10	3-12-10	0	2448	0	5-49-40	5-50-35	2
2446	2	3-15-45	3-20-0	1	2462	1	5-53-50	5-54-25	0
2459	0	3-23-55	3-27-0	0	1123	0	5-58-40	6-00-20	0
1133	1	3-33-45	3-35-25	0	2444	0	6-01-25	6-04-15	4
2322	0	3-40-50	3-42-55	0					



Car Number	No. Pass.	Arrived	Depart.	No. Pass.	Car Number	No. Pass.	Arrived	Depart.	No. Pass.
2445			7-04-10	2	2443	0	9-30-18	9-35-00	1
1127	1	7-06-20	7-10-00	1	2465	0	9-38-00	9-42-00	1
1126	0	7-14-00	7-17-05	1	1123	0	9-45-05	9-50-00	0
2447	1	7-20-05	7-25-00	0	2448	2	9-54-00	9-56-50	1
2444	0	7-30-00	7-32-30	1	2449	0	10-01-00	10-05-30	0
1518	0	7-39-20	7-42-00	0	2442	0	10-07-40	10-12-00	0
2464	0	7-43-30	7-47-05	0	2450	1	10-18-15	10-20-00	1
1136	0	7-50-00	7-54-40	0	2451	0	10-24-00	10-27-20	0
1139	0	7-58-30	8-00-20	0	2453	0	10-29-00	10-34-10	2
1130	0	8-02-00	8-04-10	1	1127	0	10-40-05	10-41-50	0
1138	0	8-05-30	8-10-25	0	2473	1	10-45-30	10-49-20	0
2461	0	8-11-30	8-15-00	0	2447	0	10-54-50	10-56-00	0
1127	0	8-17-00	8-19-20	0	2459	0	11-01-05	11-05-15	0
1143	0	8-22-20	8-25-00	0	2472	0	11-09-10	11-12-50	0
2456	0	8-29-20	8-30-35	0	1126	0	11-16-10	11-19-40	0
1134	0	8-32-10	8-34-40	2	2465	1	11-24-35	11-27-00	0
1505	0	8-37-00	8-40-10	0	2444	2	11-30-10	11-35-00	0
2468	0	8-42-35	8-45-00	1	2448	0	11-41-30	11-43-30	0
1137	0	8-47-50	8-50-05	0	2443	0	11-46-40	11-50-00	1
1127	0	8-51-45	8-55-30	0	2442	1	11-58-00	11-59-00	0
1126	1	8-59-20	9-02-05	0	1123	0	12-01-50	12-06-00	1
2447	2	9-08-00	9-11-00	0	2451	0	12-07-05	12-15-50	1
2444	0	9-15-50	9-18-00	2	2449	0	12-14-50	12-21-00	0
2472	0	9-20-40	9-25-10	0	1227	1	12-24-35	12-28-40	3



#2.

Car Number	No. Pass.	Arrived	Depart.	No. Pass.	Car Number	No. Pass.	Arrived	Depart.	No. Pass.
2450	1	12-30-10	12-35-10	0	2459	0	3-31-10	3-35-00	2
2447	0	12-41-00	12-43-30	0	2474	0	3-38-20	3-42-00	0
2453	0	12-45-10	12-51-00	0	1126	0	3-45-30	3-50-00	0
2472	0	12-55-00	12-57-40	1	1144	0	3-56-00	3-57-20	2
2473	0	1-01-35	1-05-30	0	2444	0	4-00-20	4-04-40	1
2465	0	1-07-45	1-12-30	1	1138	1	4-10-30	4-12-45	1
2459	0	1-16-30	1-30-00	0	2467	0	4-15-00	4-20-30	2
2448	0	1-26-30	1-27-40	0	2472	0	4-25-30	4-27-50	0
1126	0	1-31-40	1-35-00	0	2446	0	4-30-00	4-35-40	0
2463	0	1-38-20	1-41-50	4	2465	3	4-38-40	4-42-10	4
2444	1	1-46-20	1-49-20	0	2461	0	4-48-10	4-49-00	0
2474	0	1-55-00	1-57-20	0	2448	0	4-54-20	4-52-00	0
2467	0	2-04-00	2-05-00	0	1128	1	5-02-00	5-05-00	2
1144	1	2-13-00	2-14-40	0	2463	0	5-10-10	5-12-40	0
2446	0	2-15-00	2-20-40	3	1140	0	5-18-40	5-21-10	1
1138	1	2-24-30	2-27-10	0	2453	0	5-25-10	5-29-20	4
1130	0	2-29-40	2-34-00	1					
2472	0	2-39-30	2-42-00	0					
1128	1	2-45-00	2-49-00	1					
2465	0	2-55-00	2-59-10	0					
1140	0	2-59-20	3-05-10	0					
2448	2	3-10-40	3-13-00	0					
2473	1	3-16-00	3-20-05	3					
2463	2	3-24-00	3-26-40	0					

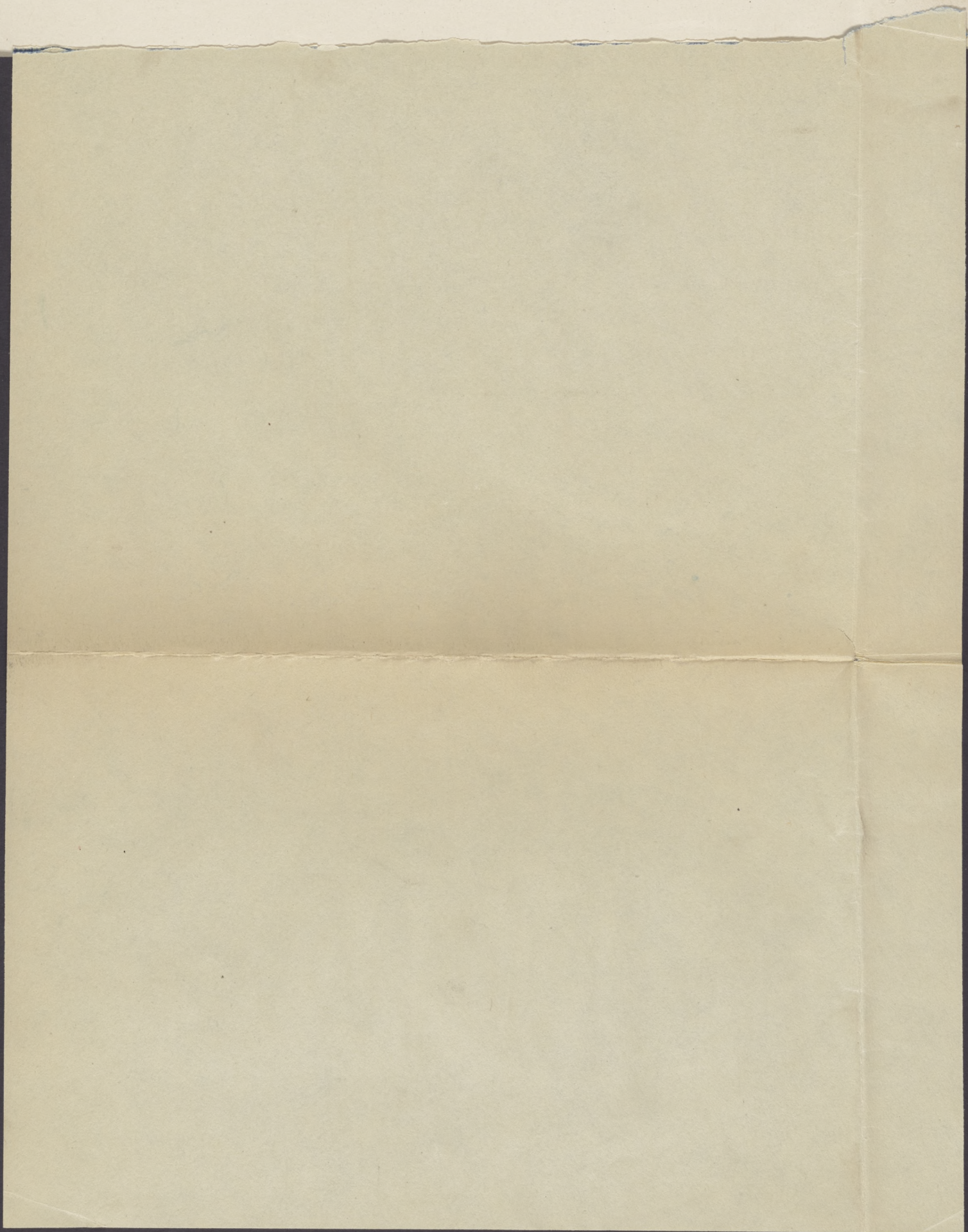
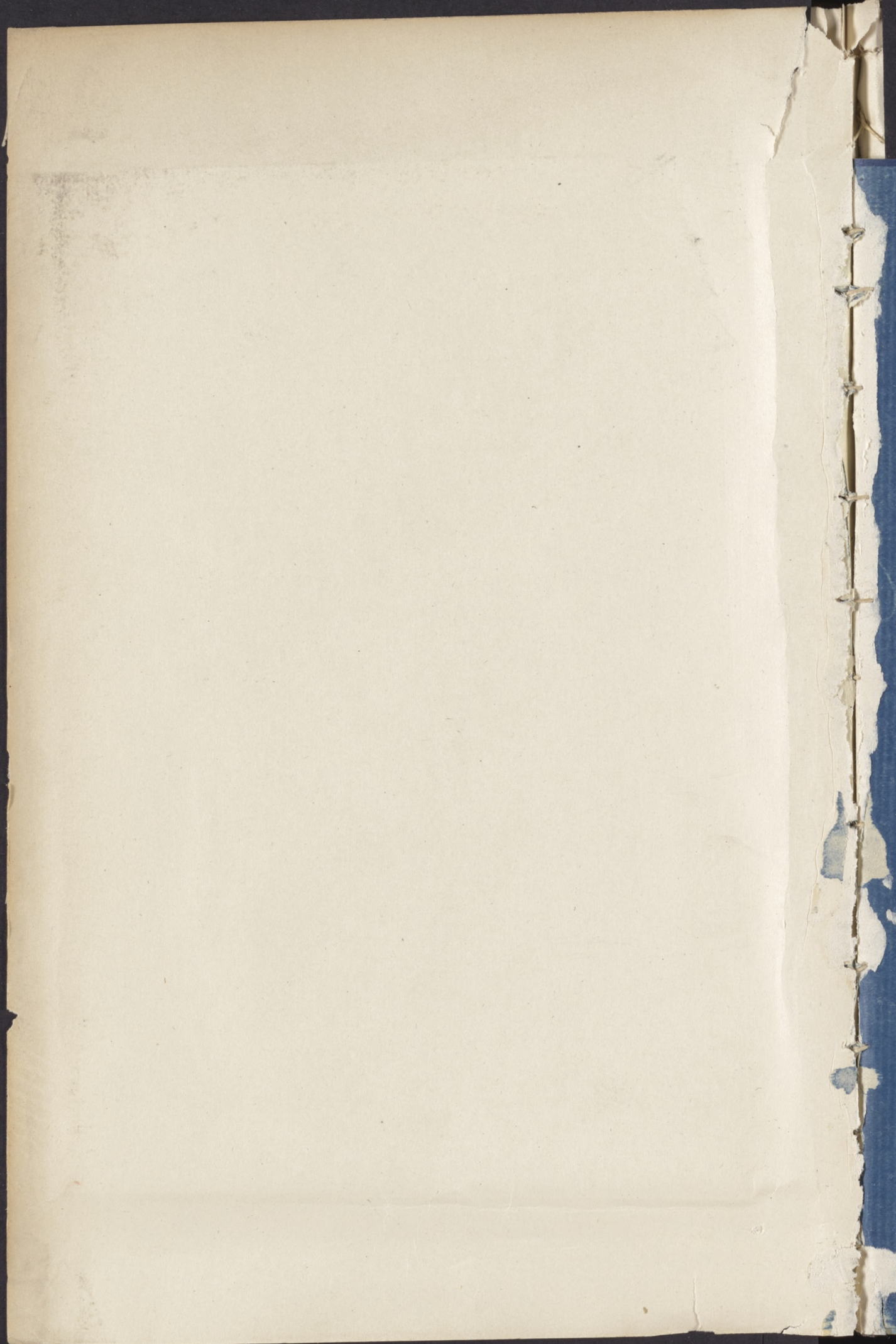


EXHIBIT 2.

Chart showing record of cars at Hamburg Place and Avenue L.

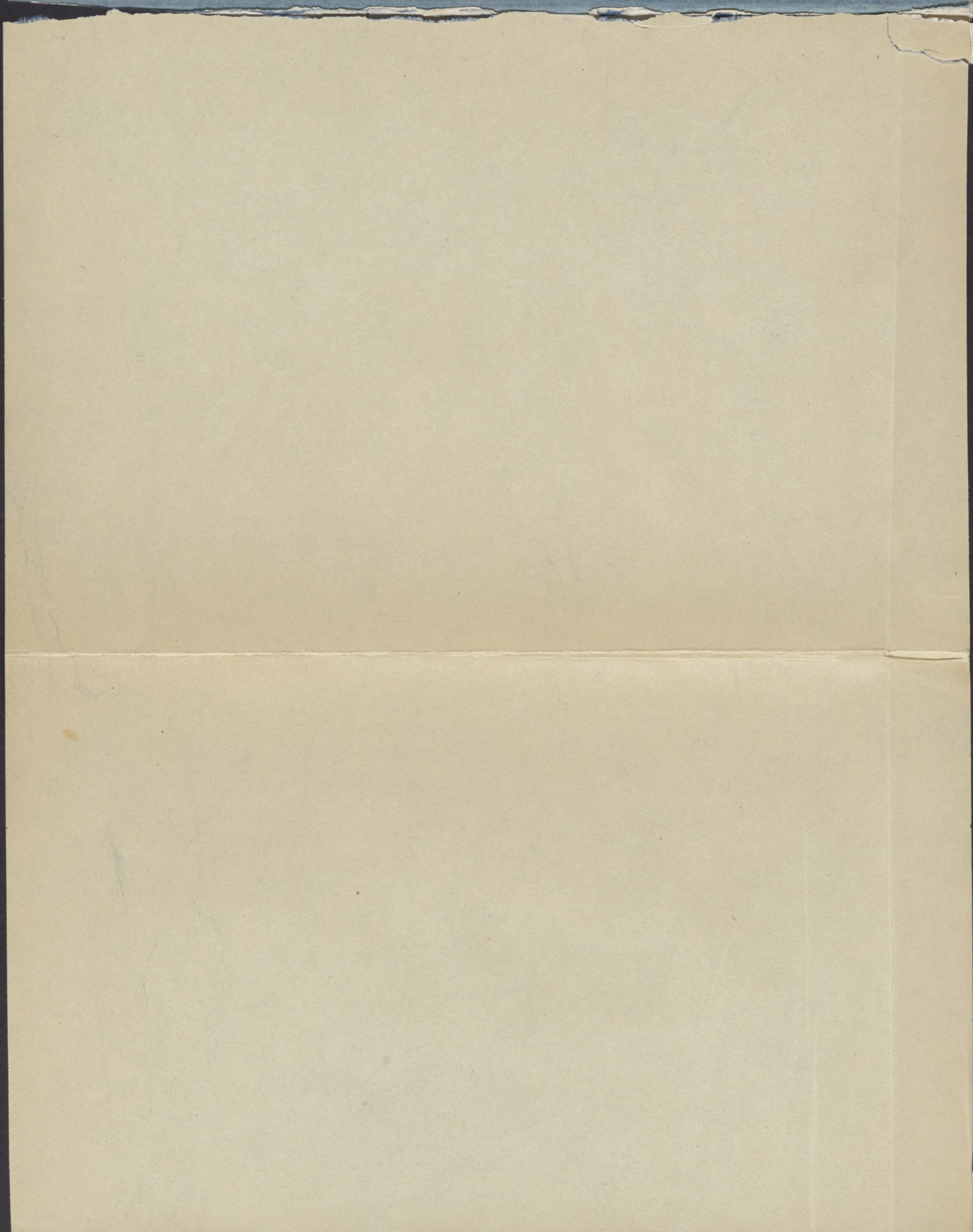


#1.

Nov. 28, '14.

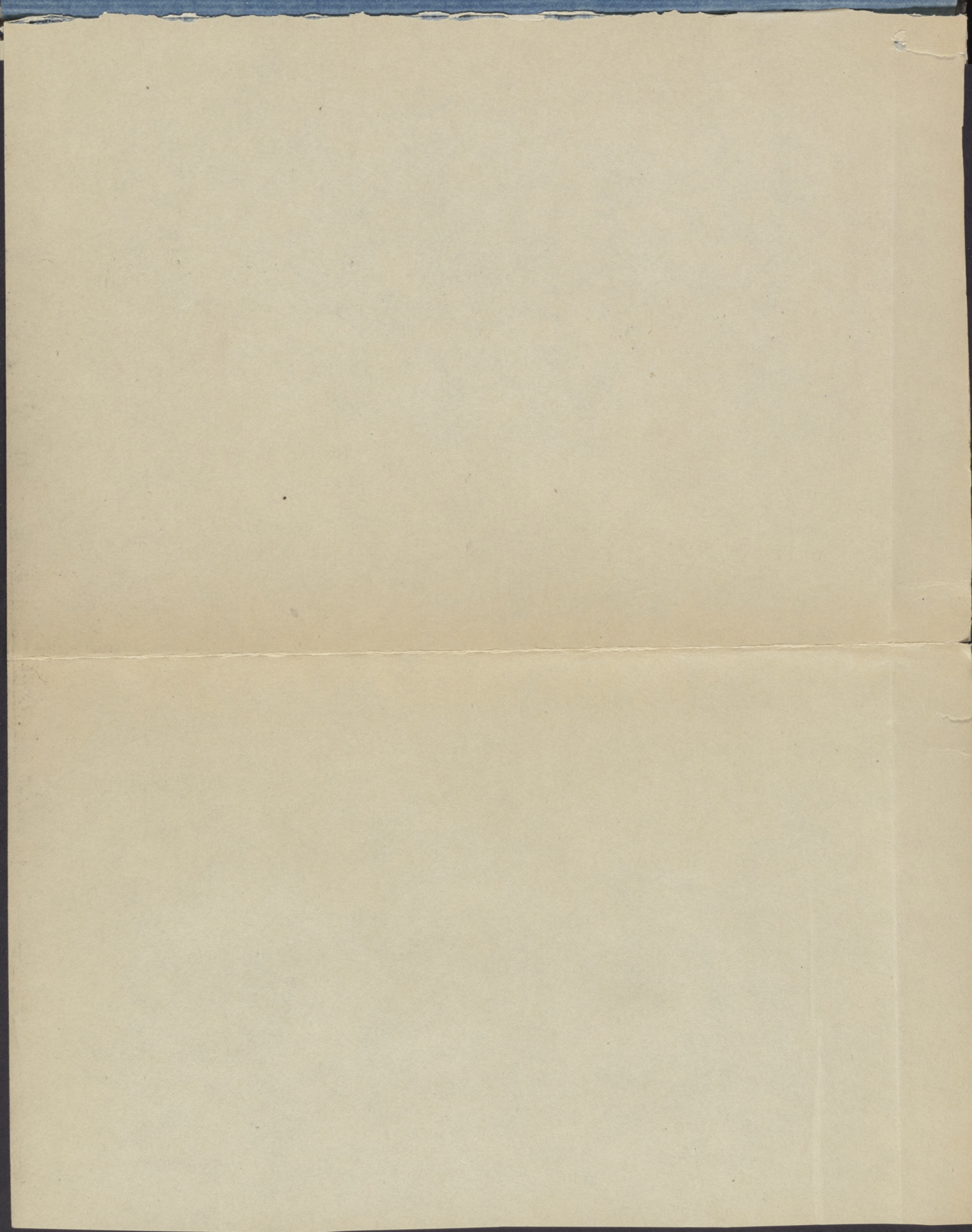
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Car Number	East or West	Arrived	Pass.	Pass. Disc'd	Car Number	East or West	Arrived	Pass.	Pass. Disc'd
	E				1185	E	7:05:54	4	0
	W				2462	W	7:10:28	15	0
2450	E	5-44-20	3	0	2457	E	7:11:58	3	0
1137	W	5-46-10	2	0	1185	W	7:17:11	1	0
2474	E	5-50-40	9	0	2454	E	7:20:26	2	0
2450	W	5-54-40	3	0	2457	W	7:24:39	12	0
1126	E	5-57-30	2	0	2465	E	7:26:22	4	0
2474	W	6-02-20	5	0	2454	W	7:31:09	6	0
1144	E	6-06-00	6	2	2475	E	7:32:30	5	0
1126	W	6-09-00	2	0	2465	W	7:36:40	0	6
2444	E	6-13-35	8	0	2448	E	7:44:20	2	0
1144	W	6-17-30	3	0	2475	W	7:46:45	10	0
1138	E	6-19-00	3	0	1126	E	7:48:55	2	0
2444	W	6-24-30	0	0	2448	W	7:54:32	1	0
1127	E	6-26-20	2	0	2458	E	7:57:55	3	1
1138	W	6-31-20	1	0	1126	W	8:01:50	2	0
2450	E	6-32-00	1	0	2461	E	8:03:05	6	0
1127	W	6-38-40	5	0	2458	W	8:09:55	3	0
2447	E	6-41-00	1	0	2445	E	8:12:10	2	0
2441	E	6-46-30	3	1	2461	W	8:16:40	1	0
2450	W	6-47-00	6	0	1144	E	8:21:10	5	0
2447	W	6:55:56	10	0	2445	W	8:24:15	1	0
2462	E	6:56:29	2	0	2444	E	8:24:20	1	0
2441	W	7:01:00	0	0	1144	W	8:31:45	3	0



Nov. 28, '14.

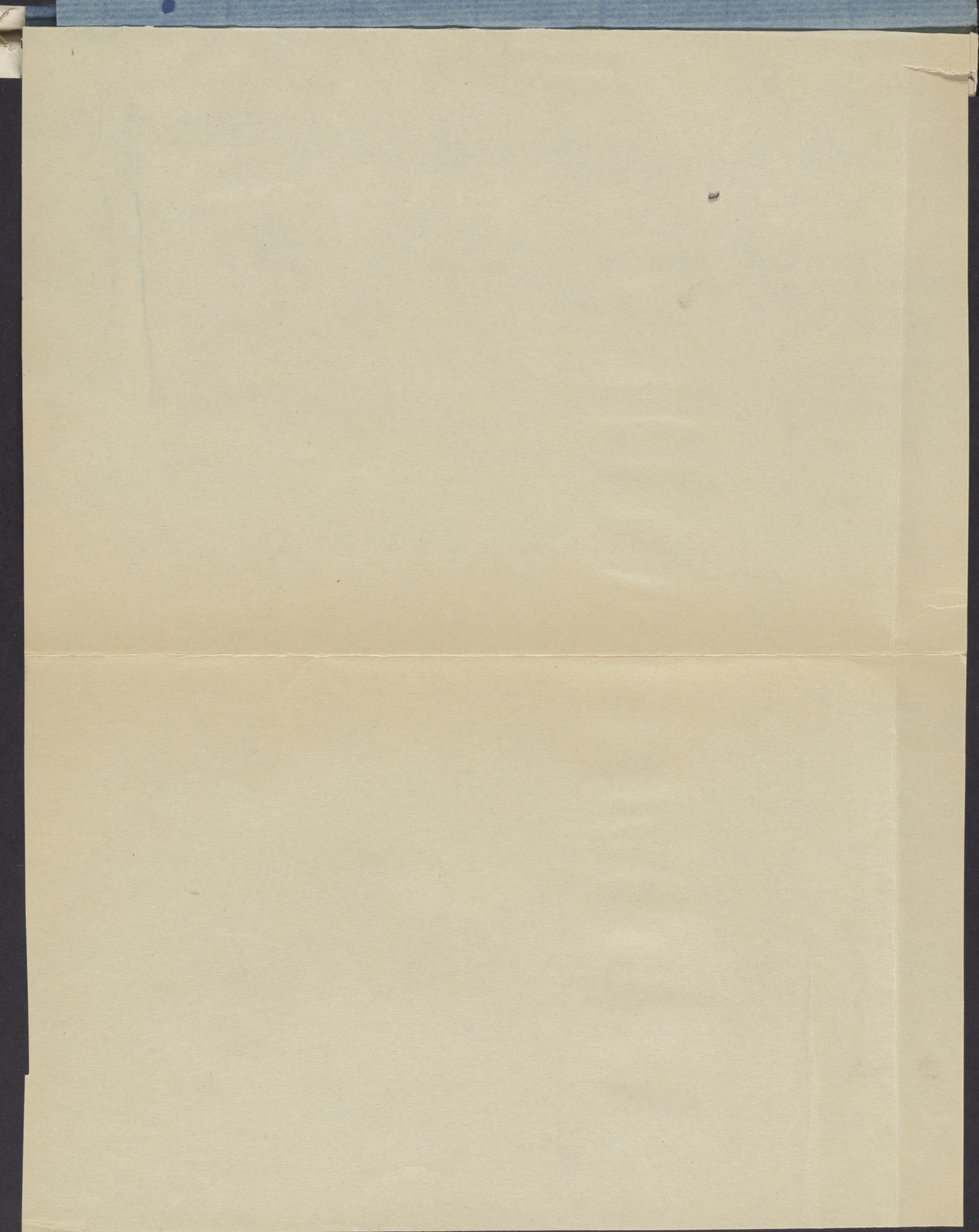
Car Number	EAST OR West	Arrived	No Passengers	No Passengers Discharged	Car Number	EAST OR West	Arrived	No Passengers	No Passengers Discharged
2441	E	8:35:05	1	0	2460	E	10:37:30	2	0
2444	W	8:41:25	2	0	2450	W	10:41:25	5	0
2457	E	8:47:55	3	0	2475	E	10:46:50	2	0
2441	W	8:50:00	1	0	2460	W	10:52:00	3	0
2447	E	8:52:15	4	3	2457	E	10:55:00	4	0
2457	W	9:01:00	0	0	2475	W	11:01:00	3	0
2454	E	9:09:00	5	0	2458	E	11:05:30	7	2
2447	W	9:11:40	3	0	2457	W	11:10:25	3	0
2322	E	9:16:40	5	0	2461	E	11:14:40	3	0
2454	W	9:21:25	3	1	2458	W	11:20:55	3	0
2463	E	9:24:00	3	0	2322	E	11:26:10	4	2
2322	W	9:30:35	2	0	2461	W	11:31:40	1	0
1126	E	9:36:05	1	0	2444	E	11:35:45	3	1
2463	W	9:40:30	3	0	2322	W	11:40:00	1	0
2472	E	9:46:55	3	0	2441	E	11:44:10	7	0
1126	W	9:50:50	1	0	2444	W	11:48:15	6	0
2456	E	9:57:40	2	0	2441	W	11:58:00	1	0
2472	W	10:00:50	1	0	2472	E	11:59:30	0	0
2446	E	10:05:30	7	1	2472	W	12:07:05	0	0
2456	W	10:11:30	0	0	2464	E	12:10:00	3	1
2452	E	10:13:10	2	0	1264	W	12:23:30	2	0
2446	W	10:24:35	4	0	2454	E	12:27:00	5	0
2450	E	10:27:10	0	0	2454	W	12:40:00	0	0
2452	W	10:31:45	0	0	1127	E	12:50:05	1	0



#3

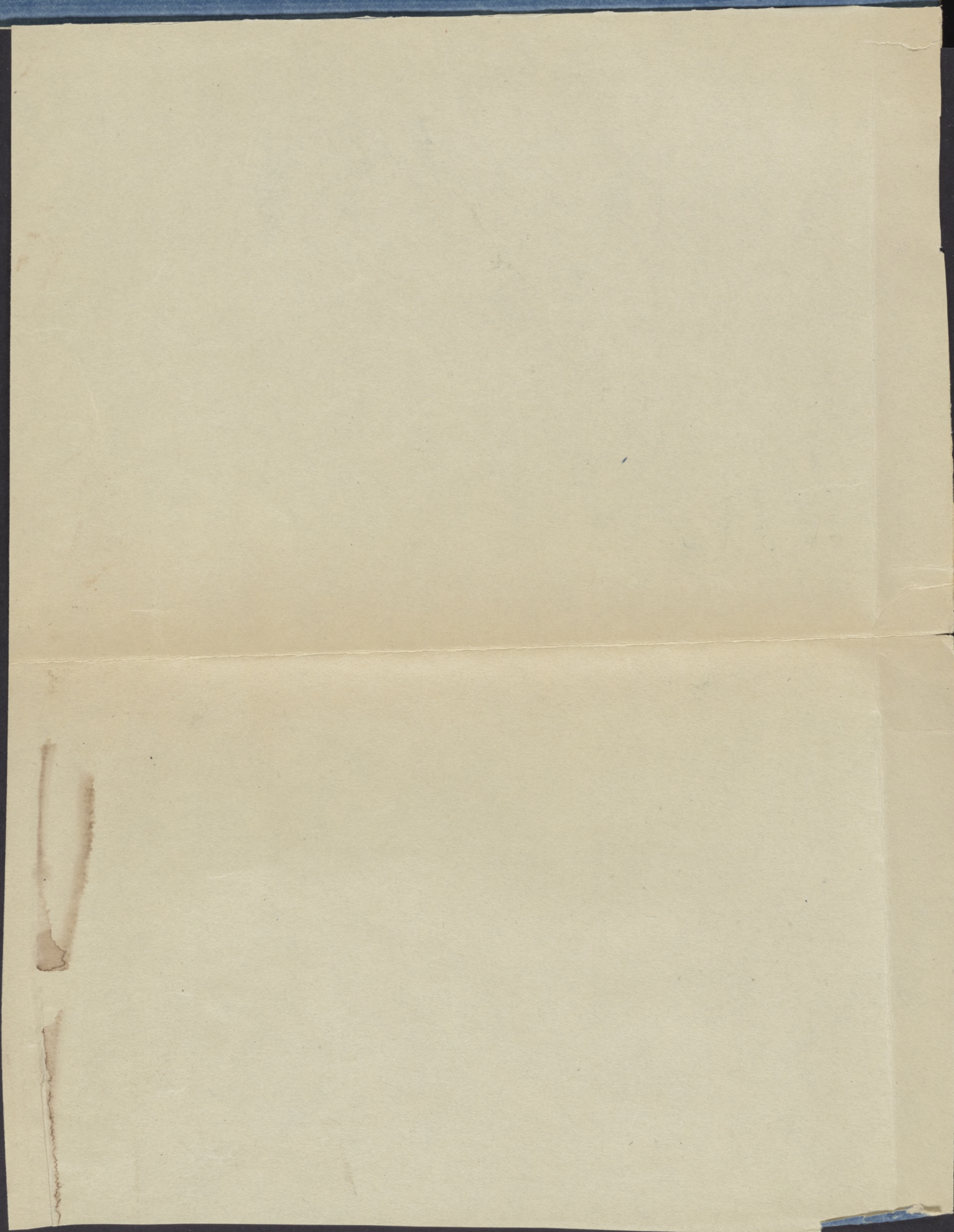
Nov. 28, '14.

Car Number	East or West	Arrived	No Passengers	No Passengers Discl'd
1127	W	12:59:10	0	0
2461	E	1:22:30	11	0
2455	E	1:42:50	10	0
2447	E	2:05:40	3	0
2457	E	2:44:30	4	0
2447	E	3:24:00	3	0
2457	E	4:03:10	0	0
2461	E	4:42:52	3	2
2463	E	5:23:20	0	0
2442	E	6:05:30	6	6
2442	W	6:15:00	0	0
2461	E	6:23:00	4	4
2461	W	6:35:00	0	0
2466	E	6:38:00	7	7
2464	W	6:50:00	5	0
2463	E	6:55:20	3	3

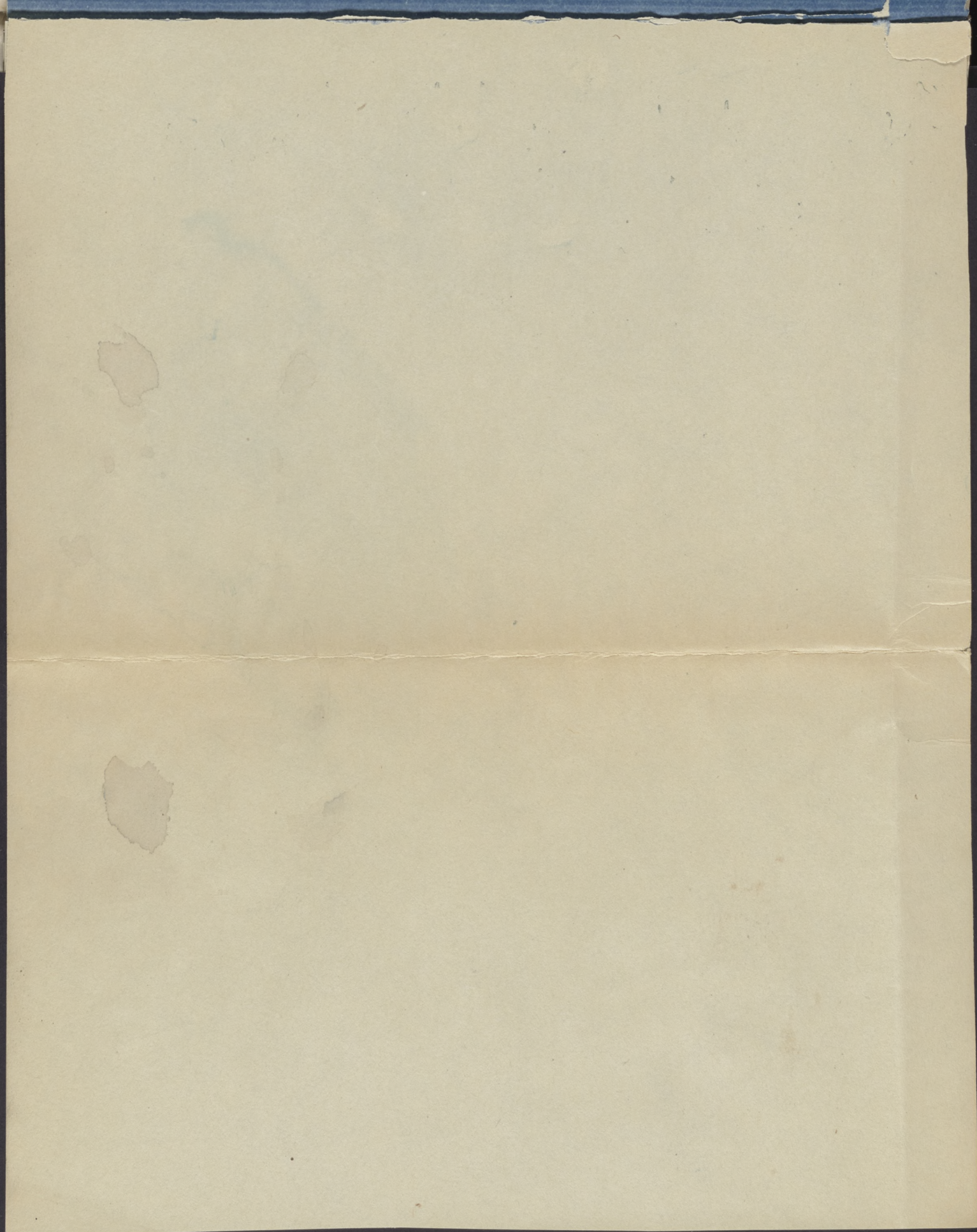


#1
Nov. 28, '19.

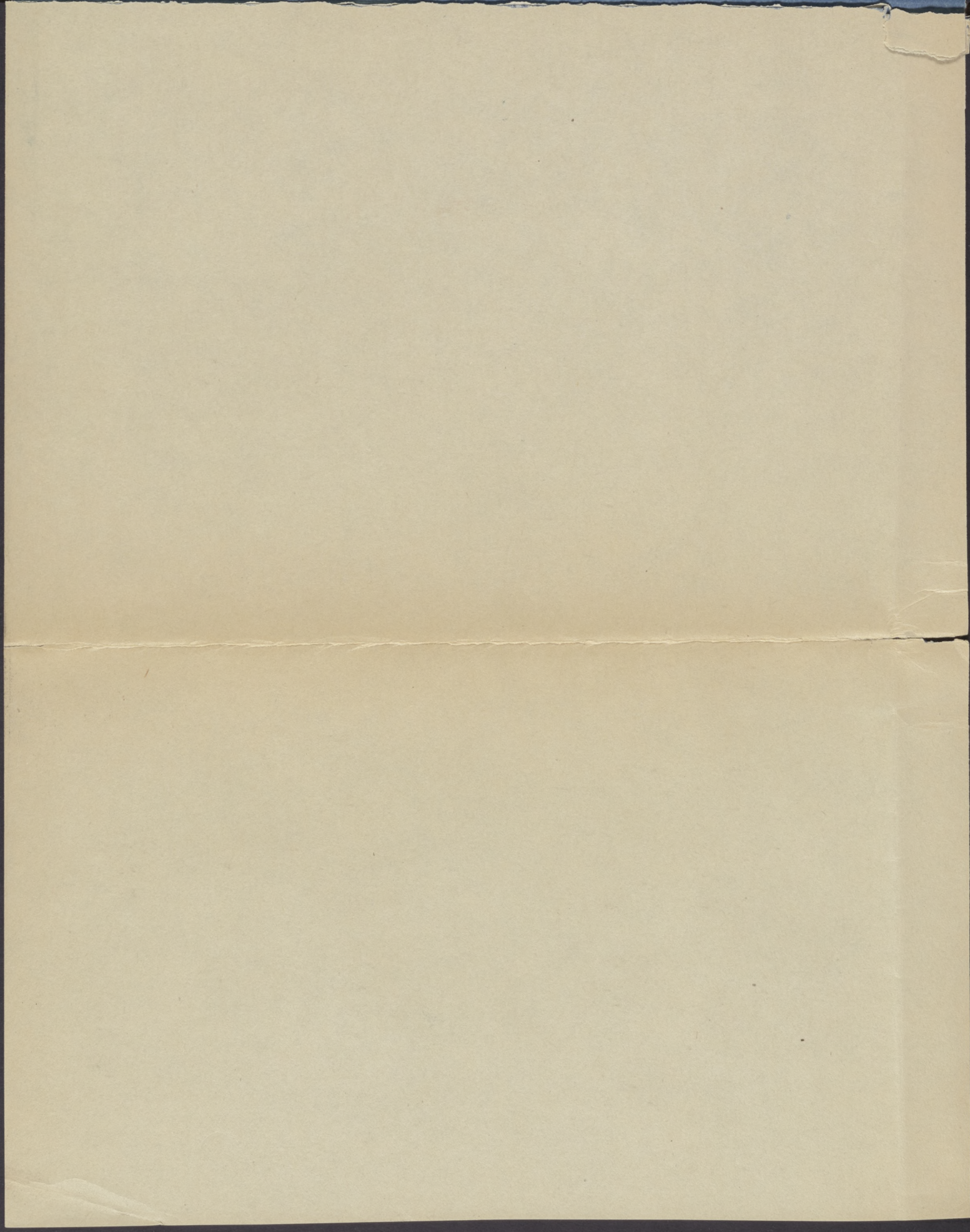
Car Number	East or West	Arrived	No Passengers	No Passengers Disc'd	Car Number	East or West	Arrived	No Passengers	No Passengers Disc'd
2452	W	8:00:00	2	0	2452	W	8:00:30	6	—
2473	E	6:32:10	—	—	2473	E	8:01:10	2	—
2466	W	6:36:55	1	—	2466	W	8:07:00	2	—
2454	E	6:39:30	4	—	2454	E	8:08:10	2	—
2473	W	6:43:40	1	—	2473	W	8:14:25	3	—
2458	E	6:46:35	—	—	2458	E	8:15:30	4	1
2454	W	6:51:45	4	—	2454	W	8:23:35	4	—
2453	E	6:54:20	6	—	2453	E	8:25:25	3	—
2458	W	6:59:25	—	—	2458	W	8:29:05	5	—
2459	E	7:01:55	4	1	2459	E	8:31:10	4	—
2453	W	7:07:00	3	—	2453	W	8:36:45	—	—
2472	E	7:09:10	6	—	2472	E	8:39:20	4	—
2459	W	7:14:20	5	—	2459	W	8:45:00	8	—
2456	E	7:16:00	—	—	2456	E	8:45:00	2	—
2472	W	7:22:30	4	—	2472	W	8:52:50	5	—
2442	E	7:24:30	3	—	2442	E	8:54:00	4	—
2456	W	7:29:25	7	—	2456	W	8:58:40	2	—
2462	E	7:33:00	5	—	2462	E	9:02:00	1	—
2442	W	7:37:50	2	—	2442	W	9:07:10	—	—
2461	E	7:43:45	7	—	2461	E	9:09:15	1	—
2462	W	7:44:35	5	—	2462	W	9:13:40	2	—
2452	E	7:47:15	—	—	2452	E	9:17:30	2	—
2461	W	7:52:00	—	—	2461	W	9:22:30	6	—
2466	E	7:53:20	1	—	2466	E	9:24:00	7	—



Car Number	East or West	Arrived	No. Passengers	No. Messengers Disc'd	Car Number	East or West	Arrived	No. Passengers	No. Messengers Disc'd
2452	W	9:00:00	13	-	2473	W	11:12:00	2	-
2473	E	9:32:20	3	-	2465	E	11:14:00	-	-
2466	W	9:37:00	1	-	2457	E	11:22:40	2	2
2454	E	9:42:00	-	-	2465	W	11:28:00	2	-
2473	W	9:44:50	4	-	2457	✓	11:23:40	5	-
2458	E	9:46:00	-	-	2453	E	11:34:00	2	1
2453	E	9:51:35	4	-	2453	W	11:45:15	-	-
2454	W	9:52:45	11	-	2449	E	11:52:00	5	-
2458	W	9:59:50	3	-	2449	W	12:02:00	-	-
2453	W	10:03:30	2	-	2459	E	12:11:50	7	1
2459	E	10:04:00	3	-	2459	W	12:19:00	4	-
2459	W	12:12:10	1	-	2456	E	12:25:30	2	-
2449	E	10:14:40	5	-	2456	E	12:38:00	2	-
2449	W	10:25:20	17	-	2452	E	12:51:50	2	-
2460	E	10:28:10	1	-	2452	W	1:00:00	2	-
2462	E	10:32:50	1	-	2458	E	1:24:25	2	-
2460	W	10:34:45	3	-	2453	E	1:45:00	3	-
2462	W	10:42:30	6	-	2459	E	2:05:35	7	-
2475	E	10:45:00	3	-	2452	E	2:46:40	2	-
2475	W	10:53:20	2	-	2459	E	3:26:00	3	-
2322	E	10:54:00	4	-	2452	E	4:06:40	6	-
2473	E	10:03:00	4	-	2459	E	4:46:05	3	-
2322	W	10:03:00	5	-	2452	E	5:26:20	6	-



Car Number	East or West	ARRIVED	No. PASSENGERS	No. PASSENGERS DIED	Car Number	East or West	ARRIVED	No. PASSENGERS	No. PASSENGERS DISCD
2458	E	5:41:35	2	2	2456	W	7:12:33	5	0
2458	W	5:51:20	5	-					
2465	E	5:58:00	5	3					
2443	E	6:00:30	2	-					
2465	W	6:05:00	5	-					
2462	E	6:06:30	3	1					
2443	W	6:12:00	5	-					
1127	E	6:16:00	5	2					
1144	W	6:17:00	7	7					
2462	W	6:17:40	7	-					
1137	W	6:25:00	10	-					
2475	E	6:28:20	16	15					
1144	W	6:31:10	6	-					
2163	E	6:35:40	39	28					
2475	W	6:39:20	0	0					
1126	E	6:42:30	22	14					
2403	W	6:45:20	4	0					
1136	E	6:49:40	33	25					
1126	W	6:54:30	3	0					
1505	E	6:57:40	26	21					
1136	W	6:58:30	1	0					
2456	E	7:00:00	19	17					
1505	W	7:07:32	8	0					
2455	E	7:10:20	16	13					

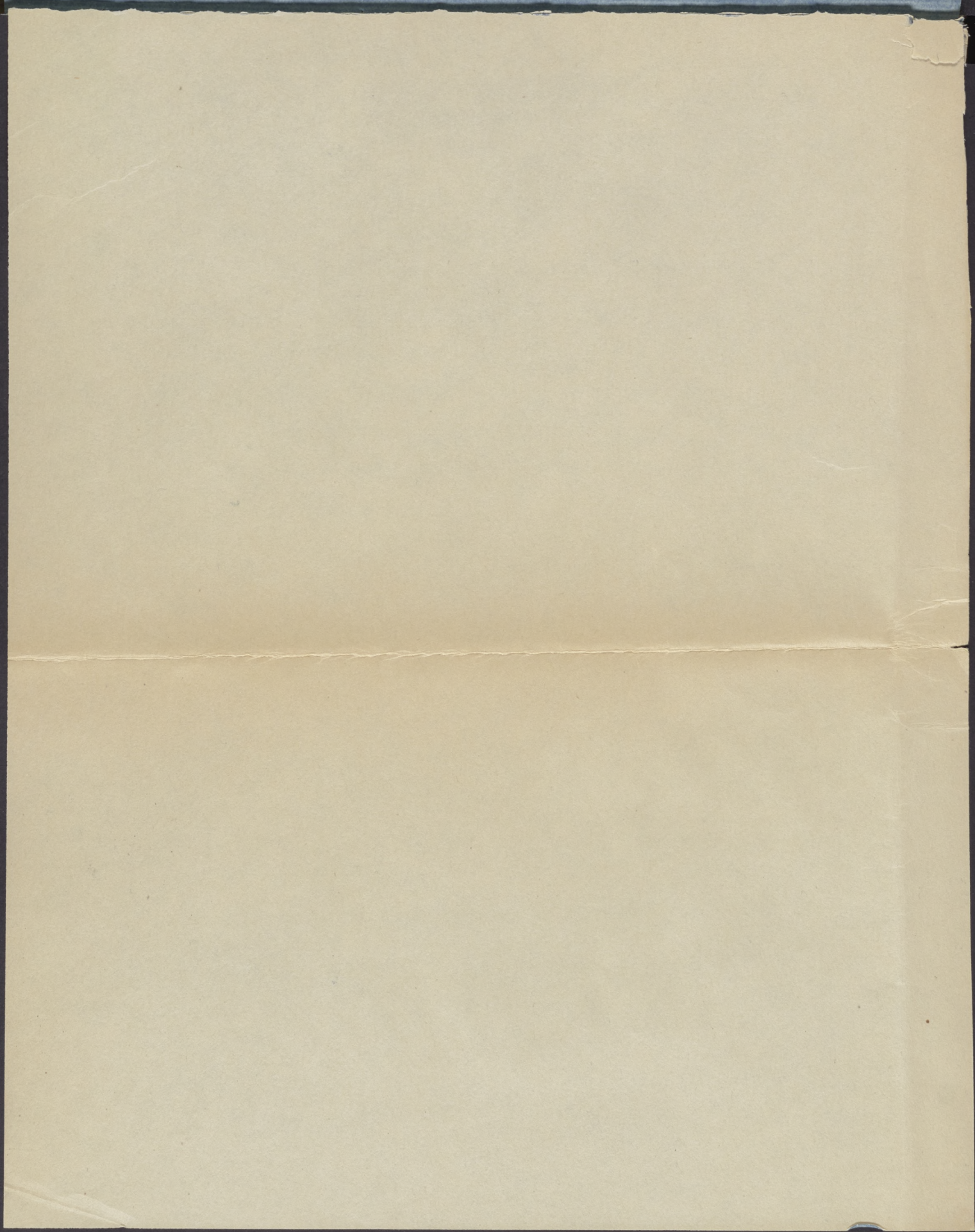


Data taken Hamburg Place and Ave. "L" from 7 P.M. Nov. 27, '14

to 7 A.M. Nov. 28, '14.

Sheet "A"

Car Number	East or West	ARRIVED	No. PASSENGERS	No. PASSENGERS BUS CO.	Car Number	East or West	ARRIVED	No. PASSENGERS	No. PASSENGERS BUS CO.
2442	E	7:00:00	2		2466	E	8:30:00	2	
2450	W	7:06:00	5		1136	W	8:36:00		
1127	E	7:08:00	4		2460	E	8:42:00	2	
2442	W	7:12:30	6		2466	W	8:44:00	2	
1185	E	7:16:00	2	1	2463	E	8:52:00	4	
1127	W	7:21:00	4		2460	W	8:56:32	4	
1134	E	7:24:00	1		2451	E	8:59:00	1	
1185	W	7:28:15	2		2463	W	9:05:00	3	
2452	E	7:31:32			2461	E	9:12:16	3	1
1134	W	7:36:30	2		2451	W	9:16:00	1	
2443	E	7:38:00	5	1	2473	E	9:20:00	3	
2452	W	7:43:00	1		2461	W	9:26:00	2	
2447	E	7:48:00	4	1	1140	E	9:30:00	3	2
2443	W	7:51:22			2473	W	9:35:00	1	
1505	E	7:54:20	1		2441	E	9:42:36	2	
2447	W	7:59:00	1		1140	W	9:46:30	4	
1140	E	8:01:00	1		2444	E	9:51:00	3	
1505	W	8:08:00	6		2441	W	9:56:32	2	
2453	E	8:10:00	1		2466	E	10:02:00		
1140	W	8:13:00	1		2444	W	10:06:00	2	
1137	E	8:15:00			2468	E	10:10:00	1	
2453	W	8:21:00			2466	W	10:16:00	4	
1136	E	8:23:00	2	1	2467	E	10:21:00	2	
1137	W	8:28:20	1		2468	W	10:27:00		



Nov. 27, 14. - Nov. 28, 14.

Car No.	East or West	Arrived	No. Passes	No. Passes	Car No.	East or West	Arrived	No. Passes	No. Passes
1119	E	10:30	3		2451	E	2:43:33	-	-
2467	W	10:36:14			2467	E	3:22:31	4	
2444	E	10:40	2		2451	E	4:02	3	
1119	W	10:46	1		2467	E	4:42	1	
2447	E	10:50	2	1	2451	E	5:26	4	
2442	W	10:56:50			1130	E	5:40	5	4
2448	E	11:00:00	1		2450	E	5:50	4	2
2447	W	11:08			1130	W	5:55	7	
2451	E	11:15	10		1122	E	6:00	6	1
2448	W	11:17			2450	W	6:04	2	
2455	E	11:30	4	2	1139	E	6:13	7	3
2451	W	11:30	3		1122	W	6:17	9	
1140	E	11:42	3	1	1138	E	6:17	6	6
2455	W	11:46	3		1139	W	6:25	12	
1140	W	11:58 A.M.	1		2448	E	6:28	24	18
2467	E	12:03	2		1138	W	6:35	54	
2467	W	12:15			1143	E	6:35	24	22
2450	E	12:22			2442	E	6:40	30	5
2450	W	12:36	1		2448	W	6:40	0	6
1119	E	12:49	2		1505	W	6:47	2	0
1119	W	12:56	1		1143	E	6:48	14	4
2451	E	1:25	3		2442	W	6:54	0	0
1140	E	1:41:28			2445	E	6:55	6	18
2467	E	2:02	7		1505	W	7:01	2	0

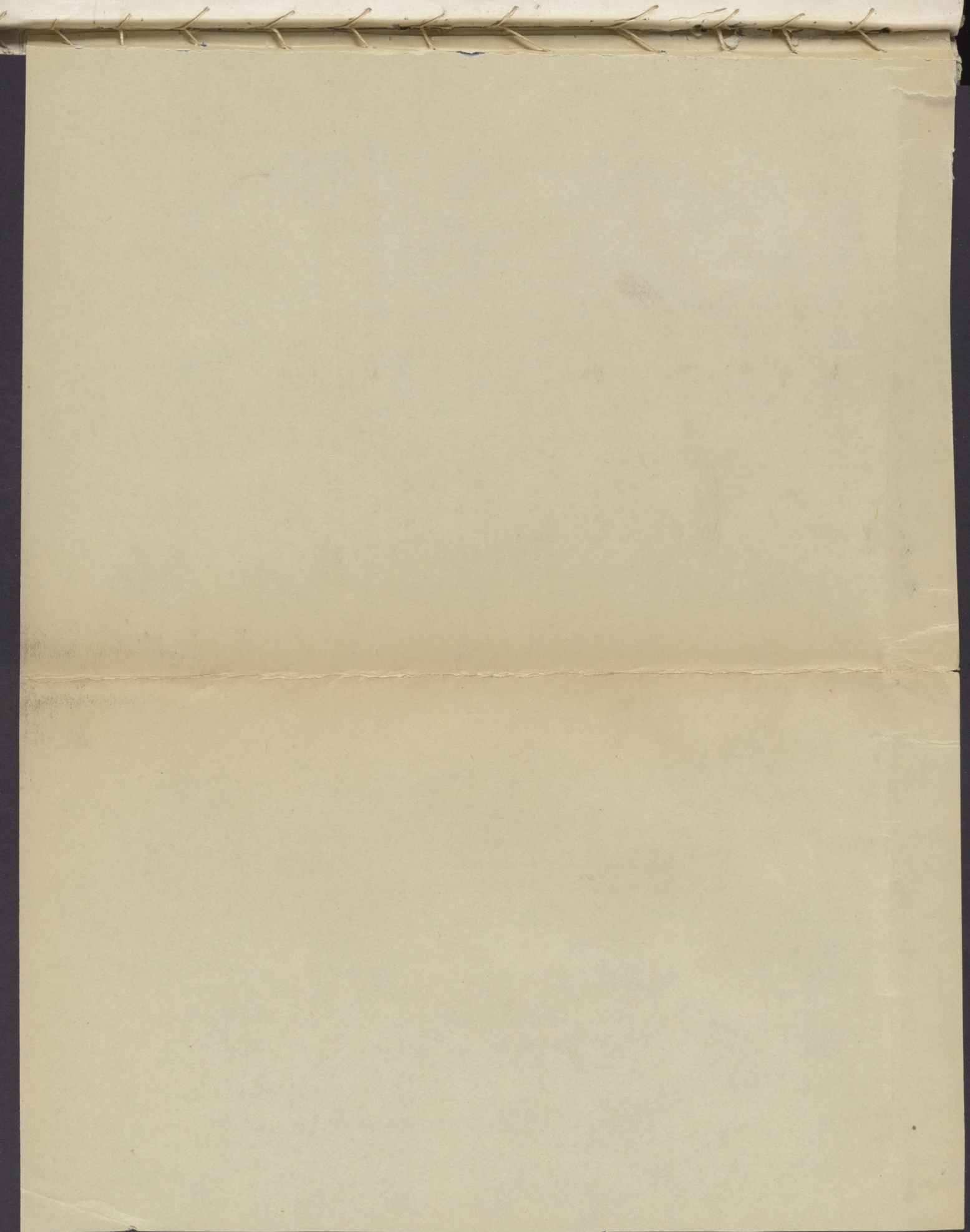
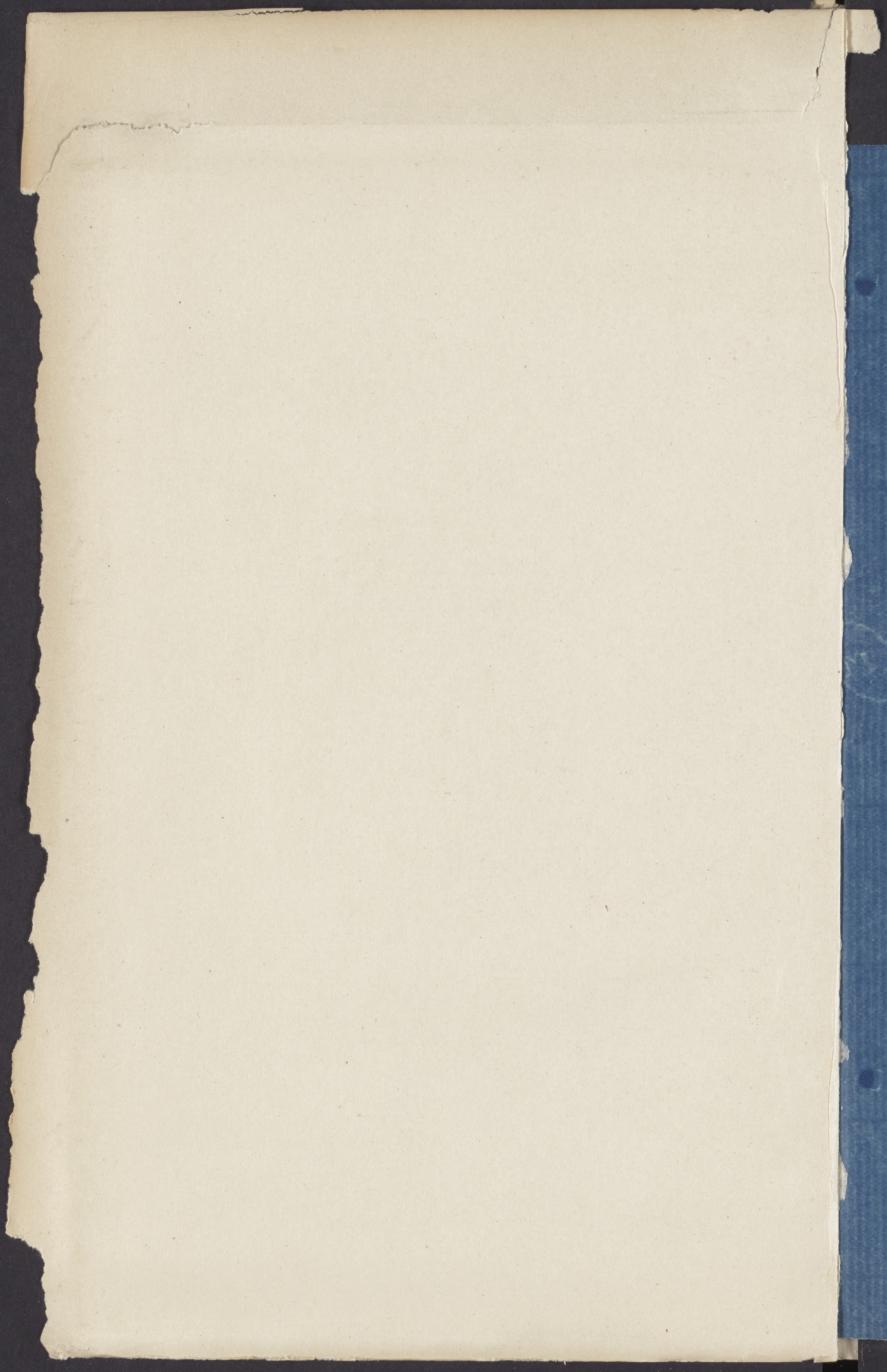


EXHIBIT 3.

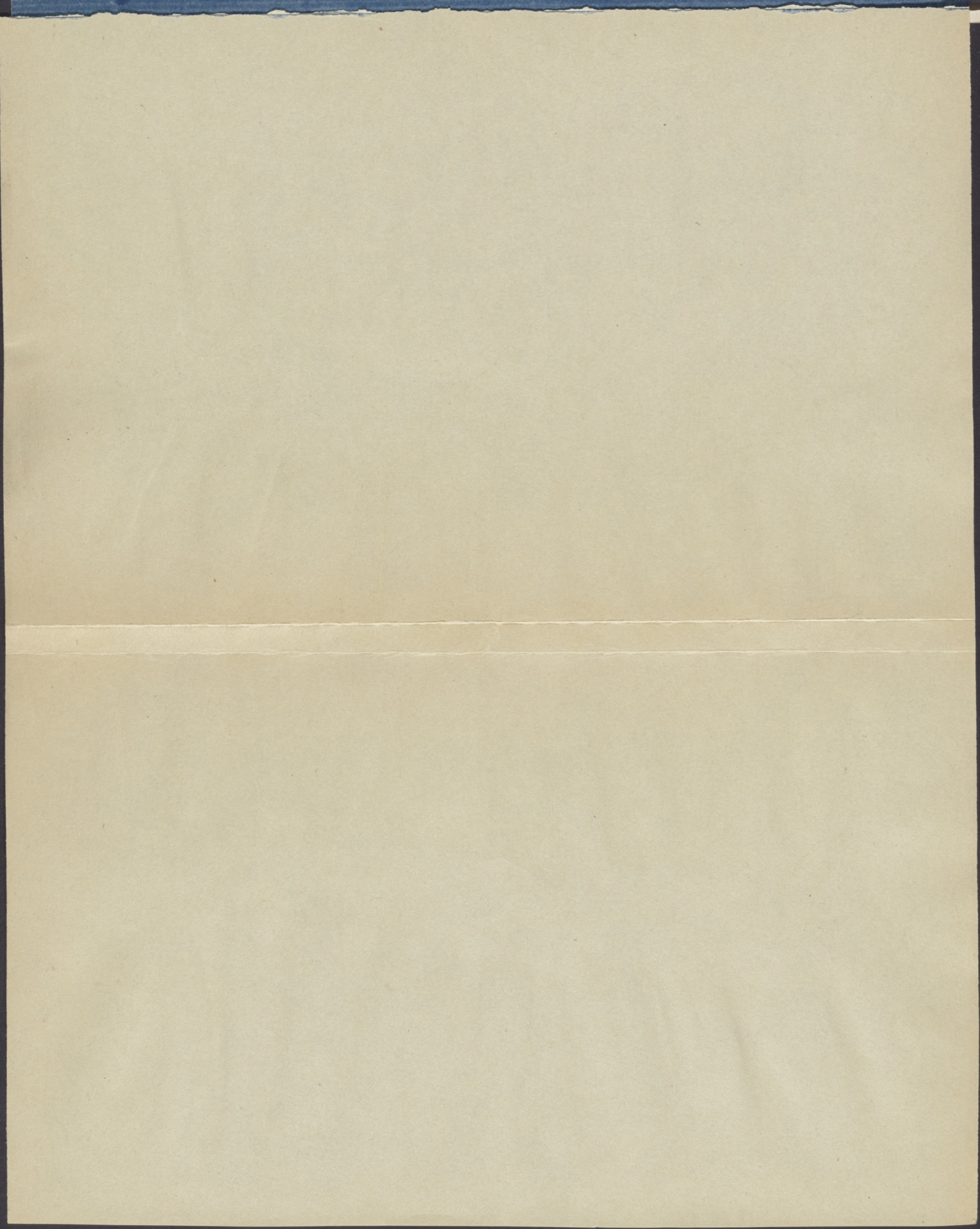
Chart showing record of cars at Hamburg Place and Avenue L.



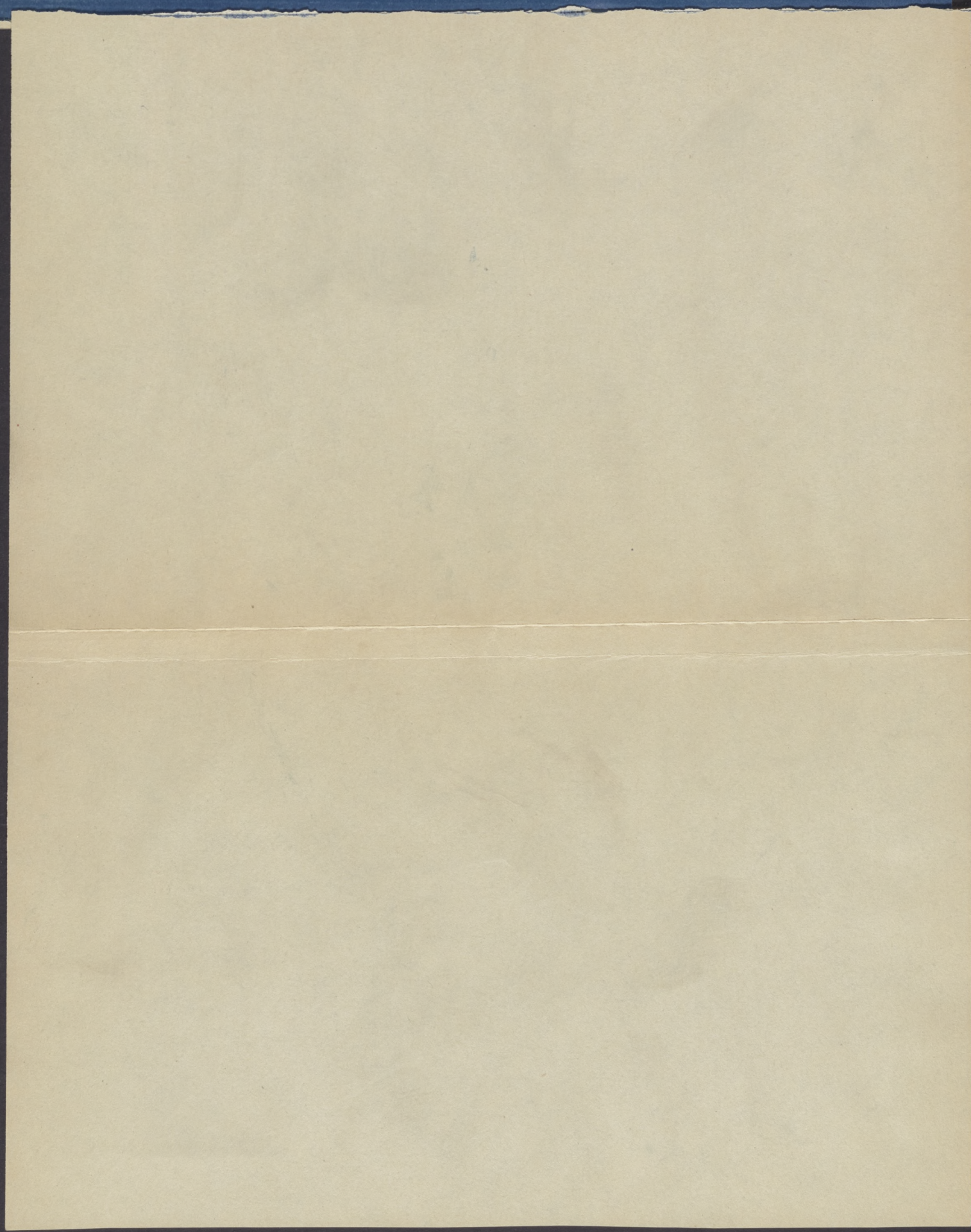
November 29, 14.

Car No.	East or West	Arrived	No. Pass.	No. Pass. Diab.	Car No.	East or West	Arrived	No. Pass.	No. Pass. Diab.
2463	W	7:06:20	1	-	2464	E	9:56:10	3	3
2473	E	7:12:30	11	10	2464	W	10:12:10	11	-
2473	W	7:21:20	1	-	2465	E	10:13:25	5	2
2454	E	7:21:35	4	1	2466	E	10:20:30	1	-
2454	W	7:37:00	5	-	2465	W	10:21:31	9	-
2453	E	7:40:00	6	5	2466	W	10:31:20	1	-
2453	W	7:50:20	-	-	2457	E	10:32:20	2	-
2460	E	7:56:30	1	1	2468	E	10:39:40	12	2
2460	W	8:06:00	1	-	2457	W	10:42:20	6	-
2442	E	8:11:20	4	4	2468	W	10:51:00	5	-
2442	W	8:19:00	-	-	2449	E	10:51:10	4	1
2461	E	8:23:30	5	4	2444	E	11:00:10	3	1
2461	W	8:35:20	5	1	2449	W	11:00:30	3	-
2466	E	8:42:10	3	1	2444	W	11:11:05	1	-
2466	W	8:49:10	4	-	2454	E	11:14:41	1	-
2463	E	8:53:10	4	2	2475	E	11:19:10	-	-
2463	W	9:04:10	2	-	2454	W	11:22:12	4	-
2449	E	9:08:50	1	1	2475	W	11:29:40	1	-
2449	W	9:20:35	8	-	2322	E	11:32:50	2	-
2443	E	9:25:30	5	4	2472	E	11:39:00	3	-
2443	W	9:35:25	3	-	2322	W	11:40:40	-	-
2475	E	9:39:00	3	1	2465	E	11:50:35	1	1
2475	W	9:50:30	3	-	2472	W	11:51:30	10	-

Inspector



Car No.	East or West	Arrived	No. Pass Disc'd	No. Pass Disc'd	Car No.	East or West	Arrived	No. Pass Disc'd	No. Pass Disc'd
2457	E	11:59:40	2	-	2456	W	1:28:06	6	
2465	W	12:00:55	4	-	2462	E	1:30:10	-	-
2461	E	12:10:40	2	-	2442	W	1:35:20	-	-
2457	W	12:11:00	2	-	2461	E	1:38:05	-	-
2461	W	12:20:50	2	-	2462	W	1:42:20	3	-
2468	E	12:21:10	-	-	2452	E	1:44:12	1	-
2473	E	12:28:40	16	-	2461	W	1:50:40	9	-
2468	W	12:31:00	3	-	2466	E	1:55:55	9	2
2454	E	12:37:50	7	2	2452	W	1:57:25	3	-
2473	W	12:42:10	1	-	2473	E	1:58:00	-	-
2458	E	12:46:30	1	-	2466	W	2:05:25	8	-
2454	W	12:50:15	1	-	2454	E	2:07:15	2	1
2453	E	12:50:25	1	-	2473	W	2:13:10	3	-
2458	W	12:58:55	3	-	2458	E	2:17:00	3	-
2459	E	1:00:30	-	-	2454	W	2:21:00	10	-
2453	W	1:06:30	-	-	2453	E	2:26:20	1	-
2472	E	1:07:10	3	1	2458	W	2:26:40	1	-
2444	E	1:08:30	-	-	2459	E	2:30:35	1	-
2459	W	1:12:35	1	-	2457	W	2:37:00	11	-
2456	E	1:16:15	7	-	2472	E	2:38:05	2	-
2472	W	1:20:20	4	-	2459	W	2:42:45	1	-
2442	E	1:21:50	-	-	2456	E	2:44:00	3	-



#3.

November, 28, '14.

Car No.	East or West	Arrived	No. Pass.	No. Pass. Disc'd	Car No.	East or West	Arrived	No. Pass.	No. Pass. Disc'd
2472	W	2:51:00	5	-	2459	W	4:11:50	5	-
2442	E	2:57:45	3	1	2456	E	4:17:10	3	-
2456	W	2:58:40	8	-	2472	W	4:20:50	2	-
2462	E	3:00:40	2	-	2442	E	4:23:30	3	-
2442	W	3:05:40	1	-	2456	W	4:27:30	3	-
2461	E	3:08:00	9	-	2462	E	4:31:05	3	-
2462	W	3:12:30	5	3	2442	W	4:36:00	2	-
2452	E	3:16:20	11	3	2461	E	4:40:10	9	1
2461	W	3:20:00	6	-	2462	W	4:43:10	6	-
2466	E	3:26:00	-	-	2452	E	4:47:00	15	1
2452	W	3:27:50	3	-	2461	W	4:51:00	7	-
2473	E	3:30:00	1	-	2466	E	4:56:10	14	2
2466	W	3:35:35	4	-	2452	W	4:58:05	5	-
2454	E	3:41:20	5	-	2473	E	5:03:10	10	1
2473	W	3:42:30	1	-	2466	W	5:06:00	3	2
2458	E	3:44:20	5	-	2454	E	5:10:10	4	1
2454	W	3:49:25	1	-	2473	W	5:11:45	1	-
2453	E	3:54:00	10	3	2458	E	5:17:30	7	-
2458	W	3:57:15	-	-	2454	W	5:20:00	7	-
2459	E	4:01:10	4	-	2453	E	5:24:20	9	-
2453	W	4:05:00	3	-	2458	W	5:27:50	8	-
2472	E	4:09:50	7	-	2459	E	5:31:30	1	1

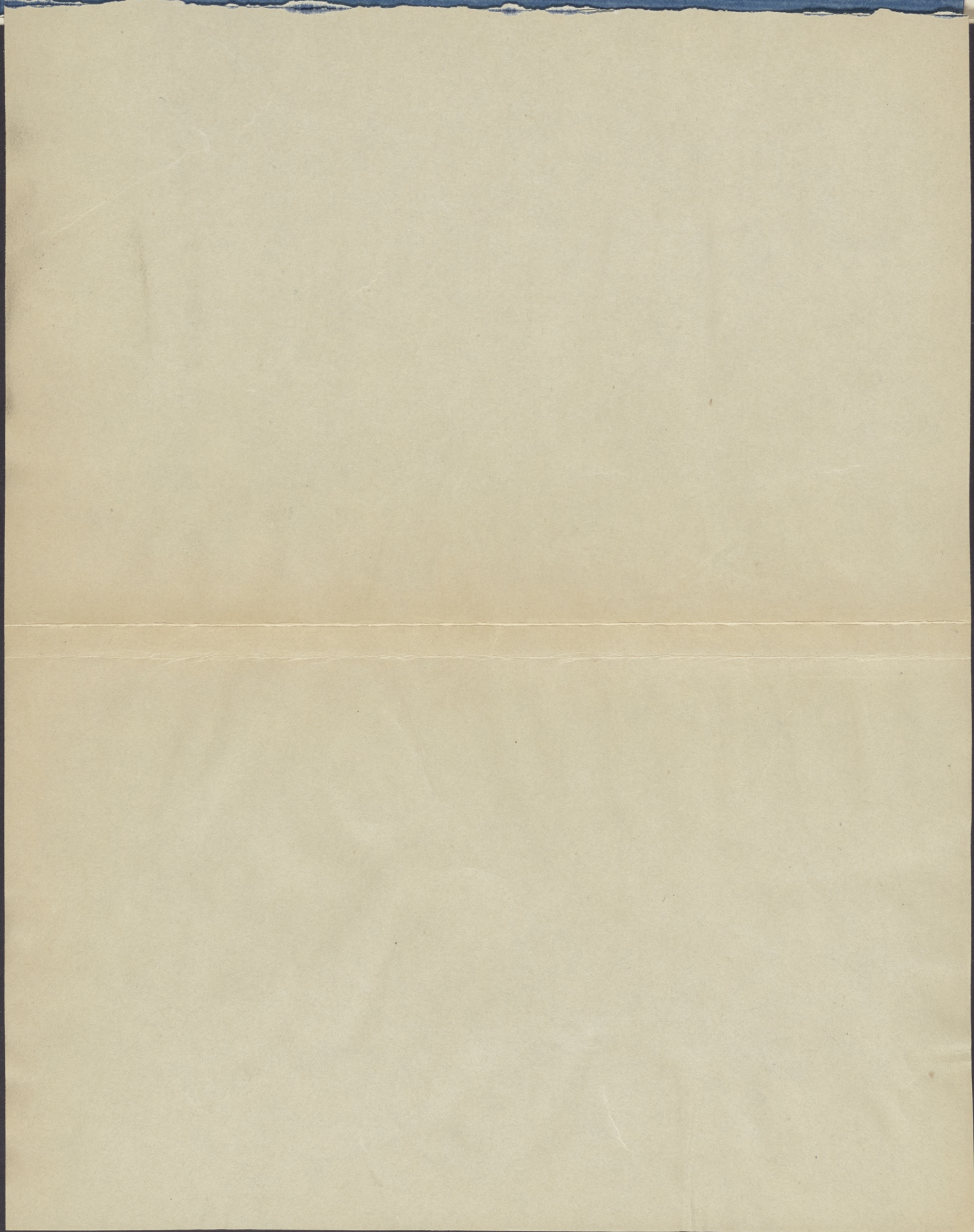
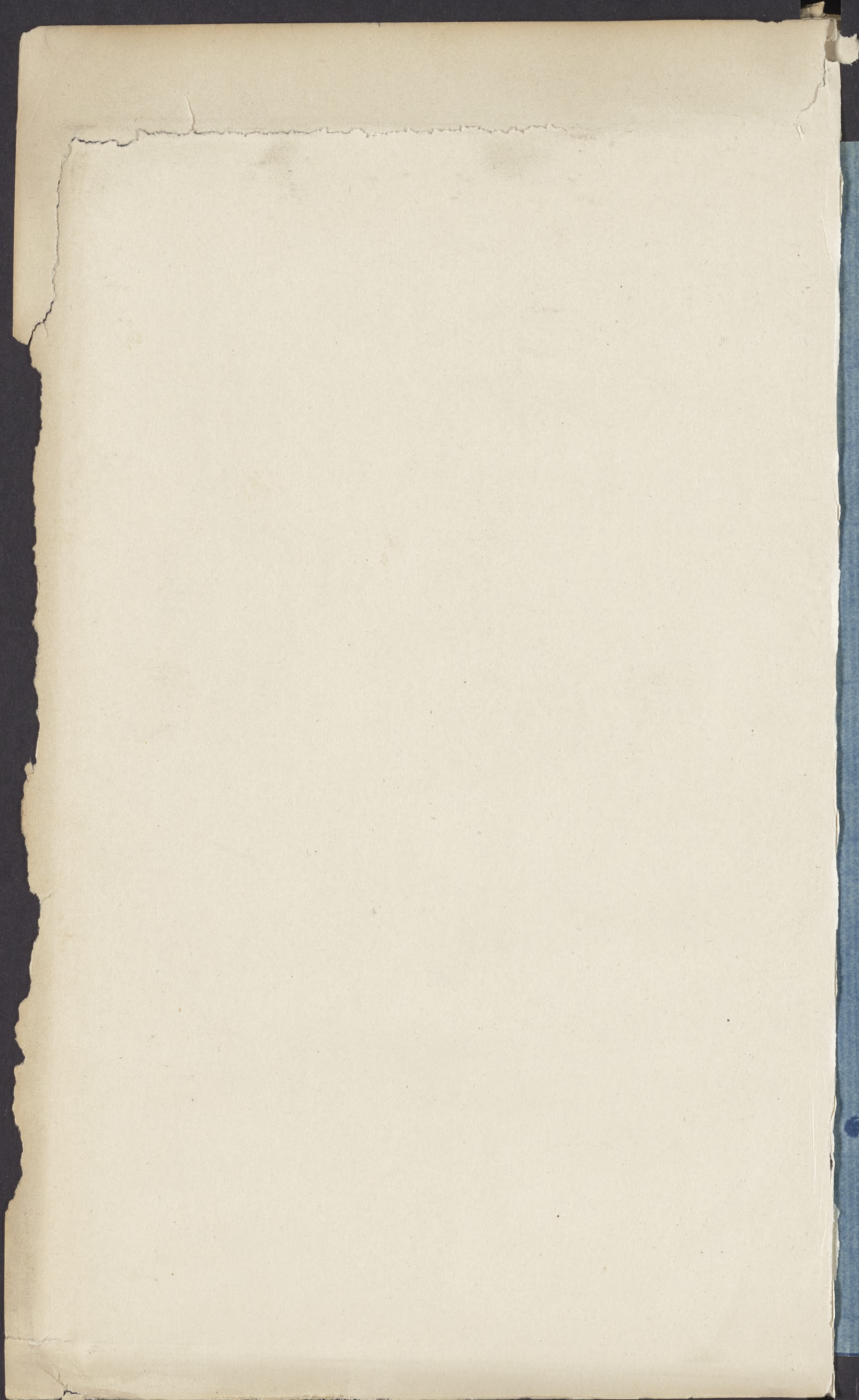


EXHIBIT 4.

Chart showing record of cars at Hamburg Place and Avenue L.

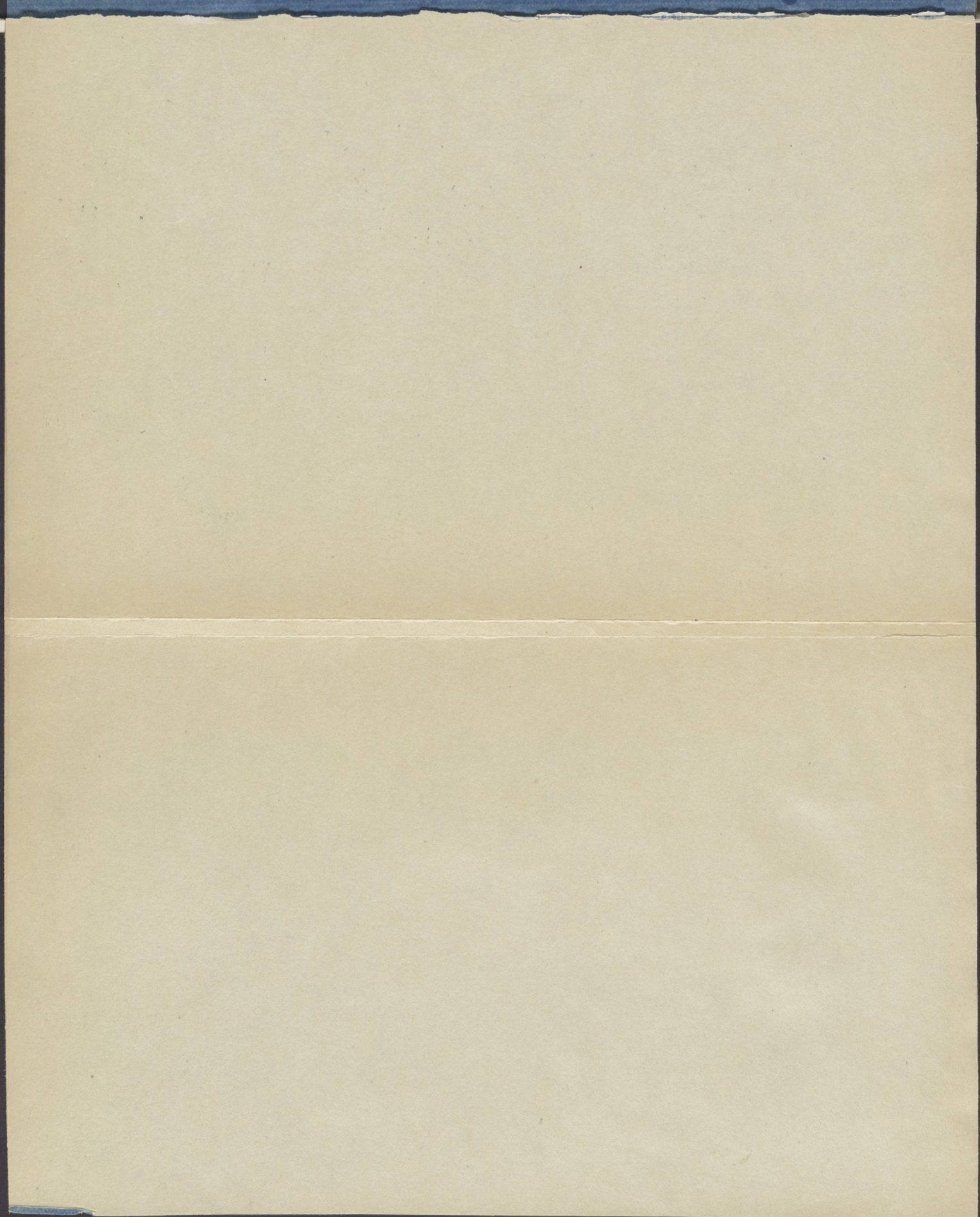


RECORDS taken at
Hamburg Place & Ave. "L"

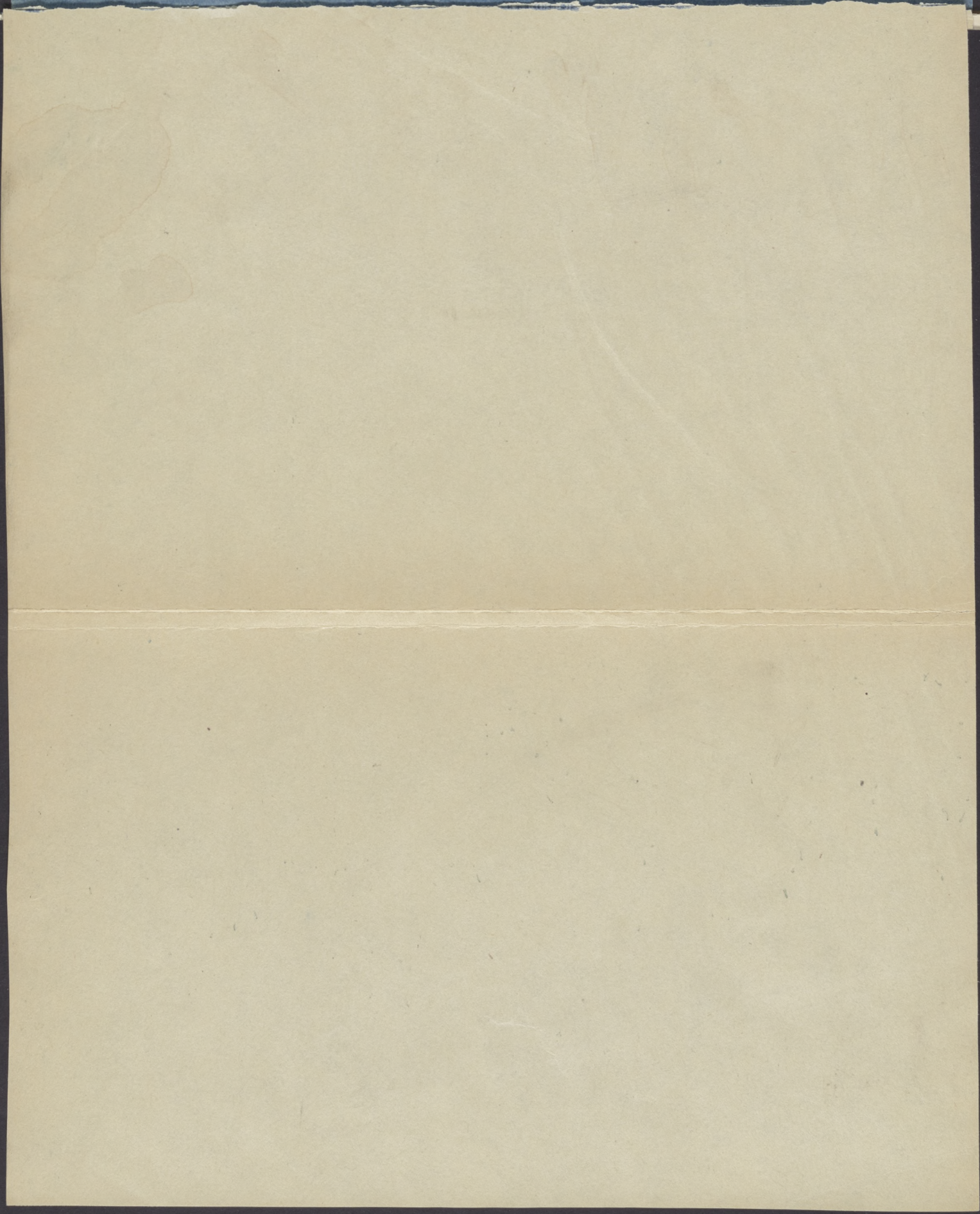
#1.

Nov. 27, 1914.

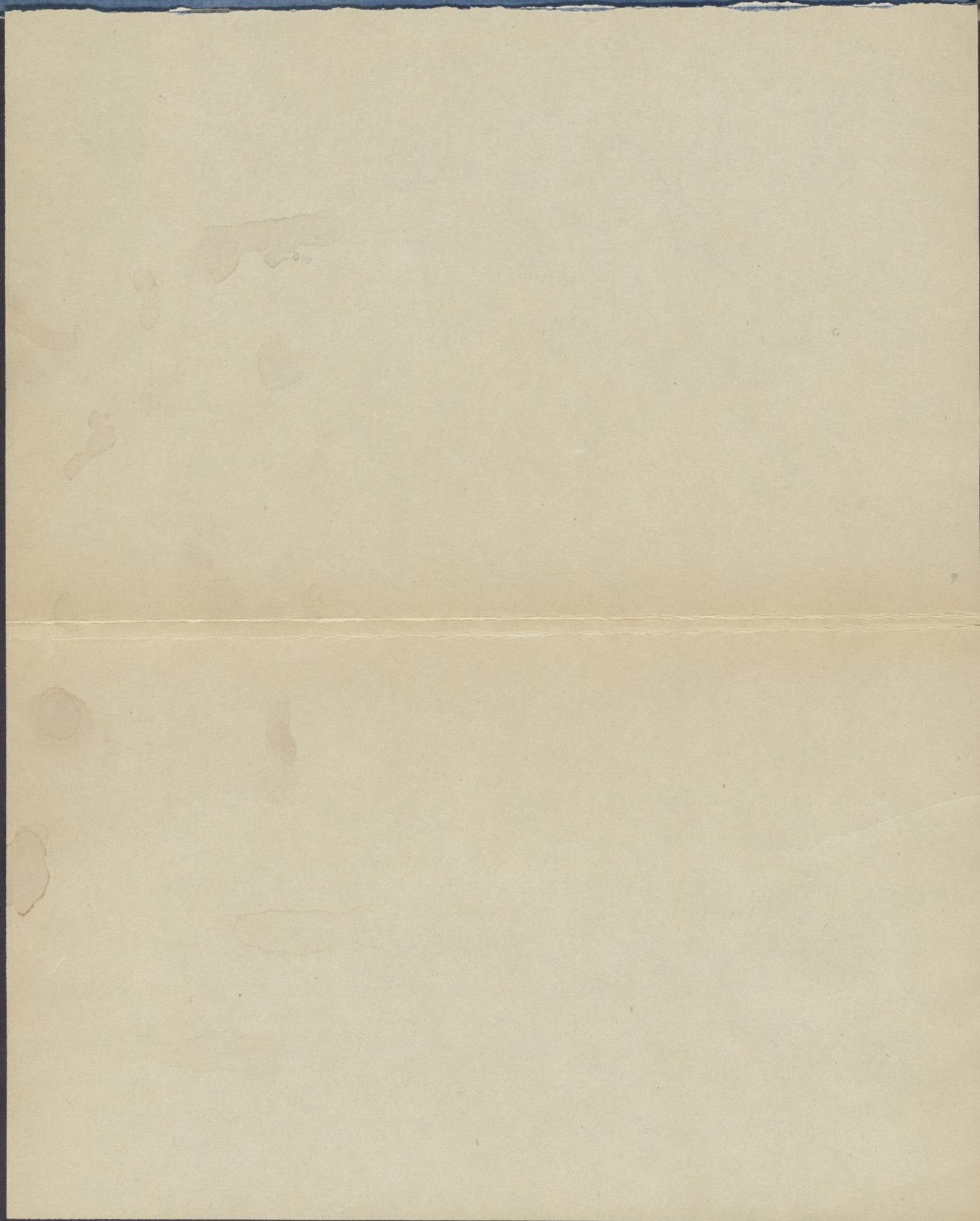
Car No.	East or West	Arrived	No. Pass.	No. Pass. Dist.	Car No.	East or West	Arrived	No. Pass.	No. Pass. Dist.
1143	W	7:06:00	10	—	2459	E	8:25:00	4	3
1129	E	7:07:20	16	13	2453	W	8:27:20	2	—
2456	W	7:11:50	5	2	2464	E	8:30:10	6	3
2460	E	7:12:10	12	9	2459	W	8:33:00	4	—
1129	W	7:20:00	17	—	1126	E	8:38:00	8	8
1140	E	7:21:40	11	6	1143	E	8:40:20	7	4
2460	W	7:27:00	—	—	2464	W	8:41:00	1	—
2448	E	7:30:00	11	3	1126	W	8:45:00	—	—
1140	W	7:34:40	4	—	1133	E	8:46:15	2	—
1123	E	7:41:10	9	3	1143	W	8:50:45	1	—
2448	W	7:42:30	6	—	1131	E	8:52:00	2	2
2466	E	7:46:15	13	7	1133	W	8:56:30	2	—
1123	W	7:48:30	2	—	2444	E	8:58:40	9	7
2474	E	7:52:00	6	2	1131	W	9:03:10	—	—
2466	W	7:55:30	3	—	2452	E	9:04:00	2	2
1125	E	7:57:30	4	3	2444	W	9:10:30	3	—
2474	W	8:01:45	3	—	2442	E	9:12:00	2	—
1137	E	8:05:00	8	3	2465	E	9:16:10	6	3
1125	W	8:07:15	—	—	2452	W	9:16:10	4	—
2473	E	8:10:10	6	6	2442	W	9:22:30	1	—
1137	W	8:13:00	—	—	2460	E	9:26:45	2	2
2453	E	8:18:39	4	2	2465	W	9:30:15	4	—
2473	W	8:20:20	2	—	2474	E	9:37:00	3	2



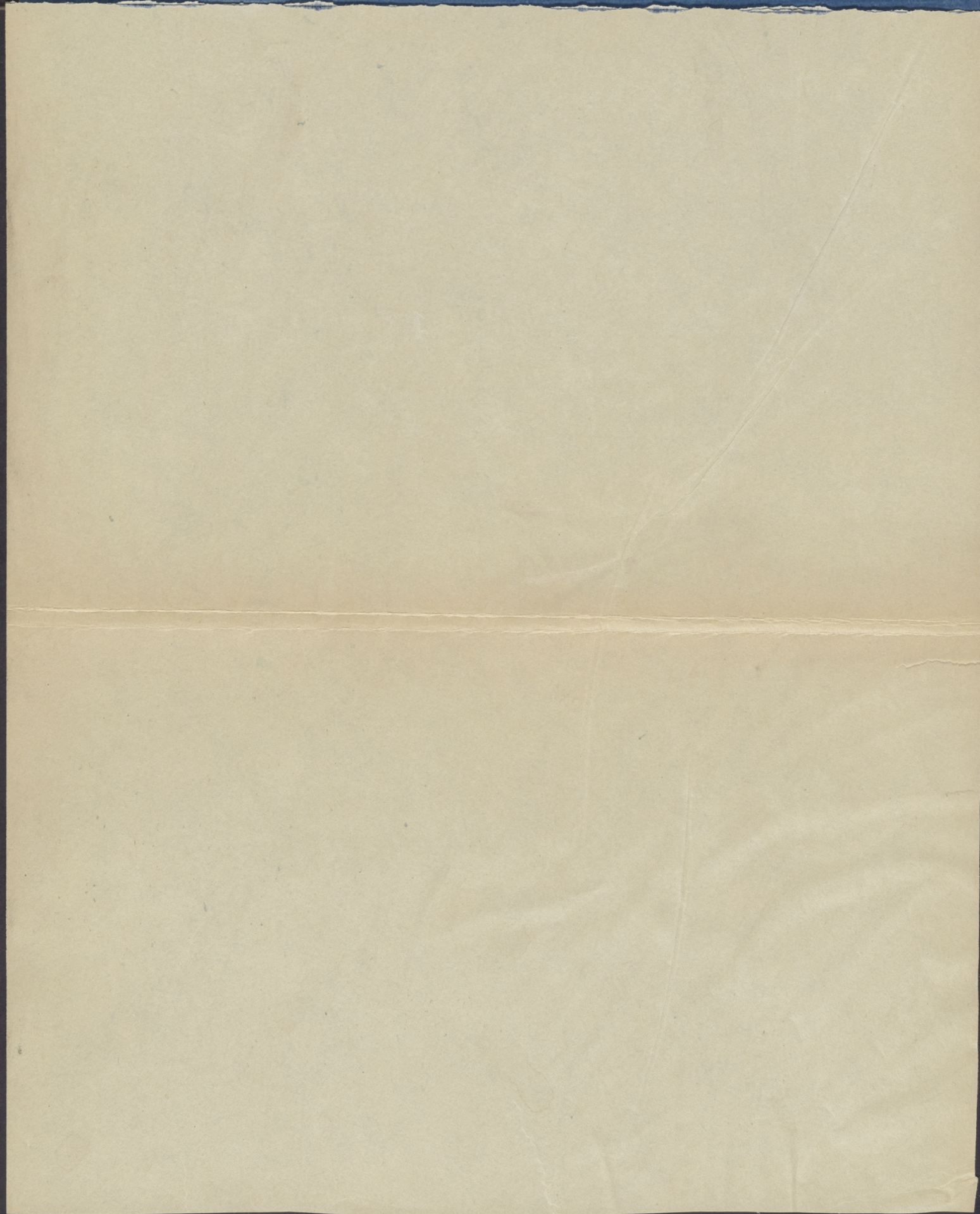
Car No.	East or West	Arrived	No. Pass /	No. Pass Disc'd	Car No.	East or West	Arrived	No. Pass /	No. Pass Disc'd
2460	W	9:41:00	3	-	2465	E	11:07:00	4	2
2448	E	9:44:00	3	2	1133	W	11:09:30	3	-
2474	W	9:46:40	1	-	2444	E	11:14:30	2	1
2449	E	9:51:30	2	2	2465	W	11:17:10	5	-
2448	W	9:55:10	3	-	2474	E	11:21:30	5	3
1132	E	9:58:30	4	4	2444	W	11:23:40	3	-
2449	W	10:02:30	3	-	2450	E	11:27:10	6	-
2459	E	10:06:10	6	3	2474	W	11:30:15	-	-
1132	W	10:10:00	4	-	2449	E	11:34:30	3	-
2468	E	10:14:10	7	3	2450	W	11:40:10	3	-
2459	W	10:21:15	2	-	2460	E	11:42:00	2	1
2322	E	10:23:45	3	2	2449	W	11:47:30	4	-
2468	W	10:24:15	-	-	2459	E	11:50:15	6	-
2453	E	10:30:10	4	-	2460	W	11:55:00	3	-
2322	W	10:31:30	2	-	2457	E	11:56:10	4	-
2453	W	10:39:30	3	-	2459	W	12:02:45	2	-
1131	E	10:41:00	2	-	2322	E	12:06:30	4	-
2446	E	10:46:45	3	-	2457	W	12:10:00	1	-
1131	W	10:47:30	1	-	1132	E	12:11:30	1	-
2446	W	10:55:10	3	-	2322	W	12:15:00	3	-
2452	E	11:00:00	4	4	1131	E	12:18:15	5	1
1133	E	11:00:30	3	-	1132	W	12:24:30	-	-
2452	W	11:03:10	2	-	2468	E	12:29:00	-	-
					1131	W	12:31:00	2	-



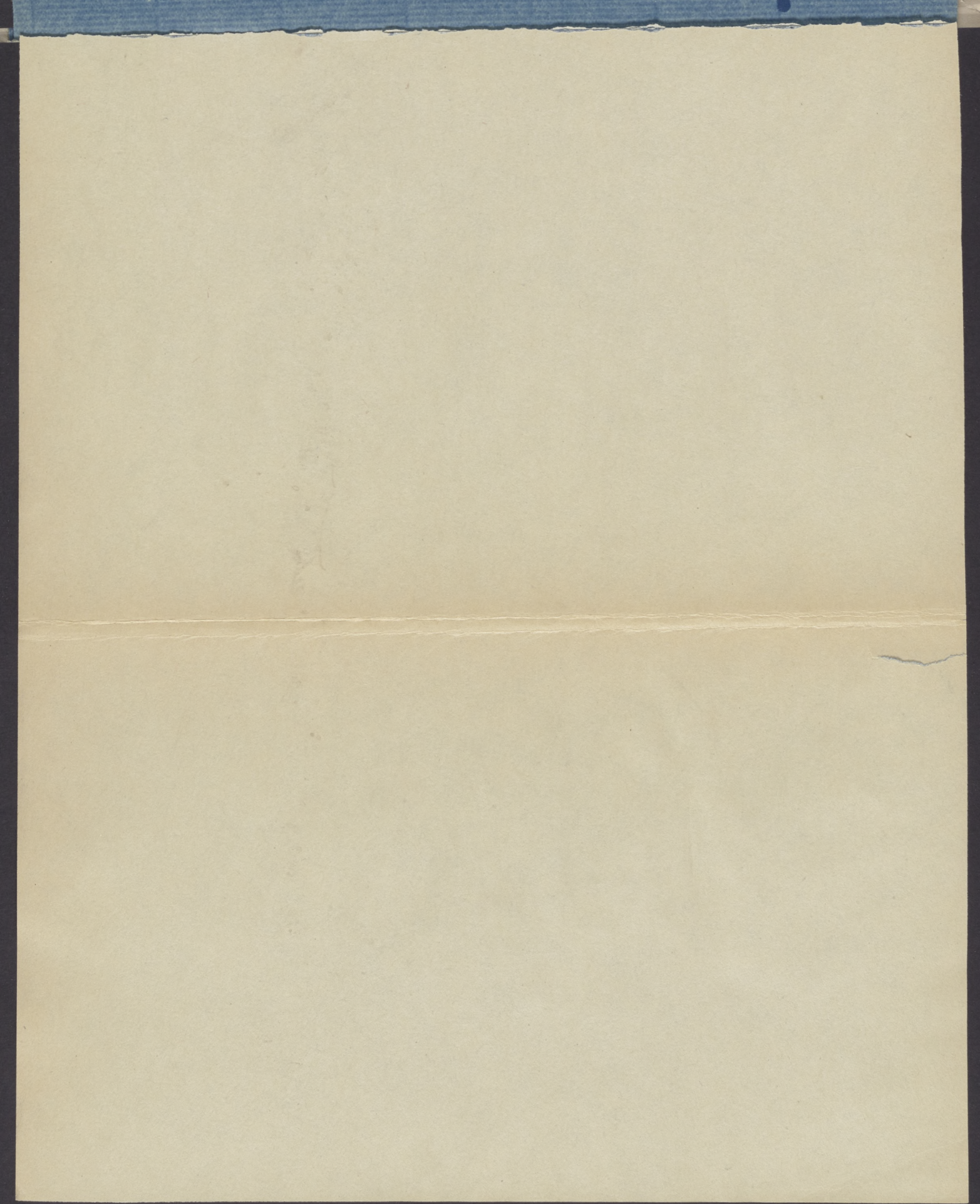
Car No.	EAST or WEST	Arrived	No. PASS.	No. PASS. DISC'D	Car No.	EAST or WEST	Arrived	No. PASS.	No. PASS. DISC'D
2452	E	12:35:00	-	-	2452	E	2:20:10	1	-
2468	W	12:39:00	2	-	2457	W	2:24:30	4	-
2459	E	12:41:30	1	-	1132	E	2:28:30	2	2
2452	W	12:46:00	2	-	2452	W	2:30:30	2	-
LUNCHEON					2465	E	2:33:45	3	1
1133	E	1:13:45	1	-	1132	W	2:39:00	3	-
2474	W	1:16:10	5	-	2468	E	2:44:00	5	-
2449	E	1:19:30	2	-	2465	W	2:46:00	2	1
1133	W	1:25:30	1	-	2474	E	2:52:50	-	-
2444	E	1:27:30	-	-	2468	W	2:53:30	-	-
2449	W	1:32:10	4	-	2453	E	3:01:00	2	-
2459	E	1:34:30	3	2	2474	W	3:01:00	4	-
2444	W	1:39:10	4	-	2449	E	3:05:10	1	-
2450	E	1:40:30	2	-	2453	W	3:09:00	4	-
2459	W	1:46:00	2	-	2446	E	3:11:30	1	-
2322	E	1:52:30	4	3	2449	W	3:16:00	2	-
2450	W	1:55:30	1	-	2459	E	3:18:30	1	1
2460	E	1:56:45	3	-	2446	W	3:23:30	1	-
2322	W	2:02:30	8	-	1133	E	3:28:45	4	1
1131	E	2:06:00	4	1	2459	W	3:31:00	3	-
2460	W	2:08:50	2	-	2322	E	3:36:45	3	2
2457	E	2:13:30	3	-	1133	W	3:38:10	3	-
1131	W	2:16:00	1	-	2444	E	3:42:10	4	2
					2322	W	3:45:10	3	-



Car No.	East or West	Arrived	No. Pass.	No. Pass. Disco.	Car No.	East or West	Arrived	No. Pass.	No. Pass. Disco.
1131	E	3:51:30	5	1	1119	E	5:13:00	5	2
2444	W	3:54:30	1	-	2459	W	5:16:10	9	-
2450	E	3:58:00	2	-	2454	E	5:19:00	2	-
1131	W	4:03:50	1	-	2322	E	5:21:10	3	-
2456	E	4:06:00	-	-	1119	W	5:24:00	5	-
2450	W	4:09:10	2	-	1185	E	5:27:00	3	-
2460	E	4:14:10	5	1	2454	W	5:28:00	6	-
2456	W	4:16:10	2	-	747	E	5:30:00	-	-
2465	E	4:21:10	2	-	748	E	5:30:00	-	-
2460	W	4:23:30	1	-	2322	W	5:30:20	4	-
2457	E	4:27:30	7	2	1185	W	5:55:50	20	-
2465	W	4:32:30	3	-	2472	E	5:37:30	19	-
2474	E	4:36:10	9	-	1126	E	5:39:40	1	-
2457	W	4:39:10	13	-	747	W	5:41:00	3	-
1132	E	4:43:00	5	1	749	W	5:41:00	5	-
2474	W	4:47:00	6	-	2448	E	5:45:30	7	-
2461	E	4:49:00	5	1	2472	W	5:46:40	8	-
1132	W	4:52:00	4	-	1125	W	5:49:30	3	-
2464	E	4:56:00	8	7	2462	E	5:50:00	7	-
2461	W	4:58:30	1	-	2448	W	5:53:10	2	-
2464	W	5:04:30	7	-	1123	E	5:53:40	5	1
1126	E	5:08:40	-	-	2444	E	5:52:20	9	-
2459	E	5:08:40	4	-	2462	W	5:58:40	3	-
1126	W	5:10:00	-	-	1123	W	6:00:00	1	-



Car No.	East or West	Arrived	No. Pass	No. Pass. Disc'd
1505	E	6:06:30	15	-
2444	W	6:08:00	5	-
1518	E	6:09:30	1	-
1505	W	6:16:30	5	-
1132	E	6:17:10	4	-
1518	W	6:18:30	1	-
2453	E	6:20:10	4	1
1132	W	6:26:00	8	-
2460	E	6:27:00	7	-
2453	W	6:31:30	3	-
2464	C	6:35:10	10	-
2460	W	6:37:10	-	-
2466	E	6:38:30	5	-
1136	E	6:39:15	-	-
2464	W	6:44:15	3	-
1126	C	6:45:15	6	-
1136	W	6:51:00	4	-
2466	W	6:52:00	1	-
2459	C	6:55:00	2	-
1126	W	6:58:00	2	-
2442	C	6:59:30	2	-
2459	W	7:06:10	3	-



Data taken at

sheet 1.

Hamburg Place and Avenue "L"

Sat. Nov. 28, '14.

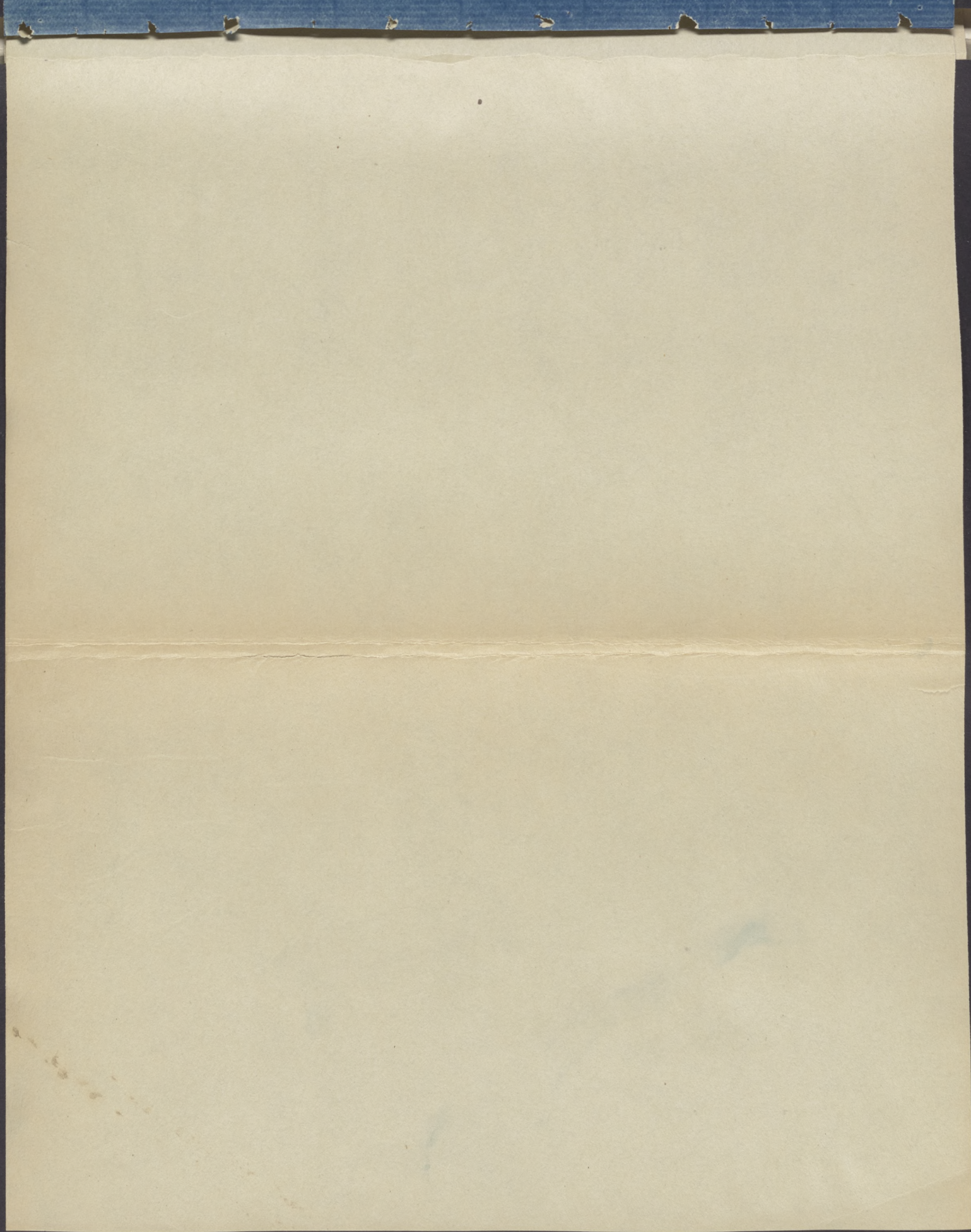
Car No.	EAST OR WEST	Arrived A.M.	No. PASS /	No. PASS DISC'D /	Car No.	EAST OR WEST	Arrived	No. PASS /	No. PASS DISC'D /
1127	E	7:02:00	9	2	1143	E	8:19:30	3	3
2445	W	7:07:30	4	—	1122	W	8:23:30	—	—
1126	E	7:12:00	12	9	2456	E	8:46:10	4	4
1127	W	7:15:00	8	1	1134	E	8:27:10	—	—
2447	E	7:16:45	5	2	1143	W	8:29:10	—	—
1126	W	7:22:00	5	—	2456	W	8:34:30	1	—
2444	E	7:27:00	14	5	1505	E	8:35:30	3	2
2447	W	7:29:30	3	—	2468	E	8:39:30	3	3
1578	E	7:36:00	17	11	1134	W	8:40:10	4	1
2444	W	7:37:15	3	—	1505	W	8:43:30	1	—
2464	E	7:38:30	11	7	1137	E	8:44:40	5	2
1578	W	7:46:00	3	—	1127	E	8:48:00	5	2
1136	E	7:47:10	7	4	2468	W	8:49:00	1	—
2464	W	7:51:30	—	—	1137	W	8:54:00	—	—
1139	E	7:55:30	8	5	1126	E	8:55:30	4	2
1130	E	7:58:30	3	—	1127	W	8:59:30	1	—
1136	W	7:59:50	4	—	2447	E	9:03:30	4	2
1139	W	8:04:50	3	—	1126	W	9:06:30	—	—
1138	E	8:05:50	1	—	2444	E	9:12:00	1	1
1130	W	8:08:45	3	—	2447	W	9:15:10	5	—
2461	E	8:09:10	—	—	2472	E	9:17:00	3	—
1122	E	8:13:10	3	1	2444	W	9:21:30	1	—
1138	W	8:14:30	1	—	2443	E	9:25:30	7	6
2461	W	8:18:40	—	—	2472	W	9:29:00	3	—

Sat. Nov. 28 '14

Sat. Nov. 28, '14.

Sheet 2.

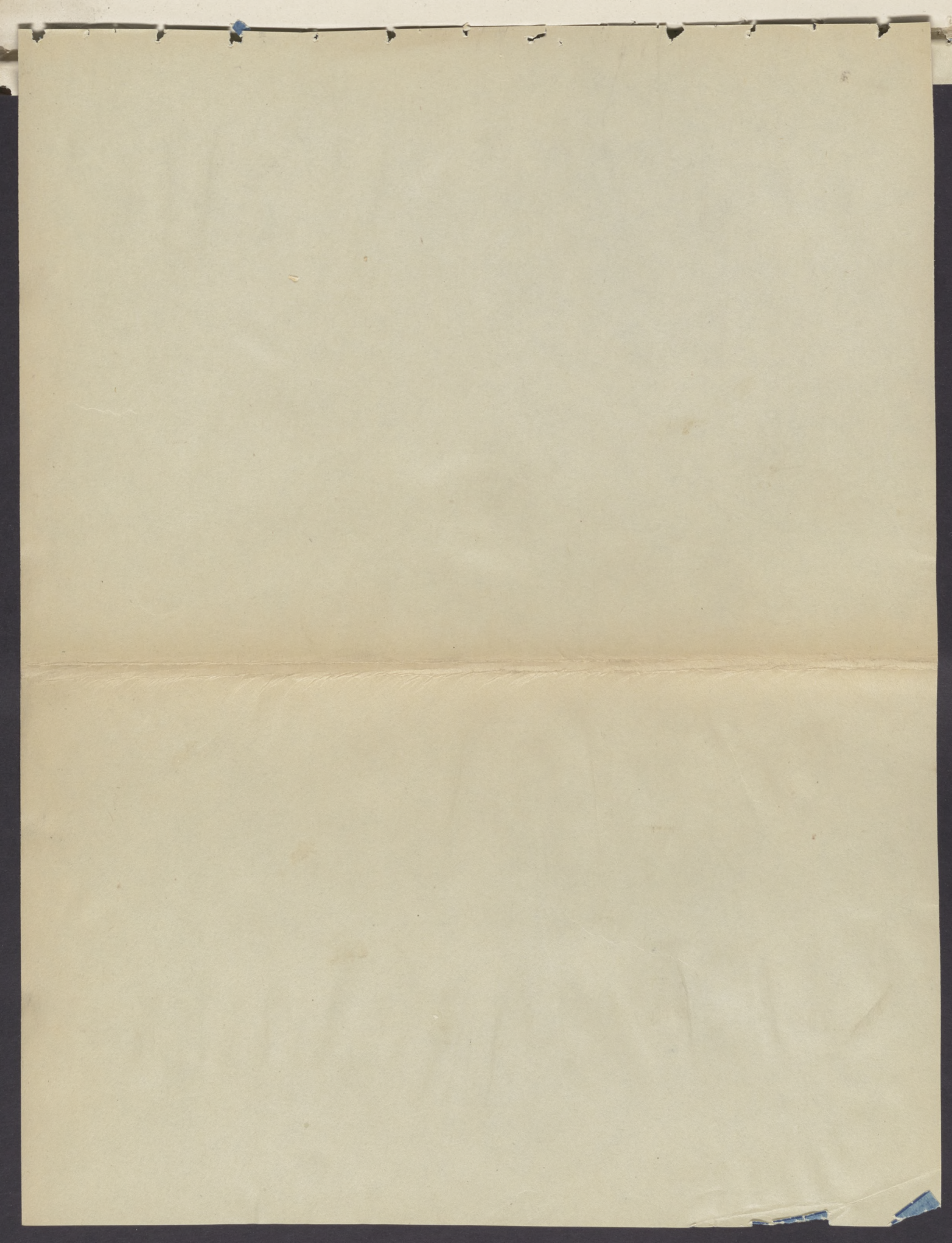
Car No.	East or West	Arrived	No. Pass.	No. Pass. Disc'd.	Car No.	East or West	Arrived	No. Pass.	No. Pass. Disc'd.
2465	E	9:34:30	1	1	2472	C	11:04:30	3	2
2443	W	9:39:30	2	-	2459	W	11:08:30	2	-
1123	E	9:41:00	4	2	1126	C	11:12:00	2	-
2465	W	9:45:30	3	-	2472	W	11:26:30	3	-
2448	E	9:48:50	1	-	2465	C	11:21:00	5	1
1123	W	9:54:00	3	-	1126	W	11:22:00	2	-
2449	C	9:57:30	4	2	2444	C	11:26:00	3	1
2448	W	10:01:00	4	-	2465	W	11:29:30	-	-
2442	C	10:03:00	1	1	2448	C	11:36:00	5	1
2449	W	10:10:00	3	-	2444	W	11:38:45	1	-
2459	C	10:15:00	2	1	2443	C	11:42:00	1	-
2442	W	10:15:45	1	-	2448	W	11:46:00	3	-
2451	C	10:21:05	2	-	2442	C	11:52:50	1	2
2459	W	10:22:00	3	-	2442	W	11:53:30	3	-
2453	C	10:25:30	-	-	1123	C	11:57:00	3	-
2451	W	10:30:30	2	-	2451	C	12:04:00	3	-
1127	C	10:37:00	4	2	2442	W	12:04:45	14	-
2453	W	10:38:00	3	-	1123	W	12:11:30	17	-
2473	C	10:40:30	2	-	2449	C	12:12:10	4	1
1127	W	10:45:00	2	-	2451	W	12:20:00	9	-
2447	C	10:57:00	3	1					
2473	W	10:53:00	2	-					
2459	C	10:57:00	3	2	2453	C	12:43:00	2	1
2447	W	10:59:30	3	-	2447	W	12:48:30	-	-



Sat. Nov. 28, '14.

Sheet 3.

Car No	East or West	Arrived	No. Pass.	No. Disc'd	Car No	East or West	Arrived	No. Pass.	No. Disc'd
2472	E	12:52:00	4	2	1144	W	2:10:00	11	—
2453	W	12:55:30	2	—	1138	E	2:22:00	1	—
2473	E	12:57:30	4	1	2446	W	3:26:00	4	—
2472	W	1:04:00	9	—	1100	E	2:27:30	3	2
2465	E	1:06:00	5	1	1138	W	2:32:30	7	—
2473	W	1:11:00	1	—					
2459	E	1:14:30	—	—					
2465	W	1:18:00	2	—					
2448	E	1:25:00	2	1					
2459	W	1:26:30	4	—					
1126	E	1:30:00	2	—					
2448	W	1:33:00	4	—					
2463	E	1:36:00	4	1					
1126	W	1:40:00	1	—					
2444	E	1:44:00	4	1					
2463	W	1:47:30	10	—					
2474	E	1:52:30	5	2					
2444	E	1:54:30	5	—					
2467	E	2:01:00	8	5					
2474	W	2:03:30	7	—					
2467	W	2:10:00	8	—					
1144	E	2:11:00	3	—					
2446	E	2:12:00	—	—					



**Exhibit No. 1 for Complainant, Public
Service Railway Company.**

New Jersey Court of Errors and Appeals

Between
PUBLIC SERVICE RAILWAY COM-
PANY,
Complainant-Respondent,

and

JAMES S. FRAZER and SELDEN
D. BURCHENAL, trading as
FRAZER & BURCHENAL,
Defendants-Appellants,

and

PASSAIC VALLEY SEWERAGE
COMMISSIONERS,
Respondents.

On Bill, etc.

On Appeal from
Decree in
Chancery.

BRIEF FOR FRAZER AND BUR- CHENAL, DEFENDANTS-APPEL- LANTS.

Statement of Facts.

This is an appeal from the Court of Chancery. On August 22, 1913, the defendants, Frazer and Burchenal, entered into a contract with the respondent, Passaic Valley Sewerage Commissioners, for the construction of the central portion of Section 6 of the Passaic Valley Trunk Sewer located in the City of Newark, and running from a point in Hamburg Place about 300 feet south of the grade crossing of the Central Railroad Company of New Jersey, then northerly through Hamburg Place to

a point near (about 150 feet) northwest of Avenue L—a total distance of 1,400 feet (Exhibits, p. 1).

The sewer as located by the Passaic Valley Sewerage Commissioners ran near the center of Hamburg Place, so that the most northerly 300 feet thereof passed under certain tracks of the Public Service Railway Company also located in Hamburg Place (case, p. 24, ll. 20-30). Of these tracks the portion thereof lying north of Avenue L (about 150 feet) were being used in operating cars easterly on Hamburg Place and northerly on Avenue L, while the remaining 200 feet of tracks lying south of Avenue L were dead end tracks (blue print, Case, p. 8½; case, p. 26, ll. 36-40; p. 27, ll. 1-10).

The contract between the Passaic Valley Sewerage Commissioners and the defendants, Frazer and Burchenal, provided that the work of building this portion of the sewer should be done by the open cut method (Exhibits, p. 1; case, p. 17, ll. 28-35), that is to say, by excavating an open trench, building the sewer, and filling in the trench.

In April, 1914, the defendants, Frazer and Burchenal, having finished their work with the exception of that portion of the sewer to be constructed beneath the tracks of the Public Service Railway Company, notified the company to remove its tracks, poles and wires temporarily while they completed the work called for and in the manner provided by their contract with the Passaic Valley Sewerage Commissioners (case, p. 4, l. 30; p. 5, p. 6, ll. 1-19). The Public Service Railway Company refused to do this, and filed the bill of complaint which, as subsequently amended, prayed that the Passaic Valley Sewerage Commissioners and Frazer and Burchenal be enjoined from interfering with the tracks located in Hamburg Place as aforesaid (case, p. 8, ll. 1-27).

The complainant charged that it was entirely

feasible for Frazer and Burchenal to construct the sewer without in any way interfering with the complainant's tracks, either by tunnel construction or the temporary support of said tracks during the excavation for said sewer (case, p. 6, ll. 19-33), and that it was their duty to do so, and if necessary that Frazer and Burchenal were required by their contract with the Passaic Valley Sewerage Commissioners to erect a temporary street railway around the excavation in order that the public service of transporting passengers, in which the complainant was engaged, might be continued without interruption (case, p. 3, ll. 28-40).

The Passaic Valley Sewerage Commissioners contended that in adopting the open cut method of constructing the sewer in Hamburg Place, it exercised the discretion committed to it by the Legislature of New Jersey upon a consideration of the cost of the construction of said sewer by said method as compared with the cost of its construction by the tunnel method as well as to the interruption of the use of the public street known as Hamburg Place necessarily resulting from the method of construction so adopted, and that such determination and exercise of discretion was reasonable and was exclusively within its jurisdiction and final and conclusive (case, p. 14, ll. 11-27):

And further, that by its contract with Frazer and Burchenal it made express provision for the protection and maintenance of the public utilities existing in the public streets through which the said sewer was to be constructed, including the portion of Hamburg Place in question (case, p. 14, ll. 28-35).

The defendants, Frazer and Burchenal, denied that by virtue of their contract or otherwise it was their duty or obligation to maintain the tracks of the Public Service Railway Company or to erect a

temporary street railway structure in order that the service in which the complainant was engaged should not be interrupted (case, p. 22, ll. 15-27).

A motion for preliminary injunction came on for hearing before Vice-Chancellor Emery on December 28, 1914, and he decided that a temporary track around the work should be built to provide for the continuation of travel during the construction period, the expense of which, in the first instance, should be borne by the contractor, but without prejudice to the contractor's rights on final hearing to claim from either the Public Service Railway Company or the Passaic Valley Sewerage Commissioners reimbursement of the whole or of any part of the money expended (case, p. 80, ll. 32-40; p. 81, ll. 1-17). An order was entered (case, p. 84) and an injunction issued accordingly.

Later it was stipulated and agreed that the case should be heard on final hearing upon the bill, answer, and affidavits filed in the case (case, p. 87, ll. 20-40). The case came on and was heard by Vice-Chancellor Howell on April 17th, 1916, and in an opinion filed June 23, 1916, he decided that the reasonable actual cost of taking up the tracks, of laying temporary tracks and of restoring the situation after the finishing of the sewer should be paid by the contractor (case, p. 89-100; p. 100, ll. 11-18). On June 28, 1916, a final decree was entered in accordance with the opinion (case, p. 101) from which decree this appeal is taken.

The Complainant's rights and obligations.

By the bill of complaint it is averred that the Ferry Street and Hamburg Place Railroad Company in 1892 consolidated with the Newark and South Orange Horsecar Railroad Company under the name "Newark and South Orange Railway

Company" and some time in the year 1893, under and by virtue of an ordinance of the City of Newark, passed April 14, 1893, built a double-track street railway in Hamburg Place in connection with its street railway that ran to South Orange, and that thereafter, in 1907, the said Newark and South Orange Railway Company was merged into the Public Service Railway Company. There are no proofs showing just what rights, if any, the Public Service Railway Company have in Hamburg Place. Consequently, the complainant has shown no right to maintain the present bill. The statement in the opinion that the point was not made in the court below is error (case p. 93, 11. 28-40).

Assuming, however, for the purposes of argument, that the tracks were lawfully there at the time the bill was filed, it is perfectly clear that complainant's rights were subject to the right of the State, acting through municipal agencies, to cause it to remove its tracks at its own expense when, as in this case, it became necessary for the construction of other public improvements in the street.

In *Dillon on Municipal Corporations* (Fifth Edition, Vol. III.) Sec. 1271, the author says:

"Pipes, conduits, rails and structures erected or constructed in the city streets under a general grant of authority to use the streets therefor *are subject to the paramount power and duty of the city* to repair, alter and improve the streets as the city in its discretion may deem proper, and to construct therein sewers and other improvements for the public benefit. This paramount power and duty of the city is clearly governmental in its nature, and, in many cases at least, forms a part of the police power of the municipality. The decisions

hold that the grantee of the franchise has no cause of action for any damage which it may sustain by acts of the city in reasonably performing its duty in these respects."

In *Kirby, et al. v The Citizen's Railway Co.*, 48 Maryland, 168 (Court of Appeals, 1877) the company under its charter and the ordinances of the city of Baltimore laid down its railway tracks through certain streets in said city and for some years had been exercising the easement of running its cars over said tracks. The appellants under a contract with the city were about to construct a sewer under the bed of one of the streets through which the appellee's tracks extended, and gave it notice of this purpose, the effect of which would be to remove the tracks from the street and stop the operation of the railway during the time required for the completion of the sewer. The appellee thereupon filed a bill for an injunction to prevent the appellants from removing the railway tracks of the complainant and from interfering with the use thereof by the complainant, for the passage of its railway cars. The bill averred that the sewer could be constructed on the street without the removal therefrom of the tracks or obstructing the same, either by shoring up the tracks in their then position, or by removing them to one side of the street; that both modes were perfectly feasible; and that the complainant was willing that the latter plan should be adopted, provided that it be done at the expense of the contractors. The court granted the injunction, which was reversed on the appeal.

Robinson, J., said:

"The power to construct sewers is expressly conferred on the city authorities by

Sec. 835 of Art| 4 of the Code of Public Local Laws.

“In the exercise of this power they have the right not only to obstruct, but to discontinue entirely the use of Carey Street as a highway so long as it may be necessary for the purpose of constructing a sewer under the bed of the street.

“The *easement* acquired by the appellee under its charter and the ordinances of the Mayor and City Council is subject to this *paramount right*, and in constructing its railway the appellee knew or was bound to know that its use of the bed of the street for railway purposes was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare.

“They had no right, of course, to interfere capriciously or unnecessarily with the appellee’s use of the street; but they were under no obligation to incur the expense either of *shoring up the railway track, or removing it to the one side of the street.*

“The power then being lawful in itself it could only become unlawful in consequence of the mode in which it was carried into execution. It is apparent from the bill that the sewer could not be constructed without interfering with the railway track of the appellee, and whatever injury may result therefrom must be regarded in law as “*damnum absque injuria.*”

“The fact that the sewer was being constructed by the appellants under a contract with the city authorities does not affect the question.”

In *New Orleans Gas Light Company v. Drainage Commission of New Orleans*, 197 U. S. 453 (1905) the plaintiff had the exclusive right to maintain gas mains and pipes in the streets of the City of New Orleans and of vending gas in that city. By a subsequent act of the Legislature the State created a board known as the Drainage Commission of New Orleans, which board was given the power to control and execute a plan for the drainage of the city. After adopting a system of drainage and proceeding with the construction thereof, it was found necessary to change the location in some places in the streets of the city of the mains and pipes theretofore laid by the Gas Light Company. The question involved was as to whether the Drainage Commission or the Gas Company should pay for these changes. In deciding in favor of the Commission, Mr. Justice Day said:

“Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. * * * The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The Drainage Commission, in carrying out this important work, it has been held by the Supreme Court of the State, is engaged in the execution of the police power of the State. * * * The police power, in so far as its exercise is essential to the health

of the community, it has been held cannot be contracted away. * * * It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. * * *

“This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy, requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authori-

ties. * * * The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

In *Scranton Gas & Water Co. v. City of Scranton*, 64 Atl. 84 (Supreme Court of Penn. 1906), Stewart, J., said:

"The right in cities and boroughs to improve and change streets for public purposes is fundamental, and does not depend upon the use of any particular word or words in expressing it. In this case what was done by the city was clearly within what is known as police power, and it is wholly immaterial how it was denominated in the ordinance, or what the city authorities thought in regard to it. * * * For whatever injury was done to property by the necessary change of grade in connection therewith, the city was clearly liable, and the means of enforcing such liability was the statutory proceeding for assessment of damages, notwithstanding all resulted from the exer-

cise of police power. Appellant's claim has not the same consideration to support it. So far as property rights are concerned, there is but slight correspondence between the easement enjoyed by appellant company in the streets of the city, and the rights of the abutting owners in their several properties. The distinctions between the two are too obvious for discussion. It is enough to say with respect to the former, that it is held and enjoyed, subject always to the earlier and superior rights of the public in the streets of the municipality. Among these is the power to regulate and control the streets in the interest of public health and safety. When these demand a change in the mode and manner of the enjoyment of the easement or privilege, and that demand is expressed through the municipal authority, in the exercise of reasonable discretion, that change must be made. Calling the legislative grant of privilege to use the streets a contract, does not avoid the conditions on which the privilege is to be exercised. Whether such limitation or conditions be expressed in the grant or not is immaterial, for, as said in *Butchers' Union Slaughter House Co. v. Crescent City Live Stock Landing Co.*, 111 U. S. 746, 4 Sup. Co. 652, 28 L. Ed. 585, the power to control and regulate the streets so as to protect the public health, is one that cannot be bargained away by legislature or municipal grant. The power to control them for the protection of public safety, if not the same, stands on equally high ground. All authorities agree that such right is both paramount and inalienable. Nor is the right limited to the control

of the mere surface; it extends to the soil beneath, to whatever extent it may be required in aid of such purposes as fall within the municipal function, in connection with the health and safety of the public. * * *

It is unnecessary to cite other authority to show that no liability results to the municipality for the disturbance of a gas or water company's pipes in the public streets when made necessary by public consideration.

* * * *It is the reasonable discretion of the municipal authorities that determines the extent of the change in the streets required to meet public necessities; and to that change, whatever it may be, short of an abrogation or annulment of the company's right to maintain its system of pipes in the public streets, the company must conform at its own cost and expense.*"

The defendant had the right to construct the sewer in Hamburg Place in the manner provided by its contract without assuming the obligation of removing and replacing the tracks of the Public Service Railway Company.

The Passaic Valley Sewerage Commissioners was incorporated by Chapter 102, P. L. 1903, pp. 158, 777, and the sewer in question was being constructed by virtue of Chap. 10, P. L. 1907, p. 22. By paragraph 3, sec. 5, of the 1907 act, it is expressly provided that the Commissioners

"shall have full power to construct such intercepting sewer or sewers and its appurtenances along under and over any water-course, or under or over or along or across

any street, turnpike, road, railroad, highway or other way or public park or grounds, and in or upon private or public land under water; in such way and manner however, as not necessarily (unnecessarily) to obstruct or impede travel or navigation, and may enter upon and dig up any street, highway or private or public land for the purpose of constructing said work and appurtenances, and for repairing and maintaining the same, and in a general way to do all other acts and things necessary, convenient and proper in connection with the making and maintaining of the improvement contemplated by the provisions of this act."

As was stated by Vice-Chancellor Howell: "It is difficult to conceive a broader grant of powers or a more specific designation of the particular things which the State in its sovereign capacity has authorized the Passaic Valley Sewerage Commission to do." Under so broad a grant, any question as to the authority of the Commissioners to construct the sewer in Hamburg Place in the method provided by the contract must, and admittedly does, rest upon the effect of the limitation "in such a manner, however, and not necessarily (unnecessarily) to disturb or impede travel."

Obviously, the limitation itself plainly indicates that the Commissioners should have power to interfere with public travel when it became reasonably necessary to do so. By the later provisions of the same section of the act, the Commissioners are expressly given the right without limitation "to enter upon and dig up any street, highway or private or public lands for the purpose of constructing said work and appurtenances and for repairing and maintaining the same, and in a general way to do all acts and things *necessary, convenient and proper*

in connection with the making and maintaining of the improvement contemplated by the provisions of this act."

In the court below, the complainant claimed that the interference must be necessary in the sense or meaning that the sewer could not, from an engineering or physical point of view, be constructed without interference, and that the matter of expense, or at least such expense as would be incurred, should not be an element in determining the necessity (case p. 11, ll. 15-22).

Vice-Chancellor Howell accepted this interpretation without qualification. He said:

"I place my decision, however, squarely upon the somewhat peculiar use of the word 'necessary.' It is quite apparent from the testimony that methods might have been employed by the contractors in the construction of the work which would have prevented much of the inconvenience that would arise from the interruption of travel by suspending the railway operations for a period as long as three months. So far as I can see, the statements of the complainant's witnesses on this point are not controverted. The engineers on the part of the contractors admit that some other plan might have been used, but object to it on the score of increased expense. Whether that consideration should affect the decision when we are dealing with the rights of the public I will not attempt to decide." (case p. 99, ll. 30-40, p. 100, ll. 1-10).

On the other hand, Vice-Chancellor Emery on the preliminary hearing said:

"My present view is that the words 'necessary interference' mean 'reasonably neces-

sary,' in view of the whole duties imposed on the commissioners by the act and of the whole scope of the act, and that they are therefore entitled to interfere to the extent that would be reasonably necessary, taking the matter of expense as one to be considered." (Case p. 75, ll. 21-28.)

The law upon the proper interpretation of the word "necessary" is correctly laid down in the case of *N. J. Railroad Co. v. Hancock* (Ct. of Err. and App.) 35 N. J Law, 537, where it was expressly held that the word "necessary" does not mean "indispensable." It implies all things suitable and proper for carrying into execution the powers granted. The court said:

"In the case of *The State v. The Commissioners of Mansfield*, already mentioned, this term 'necessary' is put in sharp contrast to the word 'convenient.' But this, I think, is clearly a mistake; and it is a mistake which has introduced confusion. The word necessary, in this use, is so far from being contradistinguished from the word convenient, that the former term comprehends much that, in strictness, is embraced in the latter term. Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptance of this term. A power which is obviously appropriate and con-

venient to carry into effect the franchise granted, has always been deemed a necessary one. * * *. Such was the limited meaning ascribed to it in the great case of *McCulloch v. State of Maryland*, 4 Wheat. 414. The constitution of the United States empowers Congress to pass such laws as are 'necessary and proper' for carrying into execution the powers granted, and it was insisted that, by this authority, such laws only could be passed as were indispensable. Referring to the term 'necessary,' Chief Justice Marshall says: 'Does it always import an absolute physical necessity so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.' It is in this sense, I think, that the word is always used in clauses which confer upon incorporated companies the general authority which is to enable them to perform the function for which they are enacted. In short, the term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view, at the time of the enactment of the charter."

Under any proper interpretation of the act in question, we submit that the decision of the Passaic Valley Sewerage Commissioners to construct

the sewer in Hamburg Place by the open-cut method was entirely within the statutory powers, and did not constitute an unnecessary or unreasonable interference with public travel. The complainants deny this.

Upon this issue the complainants produced the affidavits of several engineers who, in effect, all stated that in their opinion the work might be conducted and carried on either by tunneling or by the open cut and support in original position of the railway of the complainant so as not to interfere with the complainant's track and business, provided the defendants should exercise proper care and make the necessary expenditures to secure the safety of the railway (case p. 10, ll. 17-24; p. 11, ll. 17-34; p. 59, ll. 1-17; p. 61, ll. 18-40; p. 62, ll. 1-12; p. 63, ll. 23-40; p. 64, ll. 1-4; p. 64, ll. 34-40). Not one of these witnesses testified to the cost of either of the methods of tunneling or open cut with support for the tracks over the trench during the period of construction.

On the other hand, while the defendants, Passaic Valley Sewerage Commissioners and Frazer and Burchenal, admitted that it was an engineering possibility to either tunnel or support the tracks during the period of construction of the sewer, they stated that the cost of either method and the risk to persons and property necessarily incident thereto were such as to render either of such methods impracticable and unreasonable.

The work to be done consisted of building a concrete sewer having an interior diameter of 150 inches, or 12½ feet, together with manholes and other appurtenances (case p. 30, ll. 22-48; p. 42, ll. 30-40). The base of the sewer was to be at a depth of more than 30 feet below the surface of the ground and about 20 feet below mean low water (case p. 43, ll. 18-23). The width of the trench required to do the work was approximately 20 feet at the top (case p. 43, ll. 7-10, ll. 20-22).

The defendants' proofs further showed that the soil in the locality of the portion of the sewer in question was of a very dangerous and treacherous character. The surface was made up of filling, below that a light clay, below that a course of gravel and below that quicksand. It was subject to breaks and caving in without warning. At an average depth of 20 feet the material to be excavated became so soft as to be of the consistency of very thick soup. A considerable amount of water was present, which had to be carried off by pumps and flumes (case p. 32, ll. 29-40; p. 43, ll. 24-35).

In constructing the trench just east of the locality in question, the soil conditions made it necessary to sheath with interlocking steel sheet piling and wooden sheet piling supported by 10-inch cross braces, placed at intervals of two or three feet vertically and ten feet horizontally, as shown in the photograph marked Exhibit A (Book of Exhibits, p. 2). The sheathing and timber in the trench settled about seven feet below the surface of the street and in some instances settled so unevenly as to cause the braces on one side to be much lower than on the other, as is shown in the photograph marked Exhibit D (Book of Exhibits, p. 5). Furthermore, the ground caved in and settled on both sides of the trench to distances varying from 10 to 20 feet (case p. 43, ll. 35-40; p. 44, ll. 1-4). It further appeared that after the trench had reached a depth of 30 feet, although the pipe used in boring was driven to a depth of 17 feet further below the bottom of the trench, that is to say, upwards of 47 feet from the street level, no hard material was encountered (case p. 40, ll. 17-25). It also appeared that at a point just west of the section in question pipes were carried down to a depth of 12½ feet below the bottom of the trench excavated by another contractor after the same had reached a depth of 30 feet, or a total distance of 42½ feet below the surface, without encountering any hard material.

Both from the borings made by the Passaic Valley Sewerage Commissioners prior to the letting of the work and from the work actually done, it appeared that the soil conditions in the locality in dispute were similar to those above described (case p. 35, ll. 35-40; p. 36, ll. 1-4).

The defendants produced several engineers, who testified, after examining the plans and specifications and the soil conditions existing in the locality, that the only reasonable or practical method of constructing the sewer at the locality in question was by the open cut method adopted by the commissioners, with the tracks removed during the work of construction; that the adoption of either the tunneling method or by supporting the tracks during the work of construction would be unreasonable and from a business or engineering standpoint impracticable and prohibitive. In order to do the work by the open cut method and support the tracks during the period of construction, it would be necessary to drive piles to a sufficient depth to obtain adequate support, which would be at a depth of at least 50 feet, and probably more. The cost would be considerably increased by reason of the fact that there is a curve in the railway tracks from Hamburg Place to Avenue L, and of the necessity of supporting the overhead wires of the trolleys and also the poles carrying electric light and power cables, telegraph and telephone wires, as shown in photograph marked Exhibit B (Book of Exhibits, p. 3), in addition to the sub-surface structures shown on the plans on Hamburg Place at its intersection with Avenue L. Besides the expense of the additional structure, the labor cost of building the sewer by such method would be 50 per cent over that involved by the open cut method adopted by the commissioners with the tracks removed during the work of construction. It might easily be 75 per cent more than such cost. They

testified that any attempt to maintain trolley tracks over the trench during the period of construction would materially increase the difficulty of holding the soil in place and the danger of a probable cave-in of the sides of the trench, and would have involved a serious danger to the men working in the trench (case p. 45, ll. 28-40; p. 46, ll. 10-30; p. 47, ll. 19-40; p. 49, ll. 12-18). They all agreed that the cost of employing either the tunnel method or the open cut method adopted by the Commissioners with the tracks removed during the work of construction, from either a business or an engineering standpoint, in view of the character of the sewer as shown by the plans and specifications, and the soil conditions, would be wholly unreasonable and prohibitive (case p. 48, ll. 1-11; p. 49, ll. 12-18; p. 40, ll. 14-18; p. 36, ll. 8-15; p. 28, ll. 12-30).

It also appears that all of these things were considered by the Commissioners before deciding on the method adopted. Mr. Brown, Chief Engineer in charge of the work, testified as follows:

“That as Chief Engineer of the Passaic Valley Sewerage Commissioners he has had charge of the preparation of the working plans, specifications and contracts for the construction of the said main intercepting sewer for the Passaic Valley Sewerage District; that in the preparation of the plans, specifications and contracts he has always had regard for the convenience of public travel in the streets through which said sewer was to be constructed; that for the most part the said sewer is constructed in tunnel in the City of Newark, where the travel on the public streets is considerable, and where the interruption of street traffic would result in serious loss and injury; that the plans for said sewer in the parts of the

city where the traffic is light provide for its construction by the open trench method, the determining consideration being the greater economy in the construction of the sewer by the open trench method, as compared with the tunnel method.

“That the plans and specifications for the construction of Section 6 of the sewer, including the part in Hamburg Place in Newark at the intersection of Avenue L, were prepared under the direction of this deponent, and that the method of construction specified for this section of the city was the open trench method; that in advertising for bids for the construction of Section 6 of the sewer the said section was divided, in the first place, into two parts, designated respectively as the northerly portion of section 6 and the southerly portion of section 6; that the northerly portion included the portion of Hamburg Place in controversy in this suit; that the said northerly portion of said section 6 immediately adjoined on the north a section of the sewer under construction in tunnel, and that upon opening the bids for the construction of the northerly portion of said section it was found that the contractor constructing the adjoining section of the sewer in tunnel proposed to build the northerly portion of section 6 in tunnel at a price including a charge of \$128.50 per linear foot for the excavation necessary for said work; that another bid was made under said advertisement for the construction of said northerly portion of section 6 in tunnel, including a charge of \$175.00 per linear foot for said excavation; that a much lower bid was received for the construction of the sewer by the open trench method, involving

a charge for the necessary excavation of twenty-seven dollars per linear foot; that the lowest bidder upon the award of the contract to him failed to qualify by the due execution of the contract, and it became necessary to readvertise said northerly portion of section 6, upon which advertisement bids were received and the contract awarded upon a specification of the open trench method of construction; that the lowest bidder again failed to qualify by the execution of the contract, and it became necessary to readvertise for the construction of the said portion of section 6; that thereupon the whole of section 6 was divided into three portions, designated respectively as the northerly portion, central portion and southerly portion of section 6; that the central portion of section 6 includes that part of Hamburg Place, which is in controversy in this suit; that upon the advertisement of said section bids were received and the contract awarded to the firm of Frazer & Burchenal, the lowest bidder at a price for excavation of seventy dollars per linear foot.

"That this deponent is satisfied, from a consideration of the bids submitted, that the construction of the sewer by the tunnel method through the central portion of section 6 would have resulted in an increase of the cost of this section considerably above one hundred thousand dollars" (case, p. 17, l. 36, to p. 19, l. 15).

This testimony of Mr. Brown to the effect that the construction of the sewer by the tunnel method through the central portion of section 6 would have resulted in an increase of the cost of this section considerably above \$100,000 is undisputed, and all agree that it would cost more to construct the por-

tion of the sewer in question by the open cut method supporting the tracks over the trench than by the tunnel method (case, p. 48, ll. 1-5). One of the complainant's witnesses expressly testified to this fact (case, p. 63, ll. 25-28).

In short, the complainant's position is that the Passaic Valley Sewerage Commissioners, in exercising their powers under the statute, should have adopted either one of the two methods proposed by it at an excess cost of more than \$100,000 over the cost of the method adopted by the Commissioners, and that they were obliged to do so in order to relieve the complainant from the expense of removing and replacing 300 feet of its track at the point in question.

Of these 300 feet, the 150 feet thereof located east of Avenue L were dead-end tracks, which were used only for the storage and switching of cars at the time baseball games were played at Wiedemayer's Park, the entrance to which is a short distance to the west of such location (case, p. 26, ll. 38-40; p. 28, ll. 1-10, ll. 20-30, p. 31, ll. 1-20). And in this connection it should be observed that the Passaic Valley Sewerage Commissioners in their contract provided that "no portion of the work in Hamburg Place between Jabez Street and Avenue L shall be executed in the interval between May 1st and Labor Day. During this time the street surface shall be unbroken and the traffic uninterrupted" (Book of Exhibits, Contract, p. 26).

The remaining 150 feet of the tracks in question, located on Hamburg Place westerly of Avenue L, is alleged in the bill of complaint to be a necessary part of complainant's railway system running from the heart of the City of Newark to South Orange (case, p. 2, ll. 22-24), but which, as a matter of fact, is only the easterly end of complainant's line (case, p. 27, ll. 2-10, p. 28, ll. 1-10, ll. 20-30; p. 54, ll. 30-40, p. 55, ll. 1-30; p. 67, ll. 28-30), running into a very sparsely settled section of the City of Newark

(case, p. 34, ll. 3-16; Photograph B, Book of Exhibits, p. 3). By complainant's own evidence it appears that for a period of 24 hours from midnight of December 2d to midnight of December 3d there passed Hamburg Place and Avenue L 314 cars going both ways, or 157 cars each way, and that the total number of passengers eastbound was 474, and westbound 478 (case, p. 67, ll. 18-24). The witness states that this count is representative of an average day (case, p. 68, ll. 2-3). These figures practically agree with the count taken by defendant on other days (case, pp. 48 to 57; Book of Exhibits, pp. 7-14).

The work of completing the portion of the sewer in question in accordance with the terms and provisions of the contract, required that the tracks at such location should be removed or discontinued for not more than three months (case, p. 26, ll. 32-37; p. 28, ll. 1-10, ll. 20-30).

The complainant's contention that an interruption in the continuity of its tracks at the point in question during the period of construction would unreasonably interfere with the public travel is obviously untrue. The traffic on Hamburg Place southerly to Avenue L could, without any change, be taken care of as previously by cars running down Hamburg Place to Avenue L and returning by way of Hamburg Place.

The traffic beyond the point in question northerly on Avenue L could, without additional expense, be taken care of by either routing a part of its cars from the intersection of Hamburg Place to East Ferry Street, along East Ferry Street, Magazine Street and Avenue L to Hamburg Place, or by running a shuttle car along Avenue L between Hamburg Place and Magazine Street. The traveling public could have been fully accommodated by either of these methods, as appears from the accompanying illustration see opposite page; (case p. 40, ll. 37-40; p. 41, ll. 1-3).



NEWARK BLUE PRINT CO.
HERBERT F. SOVEREL CO.
ESSEX BUILDING
CLINTON AND BEAVER STREETS
NEWARK, N. J.
"ONE SHORT BLOCK FROM EVERYWHERE"
SUN AND ELECTRIC PRINTS

Under all the circumstances of the case we submit that the plan of construction adopted by the Commissioners was reasonable. That while they had no right to interfere capriciously or unnecessarily with complainant's use of the street, on the other hand they were "under no obligation to incur the expense either of shoring up the railway track or of removing it to the one side of the street." *Kirby v. Citizens Railway Co.* (Ct. of App.) 48 Md. 168.

The Commissioners must be presumed to have acted without malice, to have acted reasonably and as in its judgment the interests of the public demanded. There is no rule of law better settled than that the courts will not undertake to control or interfere with the discretion given a municipal body in a matter of determining upon a plan for a public work or the necessity of particular features of such plan, except where there is fraud, manifest oppression or abuse.

This principle has been repeatedly recognized by our courts on numerous occasions.

In *Berdan v. Passaic Valley Sewerage Commissioners*, 82 N. J. Eq. 235, 241, the court, in speaking of a determination that had been made by the Passaic Valley Sewerage Commissioners, one of the defendants in this suit, said:

"No principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate, political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. And the fact that the court would have exercised the discretion in a different

manner will not warrant it in departure from the rule.' High Inj. Sec. 1240.

"This principle has been often applied and exploited by the courts of this state. *Plum v. Morris &c. Canal Co.* 10 N. J. Eq. (2 Stock) 256; *Allen v. Board of Chosen Freeholders*, 13 N. J. Eq. (2 Beas.) 68; *Pope v. Town of Union*, 18 N. J. Eq. (3 C. E. Gr.) 282; *Bond v. Newark*, 19 N. J. Eq. (4 C. E. Gr.) 376; *Greenville v. Seymour*, 22 N. J. Eq. (7 C. E. Gr.) 458; *Schumm v. Seymour*, 24 N. J. Eq. (9 C. E. Gr.) 143; *Liebstein v Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200; *Mattiessen, &c., Co. v. Jersey City*, 26 N. J. Eq. (11 C. E. Gr.) 247; *McKinley v. Board of Chosen Freeholders*, 29 N. J. Eq. (2 Stew.) 164; *Cape May Railroad Co. v. Cape May*, 235 N. J. Eq. (8 Stew.) 419."

In *San Antonio v. San Antonio St. Ry. Co.* 39 S. W. 136, the principle was directly applied to a case similar in all essential features to the present. The authority of the municipality contained the express limitation:

"Said City is hereby given the right to lay, construct and maintain its sewers in, under and across or along any public street, highway, or public grounds within or without the corporation limits of said city: provided that due regard shall be had for franchise rights and vested rights in, upon, and along said streets, highways and public grounds."

The court said:

"The duty of adopting a general plan of drainage and determination when and where sewers shall be built, of what size and at

what level, involving, as it does, the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory, can be effectively performed only by some person or tribunal vested with full authority, and armed with the necessary means to accomplish that end, and who, by devoting the necessary time to the matter, and by obtaining the requirements of the system of sewerage as an entirety. The legislature, appreciating the fact, has imposed upon the city council this duty, with the discretionary powers necessary and proper to its performance. There is no rule of law better settled than that the courts will not undertake to control or interfere with the discretion given a municipal council in the matter of determining upon a plan for such public work, or the necessity of particular features of such plan. If a court or jury were to pass upon the advisability or expediency of a particular feature of the system at a particular place in the city, not only would it be impossible upon the trial of the case to give the matter that thorough and comprehensive investigation which such a matter would demand, but another jury might be called upon to pass upon another feature of the system at another place, and so on indefinitely, until numberless features of the system, at numberless places throughout the city, would have been modified by successive juries, no one jury having had any means of consulting with another, or of hearing the evidence adduced on other trials; and the inevitable consequence would be a series of incongruous,

incompatible results, which no engineering skill could harmonize. This *reductio ad absurdum* shows that the rule that courts will not undertake to control the discretion of the municipal council in these matters is founded, not only in reason, but in imperative necessity. 1 Dill. Mun. Corp. Secs. 94, 95, 483; *Hines v. City of Lockport*, 50 N. Y. 233; *Bell v. City of Rochester* (Sup.), 30 N. Y. Supp. 365; *Elliott, Roads & S.* p. 576; *Johnston v. District of Columbia*, 118 U. S. 19, 6. Sup. Ct. 923.

“The property rights of appellee in the streets of the city having been from their incipiency subject to the right of the public to locate sewers in said streets, no right of compensation can arise in favor of the street railway company, as against the public, or its representative, the city, by reason of any loss or expense which the appellant may incur by reason of the exercise of this right of the public. *Kirby v. Railway Co.*, 48 Md. 168; *In re Deering*, 93 N. Y. 361.”

The obligation to care for the tracks of the Public Service Railway Company was not imposed on the defendants Frazer and Burchenal by their contract with the Passaic Valley Sewerage Commissioners.

Nowhere in the contract from beginning to end is there any mention of street railways. While by Art. IV, Sec. 18 the contract provides for the maintenance of service of sewers, drains, water and gas pipes, and Sec. 19 provides for the removal of the plank road across the track of the Central Railroad, nowhere does it provide for the removal or

restoration of the tracks of the complainant. Under the well-settled principle of *expressio unius est exclusio alterius* the express mention of the temporary care of sewers, drains, water pipes, and gas pipes excludes the idea that the temporary care of street railways was intended to be included.

Even in the case of the Central Railroad Company especially mentioned, the obligation on the contractors was expressly restricted to the removal and replacing of the plank that formed the surface of the street across its railroad, and no mention was made as to the support or maintenance of the tracks during the period of the construction of the sewer underneath the railroad. On the contrary, by Art. IV, Sec. 8, it is expressly provided:

“Whenever it is necessary to *cross roads or railroads* the contractor shall, at his own expense, provide suitable and safe bridges or other sufficient crossings for the accommodation of the travel on said roads; and shall maintain the same in good and safe condition until the roads can be restored to as good condition as before, when he shall remove all bridges and other temporary expedients, and shall restore said *roads* to a condition suitable for use; all to be satisfactory to the Engineer. The contractor shall give reasonable notice to the owners of railroads and private ways before interfering with them.”

By this clause it appears that the obligation of the contractor is confined to the accommodation of the travel on the streets as distinguished from the railroads. Moreover, the evident purpose of the clause requiring reasonable notice to be given to the owners of railroads before the contractor

should begin work was to give the railroads time to prepare to discharge their obligation of taking care of their own property at their own expense while the work of construction was going on.

By Art. IV, it is provided:

“Sect. 10. * * * All surfacing material within the location of the work, including loam, pavements, paving gravel, cinder road materials, broken stone, etc., shall be removed and kept separate, as may be directed, to be again used in repaving or resurfacing the streets, roads, or grounds, as directed by the Engineer.”

“Sect. 20 (Par. 2.) The surfacing of ground and streets and elsewhere shall in all cases be left in as good condition as it was previous to the commencement of the work; when of gravel or broken stone, it shall be well rolled with a heavy roller; and the whole work of refilling and resurfacing shall be done, as far as possible, in a manner to prevent after settlement.”

No mention is made here of removing, preserving or restoring streets, railways and their appurtenances which undoubtedly would have been done if it was intended that the contractor should be chargeable with the removal and restoration thereof.

Art. IV, Sec. 14, provides:

“All materials shall be so placed as not to endanger the work, and so that free access may be had at any time to all parts of the excavations, and to all hydrants and water gates and other valves in the vicinity. They shall be kept neatly piled, so as to in-

convenience as little as possible the public travel or the adjoining tenants. Reasonable provisions, satisfactory to the Engineer, shall be made for travel on streets, roads, railroads and private ways."

This section, as appears by the marginal note, is intended only to deal with "piling of materials." The last sentence, therefore, must be construed in connection with the rest of the section and confined in its operation to reasonable provision for the piling of materials so that they might not interfere with the kinds of travel specified.

Art. IV, Sec. 16, provides:

"In rock excavation, it is especially required that the blasting shall be conducted with all possible care, so as to avoid injury to persons and property; that the rock shall be well covered and sufficient warning shall be given to all persons in the vicinity of the work before blasting; that care shall be taken to avoid injury to gas and water pipes, sewers, drains or other structures."

This section, as appears by the marginal note, is intended only to refer to blasting stipulations and liabilities. Obviously it has no references to the right of the complainant to the support of its tracks in their original position during the period of construction or the assumption of liability by the Commissioners or the contractors to remove and replace the same.

Concerning the work at the point in question, Art. V., Par. 2, provides:

"No portion of the work in Hamburg Place between Jabez Street and Avenue L shall be executed in the interval between

May 1st and Labor Day. During this time the street surface shall be unbroken and the traffic uninterrupted."

This provision undoubtedly indicates that interruption of traffic at the point in question was necessary in carrying out the work, and that this interruption might be made between the months of September and May. Again there is no mention that temporary provision for the street railway tracks should be provided by the contractor.

The complainant really bases its claim upon Secs. 2 and 18 of Art. IV of the contract. The pertinent portions of these sections are as follows:

"Sect. 2. The Contractor shall furnish and do everything, except as herein otherwise provided, necessary to complete the work in accordance with the terms of the contract and with the requirements of the Engineer thereunder. * * * make all provisions necessary to maintain and protect existing structures of whatever kind; to repair all damage done to such structures * * *."

"Sect. 18. Care shall be taken not to move, without the consent of the Engineer, *any sewers, drains, water or gas pipes*, or other structures; and in crossing these or in running parallel with or near them they shall be sustained securely in place until the work is completed.

"Whenever it is necessary to interfere with said structures the Contractor shall maintain their respective services, and if necessary for that purpose *shall lay temporary water, gas or other pipes*. He shall repair all damages done to any of said struc-

tures, and shall keep them in repair until six months after the completion of the work on the section. He shall leave them in as good condition as they were previous to the commencement of the work."

Section 2 provides in general terms that the contractor shall maintain and protect existing structures of whatever kind, but the extent of the contractual obligation is specifically defined by Sec. 18 which is entitled in the margin "*Care of existing structures.*" By this section both the character of the "*existing structures*" and the kind of protection intended is set forth in detail. The structures intended are stated to be *sewers, drains, water or gas pipes, or other structures.* The words "other structures" are merely general words which follow words of a more particular character and consequently, according to the well-settled rule of *eiusdem generis*, must necessarily be limited in their meaning by the more particular words which precede them, "sewers, drains, water or gas pipes" and can only be held to include "other structures" of similar character or class. The rule is well settled. In 9 Cyc, 584, 585, it is said:

"The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply. Thus, general words following particular or specific terms are restricted in meaning to those things or matters which are of the same kind as those first mentioned."

Kendall v. Almy (Judge Storey), 2 Sumner Rep. (Cir. Ct. U. S.), 278; *Hickman v. Cabot*, 183 Fed. 747; *Jewel Tea Co. v. Watkins*, 145 Pac. 719; *Hawkins v. Gt. Western RR. Co.*, 17 Mich. 57.

By no rule of construction can these words be held to include street railways. It would be strange indeed that the Commissioners should specify a gas pipe and not specify a street railway if they had intended to include it.

In *Penn. Steel Co. v. J. E. Potts Salt & Lumber Co.*, 63 Fed. 11, the court had under consideration the interpretation of the Mechanics Lien Law of Michigan. It said:

“We are not disposed to question the proposition that such statutes, though they are in contravention of the common law, should be fairly and liberally construed; but we cannot extend them beyond the bounds of the purpose of the legislature, as gathered from the words employed. Upon general principles of construction, we do not think that the words ‘other structure’ following, as they do, in the Michigan statute, such limited and localizing words as ‘house, building, machinery, wharf,’ can reasonably be held to include a railroad.”

To the same effect see also *Rutherford v. Railroad Co.*, 35 Ohio St. 559.

In *Frelinghuysen v. Town of Morristown*, 76 N. J. Law, 271, 275, Mr. Justice Swayze said:

“The act of 1895 is entitled ‘An act to regulate the location of pest houses, crematories and other objectionable structures.’ Its scope is limited by this title. In one sense a sewage disposal works may be called a structure, although the use of the word to include a disposal plant seems a little strained, but another consideration leads us to think that a more restricted meaning

must be attributed to it. Words, like men, are known by the company they keep; and the word 'structure' is here found in company with crematories and pest houses. It must mean some structure of like character; that is, some sort of a building."

Moreover, the second paragraph of Sec. 18 above recited specifically defines the kind of maintenance and protection which the contractor is required to give, and expressly makes provision for the case where it is necessary to interfere with the existing structures contemplated by the contract and to provide temporary maintenance of public service, to wit, "whenever it is necessary to interfere with *said structures*, the contractor shall maintain their respective services, and if necessary for that purpose *shall lay temporary water, gas or other pipes*. By this clause the temporary structures required to be built by the contractor for the purpose of maintenance of public service are expressly limited to water, gas or other pipes. The erection of a temporary street railway track is not in any way suggested.

We repeat that nowhere in the contract from beginning to end, is there any mention of street railways. The Commissioners have specifically mentioned that care should be taken of sewers, drains, water and gas pipes, and explicitly provided "that if necessary in order to maintain their respective services the contractors should lay temporary water, gas or other pipes," and it is, we submit, inconceivable that they intended to include without mentioning it so important a structure as a street railway.

Art. XVIII, Item I, specifies *the structures the protection and restoration* of which the compensation of the contractor shall cover, as follows:

“ * * for all *protection and restoration* of buildings, fences, existing sewers, cisterns, culverts, water pipes, gas pipes, house drains, etc.”

Mr. Brown, the Commissioners' engineer, testified that the construction of that portion of the sewer covered by Frazer and Burchenal's contract by the tunnel method would have resulted in an increase of the cost considerably above \$100,000 over the cost of construction by the method adopted by the Commissioners (case p. 19, ll. 8-14). If the excess cost for 1,400 feet would amount to \$100,000, for the 300 feet in question the *excess cost* would be \$20,000 by the tunnel method (case . 20, ll. 9-14). Mr. Brown also testified that the cost of supporting the tracks in their original location during the construction of the sewer by the open trench method would also cost \$20,000 (case p. 20, ll. 10-18). In addition to the cost of the support of the tracks, this method would increase very materially the difficulty of getting the material out from under the tracks so supported, and would increase the labor cost from 50 per cent. to 75 per cent. or more in excess of the cost of constructing the sewer by the open cut method adopted by the Commissioners with the tracks removed during the work of construction (case, p. 47, ll. 20-27; p. 37, ll. 33-40). By the terms of the contract it appears that the contractors were to receive only \$70 per linear foot for excavation and refilling, including the support of existing structures, etc., which would amount to only \$21,000 for the 300 feet of sewer located under the complainant's tracks (Exhibits, Contract, p. 33, Art. 18, Item I). Obviously, the sum would not even be enough to meet the *excess cost* of supporting the complainant's tracks either by the tunnel or open cut method with temporary supports,

and would provide nothing whatever for the doing of the work called for by the contract.

Under these circumstances, it would be entirely unreasonable to hold that either the contractor assumed or the Commissioners intended to impose upon them, the expense of maintaining the tracks of the complainant during the period of construction.

The duty to take care of its tracks during the period of construction rested upon the Public Service Railway Company, and it would have been an *ultra vires* act for the Commissioners if they had undertaken to assume it, or impose it upon the contractor. You can search the statute in vain to find any authority in the Commissioners to relieve the complainant of this duty, or, by assuming it, to throw the burden thereof upon the taxpayers. As was said in *The Sedalia Gaslight Co. v. Mercer*, 48 Mo. App. 644:

“Sewerage is a matter unquestionably affecting largely the public health. The city could make no contract with the plaintiff, abridging or divesting its full control over such matters. The plaintiff took its contract right to lay its pipes in the public streets subject to the paramount and inalienable rights of the city to construct its sewers wherever therein, in its judgment, the public interests demanded. Although the plaintiff laid its pipes down in the public streets in the place and manner directed by the city, yet it acquired no such vested right in an trespass upon or invasion thereof like any other attack upon private property would subject the city to an action of damages. The city could, for the reason already stated, incur no liability for constructing a sewer

which would interfere with or compel the relaying of the pipes once laid in the place and manner directed. This statement of the law finds support in *Nat. Water Works v. City of Kansas*, 28 Fed. Rep. 922; *Butcher's Union v. Crescent City*, 111 U. S. 746; * * *.

“And if there is no liability on that account it is quite difficult to understand why the indemnity provision of the ordinance was either essentially or necessarily implied in or incident to the power conferred by its charter provision to establish public sewers. The provisions in the ordinance that the contractor shall assume all responsibility for loss, damage or injury to persons or property arising out of the nature of the work, from the action of the elements, or from unseen or unusual difficulties, is without the chartered grant of powers to the city. This becomes apparent when it is borne in mind that the revenue with which to pay for the construction of the sewer must be raised by the levy of a tax on all property made taxable for state purposes over the whole city, and that the revenue so arising ‘shall be appropriated solely to the building of said sewer.’ Now if a contractor must assume the liability imposed by said ordinance as the plaintiff contends, then in bidding for the work he must make allowance therefor. If he must assume the tremendous responsibility provided by the ordinance of affording indemnity to water, gas, heat, electric light, telephone and telegraph companies where pipes and conduits are interfered with in the building of the sewer—if he must answer to these private corporations for the action of the elements or from other unseen or unusual

difficulties in prosecuting the work, then it is plain that his bid must necessarily be far above what it would be without such extensive liability, or in other words the cost of the sewer must necessarily be increased by the risks of the liability required to be assumed. To what would otherwise be the cost of the sewer must be added a per cent. of cost commensurate with the risk imposed upon contractor by the ordinance. The city under its charter has no power to levy or collect a tax to pay the difference between the cost of the sewer with and without the ordinance liability. The plain and obvious purpose of the ordinance seems to be to provide an indemnity at the public expense by an indirect method from damages resulting from the interference in the construction of public sewers with the property of private business corporations using the public streets in which sewers are to be built. The effect of the ordinance is to increase the cost of the construction of sewers in proportion to the extent of the liability it imposes upon the contractor to pay private indemnity. The practical effect of the ordinance is to make the sewer contractor a mere collector of indemnity from the city for the private business corporations for the damages to their property for which the ordinance renders him liable. Thus a revenue which is raised by taxation, and must, under the charter, be appropriated solely to the building of the sewer, is diverted and applied to the payment of the ordinance indemnity. This well and ingeniously devised system for the allowance, collection and payment of the indemnity to third parties, as is provided in

this ordinance, is not authorized by any express or implied grant of power to be found in the charter of the city. The power to levy a tax to construct a sewer does not necessarily imply the power to levy a further tax to pay damages resulting from the construction for which the city is in no way liable. The levy of a tax for such a purpose by the city is the exercise by it of an unauthorized and arbitrary power without the scope of its charter. Manifestly, it was never the intention of the legislature to authorize the city by ordinance to levy a tax to raise a fund to pay damages for so constructing a public sewer as to interfere with and compel the relaying of the plaintiff's gas pipes once laid in the place and manner directed. The ordinance, so far as it provides indemnity and the payment of same to the plaintiff through the defendant as contractor out of the fund arising from the sewer tax, must be held to be invalid."

And again, in *Anderson v. Fuller*, (Fla.) 41 So. 684:

"While municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety and convenience, notwithstanding the same may interfere with legal franchise

rights. A water company, placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public through its duly constituted municipal authorities, to construct sewers in the same streets whenever and wherever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. *McQuillin*, Mun. Ord. Sec. 521; *National Water Works Co. v. City of Kansas* (C. C.) 28 Fed. 921; *Kirby v. Citizens' Ry Co.* 48 Md. 168, 20 Am. Rep. 455; *Elliott on Roads and Streets*, sec. 476; *New Orleans Gas Co. v. Drainage Com.* 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831. The city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water pipes, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or *railway tracks* that might necessarily have been interfered with in laying its sewers in the streets. And that these contracts did indirectly undertake to cast such burden upon the city there can be no doubt, since bidders for the work, being advised in advance that they would be required to bear the cost of such removal and replacement, would increase their bids sufficiently to cover such cost, thereby casting an authorized and illegal burden upon the taxpayers and defeating the purpose and object of the law in having the contracts for such work awarded to the lowest responsible bid-

der. These provisions in these contracts, and in the specifications of the work upon which the bids for the contracts were submitted, requiring the contractors at their cost to remove and replace all water and gas pipes, telephone, telegraph, and electric light poles, pipes, drains and conduits, and all *railway tracks* that interfered with such sewers go to the vitals of such contracts, and render them null and void upon their face. Particularly is this true when the city is authorized by its charter to assess the cost of such work against the abutting property. *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; *Inge v. Board of Public Works*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20; *Colwell v. City of Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218. On the general subject see *Diamond v. City of Mankato*, 89 Minn. 48, 93, N. W. 911, 61 L. R. A. 448."

In this connection we should say that as a matter of fact the price at which the contract was let did not impose any illegal burden on the taxpayers, as the actual construction work was completed by the contractor at a loss of over \$30,000 to themselves, but the doctrine of these cases is particularly important in construing the contract under consideration, for it is well settled that corporations must be presumed to contract within the existing powers of their charters and where general words are used in a contract by them admitting of a double construction they must be construed consistently with the scope and powers of the charter. *Morris and Essex RR. Co. v. Sussex RR. Co.*, 20 N. J. Eq. (5 C. E. Gr.), p. 542. In this case the Court of Errors and Appeals said:

The difficulty in question arises under the first section of the contract. That relates to all freight and passengers which shall be transported over either of the roads of the said companies, or *any future extensions or branches of the same.*

“First. Do these words ‘any future extensions or branches of the same’ include the extensions in question. This is a matter of construction and application of words to their subject matter. In determining it, we must necessarily look to the situation of the parties and their powers. The parties are creatures of the statute, and if these words can be fully satisfied by the objects authorized in their charters and supplements, we would not be justified in giving them an application to objects outside, uncertain and unauthorized. Corporations in dealing with each other are presumed to contract within the powers and limitations of their charter, and any intention to contract upon matters not then authorized, even with the expectation of a subsequent legislative ratification, must be clearly expressed. There is nothing in this contract, certainly by express words, to show that the parties contemplated at any future time the construction of any lines not then authorized. Such an implication is, however, sought from the general words, *any future extensions or branches*, but that could not be permitted unless it was necessary to look beyond the scope of existing powers to satisfy the words.”

And again, in *Morris and Essex RR. Co. v. Bonnell, et al*, 34 N. J. L., p. 474, 477, the Supreme Court said:

"In further applying the deed, the court charged that it 'conveyed a strip widening as going east, according to the depth of the cut, until at the extreme easterly end, where the cut is twenty feet six inches deep, the width to furnish the road-bed, ditches, and for necessary slopes would be forty feet three inches south of the center line.' This would make eighty feet and six inches for the whole width at that point. That is more than the full width allowed for the route of the road in the act of incorporation. The language of the deed should not be held to embrace more land than the company had power to take for the route. It being general must be construed within the scope of the powers of the company then existing. *Morris and Essex v. Sussex RR. Co.*, 5 C. E. Green, 542."

Applying this principle of construction to the present case we submit that the terms of the contract must be construed in connection with the corporate power of the commissioners, and since there is no statutory authority to relieve the complainant of the expense of taking care of its own tracks during the period of construction of the sewer, it cannot be said that the commissioners either assumed it themselves or attempted to impose it upon the contractors.

Under no circumstances did the contract between the Passaic Valley Sewerage Commissioners and Frazer and Burchenal impose any liability on Frazer and Burchenal in favor of the Public Service Railway Company, which was not a party thereto.

In construing such a contract the power of the Commissioners to contract as well as the subject-matter of the contract and the purpose intended to be accomplished by it should all be considered, and it ought never to be inferred that the contract made by the commissioners was intended to inure to the benefit of a complainant further than it may be necessary for the absolute protection of the commissioners unless their charter expressly or by necessary implication confers the power to make contracts to inure to the sole benefit of individuals and the intent so to do clearly appears in the contract itself.

In *Carpenter v. Reliance Realty Co.* (Mo.) 77 S. W., p. 1004, a contract between defendants (a lot owner and a construction company employed to erect a building on the lot) provided that the construction company should protect the adjacent walls. Held, that a contention by plaintiff, in an action to compel the defendants to adopt measures at their expense to protect his adjacent buildings from damage by excavation, that he was entitled to enforce the contractual provision against the construction company is untenable, since he was not a party to the contract.

The Court said:

“It is further contended that, as the construction company bound itself by contract with the realty company to protect the adjacent walls, the contract was made for the benefit of plaintiff, as the owner of those walls, and he is entitled to enforce it. This position is untenable. That clause of the contract between the construction company and the realty company which the plaintiff invokes was designed as an indemnity to the latter company against any possible

loss *it might be called on* to make good on account of injury to the adjacent walls or the street, and was in no sense a contract for the benefit of the plaintiff or the city, or one on which either could sue. The observance of the contract might have, and doubtless would have, redounded incidentally to the plaintiff's benefit, but that circumstance gave him no right of action on it. *Koken Ironworks v. Livers*, 147 Mo. 580, 49 S. W. 507; *Howsmon v. Water Co.*, 110 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Blumb v. O'Connell*, 99 Mo. 357, 12 S. W. 791; *New Haven v. R. R.*, 62 Conn. 253, 25 Atl. 316, 18 L. R. A. 256. Moreover, we think a just construction of the contract between the construction company and the realty company did not bind the former to underpin the building, as they were compelled to do by the injunction, but only bound the construction company, *as between it and the realty company*, to save the buildings from harm; and, if they had been harmed (as they were not) the only party that could have sued on the contract was the realty company, *and it only after it had been damnified by paying for the injury done to the buildings*. *The indemnity clause certainly cannot be held to have inured to plaintiff's benefit in such sense as to relieve him from the duty of taking care of his walls and from all the expense necessary to do it, and transfer the duty and expense to the construction company*. If it had that effect, it was equivalent to awarding the plaintiff a large sum of money by virtue of a contract to which he was no party, and for which he advanced none of the considera-

tion. The realty company owed him no duty to protect his buildings, and could not have contracted for his benefit, except as a gratuity, which no one will say was its intention or the construction company's understanding. The realty company was contracting solely for its own benefit, and to guard against any loss that might befall in the course of erecting the new building."

Also in *Styles v. Long Co.*, 67 N. J. L. 413 (affirmed 70 N. J. L., p. 301), the Supreme Court said:

"The action was in tort, to recover damages for personal injuries sustained by the plaintiff while crossing a temporary foot-bridge alleged to have been erected, controlled and maintained by the defendant over the Passaic River, at Main Street, in Paterson. * * *

"* * * The contract contained also the following stipulations:

"'Contractor's risk. The contractor must assume all risks from floods and storms, damage to persons and properties, and casualties of every description pertaining to the removal of the old bridge, the construction of the new bridge and the construction and use of the temporary foot-bridge, until the final acceptance of the new structure.

"'Protection of the public. The contractor shall provide, make and maintain all temporary fences, boardings, struttings, shorings, bridgeways or temporary arrangements necessary for or required in consequence of any of the works, all enclosures for materials, or works for the protection of the pub-

lic, or for the protection of any building or property whatsoever near to or, liable to be affected by the work, and shall sufficiently watch and light the same when necessary, both during the construction and after the completion of the work, until the acceptance thereof, and take such other precautions as may be required by the bridge committee.

“Provision for the accommodation of pedestrians. The contractor shall provide and maintain for the accommodation of pedestrians during the construction of the new work a temporary foot-bridge on temporary piers, to be located near the site of the present bridge, and for this purpose shall have the right to use the materials in the old bridge as far as necessary.’

* * *

“The general rule is entirely well settled that one who is not a party to a contract cannot sue in respect of a duty arising out of the contract. This rule was applied and the reasons for it expounded in this court in the case of *Marvin Safe Co. v. Ward*, 17 Vroom, 19, the circumstances of which were quite similar to those of the present case. It is true that in the case cited the contract had been fully performed by the defendant, while in the present case there were stipulations imposing a continuing obligation. But there seems no reason for drawing a distinction on this account, and the adjudicated cases apply the rule as well to contracts imposing a continuing obligation as to those whose stipulations have been fully executed.

“Other New Jersey cases recognizing the rule above stated are *Kahl v. Love*, 8 Vroom 5; *Appleby v. State*, 16 Id. 161, 240, 245; *Clyne v. Helmes*, 32 Id. 358, 368.

“It is claimed that, by reason of the fact that the contract here in question was made by a public corporation for the construction of a public work, and contains stipulations intended for the safety of the public, the plaintiff, as one who has sustained personal injuries by reason of the non-performance of such stipulations, is entitled to maintain an action of tort against the defaulting contractor.

* * *

“But the rule entitling third parties to maintain an action for breach of the contract is limited to those for whose benefit the contract was made, and is not extended to third parties, who, indirectly and incidentally, would be advantaged by its performance. 15 Encycl. Pl. and Pr. 516, and cases cited. It was on this ground, as well as on the ground of the contract being under seal, that in *Crowell v. Hospital of St. Barnabas, ubi supra*, it was adjudged by our Court of Errors and Appeals that a prior mortgagee was not entitled to enforce payment of the mortgage debt by personal decree against the grantee of the mortgagor, such grantee having simply assumed the payment in the deed by which the property was conveyed to him. This will appear in the reasoning of the opinion delivered by Mr. Justice Depue for the Court.

* * *

“We take it to be quite plain that the rule that no one can sue upon a contract

unless he is a party to it, cannot be evaded by bringing what is really an action for breach of contract in the form of an action of tort. 15 *Encycl. Pl. & Pr.* 504. It follows that, in order to maintain an action of tort for breach of a contractual duty, the plaintiff must have the same *status* under the contract as would entitle him to maintain an action upon contract for a breach of its stipulations. If therefore the act of 1898, above referred to, can be so extended, by construction, as to entitle one not a party to a contract under seal to maintain an action of tort in respect of a breach of duty arising out of the contract, the right of action must at least be limited to those who would be entitled, in an action strictly upon the contract, to sue for a breach of its provisions.

“The adjudicated cases, as well as the reason of the matter, fully sustains the propriety of exempting one who is employed by a public corporation to perform works for the public benefit, under a contract which imposes a continuing obligation, from an action of tort at the suit of an individual who suffers injury by reason of its non-performance, so far as such action is based upon the contract itself, the party injured being remitted to his action for breach of such duty, if any, as may be imposed upon the defendant independent of the contract.”

Nickerson v. Bridgeport Hydraulic Co.,
46 Conn. 24; S. C. 33 Am. Rep. 1;

Davis v. Clinton Water Works, 54 Ia. 59;

Foster v. Lookout Water Co., 2 Lea. 42;

Ferris v. Carson Water Co., 16 Nev. 44;

S. C. 40 Am. Rep. 485;

Beck v. Kittanning Water Co., 11 Atl. Rep.
300 (Pa. Sup. Ct).

And continuing:

“In our opinion, therefore, the plaintiff in the present action, as one of the public for whose general benefit and protection the contract in question was made, does not sustain such a relation to the defendant as a contracting party that she can maintain her action of tort by reason of a mere violation of the contractual duty.”

The Court of Errors said (70 N. J. L. 301, 304) :

“Although this action is framed in tort, and the statute is inapplicable, it may be well to add that we have reached the same conclusions as the Supreme Court when the case was before that court.

“The difficulties which presented themselves in the case of suits by third persons upon contracts made by others were two—the want of privity and the want of consideration moving from the third person. These difficulties have been overcome in this state as to contracts not under seal by decisions of the courts (*Joslin v. New Jersey Car Spring Co.* 7 Vroom 141; *Whitehead v. Burgess*, 32 Id. 5; *Economy Building and Loan Association v. West Jersey Title Co.* 35 Id. 27; *Elmer v. Loper*, 37 Id. 50), and as to contracts under seal by the statute. The only effect of the decisions and the statute is that privity of contract is not requisite in order to maintain the action, and the consideration need not move from the person for whom the contract is made. Neither the cases above cited nor the statute go so far as to permit a suit upon contract to be main-

tained by persons with whom the defendant never meant to enter into contractual relations. It is not enough that the plaintiff may be benefited by the performance of the contract; he can only maintain the action when the contract is made for him. It would be a decided novelty to hold that anyone contracting with a municipal corporation is liable to an action of contract, not only by the corporation but by every citizen of the municipality."

In conclusion we submit—

(1) That the complainant's rights in Hamburg Place were subordinate to the rights of the Passaic Valley Sewerage Commissioners in the exercise of their honest discretion to build, by the method adopted, the sewer in Hamburg Place without any obligation on its part to assume the cost of removing and replacing complainant's tracks necessarily incident to such method of construction.

(2) That the Commissioners, had they been so disposed, were without authority to either assume the expense in question or to impose the same upon the defendants, Frazer and Burchenal, and did not attempt to do so.

(3) That even if the Commissioners were obliged to assume such expense and intended to do so, they did not, as a matter of law, impose the same upon the defendants, Frazer and Burchenal, by their contract.

(4) And that even if said contract should be held to impose the expense in question upon the defendants, Frazer and Burchenal, as between the Passaic

Valley Sewerage Commissioners and Frazer and Burchenal it cannot be held to have imposed on Frazer and Burchenal any liability in favor of the company, and that this is true whether the court should hold that the Passaic Valley Sewerage Commissioners were under a duty to provide for the maintenance of the Public Service Railway Company's tracks or whether the court should hold that the Passaic Valley Sewerage Commissioners were under no such duty.

For the reasons above set forth, we submit that the decree of the lower court should be reversed, and since the Public Service Railway Company exercised its right under the order of December 28, 1915 (case p. 84) to do the work itself, and consequently has already borne the cost thereof, as it was obliged in law to do, the bill of complaint should be dismissed as against Frazer and Burchenal, with costs.

J. EDWARD ASHMEAD,

Of Counsel with Frazer and Burchenal,
Defendants-Appellants.

March Term, 1917.

[9630]