

New Jersey Court of Errors and Appeals

Between

POSTAL TELEGRAPH-CABLE
CO. OF N. J.,
Complainant-Appellant,

and

DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.,
ET AL.,
Defendants-Respondents.

On Appeal
from Chancery.

STATE OF CASE.

MALCOLM G. BUCHANAN,
Solicitor and of Counsel with Complainant-
Appellant.

FRED W. VAN BLARCOM,
Solicitor and of Counsel with Board of
Freeholders of Passaic County.

WM. B. GOURLEY,
Solicitor and of Counsel with City of Clifton
(formerly Township of Acquackanonk).

WM. J. LARRABEE,
Solicitor and of Counsel with D., L. & W. Co.

BILL OF COMPLAINT.

(Filed June 3d, 1916.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, POSTAL TELEGRAPH-CABLE COMPANY OF NEW JERSEY, respectfully shows that:

1.—Complainant is a corporation duly organized and existing under the laws of the State of New Jersey, with its principal office in said State at No. 99 Montgomery Street, Jersey City.

2.—The Delaware, Lackawanna & Western Railroad Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania; The Board of Chosen Freeholders of the County of Passaic is a body politic and corporate under the laws of the State of New Jersey; The Inhabitants of the Township of Acquackanonk, in the County of Passaic, is a body politic and corporate under the laws of the State of New Jersey.

3.—Complainant is a telegraph company, and has been for many years, and since its organization has continuously been engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extend throughout several of the United States, and in its arrangement, and connection with other telegraph companies, throughout all of the states and territories of the United States and into foreign countries; that at present its said system of telegraph lines operated and controlled by it, as aforesaid, comprise many thousands of miles of poles and cables and wires; that upon the said system of telegraph lines it has many thousand offices and transmits thousands of

messages for the public and for the Government of the United States and for foreign countries; that said system of lines has been built up so as to connect with and be largely operated from the central office, and that the said lines radiate therefrom to all the important cities and commercial centres and to many towns and villages in the United States and North America, and land lines to all the important commercial centres of this country and the continent of Europe, and through lines there situated to all parts of the world; that among the lines of telegraph forming an important part of said system, and connected with its main office, as aforesaid, is a line extending through the County of Passaic, in the said State of New Jersey, and through the Township of Acquackanonk, in said county and state. 10

4.—That the said last mentioned lines passing through the County of Passaic and the Township of Acquackanonk are built along and upon the public highways of the State of New Jersey, among others upon the public highway known and designated as River Road, at Delawanna, in said Township of Acquackanonk, County of Passaic, at and near the intersection of said highway with the railroad tracks or right of way of The Delaware, Lackawanna & Western Railroad Company, upon which said complainant has acquired the right and privilege of constructing and maintaining its said lines and erecting its said poles necessary to the maintenance thereof. 20 30

5.—That by virtue of said right and privileges thereunto belonging, said complainant constructed and has since maintained and is now maintaining its through line or system of telegraph in, across and upon said public highway in said Township of Acquackanonk, Passaic County, New Jersey, and especially at and near the intersection of said highway with the railroad tracks or right of way of said The Delaware, Lackawanna & Western

Railroad Company, at Delawanna, aforesaid, and has constructed and erected several poles and strung wires and other necessary appliances thereon, which have for a long time, to wit, for a number of years last past, been maintained and used by said complainant in its said telegraph business as a through line or system from points in New Jersey to other states of the United States, and from points in other states of the United States to
10 points in New Jersey, and to points in other states of the United States, and from points in the United States over said lines, and through and by its connections with various other telegraph companies and lines, to foreign countries, and all the countries of the world.

6.—The Congress of the United States passed an Act, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for
20 postal, military and other purposes," and the first section of said act is as follows:

30 "That any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate telegraph lines through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or to interfere with the ordinary travel on such military or post roads."

The second section of said Act is as follows:

"That telegraphic communication between the several departments of the Government

and their officers and agents, will, in their transmission over the lines of any such telegraph company, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

The third section of said Act is as follows:

"That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; provided, however, that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any and all of said companies, at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

The fourth section of said Act is as follows:

"That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this Act."

7.—Complainant, complying with the provision of said Act of Congress, has duly filed its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of the said Act, and thereupon became and is entitled to all the rights and privileges conferred by said Act and burdened with all the obligations imposed thereby; and has, since the filing of its said acceptance, fully performed, and at the present time is performing, all the obligations and requirements of said Act, and has carried upon its lines of telegraph messages for the Government

of the United States and for the several departments thereof, giving the same priority over all other business, and at rates annually fixed by the Postmaster-General, which rates have been much less than the ordinary reasonable rates charged to and paid by individuals and the public for the transmission of like messages and communications?

10 8.—Complainant, since its acceptance of the burdens, restrictions and obligations of the Act of Congress of July 24th, 1866, aforesaid, has constructed its lines along and upon the highways of the different states of the United States, and along and upon the streets of different municipalities throughout the United States under claim of right derived from the aforesaid grant by Congress, and the right to use and occupy said highways of the different states and municipalities as military and post roads of the United States under and by virtue of said grant has many times been affirmed by
20 state and federal courts; that many of the poles and wires on the lines of complainant which pass through said Township of Acquackanonk, County of Passaic, are located on such public post roads and highways, and that the part of said poles and lines located at and near the intersection of said River Road with the tracks or right of way of said The Delaware, Lackawanna & Western Railroad Company, of Delawanna, aforesaid, in said Township of Acquackanonk, County of Passaic, are a
30 continuation of its lines so located upon said post roads and highways under and by virtue of said Act of Congress, and upon and over which it transmits messages for the Government of the United States in accordance with its agreement and acceptance of the same.

9.—The Congress of the United States passed an Act, approved March 1st, 1884, which appears in Vol. 23 of the United States Statutes at Large, at page 3, defining post roads as follows:

“That all public roads and highways while kept up and maintained as such, are hereby declared to be post routes.”

10.—Complainant avers that said The Delaware, Lackawanna & Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township of Acquackanonk, in the County of Passaic, or some one or more, or all of them, are about to commence, or have already commenced, work at and near said point of intersection of said River Road with the tracks or right of way of said The Delaware, Lackawanna & Western Railroad Company, at Delawanna, in the Township of Acquackanonk, County of Passaic, to change the grade of said highway and to depress the same so that it will run underneath said railroad tracks or right of way of said railroad company, and are threatening to, and will, unless restrained by this Honorable Court, cut down, remove and destroy the poles and lines of complainant located upon said public road or highway, and especially at and near said point of intersection of said public road or highway with the railroad tracks or right of way of said railroad company; and thereby injure, destroy and interfere with the business of complainant in and upon its through system of telegraph lines, of which the said lines upon said public road or highway are a part, and thereby cause it irreparable injury.

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11.—In tender consideration whereof, and forasmuch as complainant is without adequate remedy in the premises by the strict rules of the common law, and without the aid and intervention of this Honorable Court, where matters of this kind are particularly cognizable and relievable, to the end therefore that the said defendants, The Delaware, Lackawanna & Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township

of Acquackanonk, in the County of Passaic, and each of them, may, but without oath, full, true and perfect and distinct answer make to all and every of the matters aforesaid, and that a permanent injunction may issue from and under the seal of this Honorable Court restraining said defendants, and each and every of them, from in any manner cutting down, excavating around and under so as to interfere with the support of, removing or destroying the poles and lines or any or any part or portion thereof of complainant located upon said public road or highway, and especially at and near said point of intersection of said public road or highway with the railroad tracks or right of way of said The Delaware, Lackawanna & Western Railroad Company, at any time hereafter while said injunction may remain in force, and restraining said defendants, and each and every of them, from in any way impeding, blocking, injuring, destroying or interfering with the business of complainant in and upon its through system of telegraph lines aforesaid, while said injunction may remain in force, and that meantime and until the granting of such injunction by this Honorable Court, said defendants, and each of them, their respective agents, officers, employes, servants and contractors, may be restrained by order or injunction of this Honorable Court from any and all action whatsoever tending to so cutting down, excavating around and under, removing or destroying said poles and lines or any part or portion thereof, and from in any way whatsoever impeding, blocking, injuring, destroying or interfering with the business of complainant as aforesaid, and that complainant may have such other and further relief in the premises as the nature of the circumstances shall require, and to your Honor shall deem meet.

May it please your Honor, the premises considered, to grant to complainant 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 The Delaware, Lackawanna & Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township of Acquackanonk, in the County of Passaic, their respective agents, officers, employes, servants and contractors, restraining and enjoining them, and each and every of them, from in any way cutting down, excavating around and under, removing or destroying said poles and lines, or any part or portion thereof, of complainant, at, upon or near said public road or highway, at and near said point of intersection of said River Road with the railroad tracks or right of way of said railroad company, at Delawanna, aforesaid, and from in any way whatsoever impeding, blocking, injuring, destroying or interfering with the business and usual occupation of complainant in transmitting intelligence by means of telegraph messages, as aforesaid, and also the State's writ of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, The Delaware, Lackawanna & Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township of Acquackanonk, in the County of Passaic, therein and thereby commanding them, and each of them, on a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor and this Honorable Court, then and there to answer the premises, and to stand to and abide by and perform such decree therein as to your Honor shall seem meet.

12.—Complainant, as in duty bound, will ever pray, etc.

VREDENBURGH, WALL & CAREY,
Solicitors for Complainant.

JOHN A. HARTPENCE,
Of Counsel with Complainant.

ANSWER OF DEFENDANT RAILROAD
COMPANY.

(Filed October 16, 1916.)

This defendant, The Delaware, Lackawanna & Western Railroad Company, answers the complainant's bill of complaint as follows:

1.—It admits the allegations contained in Paragraph "1" of said complaint.

10 2.—It admits the allegations contained in Paragraph "2" of said complaint in so far as they refer to this defendant.

3.—It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "3" and "4" of said complaint, and in so far as they shall be deemed material, it demands that complainant duly prove the same.

20 4.—Answering Paragraph "5" of said complaint, this defendant admits that the complainant has constructed and maintained, and is now maintaining, a line or system of telegraph in, across and upon said River Road in said Township of Acquackanonk, and especially at and near the intersection of said highway with the tracks or right of way of this defendant, at Delawanna, in said township, and has constructed and erected several poles and strung wires and other necessary appliances thereon, which have for a long
30 time, to wit, for a number of years last past, been maintained and used by said complainant in its telegraph business. Except as hereinbefore admitted, this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph "5." and in so far as they shall be deemed material, it demands that the complainant duly prove the same.

5.—It admits the allegations contained in Paragraph "6" of said complaint.

6.—It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "7" and "8" of said complaint, and in so far as they shall be deemed material, it demands that complainant duly prove the same.

7.—It admits the allegations contained in Paragraph "9" of said complaint.

8.—It admits so much of Paragraph "10" as alleges as follows:

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"Complainant avers that said The Delaware, Lackawanna and Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township of Acquackanonk, in the County of Passaic, or some one or more, or all of them, are about to commence, or have already commenced, work at and near said point of intersection of said River Road with the tracks or right of way of said The Delaware, Lackawanna & Western Railroad Company, at Delawanna, in the Township of Acquackanonk, County of Passaic, to change the grade of said highway and to depress the same so that it will run underneath said railroad tracks or right of way of said railroad company."

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It denies the remaining allegations in said Paragraph "10" contained, except as hereinafter admitted in this answer.

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Further answering said complaint this defendant says:

9.—The public highway in the Township of Acquackanonk, County of Passaic and State of New Jersey, known as River Road, is under the custody and control of the Board of Chosen Freeholders of the County of Passaic, defendant herein, and is maintained at the expense of the County of Passaic.

10.—On or about August 26, 1915, under authority of an Act of the Legislature of New Jersey, entitled "An Act Concerning Railroads (Revision of 1903)," the same being Chapter 257 of the Laws of 1903, it entered into a certain contract in writing with defendants, Board of Chosen Freeholders of the County of Passaic and The Township of Acquackanonk, in the County of Passaic, providing, among other things, for the elimination of the grade crossing of its railroad tracks and the said River Road, at Delawanna, in said Township, and the substitution of an undergrade crossing in lieu thereof, in accordance with a certain plan thereto annexed. Said contract provides, in part, as follows:

20 "The grade of River Road shall be depressed so as to pass beneath the tracks of the railroad and the tracks of the railroad shall be carried across said road above the grade thereof upon a concrete bridge with tight floor, having a minimum clearance above the roadway of thirteen (13) feet, as shown upon said plan."

30 "The county and the township shall take all necessary action to promptly secure the removal or relocation, as occasion may require, of any gas or water pipes, or other sub-surface conduits, or any telegraph, telephone or other aerial lines, the removal or relocation of which shall be necessitated by the work to be done under this agreement."

"The county and the township shall promptly take all official or other action (including the passage of ordinances and resolutions) necessary to carry out or effectuate the provisions of this agreement, or to facilitate the doing of the work herein provided for."

II.—Pursuant to the provisions of said contract said Board of Chosen Freeholders of the County of Passaic, by resolution duly passed on March

1, 1916, changed the grade of said River Road and fixed and established the same in accordance with the profile thereof shown upon said plan, and on April 18, 1916, the said Township of Acquackanonk, by its Township Committee, passed an ordinance changing the grade of said River Road and fixing and establishing the same in accordance with the grade line fixed and established by said resolution of defendant Board of Chosen Freeholders.

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12.—Under said contract this defendant is obligated to do all work necessary to depress said River Road so as to pass the same beneath the tracks of its railroad and to alter the same so that the grade line of said road will conform to that fixed and established by said resolution and ordinance.

13.—A part of the necessary work involved in the depression of said River Road and the change of its grade as aforesaid, includes the excavation from within its side lines of large quantities of earth, rock and other matter, which work this defendant commenced to do several weeks prior to the filing of the bill of complaint in this cause and has since continuously been engaged in doing.

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14.—At and for a long time prior to the filing of the bill of complaint in this cause the telegraph poles and lines referred to in the 10th paragraph of said bill of complaint were and had been located and erected within the side lines of said River Road and within the area which this defendant is required to excavate under said contract, and the presence of said poles and lines within the side lines of said River Road and the area to be excavated constituted an obstruction to and rendered impossible the doing of the work of excavation which this defendant was and is required to do under said contract.

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15.—On or before May 26th, 1916, complainant was notified in writing by defendants, Board

of Chosen Freeholders and said Township of Acquackanonk, of the passage of said resolution and ordinance, and that it would be necessary for complainant to remove said poles and lines in order to permit said work to be done. It was also notified and directed in writing by said defendants, on or before said 26th day of May, 1916, to remove said poles and lines, and informed that upon its failure to commence the work of such removal on or before the third day of June, 1916, defendants, Board of Chosen Freeholders and the Township of Acquackanonk, would proceed to remove said poles and lines and charge the expense thereof to the complainant. Complainant was further advised that said poles and lines might be restored to positions with the lines of said River Road as soon as the status of the work of changing the grade thereof would permit.

16.—Notwithstanding said notice and directions of defendants Board of Chosen Freeholders of the County of Passaic and the Township of Acquackanonk, complainant, up to the time of the filing of the bill of complaint herein, neglected and refused and then neglected and refused to remove said poles and lines as directed.

17.—Defendant further says that subsequent to the filing of the bill of complaint in this cause certain proceedings were had thereon and an order made by this Court, dated June 19th, 1916, directing the complainant, within 16 days from the date thereof, to relocate and and reconstruct said telegraph poles and lines in such manner as would not interfere with, obstruct or prevent the doing of said work of changing the grade of said River Road. Defendant begs leave to refer to the record of said proceedings for greater regularity.

18.—Thereafter, and within the time limited for so doing in said order dated June 19th, 1916, complainant removed said poles and lines from within the side lines of River Road and relocated and re-

constructed them upon private property outside the lines of said public highway, where they are now being operated by the complainant.

Defendant prays that the complaint be dismissed.

WALTER J. LARRABEE,
Solicitor for Defendant, The Delaware, Lackawanna & Western Railroad Company.

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ANSWER.

(Filed October 16, 1916.)

This defendant, The Board of Chosen Freeholders of the County of Passaic, answers the complainant's bill of complaint as follows:

1.—It admits the allegations contained in Paragraph "1" of said complaint.

2.—It admits the allegations contained in Paragraph "2" of said complaint, in so far as they refer to this defendant. 20

3.—It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "3" and "4" of said complaint, and in so far as they shall be deemed material, it demands that the complainant duly prove the same.

4.—Answering Paragraph "5" of said complaint, this defendant admits that the complainant has constructed and maintained, and is now maintaining, a line or system of telegraph in, across and upon said River Road, in said Township of Acquackanonk, Passaic County, New Jersey, and especially at and near the intersection of said highway with the tracks or right of way of the defendant, The Delaware, Lackawanna & Western Railroad Company, at Delawanna, in said township, and has constructed and erected several poles and strung wires and other necessary 30

appliances thereon, which have for a long time, to wit, for a number of years last past, been maintained and used by said complainant in its telegraph business. Except as hereinbefore admitted, this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph "5," and in so far as they shall be deemed material, it demands that the complainant duly prove the same.

10 5.—It admits the allegations contained in Paragraph "6" of said complaint.

6.—It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "7" of said complaint, and in so far as they shall be deemed material it demands that the complainant duly prove the same.

20 7.—It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "8" of said complaint and in so far as they shall be deemed material, it demands that the complainant duly prove the same.

8.—It admits the allegations contained in Paragraph "9" of said complaint.

9.—It admits so much of Paragraph "10" as alleges as follows:

30 "Complainant avers that said The Delaware, Lackawanna & Western Railroad Company, The Board of Chosen Freeholders of the County of Passaic, and The Inhabitants of the Township of Acquackanonk, in the County of Passaic, or some one or more, or all of them, are about to commence, or have already commenced, work at and near said point of intersection of said River Road with the tracks or right of way of said The Delaware, Lackawanna and Western Railroad Company, at Delawanna, in the Township of Acquackanonk, County of Passaic, to change

the grade of said highway and to depress the same so that it will run underneath said railroad tracks or right of way of said railroad company."

It denies the remaining allegations in said Paragraph "10" contained, except in so far as they are admitted in the remainder of this answer.

10.—This defendant further answering says that the public highway in the Township of Acquackanonk, County of Passaic and State of New Jersey, known as River Road, is under the custody and control of this defendant and is maintained at the expense of the County of Passaic. 10

11.—This defendant further answering says that on or about August 26, 1915, under authority conferred by sections 30 and 31 of an act entitled "An Act Concerning Railroads (Revision of 1903)," the same being Chapter 257 of the Laws of 1903, it entered into an agreement, in writing, with the defendant, The Delaware, Lackawanna & Western Railroad Company, and the Township of Acquackanonk, in the County of Passaic, providing, among other things, for the elimination of the grade crossing of said railroad tracks and said River Road, at Delawanna, in said township, and the substitution of an undergrade crossing in lieu thereof, in accordance with a certain plan thereto annexed. Said agreement provides, in part, as follows: 20

"The grade of River Road shall be depressed so as to pass beneath the tracks of the railroad and the tracks of railroad shall be carried across said road above the grade thereof upon a concrete bridge with tight floor, having a minimum clearance above the roadway of thirteen (13) feet, as shown upon said plan." 30

"The county and the township shall * * * take all necessary action to promptly secure the removal or relocation, as occasion may re-

quire, of any gas or water pipes, or other sub-surface conduits, or any telegraph, telephone or other aerial lines, the removal or relocation of which shall be necessitated by the work to be done under this agreement."

10 "The county and the township shall promptly take all official or other action (including the passage of ordinances and resolutions) necessary to carry out or effectuate the provisions of this agreement, or to facilitate the doing of the work herein provided for."

* * *

12.—This defendant further answering says that pursuant to the provisions of said agreement, this defendant, by resolution duly passed on March 1, 1916, changed the grade of said River Road and fixed and established the same in accordance with the profile thereof shown upon the plan annexed to said agreement, and on April 18, 1916, the said Township of Acquackanonk passed an ordinance changing the grade of said River Road and fixing and establishing the same in accordance with the grade line fixed and established by said resolution of this defendant.

13.—This defendant further answering says that under said agreement, the defendant, The Delaware, Lackawanna & Western Railroad Company, is obligated to do all work necessary to depress said River Road so as to pass the same beneath the tracks of its railroad and to alter the same so that the grade line of said road will conform to that fixed and established by said resolution and ordinance.

14.—This defendant further answering says that there were located and erected within the said lines of said River Road and within the area to be excavated under said agreement, seven telegraph poles and appurtenances, upon which were strung numerous wires, which poles, appurtenances and wires, as defendant is informed and verily believes,

are owned, operated or controlled by the complainant and are those mentioned and referred to in the 10th paragraph of the complainant's bill, of complaint.

15.—This defendant further answering says that on or before the 26th day of May, 1916, as this defendant is informed and verily believes, said complainant was notified in writing by this defendant and by said Township of Acquackanonk of the passage of said resolution and ordinance and of the necessity of removing said poles, appurtenances and wires so as not to impede or interfere with the prosecution of said work. It was also notified and directed in writing by this defendant and said Township of Acquackanonk on or before said day, to remove said poles, appurtenances and wires, and informed that upon its failure or refusal to commence the work of such removal on or before the 3d day of June, 1916, this defendant and the defendant, Township of Acquackanonk, would proceed to remove said poles, appurtenances and wires and charge the expense thereof to the complainant. Said complainant was further advised that said poles, appurtenances and wires might be restored to positions within the lines of said River Road as soon as the status of said work would permit.

16.—This defendant further answering says that notwithstanding said notice and direction, the said complainant Postal Telegraph-Cable Company, neglected and refused to remove said poles, appurtenances and wires from within the lines of said River Road and the area to be excavated as aforesaid, and thereby obstructed and rendered impossible the performance of said work of excavation and the work which it was necessary to do to change the grade of said River Road to conform to the grade line thereof fixed and established by said resolution and ordinance, and delayed and prevented the completion of said improvement and

the restoration of said River Road to public travel.

17.—This defendant further answering says that the use of the said River Road by the complainant is subject to the proper and reasonable police regulations imposed or ordered by this defendant or by the defendant, the Township of Acquackanonk, and subject also to any other proper and reasonable regulations imposed by either of said defendants; that the change of grade of the River Road under said agreement as hereinabove more particularly set forth was a reasonable and proper regulation, and that the request made of the complainant to cause its poles and lines to conform to the newly established grade was a reasonable and proper request and should have been complied with by the complainant; that it was the duty of the complainant to have complied with the reasonable regulation of its use of the River Road and with the reasonable request to so re-locate its poles and lines as to conform to the newly established grade.

FRED W. VAN BLARCOM,
Solicitor and of Counsel for Defendant, The
Board of Chosen Freeholders of the County
of Passaic.

ANSWER.

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(Filed October 16, 1916.)

The answer of the defendant, The Township of Acquackanonk, in the County of Passaic, impleaded as The Inhabitants of the Township of Acquackanonk, in the County of Passaic.

This defendant answering the bill of complaint, says:

1.—Paragraphs 1 and 2 are admitted, except that the title of this defendant is The Township of

Acquackanonk, in the County of Passaic, and not as set forth in the second paragraph.

2.—This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraph 3, except that it admits that the complainant has a telegraph line through The Township of Acquackanonk aforesaid.

3.—Paragraph 4 is admitted, except that this defendant has no knowledge or information sufficient to form a belief as to any right and privilege acquired by the complainant of constructing and maintaining its said lines and erecting its said poles as in Paragraph 4 mentioned. 10

4.—It admits that the complainant had constructed and erected several poles and strung wires and other necessary appliances thereon upon said public highway at and near the intersection of said highway with the railroad tracks or right of way of the Delaware, Lackawanna & Western Railroad Company, at Delawanna, as in Paragraph 5 mentioned, but this defendant has no knowledge or information sufficient to form a belief as to the remaining statements in Paragraph 5. 20

5.—It admits that the Congress of the United States passed the Act in the sixth paragraph mentioned.

6.—This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 7 and 8.

7.—It admits that the Congress of the United States passed the Act mentioned in Paragraph 9. 30

8.—It admits that the grade of said road is to be depressed, but says that this is to be done by virtue of an agreement bearing date August 26th, 1915, between said defendants to secure greater safety to persons and property at the intersection of said road with said railroad of The Delaware, Lackawanna & Western Railroad Company, which intersection at the time of filing the bill of complaint was a grade crossing, by depressing said

River Road so as to pass beneath the tracks of said railroad.

9.—This defendant by the terms of the agreement aforesaid was bound to take all necessary action to promptly secure the removal or relocation, as occasion might require, of any gas or water pipes, or other sub-surface conduits, or any telegraph, telephone or other aerial lines, the removal or relocation of which should be necessitated by
10 the work to be done under the agreement aforesaid and was further bound promptly to take all official or other action (including the passage of ordinances and resolutions) necessary to carry out or effectuate its provisions or facilitate the doing of the work therein provided for.

10.—In conformity to its obligation aforesaid, this defendant on April 18th, 1916, adopted an ordinance changing the grade of said River Road and establishing the same in accordance with the
20 grade line theretofore fixed and established by resolution of the Board of Freeholders of the County of Passaic.

11.—Under the terms of this agreement, The Delaware, Lackawanna & Western Railroad Company bound itself to do all work necessary to depress said road so as to pass the same beneath the tracks of its railroad and make the grade conform to that fixed and established by said resolution and ordinance.

30 12.—This defendant shortly after the passage of said ordinance, caused a copy thereof to be sent to the complainant, together with a written notice, instructing them that their poles, appurtenances and wires should be removed to conform to the grade as established by said ordinance. Subsequently, on May 23d, 1916, another copy of said ordinance was sent to the complainant with another written notice, directing them to make said changes.

13.—The complainant has seven telegraph poles with appurtenances upon which were strung numerous wires within the side lines of said road and area, which will be required to be moved in order that the necessary work may be done in the removal of large quantities of earth, rock and other material to make the grade to conform to the grade aforesaid.

14.—The complainant was informed by this defendant that it might replace said poles, appurtenances and wires upon the said River Road after its grade had been made to conform to said ordinance. 10

15.—Such change in said highway is in accordance with the statutory direction aforesaid, and further imposes upon complainant only reasonable police regulation necessary for the protection of life and property.

WILLIAM B. GOURLEY,
Solicitor of and of Counsel with Defendant. 20

ORDER.

(Filed June 23d, 1916.)

This matter coming on to be heard in the presence of counsel for the respective parties, upon an order entered herein on the 3d day of June, 1916, that the defendants show cause why an injunction should not be issued out of and under the seal of this Court in accordance with the prayer of the bill of complaint, and having considered said bill of complaint and the affidavits thereto annexed, and also the affidavits filed by the respective defendants; and having heard the arguments of counsel for the respective parties; and it appearing from said affidavits of the defendants that the grade of River Road in the Township of Acquack- 30

anonk, County of Passaic and State of New Jersey, has been changed by resolution of defendant, Board of Chosen Freeholders of the County of Passaic, and by ordinance of defendant, Township of Acquackanonk, in the County of Passaic, duly passed, and that the work of changing the grade of said highway cannot be carried on nor prosecuted to completion while the telegraph poles and wires of the complainant referred to in said bill of complaint and said affidavits remain in their present location; and it also appearing from statements of counsel for the complainant that the complainant stands ready to remove said poles and wires so as to permit said work to be done, providing the defendants, or any of them, will pay the entire cost and expense of such work as it is necessary to do to remove said poles and wires, provide for their temporary maintenance outside the lines of said road and the area affected by said change in grade during the prosecution of said work, and the restoration of said poles and wires to within the lines of said highway upon completion of said change in grade; it is, on the 19th day of June, 1916,

ORDERED, That the complainant, Postal Telegraph-Cable Company, within sixteen days from the date of this order, relocate or reconstruct such of its telegraph poles and lines as may be necessary to permit the defendants to carry on and complete the work of changing the grade of said River Road in accordance with the resolution of defendant, Board of Chosen Freeholders, passed March 1st, 1916, and the ordinance of said defendant, The Township of Acquackanonk, in the County of Passaic, passed April 18th, 1916, and as shown upon the plan of said improvement annexed to the affidavit of George W. Botbyl, Clerk of said Board of Chosen Freeholders, filed herein, in such manner as will not interfere with, obstruct or prevent the doing of said work, the cost and expense

of such relocation or reconstruction to be paid, in the first instance, by complainant, Postal Telegraph-Cable Company.

FURTHER ORDERED, That the work of relocating or reconstructing said poles and lines be commenced by said complainant on or before Monday, June 26th, instant, and prosecuted diligently to completion and in such manner as will not unnecessarily delay, interfere with or obstruct the work of changing the grade of said River Road. 10

FURTHER ORDERED, That pending such relocation or reconstruction, the restraint in said order allowed June 3d, 1916, continue with like effect as therein set forth.

FURTHER ORDERED, That the question, "which of the parties shall be liable for the cost and expense of such relocation or reconstruction and the restoration of said poles and lines to within the lines of said River Road upon the completion of said improvement, and the costs on said order allowed June 3d, 1916, abide the final decree of this Court." 20

E. R. WALKER,
C.

Respectfully advised:

VIVIAN M. LEWIS,
V. C.

On motion of:

W. J. LARRABEE,
Solicitor of Defendant, D., L. & W. R. R. Co. 30

FRED'K W. VAN BLARCOM,
County Counsel, Solicitor of Defendant,
Board of Chosen Freeholders.

WILLIAM B. GOURLEY,
Solicitor of Defendant, Township of Acquackanonk.

REPLICATIONS.

(Separate replication to each answer, duly filed by complainant, in usual form.)

STIPULATION OF FACTS.

10 (Filed March 2, 1918.)

IT IS HEREBY STIPULATED AND AGREED by and counsel for the respective parties that the above entitled cause be submitted on the pleadings and the following statement of facts:

20 I.—Complainant is a corporation duly organized and existing under the laws of the State of New Jersey. It has constructed and acquired a continuous system of telegraph lines extending throughout several of the United States, and for many years past has been, and now is engaged, in connection with other telegraph companies, in the transmission of intelligence by telegraph throughout all of the states and territories of the United States and foreign countries.

30 II.—Defendant, The Delaware, Lackawanna & Western Railroad Company, is a corporation of the State of Pennsylvania, and lawfully engaged as a common carrier for hire in the operation of a railroad extending from the City of New York, in the State of New York, through the States of New Jersey, Pennsylvania and New York, to Buffalo, in said last named state.

III.—Defendants, Board of Chosen Freeholders of the County of Passaic, and the Township of Acquackanonk, in the County of Passaic (now the City of Clifton), are bodies politic and corporate under the laws of the State of New Jersey.

IV.—The public highway in the Township of Acquackanonk, County of Passaic and State of

New Jersey, is under the control of defendant, Board of Chosen Freeholders of the County of Passaic, and is maintained by and at the expense of the County of Passaic.

V.—At the time of the filing of the complaint herein, and for many years prior thereto, the railroad tracks of defendant railroad company crossed said River Road at the grade thereof near said defendant's railroad station, known as "Delawanna," in said Township of Acquackanok.

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VI.—Among the lines of telegraph forming an important part of complainant's continuous system of lines is a line, extending through the said Township of Acquackanok, which is built upon and along said River Road, and crosses while on said River Road the railroad tracks and right of way of defendant railroad company, within the same lines as said River Road crosses the same.

VII.—For over ten years complainant has maintained its said telegraph line for a considerable distance on said River Road. In the immediate vicinity of the intersection of said road with the right of way and tracks of defendant railroad company, there are seven poles of said telegraph line, and upon these, as well as upon the remainder of said line, were strung numerous wires and other appliances necessary for the transmission of messages in connection with complainant's through or continuous system. At the time of the filing of said complaint said poles, wires and appliances were being, and for many years had been used, by complainant in its telegraph business as a part of its through or continuous system.

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VIII.—Said seven telegraph poles and the wires and appliances thereon were so erected and strung and are also maintained and operated by complainant within the lines of said River Road under and by virtue of the authority conferred by the Acts concerning Telegraph and Telephone Companies of New Jersey, and an Act of Congress approved

July 24th, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the use of the same for postal, military and other purposes," the first section of which provides as follows:

10 "That any telegraph company now organized or which may hereafter be organized under the laws of any state shall have the right to construct, maintain and operate telegraph lines through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or to interfere with the ordinary travel on such military or post roads."

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IX.—Said River Road is a post road within the meaning of said Act of Congress.

X.—Complainant has duly accepted and complied with the provisions of said Act of Congress.

30 XI.—On or about August 26th, 1915, defendants entered into a contract in writing, a copy of which is annexed hereto and made a part hereof, marked "Exhibit C," providing, among other things, for the elimination of the said grade crossing of River Road and the tracks of said railroad and the substitution of an undergrade crossing in lieu thereof, in accordance with a certain plan, marked "Exhibit B," a copy of which is hereto annexed and made a part hereof.

XII.—Pursuant to the provisions of said contract, defendant, Board of Chosen Freeholders, by resolution duly passed on March 1st, 1916, subject to the approval of the Acquackanonk Township Committee, changed the grade of said River

Road and fixed and established the same in accordance with the profile thereof shown upon said plan. On April 18th, 1916, the Township Committee of defendant, Township of Acquackanonk, manifested its approval of said change of grade by the passage of an ordinance.

XIII.—Said contract also provided as follows:

“The county and the township shall take all necessary action to promptly secure the removal or relocation, as occasion may require, of any gas or water pipes, or other sub-surface conduits, or any telegraph, telephone or other aerial lines, the removal or relocation of which shall be necessitated by the work to be done under this agreement.”

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XIV.—Defendant railroad company was obligated by said contract to do all work necessary to depress said River Road and to alter the same so that the new grade line thereof would conform to the grade line agreed upon and fixed and established as aforesaid.

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XV.—A necessary part of the work involved in changing the grade of said River Road consisted of the excavation from within the lines of said road of large quantities of earth, rock and other matter.

XVI.—The seven telegraph poles of complainant referred to in Paragraphs “VII” and “VIII” hereof, were erected and stood within the area where said work of excavation was required to be done, the location of the same with reference to said excavation work being shown upon the cross-section map marked “Exhibit A,” which is annexed hereto and made a part hereof. The seven poles are numbered from 357 to 363 inclusive on said Exhibit A.

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XVII.—In order to permit said excavation work to be carried on and prosecuted to completion it was necessary to remove said seven poles to positions outside the lines of said River Road.

XVIII.—Defendant railroad company, at its own expense, provided complainant with right of way outside the lines of said road for the erection, maintenance and operation of such part of said telegraph line as it was necessary to so remove, during such time as said work of excavation was being carried on.

10 XIX.—It was necessary for complainant to continuously and uninterruptedly maintain its telegraph service over its said line erected along and upon said River Road at and in the vicinity of its intersection with said railroad, for the transmission of telegraph messages between points outside of the State of New Jersey, as well as between points within said state, during the prosecution of said work of excavation.

20 XX.—Complainant was duly notified of said change in the grade of River Road and of the necessity of removing its said telegraph poles, wires and appliances so as to permit said work of excavation to be done. Complainant was also notified that upon completion of said excavation work said poles, wires and appliances might be restored to position within the lines of said road.

30 XXI.—This Court, on June 19th, 1916, made an order that, in view of the urgent public necessity, said seven poles with their wires and equipment should, pending final hearing, be shifted to a new temporary location by the complainant and later moved back again after the grade crossing work was completed, and “that the question which of the parties shall be liable for the cost and expense of such relocation or reconstruction and the restoration of said poles and lines to within the lines of said River Road, upon the completion of said improvement, and the costs on said order allowed June 3d, 1916, abide the final decree of this Court,” to which order for greater certainty, reference is hereby made.

XXII.—The reasonable cost and expense incurred and paid by complainant in removing said poles, wires and appliances, in erecting said temporary detour line, in removing said detour line and in restoring its poles, wires and appliances to within the lines of River Road aforesaid, was as follows:

Labor	\$572 49	
Carfare and miscellaneous..	73 73	
Freight and hauling.....	79 87	10
Material	411 54	
	<hr/>	
	\$1,137 63	

VREDENBURGH, WALL & CAREY,
Solicitors for Complainant.

W. J. LARRABEE,
Solicitor for Defendant, The Delaware, Lackawanna & Western Railroad Company.

FRED W. VAN BLARCOM, 20
Solicitor for Defendant, Board of Chosen Freeholders of the County of Passaic.

WILLIAM B. GOURLEY,
Solicitor for Defendant, Township of Acquackanonk, in the County of Passaic, now the City of Clifton.

EXHIBIT "C."

THIS AGREEMENT, made this 26th day of August, 1915, between THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF PASSAIC, a municipal corporation of the State of New Jersey, party of the first part, hereinafter called the "County," THE TOWNSHIP OF ACQUACKANONK IN THE COUNTY OF PASSAIC, a like corporation, party of the second part, hereinafter called the "Township," and THE DELAWARE, LACKAWANNA AND WESTERN RAIL-

ROAD COMPANY, a corporation of the State of Pennsylvania, as Lessee of THE MORRIS AND ESSEX RAILROAD COMPANY, a corporation of the State of New Jersey, party of the third part, hereinafter called the "Railroad Company."

10 WHEREAS, the tracks of the Railroad Company's railroad now cross at grade the public highway or road known as "River Road," at Delawanna, in the Township of Acquackanonk, County of Passaic and State of New Jersey, and the parties hereto, for the purpose of securing greater safety to persons and property and to facilitate the construction and maintenance of other than grade crossings, desire to eliminate said crossing at grade and to pass said road beneath the tracks of the railroad; and

20 WHEREAS, by Sections 30 and 31 of an act entitled "An Act Concerning Railroads (Revision of 1903)," and amendments thereof and supplements thereto, and other statutes of the State of New Jersey, the parties hereto are authorized to enter into contracts to effectuate the purposes aforesaid;

30 NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar (\$1.00) to each of the parties hereto by the others in hand paid, the receipt whereof is hereby severally acknowledged, and of the covenants and agreements hereinafter contained, to be severally kept and performed by each of the parties, it is agreed as follows:

FIRST: Attached hereto and made a part of this agreement, is a blueprint plan entitled "D. L. & W. R. R., Boonton Branch, Proposed Elimination of Grade Crossing at River Road, Delawanna, N. J., Off. Div. Eng., Hoboken, N. J., Scale 1 inch—50 feet, April 1, 1915, Revised June 21, 1915," showing in detail the work herein provided for. Should there be any discrepancies between the written portions of this agreement and the plan

aforesaid in describing the work intended to be covered herein, the plan shall prevail.

SECOND: The grade of River Road shall be depressed so as to pass beneath the tracks of the railroad, and the tracks of the railroad shall be carried across said road above the grade thereof upon a concrete bridge with tight floor, having a minimum clearance above the roadway of thirteen (13) feet, as shown upon said plan.

William Street shall be depressed so as to conform to the new grade of River Road as shown upon the plan hereinabove referred to. 10

The cost of all work done pursuant to this action shall be borne and paid for by the Railroad Company.

THIRD: The Railroad Company shall also, at its own expense, equip said bridge with suitable conduits for electric light wiring and furnish proper electric light fixtures for lighting the passageway beneath the same, but the Railroad Company shall not be liable hereunder further than for the cost of original installation. 20

FOURTH: Any macadamizing or other paving of River Road or William Street which the County or the Township may deem necessary or desirable, shall be done by and at the expense of the County or the Township, as occasion shall require. The County or the Township shall also provide and maintain, at their own expense, any and all sidewalks, curbing and guttering, which in their or either of their judgments should be provided for either of said highways. 30

Upon completion of the work to be done by the Railroad Company under Section SECOND hereof, the County shall thereafter maintain and keep said portion of River Road in repair at its own expense, and the Township shall thereafter maintain and keep said portion of William Street in repair at its own expense.

The expense of lighting the passageway beneath said bridge shall be borne and paid for by the County, and the County shall also, at its own expense, maintain and keep in repair the conduits and fixtures to be provided by the Railroad Company under the provisions of Section THIRD hereof.

10 FIFTH: The County and the Township shall, at the request of the Railroad Company, take all necessary action to promptly secure the removal or relocation, as occasion may require, of any gas or water pipes or other sub-surface conduits, or any telegraph, telephone or other aerial lines, the removal or relocation of which shall be necessitated by the work to be done under this agreement.

20 SIXTH: The County and the Township shall promptly take all official or other action (including the passage of ordinances and resolutions) necessary to carry out or effectuate the provisions of this agreement, or to facilitate the doing of the work herein provided for, at such times as the Railroad Company shall request.

30 SEVENTH: The Railroad Company agrees that it will assume and pay any and all damages to which the owners of lands abutting on William Street may be lawfully entitled by reason of the change of grade of said street, and the Railroad Company also agrees that it will assume and pay the cost of any lands taken or acquired, by condemnation or purchase, for the slopes and embankments of said street as depressed under the provisions of this agreement.

The Railroad Company agrees that it will assume and pay any and all damages to which the owners of the lands and premises abutting on River Road, which are designated on the said plan as "Johanna H. Hammond" and "Otto and Veroika Seidel," respectively, may be lawfully entitled by reason of the change of grade of said road, and the Railroad Company also agrees that it will assume

and pay the cost of any of said lands which may be taken or acquired, by condemnation or purchase, for the slopes and embankments of said River Road as depressed under the provisions of this agreement.

EIGHTH: Except as otherwise provided in Section SEVENTH of this agreement, the County shall, in the first instance, pay all damages to which any owners or occupants of lands may be lawfully entitled, or which may be lawfully awarded, on account of the change of the grade of River Road, and also the cost of any lands which may be taken or acquired, by condemnation or purchase, for the slopes and embankments of said road as depressed under the provisions of this agreement. The Railroad Company shall pay to the County fifty (50) per centum of such damages and a like proportion of the cost of any lands taken or acquired for the purpose aforesaid, provided, however, that no settlement of any such damages to be shared by the Railroad Company shall be made by the County, nor shall the County acquire by purchase or agreement any lands, the cost of which is to be shared by the Railroad Company as above provided, without the consent of the Railroad Company.

Unless the damages aforesaid can be agreed upon between the County, the Railroad Company and the owners or occupants (as the case may be) of the property, they shall be ascertained, determined and awarded as provided by law. If the County shall be unable to acquire any lands necessary for the slopes and embankments of River Road by purchase or agreement with owners, at a price or cost satisfactory to the County and the Railroad Company, the County shall, when requested by the Railroad Company, promptly institute proceedings by eminent domain or condemnation and acquire said lands thereunder. The Railroad Company may appear by its attorneys in all proceedings instituted to ascertain, determine, re-

cover or award such damages, and in all proceedings to acquire lands for the purpose aforesaid by eminent domain or condemnation.

NINTH: The Railroad Company waives all claims for damages to which it might otherwise be entitled, by reason of the change of grade of River Road in front of lands owned by it and all rights to compensation for any of its lands to be taken for the purposes of this agreement.

10 TENTH: The County and the Township hereby grant to the Railroad Company permission to construct, maintain and operate such temporary tracks and structures upon, along and across River Road and William Street, at grade or otherwise, as may be necessary or required to facilitate the prosecution of the work to be done under this agreement. The County and the Township also grant permission to the Railroad Company to temporarily close up and obstruct the portions of River Road and
20 William Street to be changed or altered hereunder, during the prosecution of the work, not, however, to exceed a period of three months; provided, however, that during such time, the Railroad Company shall, at its own expense, provide and maintain a temporary way between River Road and the properties on William Street, which are shown upon said plan, for the purpose of affording access to and egress from said properties.

30 ELEVENTH: In the event that it shall be deemed necessary during the prosecution of the work to be done hereunder, to make changes in the plan of or in the manner of doing said work, it is hereby agreed that the same shall proceed in accordance with such changes when they have been approved in writing by the Railroad Company and by proper official action on the part of the County and Township. Certified copies of the record of said official action shall be furnished to the Railroad Company as its authority to proceed thereunder.

IN WITNESS WHEREOF, The County has caused this agreement to be signed by its Director and its corporate seal to be hereto affixed, attested by its Clerk, pursuant to authority of a resolution passed the 4th day of August, 1915, and the Township has caused this agreement to be signed by the Chairman of its Township Committee and its corporate seal to be hereto affixed, attested by its Clerk pursuant to a resolution passed the 20th day of July, 1915, and the Railroad Company has caused this agreement to be signed by its President and its corporate seal to be hereto affixed, attested by its Secretary, the day and year first above written. 10

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF PASSAIC,
By ISAAC WOLLENBERG,
Director.

Attest:

GEO. W. BOTBYL,
Clerk.

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(SEAL)

THE TOWNSHIP OF ACQUACKANONK
IN THE COUNTY OF PASSAIC,
By GEO. F. SCHMIDT,
Chairman, Township Committee.

Attest:

EDO M. YEREANCE,
Clerk.

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(SEAL)

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
As Lessee of The Morris and Essex
Railroad Co.
By W. H. TRUESDALE,
President.

Attest:

R. B. SCOFIELD,
Asst. Secretary.

(SEAL)

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

BE IT REMEMBERED, that on this Twenty-first day of July, 1915, before me, a Notary Public of N. J., personally came Edo M. Yearance, who being duly sworn, did depose and make proof to my satisfaction that he is the Clerk of the Township of Acquackanonk, one of the parties to the foregoing agreement; that he well knows the corporate seal of said Township; that the seal affixed to said agreement is the proper corporate seal of said Township; that the said agreement was signed and the said seal thereto affixed by George F. Schmidt, who was at the date thereof Chairman of Township Committee of said Township, pursuant to a resolution in that behalf passed by the Township Committee of the Township of Acquackanonk on the 20th day of July, 1915; and that thereupon deponent signed the same as attesting witness.

20 EDO M. YEARANCE,
 Township Clerk.

(SEAL)

Subscribed and sworn to before me the day and year aforesaid.

ALEXANDER M. SMITH,
 Notary Public, Passaic Co., N. J.

(SEAL)

30 STATE OF NEW JERSEY, }
 COUNTY OF PASSAIC. }ss.

BE IT REMEMBERED, that on this Fourth day of Augsut, 1915, before me, a Master in Chancery of N. J., personally came George W. Botbyl, who being duly sworn, did depose and make proof to my satisfaction that he is the Clerk of the Board of Chosen Freeholders of the County of Passaic, one of the parties to the foregoing agreement; that he well knows the corporate seal of said Board; that

the seal affixed to said agreement is the proper seal of said Board; that the said agreement was signed and the said seal thereto affixed by Isaac Wollenberg, who was at the date thereof the Director of said Board; pursuant to a resolution passed August 4, 1915; and that deponent thereupon signed the same as attesting witness.

GEO. W. BOTBYL.

Subscribed and sworn to before me the day and year aforesaid.

FRED W. VAN BLARCOM,
Master in Chancery of New Jersey.

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OPINION.

(Filed June 13, 1918.)

GRIFFIN, V. C.

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This cause is submitted upon the pleadings and a stipulation of facts, from which it appears that the River Road in the Township of Acquackanonk in the County of Passaic is a public highway which was crossed by the Delaware, Lackawanna & Western Railroad at grade; that said River Road is a post road within the meaning of the Act of Congress, within the lines of which the complainant had erected its telegraph poles carrying wires for the transmission of messages. The Railroad Company and the Township and County authorities entered into an agreement to change the grade of the River Road to abolish the grade crossing, under Laws of 1903, p. 661, secs. 30 and 31 Comp. Stat. 4234 (sec. 30 amended P. L. 1915, p. 98, 1st sup. Comp. Stat., p. 1299). In doing the work it became necessary to temporarily remove the telegraph poles and wires of the complainant to a point outside the lines of highway, anticipating which, the complainant filed its bill to restrain this

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disturbance, and obtained an order to show cause, with restraint, upon the hearing of which an order was entered on the 19th day of June, 1916, on motion of the solicitors of all the parties, which, after permitting the work to be proceeded with, ordered as follows:

10 "FURTHER ORDERED, that the question, which of the parties shall be liable for the cost and expense of such relocation or reconstruction and the restoration of said poles and lines to within the lines of said River Road upon the completion of said improvement, and the costs on said order allowed June 3rd, 1916, abide the final decree of this Court."

The complainant thereafter removed its poles, wires, &c., outside the lines of the road, and restored the same after the change of grade was completed, at an expense of \$1,137.63.

20 The question now presented is which of the parties should bear this expense.

First, are the municipalities liable?

30 If the complainant sought to enjoin the municipalities from changing the grade of the road because it would interfere temporarily with the maintenance of its poles in the *locus in quo*, or if it sued to recover the cost of changing the location of its poles during the improvement and restoring them to their former location after its completion, it is quite clear it would fail in both instances, because its easement is subservient to the rights of the public in the highway, from which it follows that the cost of all changes of location in the highway, made necessary to the use of the dominant right of the public in the highway, must be paid by the owners of what might be termed the subordinate easement. *Jersey City vs. City of Hudson*, 13 N. J. Eq., p. 420; *Erie R. R. Co. vs. Public Utilities Comm'rs*, 89 N. J. L., 57 affirmed 90 *idem.*, 672-673.

Second, is the Railroad Company liable?

The complainant insists that even though the municipalities are not liable, the Railroad Company is. Its view is that the change of grade was made for the sole benefit of the Railroad Company. With this I do not agree, and do not deem it necessary to pass upon what the situation would be if this contention were true. The change of grade was made with legislative sanction, which authorized municipalities and the railroad companies to enter into agreements to abolish grade crossings—a thing clearly beneficial to both—and fixing the portion of the expense to be borne by the municipalities. This is precisely what defendants did. In the 6th paragraph the municipalities agreed to take the necessary official, or other action, etc., to carry out the provisions of the agreement, etc. 10

In the 5th paragraph the municipalities agreed (among other things) to secure the removal and relocation of the poles in question, where rendered necessary to perform the work contemplated. This paragraph was evidently inserted to bind the municipalities to exercise their rights to compel the removal or relocation of the poles during the work, so that the same might not be impeded. The Railroad Company assumed no liability under this paragraph. 20

The complainant, as I understand it, makes the point, which is combatted in defendants' brief, that, as the railroad did the work (which is true), coupled with the assertion that it was for the railroad's sole benefit (which I have found to be untrue), a legal or equitable right arises in favor of the complainant against the Railroad Company to reimbursement. I do not deem it necessary to pass on this compound contention, if it is so urged, because the element of sole benefit to the Railroad Company is missing; and, as to the fact that the Railroad Company did the work, that fact alone 30

does not render the Railroad Company liable, because, in doing it, it stood toward the municipalities in the relation of contractor and employe. *Clark vs. Elizabeth*, 61 N. J. Law, 565-577.

Being of the opinion that the defendants are not liable to reimburse the complainant, a decree will be advised dismissing the bill.

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FINAL DECREE.

(Filed May 31, 1918.)

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The complainant having filed its bill of complaint in the aboxe entitled case, with affidavits thereto annexed, praying that a permanent injunction issue restraining the defendants, their respective agents, officers, employes, servants and contractors, and each and every of them, from in any way cutting down, excavating around and under so as to interfere with the support of, removing or destroying the complainant's telegraph poles and lines, or any part thereof, located upon the public highway known as River Road, in the City of Clifton (formerly the Township of Acquackanonk), at and near the point of the intersection of said highway with the tracks and right of way of defendant, The Delaware, Lackawanna and Western Railroad Company; and the Court having allowed an order to show cause why an injunction should not issue in accordance with the prayer of said bill of complaint, returnable June 12th, 1916, with ad interim restraint, which order was duly continued to June 19th, 1916; and said order to show cause coming on to be heard on said 19th day of June, in the presence of counsel for the respective parties, at which time it appeared that the defendants were engaged in the work of depressing the grade of said River Road

so as to pass the same beneath the tracks of the railroad of the defendant Railroad Company, and that said work could not be done nor prosecuted to completion while said telegraph poles and lines of the complainant remained in their then present location; and the Court on said 19th day of June, 1916, having made an order that, in view of the urgent public necessity, said poles and their wires and equipment should, pending final hearing, be shifted to a new temporary location by the complainant and later moved back again after the grade crossing work was completed, the question, which of the parties shall be liable for the cost and expense of such relocation or reconstruction and the restoration of said poles and lines to within the lines of said River Road upon the completion of said improvement, and for the costs on the said order to show cause, to abide the final decree of this Court; and the several defendants having filed their respective answers and issue having been joined thereon and the said cause coming on for final hearing on January 30th, 1918, on the pleadings and an agreed stipulation of facts, in the presence of John A. Hartpence, Esq., of Vredenburgh, Wall and Carey, appearing for the complainant; Walter J. Larrabee, Esq., appearing for defendant Railroad Company; Fred W. Van Blarcom, Esq., appearing for defendant Board of Chosen Freeholders, and William B. Gourley, Esq., appearing for defendant City of Clifton (formerly the Township of Acquackanonk); and the Court having heard the arguments of counsel and duly considered the same, together with the said pleadings and stipulation of facts, and being of the opinion that complainant is not entitled to relief, it is now, on this 31st day of May, 1918,

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ORDERED, that the bill of complaint be and the same is hereby dismissed, with costs.

Respectfully advised,

JOHN GRIFFIN,
V. C.

E. R. WALKER,
C.

On motion of

10 W. J. LARRABEE,
Solicitor of Defendant The Delaware, Lackawanna and Western Railroad Company.

FRED W. VAN BLARCOM,
Solicitor of Defendant Board of Chosen Freeholders of the County of Passaic.

WILLIAM B. GOURLEY,
Solicitor of Defendant City of Clifton (for
merly Township of Acquackanonk).

20

NOTICE OF APPEAL.

(Filed July 23rd, 1918.)

30

The complainant hereby appeals from the whole and every part of the final decree made in this Court in above-stated cause on the 31st day of May, 1918, to the Court of Errors and Appeals in the last resort in all causes.

Dated May 31st, 1918.

Yours, &c.,

VREDENBURGH, WALL & CAREY,
Solicitors for Complainant.

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

JOHN A. HARTPENCE,
Of Counsel with Complainant.

Service of within notice acknowledged May 31,
1918.

W. J. LARRABEE, 10
Solr. for Defendant The Delaware, Lacka-
wanna & Western Railroad Company.

FRED W. VAN BLARCOM,
Solr. for Defendant the Board of Chosen
Freeholders of the County of Passaic.

WILLIAM B. GOURLEY,
Solr f.or Defendant The City of Clifton (for-
merly the Township of Acquackanonk in
the County of Passaic). 20

NEW JERSEY COURT OF ERRORS AND
APPEALS.

	Between	} On Appeal from Chancery.
	POSTAL TELEGRAPH CABLE COMPANY OF NEW JERSEY, Complainant-Appellant,	
	and	
10	THE DELAWARE, LACKA- WANNA & WESTERN RAIL- ROAD, and others, Defendants-Respondents.	}

PETITION OF APPEAL.

(Filed July 24, 1918.)

20 To the Honorable the Court of Errors and Ap-
peals in the last resort in all causes:

30 The Petition of the POSTAL TELEGRAPH CABLE
COMPANY OF NEW JERSEY, the Appellant in the
above stated cause, respectfully shows that your
petitioner finds itself aggrieved by a final decree
made in the Court of Chancery by his Honor Ed-
win Robert Walker, Chancellor of the State of
New Jersey, bearing date the 31st day of May, in
the year 1918, in a cause wherein your petitioner,
the Postal Telegraph Cable Company of New Jer-
sey, was complainant, and The Delaware, Lacka-
wanna & Western Railroad Company, The Board
of Chosen Freeholders of the County of Passaic,
and The Township of Acquackanonk in the
County of Passaic (now the City of Clifton), were
defendants, in this respect, to wit, that the said
final decree orders that the Bill of Complaint in
said cause be dismissed with costs;

And your petitioner humbly appeals from the
said decree of the Chancellor, upon the ground

that the same is erroneous, for that the said decree should have adjudged, ordered and decreed that the said defendants, or some one or more of them, should pay to said complainant, your petitioner, the costs and expenses which said complainant had incurred in removing its wires, poles and equipment from River Road, near Delawanna Crossing, in said County of Passaic, to the temporary detour provided during the elimination of the grade crossing of said defendant, The Delaware, Lackawanna & Western Railroad Company, at Delawanna aforesaid, and the restoration of the same on said River Road upon the completion of said grade crossing elimination; and also pay the costs of this suit to said complainant; 10

And the said Chancellor should have refused to find the matters set forth in the recitals of said final decree, and should have refused to dismiss said bill of complaint, and should have refused to allow costs to said defendants, the proofs in the said cause, in your petitioner's judgment, supporting the bill of complaint and fully warranting the granting the prayer of said bill. 20

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

VREDENBURGH, WALL & CAREY,
Solicitors for Complainant-Appellant. 30

JOHN A. HARTPENCE,
Of Counsel with Complainant-Appellant.

Service acknowledged July 25, 1918.

W. J. LARRABEE,

Solr. for Defendant The Delaware, Lackawanna & Western Railroad Company.

FRED W. VAN BLARCOM.

Solr. for Defendant The Board of Chosen Freeholders of the County of Passaic.

WILLIAM B. GOURLEY,

10 Solr. for Defendant The City of Clifton, (formerly The Township of Acquackanonk in the County of Passaic).

RULE FOR HEARING.

(Filed Oct. 17, 1918.)

20 It appearing that the above-named complainant-appellant duly filed in this Court in this cause, its petition of appeal within twenty days after filing the notice of appeal in Chancery, and that service of a copy of the said petition of appeal was duly made upon each of the respondents within five days after the filing of the said petition of appeal; and that none of the said respondents has filed its answer to said petition of appeal, although the time limited therefor by the rules of this Court has expired as to each of said respondents.

30 IT IS, therefore, on this seventeenth day of October, nineteen hundred and eighteen, ORDERED, that the above-named complainant-appellant hereby have leave to bring on the hearing of the said appeal at the ensuing term of this Court, pursuant to the rules and practice of this Court.

On motion of

MALCOLM G. BUCHANAN,

Solicitor for and of Counsel with Complainant-Appellant.

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of the State of New Jersey, and having duly complied with the provisions of the Act of Congress, of July 24, 1866; operating a through or interstate telegraph line along (inter alia), a portion of the public highway, known as River Road in the Township of Acquackanonk (now the City of Clifton) in Passaic County, New Jersey, where said River Road was crossed by the tracks or right of way of the defendant Delaware, Lackawanna & Western Railroad Company, at grade. Said River Road was a Post Road under the meaning of said act of Congress, and seven of the poles of complainant's through line were located within the lines of said River Road. It was necessary that telegraph communication over said line be maintained without interruption. Said River Road was under the control of the defendant Board of Freeholders of the County of Passaic.

The Railroad Company, and the Township and the County entered into an agreement, pursuant to Sections 30 and 31 of Chapter 257, P. L. of N. J. 1903 (p. 645, at 661), and the amendment of 1915 (P. L. of N. J. 1915, p. 98), to change the grade of River Road in order to abolish the grade crossing.

The change of grade was provided for by resolution and ordinance of the Freeholders and the Township Committee, respectively.

To accomplish this change of grade it was necessary temporarily to remove the said seven poles of complainant's line from said River Road. By the terms of said contract, the Railroad company was to do the work of altering the grade of the highway; the County and Township were to secure the removal or relocation of the telegraph poles.

Complainant filed its bill to enjoin such removal and obtained an order to show cause with interim restraint, on the hearing of which an order was made by the Court below, on June 19th, 1916

(case, p. 23) in order that the public interests in the accomplishment of the improvement might not be delayed, that complainant temporarily remove said poles to permit said change of grade, and then replace them, at its own cost in the first instance, the question of where the burden of such cost should ultimately fall, to abide the final decree.

The cost of the removal and replacement of the poles and wires amounted to \$1137.63.

The learned Vice Chancellor decided (opinion, case p. 39), that the change of grade of said highway was not for the sole benefit of the railroad, but for the benefit of the public, the municipalities as well; that the complainant's rights in the highway were subject to the right of the municipalities to alter the grade of the highway, and hence that the expense of the temporary removal must be borne by complainant. Final decree was entered therefore dismissing the bill. (Case p. 42-44).

GROUND OF APPEAL.

From this decree complainant appeals, (Case p. 46-7), on the ground that the prayer of complainant's bill should have been granted; that the bill should not have been dismissed; that complainant should not have been decreed to pay defendant's costs; that defendants, or some of them, should have been decreed to pay complainant the expense of the temporary removal, and also its costs of suit.

ARGUMENT.

The questions involved, the rights and liabilities of the parties, are of course to be determined as of the date of the filing of the bill. The relief to be awarded is different from that prayed for in

the bill, because of the changed state of facts resulting from the original interim restraint, the order of June 19th, 1916, (directing complainant to attend to the temporary removal, so as to permit the work to go on, and let the burden of expense be determined on final hearing) and the compliance by complainant with that order.

The essential question is, therefore, what right, if any, did the railroad company or the township or the county have to remove complainant's poles, even temporarily, as they threatened, and were about to do. (Case p. 13, l. 10; p. 14, l. 13, p. 18, l. 25; p. 19, l. 25; p. 22),

I. COMPLAINANT HAD AN ABSOLUTE AND PARAMOUNT RIGHT TO MAINTAIN ITS LINE ON RIVER ROAD.

River Road was a post road; complainant had accepted the provisions of the Act of Congress, of July 24th, 1866, (*Ch. 230, Stat. L. 221; R. S. Sections 5263-5268; 9 Fed. Stat. Ann., 2d Ed., 505-518*) and had constructed its line. By the terms of that Act (quoted in the bill, Case p. 4) complainant was given by the Federal Government the right to maintain and operate its line now in question on River Road. This of course comes within the power of the Federal Government in the matter of interstate commerce.

Complainant also, as a telegraph company of this state, had a similar right to maintain and operate the through line in question, under Section 8 of the "Act to incorporate and regulate telegraph companies." (*4 Comp. Stat. N. J., p. 5314*).

The complainant's rights in the post road are supreme, subject only to reasonable regulations. The leading case may be said to be the recent decision of the Supreme Court of the United States in

Town of Essex vs. Telegraph Co., 239 U. S. 313.

Other cases sustaining the right of telegraph companies under the act of 1866, are

Pensacola Tel. Co. vs. West Un. Tel. Co., 96 U. S. 1.

West Un. Tel. Co. vs. Mass.—125 U. S. 530.

West Un. Tel. Co. vs. Richmond, 178 Fed. Rep. 310; *aff. in* 224 U. S. 160.

St. Louis vs. West Un. Tel. Co., 63 Fed. Rep. 68; *aff. in* 166 U. S. 288. . .

In the case last above cited the Court said:

“The defendant company is in the city, with the poles and wires on the streets, under the paramount authority of an act of the Federal Congress. It comes as a governmental agency, in performing an important function in interstate commerce. It neither asks, nor can the city demand any permit or license to be and remain on such public highway. It has the right to demand the use of plaintiff’s streets and alleys, and the plaintiff must submit to such use, with or without an ordinance.”

And in the Richmond case, next to the last above cited, the Court said:

“To hold that said companies mentioned in said Act of Congress are required to obtain the consent of the state and municipalities through which they pass before they are entitled to so use the post roads of the United States is to admit the power of an authority other than the United States to control them, and indirectly, at least, to concede to such authority the right to regulate interstate commerce.”

See also

Carver vs. State, 11 Ga. App. 22.

West Un. Tel. Co. vs. Superior Ct., 15 Calif. App. 679.

Beekman vs. Third Ave. R. R. Co., 153 N. Y. 144, 158.

Farmer, etc., vs. Columbian et Co., 72 Oh. St. 525:

Wright vs. Glen T. Co., 112 N. Y. App. Div. 745.

When the poles have been erected and the lines established they are protected from molestation by stringent laws. Generally it is a misdemeanor to cut down or destroy the poles and lines. In New Jersey it is so provided by Sec. 104, of the Crimes Act, 2 *Comp. Stat.* p. 1778. See also, *Cook on Corporations* (6th Ed.) p. 3574; (7th Ed.) p. 3895, where the authorities are collected.

And where poles and lines have been established and money has been expended in establishing such lines, the municipal consent thereto cannot be withdrawn.

Telephone Co. vs. Jersey City, 49 N. J. Law, 303.

The right to the designation of a route for a through line cannot be withheld by the municipality upon application therefore, and it has been held that there is no discretion in the municipality, and mandamus will issue to compel designation.

N. Y. & N. J. Tel Co. vs. Bound Brook, 66 N. J. Law, 168.

And in *Twp. of Summit vs. N. Y. & N. J. Tel Co.*, 57 N. J. Eq., 123, 127, it was held that

“The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant that the use shall be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall pro-

hibit the use or impose new conditions to the power to exercise the franchise. An ordinance imposing a new condition upon which the telephone company may use its franchise in or over the public streets granted by the legislature, is an entirely different thing from an ordinance regulating and restricting the manner of erection and use in or over the streets."

It would follow from these principles that the right of the complainant in the public highway is secure, subject only to reasonable regulations in the exercise of it. Such regulation does not contemplate compulsory removal of the poles and lines at the expense of the telegraph company, either temporarily or permanently. Such action would not be a regulation of, but an interference with, the right of the complainant, and in violation of the protection afforded it by both the State and the Federal Law; and would in effect, deny complainant the protection of the Fourteenth Amendment of the Constitution of the United States, abridging its privileges and immunities as a citizen of the United States, depriving it of its property without due process of law, and denying it the equal protection of the laws; and would also deprive it of its property rights under both the State and the Federal Constitution.

II. THIS RIGHT OF COMPLAINANT WAS A PROPERTY RIGHT, AND ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AS OTHER PROPERTY AND CONTRACTS.

A right of way duly granted to or acquired by a telegraph company, to construct, operate and maintain its telegraph line in a public highway, is a vested easement and a property right, and entitled to all the constitutional protection afforded to other property and contracts.

Southern Bell Telephone Co. vs. Mobile,
162 Fed. 523, at 532.

Morristown vs. East Tenn. Tel. Co., 115
Fed. 304, at 307.

An electric light company by suit in the Federal Court may enjoin a city from summarily ousting it from the streets which it is occupying under grant from the city, due process of law being involved.

Ashland, etc. Co. vs. City of Ashland, 217
Fed. Rep. 158.

In the case of *Hudson River Tel. Co. vs. City of New York*, 210 N. Y., 394, an award of \$9,250. to the telephone company for the cost of changing its line from one highway to another to make way for a city reservoir, besides \$10,500. for damage due to injury to its telephone business, was affirmed.

Even though the state itself vacates a highway by using it with other land for a reservoir in connection with a State Canal, thereby necessitating the removal of telephone poles and wires from the highway, the company owning the pole line is entitled to compensation including the value of the easements and structures (less what they sell for) constituting the entire property, but not the loss of business.

N. Y. Tel. Co. vs. State, 169 N. Y. App.
Div. 310.

Where a street on which a telephone line was located is vacated without making the telephone company a party, the owner of the fee cannot compel the telephone company to remove its line without compensation.

L. & N. R. R. Co. vs. Russelville etc. Tel. Co. 173 S. W. (Ky.) 1105.

An ordinance ordering a telegraph company to remove its poles from a specified street, the purpose being to beautify the town, violates the con-

tract of the original ordinance under which the company erected its poles on such street.

City of Vandalia vs. Postal Tel. Co. 113 N. E. (Ill.) 65.

A city cannot order an electric light company to shift its lines on the streets to make way for a city electric lighting system not only to light the streets but to furnish light to the public, inasmuch as in selling light it acts in a proprietary and quasi private capacity.

Los Angeles, etc. Co. vs. Los Angeles, 241 Fed. Rep. 912.

III. NEITHER THE RAILROAD COMPANY NOR THE MUNICIPALITY HAD AUTHORITY TO COMPEL THE REMOVAL OF COMPLAINANT'S POLES WITHOUT COMPENSATION.

That the railroad company had no such power or authority is evident from the foregoing part of this brief. We may concede that the railroad company might, perhaps, under its delegated right of eminent domain, have required the removal of complainant's poles, but of course, in such case it would have been required to compensate complainant.

In the same way, if the municipalities, or either of them, possessed the right of condemnation in this behalf, it nevertheless could only have been exercised coupled with compensation to complainant.

It is claimed, however, by defendant, that the municipalities had the right and power to compel such removal, and without compensation, under the police power and the rights reserved over complainant's line, in the way of reasonable regulation; that in the case at bar the municipalities were only exercising such rights and the railroad company was acting as the agent of the municipalities in the execution thereof.

But the facts show that it was not a case of exercise of police power or reasonable regulation.

It is not intimated that complainant's line, or any part of it was a hindrance or obstruction to the public travel or dangerous to the public in any way. The danger sought to be corrected was that occasioned by the railroad company's grade crossing. The telegraph company was in no wise responsible for its creation nor in anywise participating in its maintenance.

There can be no equity therefore in penalizing the telegraph company in order to aid in the correction of a dangerous situation in which it had no part, but which was the fault of the railroad company and the municipalities together.

It is true, that it has been held that under the police power and reasonable regulation, a telegraph company may be compelled to substitute underground conduits in place of overhead pole lines, where the circumstances made such a change reasonably necessary.

But in such cases, obviously, it is the correction of a condition dangerous or detrimental to the public welfare, *in which the telegraph company has been at least a participating cause.* The telegraph company, or companies, have in the growth of their business, strung so many wires in the streets, as to result, coupled with the growth of the City, in a congested condition dangerous or obstructive to the public good.

Likewise, in *Am. Tel. & Tel. Co. vs. Millcreek*, 195 Pa. St. 643, cited by respondents, the telephone poles were so located in the highway as to interfere with the working of the highway, and to obstruct the gutters. So also in *Ganz vs. Ohio & Tel. Co.* 140 Fed. 692, the poles were located in the middle of the highway and were a dangerous obstruction to public travel.

No such situation exists in the case at bar. The telegraph company is a purely innocent bystander.

The railroad company and the municipality, for the purposes and benefit of one or the other, or both *but for no purpose or benefit of the telegraph company, and for no regulation of the telegraph company as such*, seek to interfere with and damage the latter's vested property rights, without reimbursing complainant therefor.

Nor is it of any materiality or force to argue that the removal sought was only temporary and of only a comparatively small part of complainant's line.

The question is one of basic principles of rights and liabilities. If the defendant municipalities had the right to require the complainant to remove at its own expense, seven poles, it would have the same right to require it to remove seven miles or seventy miles of poles (assuming, of course, that so lengthly a road alteration were reasonably necessary for the public benefit). And so, also, if the complainant had to acquire a temporary new right of way, instead of, as in the present instance, being given temporary accommodation by the railroad company. All this, be it remembered, without one iota of fault or responsibility on its part for the condition sought to be improved.

The situation has not, however, been left by the legislature to the realm of abstract logic. The Act of 1877 (*4 Comp. State, p. 4461, Sec. 70*) provides as follows:

"70. DAMAGES FROM ALTERATIONS OF GRADE RECOVERABLE. An action doth and shall lie in behalf of any person or corporation owning any house or other building standing and erected upon any street or highway, the grade whereof shall be, or shall have been, altered by virtue of the ordinance, resolution, or other proceeding of the legislative authority of any city, borough, town corpo-

rate, village, or other municipality in this state, to recover from such city, borough, town corporate, village, or other municipality, all damages which such owner or owners shall suffer by reason of altering any such grade; provided, that no such action shall be brought after the expiration of twelve months from the working of any such grade. (Rev. 1877, p. 1009, as amended P. L. 1905, p. 448, and P. L. 1906, p. 323.)"

And Section 73 provides as follows:

"73. CONSENT TO ALTERATION OF GRADE BY MAJORITY OF LOT OWNERS, AND PAYMENT OF DAMAGES, REQUIRED. The grade of no street in any city, town or village which has been built on shall be altered, unless by the consent of the majority of owners in interest of the lots fronting on the part proposed to be altered, nor without paying to the owners of such buildings the damages sustained by the alteration of such grade. (Rev. 1877, p. 1009, as amended P. L. 1905, p. 448)."

This act was a remedial act and is to be interpreted liberally rather than strictly.

Lambertville vs. Clevenger, 30 N. J. L. 53, at 54.

The Court in that case, also says, "The object of the act was, in accordance with the settled policy of our laws, to compensate the owners of property for injuries occasioned by acts of the public authorities for the benefit of others."

This case, and the language above quoted, is cited with approval by this Court in *Clark vs. Elizabeth*, 61 N. J. L. 565, at 583.

It would seem clear, even under a strict interpretation of the statute, that complainant's pole

line, though not a house, would come within the category of a "building standing and erected upon" the street or highway. Certainly, there can be no doubt about it, in view of the fact that the act is to be liberally construed, and in view of the wording of the title of the act, "An act to define the rights of parties whose property is damaged or taken for public use in cases of the alteration of grades of streets or highways."

That it is the settled public policy of the state that damages occasioned to individuals by the construction of public improvements is shown throughout the entire state legislation, and particularly in the matter of street grades by the several amendments to the act cited, which was originally passed in 1858, (P. L. 1858, p. 415), applying to cities, towns and boroughs, and as later amended, (4 Comp. Stat. 4461) applies to all municipalities, also the several municipal charters and acts relative thereto. *Cf. Clark vs. Elizabeth (supra) at pp. 578-582.*

Provision is made by the Act (4 Comp. Stat. 4462, Sec. 74), for the ascertainment of the damages in question and their assessment, etc.

In the case at bar, not only was no proceeding taken for the ascertainment, or assessment of the damages to complainant, but none for any payment of damages to complainant whatsoever. On the contrary, the municipalities notified complainant to remove its line at its own cost and that in default thereof, they the municipalities would remove it *and charge the cost to complainant*. This they had no right to do, as shown above; and hence complainant was entitled to injunction restraining such threatening procedure, as prayed for in its bill.

It is true, of course, as argued by defendants, that it is the public policy of the state to eliminate grade crossings, as shown by the course of legislation. But the two policies are in no wise incon-

sistent, and there is no indication that the elimination of grade crossings for the benefit of the public is to be accomplished at the expense, or to the detriment or damage of individuals.

There is nothing whatever in the act under which defendants were proceeding in the case at bar, (P. L. 1903, 661, Sec. 30 & 31; P. L. 1915, 98) in contravention of the legislation above referred to, or to indicate an intention that individual damages should not be provided for and paid, as theretofore.

But even aside from the statutory provisions above referred to, the municipalities had no right to take their threatened action, without compensation to complainant.

To judge from the reported decisions under the statute, the largest class of persons affected thereby were owners of lands abutting on the street or highway, the grade of which was to be altered. Prior to the statute they had no remedy for the damage occasioned them. *Clark vs. Elizabeth*, 61 *N. J. L.*, at p. 578.

The damage so occasioned them was not direct but incidental.

But the damage to be occasioned to complainant here was not incidental, but direct, just as direct as the upheaval and disturbance of an adjoining owner's lands and buildings by the construction of a railroad embankment, in *Costigan vs. P. R. R.* 54 *N. J. L.*, 234. Here complainant's poles were to be actually taken up and removed from the highway, and its wires, of course, along with them. That complainant might have leave to replace them, is of no moment. As the Court said in the *Costigan* case, *supra*, (at p. 241):

"Between an injury to property, though it be temporary, which diminishes its value or usefulness, and its total destruction or complete appropriation, the difference is only in degree."

In *Trenton Water Power Co. vs. Raff*, 36 N. J. L., 335, at p. 343, the Court said:

“The destruction of private property, either total or partial, or the diminution of its value by an act of the government, directly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision, and the power can only be exercised under the right of eminent domain, subject to the constitutional limitation of making just compensation.”

The two last cited cases are cited with approval by the Court in *Clark vs. Elizabeth*, 61 N. J. L., at 576. This Court there deals with damages to an abutting owner, occasioned by a change of grade of street, under contract between a railroad company and a municipality, very similar to the one sub judice. It says (p. 575):

“But for injuries to private property neither the charter of the company nor Sec. 95 of the Road Act will be a justification. The constitution forbids the taking of private property for public use without compensation. The only exception to this rule is that under certain circumstances” (presumably those of *incidental* damage to abutting owners in cases like the one under consideration) “and in the absence of liability imposed by statute, municipal corporations might take or injure private property without any liability to make compensation. This immunity does not extend to persons or other corporations, although the latter may be created for public purposes; and the destruction of private property, either total or partial, or the diminution of its value by the act of government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is

a taking within the constitutional provision, and can only be exercised under the right of eminent domain on just compensation made."

In *Central R. R. vs. Bayonne*, 51 *N. J. L.*, 428, at 431, the Court quotes with approval the language of the Massachusetts Court in *Mass. Central R. R. vs. Boston C. & F. R. R.*, 121 *Mass.*, 124, as follows:

"A railroad corporation, across whose road another railroad or a highway is laid out, has the like right of all individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or, in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition."

The telegraph company has just as much of an easement in the street in the present case, as the railroad company in the case last cited. *Cf.* the cases cited *supra* herein under Point II. See also the decision of this Court in *Nicoll vs. N. Y. Tel. Co.*, 62 *N. J. L.*, 733, holding that a telegraph or telephone line imposes an additional servitude upon the fee in the highway, such servitude necessarily constituting an easement.

Either by the statutory provisions, or aside therefrom, therefore, complainant was entitled to the injunction.

IV. THE RAILROAD COMPANY AND THE COUNTY SHOULD BE DECREED TO PAY THE APPELLANT'S DAMAGES.

The damage to appellant is ascertained and fixed at \$1137.63 (Case p. 31). By reason of the changed conditions since the filing of the bill, the

agreement between the parties and the decree thereupon entered, (case p. 23-24) nothing remains therefore but the direction for payment, and which of defendants shall pay.

By the contract entered into among defendants, it is provided that these damages shall be borne by the railroad company and the county in equal shares (Case p. 35, lines 5-25). Costs should, of course, be also awarded. The decree should be reversed with directions to enter decree in accordance with the above.

V. SUPPLEMENTAL ARGUMENT.

The point that is desired to be made and emphasized is this: That not only is the injury of the complainant's property without compensation, contrary to the statute of this state (as shown in Point *III. ante*), but it is a taking of complainant's property without compensation, and an impairment of the obligation of complainant's franchise contract, both of which are expressly prohibited, even to a state itself, by Art. *XIV.*, Sec. I, and Art. *I.* Sec. X. Paragraph 1, respectively, of the Federal Constitution.

It is not thought that, aside from the claim that the situation under consideration is a justifiable exercise of the police power of the State, it would seriously be contended that it was not a case of taking property and impairing of contract.

The grant of the franchise to the telegraph company constitutes a valid and binding contract, giving the telegraph company the right to use the highway. That right of user is property, and its impairment or diminution, (whether temporary or permanent is a difference only in degree, not in kind), is a taking of property, and an impairment of the contract. See the cases hereinbefore cited, and also:

Grand Trunk vs. South Bend, 227 U. S.,
544.

Louisville vs. Cumberland Tel. Co., 224 U. S. 649.

Northern Ohio Traction Co. vs. Ohio (U. S. Sup. Ct.) 62 L. Ed. 241, *Adv. Opinions*.
N. Y. Tel. Co. vs. N. Y. 169 *App. Div.* (N. Y.) 310.

Gr. Northern Ry. vs. State, (Sup. Ct. Washington) 173 *Pac.* 40.

The whole public policy, both constitutional and statutory, not of this state alone, but of all the states and of the Federal Government, is against the taking or damaging of the property of an individual for the benefit of the public. The state has the power, and should have, both itself, directly and indirectly through municipalities or public service corporations as its agents to compel the rights of individuals to give way to the benefit of the public, but for the consequent damage to the individual, the public must pay.

The principle is very well set forth in the following excerpt from *Nevins vs. Peoria* 41 Ill. 502; 89 Am. Dec. 392, (quoted in *Gt. Northern Ry. vs. State*, *supra.*):

“Neither state nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the Courts whenever the property of the citizen is invaded, and without reference to the degree. * * * The same law that protects my right of property against invasion by private individuals must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper; but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his

household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought? It is said that the city must grade streets and direct the flow of waters as best it can for the interests of the public. Undoubtedly; but, if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading, or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is deprived of its legitimate use, and in so far as its value is impaired, to that extent he should be paid."

Defendants, in effect, practically concede all the foregoing, but say in reply, this case demands no compensation because the telegraph company's conceded property and contract rights are subject to reasonable regulation under the police power, and the present situation is an instance of such reasonable regulation.

The answer is that it is not an instance of exercise of police power, but is, so far as the relationship of the telegraph company to the matter is concerned (and it is with that, and that only, that we must deal, in the consideration of the telegraph company's rights) a construction of a public improvement, for the benefit of the public, of the same character as would be the laying of a new highway, or another railroad, or a canal, across, River Road and appellant's telegraph line.

The decisions as to what is, or is not, a valid police regulation of a public utility company by a municipality, are, of course, numerous and conflicting. It would be useless, and probably impossible to attempt to consider and reconcile them all. It is conceived, however, that almost all, if not all of them, would be found to harmonize with a rule which might be defined as follows:

That a reasonable and valid police regulation, is one designed to (and reasonable and proper for that purpose) protect the public interest, in regard to a situation arising between the public (or the municipality as representing the public), and the public utility, for the existence of which situation requiring such regulation, the utility company may fairly be said to be responsible.

Such, for example, would be regulations requiring railroads to provide gates or watchmen at crossings, or to strengthen a bridge carrying a highway over its tracks; requiring one utility to shift locations in a highway so as to permit the accommodation in said highway of another utility having equal claim to use the highway; requiring electric light or power companies to safeguard their wires, to pay cost of inspection of same; requiring traction companies to fill the roadway between the rails to the grade of the highway, to provide proper headlights, gongs or whistles on cars; requiring telephone or telegraph companies to move poles where such poles obstructed traffic, even though when originally placed they were not an obstruction to traffic, or to place wires underground where congestion of wires or traffic, or both, has occurred; and so on.

On the contrary, such would *not* be regulations requiring a telegraph company to move its poles in order that a street may be beautified; requiring railroads or street railways to carry various state or municipal officials (except those having some duty in connection therewith); requiring

street railways to pave the streets for a number of feet on each side of the tracks; requiring pole companies to pay annual fees for each pole (in excess of any expense caused the city), &c.

So in the case at bar, the attempt is to "regulate" the telegraph company as to a matter for which it is in no wise responsible. It is not even a case of altering a *natural* and dangerous grade of a street, for the safety of the public. It is making a greater grade in the street than theretofore existed, and for what? Simply to avoid a dangerous situation which exists solely because of the existence of the railroad, and not at all occasioned by the existence, number, size or location of complainant's poles.

Notwithstanding the conclusion of the learned Vice Chancellor, the change was being made really for the benefit of the railroad company. If the railroad were not there no such change would be needed. If the railroad were coming there for the first time, the state could have required it to construct a non-grade crossing. In so doing, it would have had to compensate complainant. Under the reasonable regulation principle above advanced, it would certainly be as logical and as just for the state to require the railroad at its own expense, to change from a grade crossing to a tunnel crossing, in order to protect the public from danger or obstructed traffic on the highway, as to require a telephone company to relocate its poles for a similar purpose. That the state is willing to take upon itself and away from the railroad company a part of the expense of so doing may be entirely proper, but not so the attempt to saddle the innocent telegraph company with a part thereof.

It is not, therefore, a case where a greater public right may override a lesser. The municipality was changing the grade, not for its own needs or the public interest *per se*, but simply because of the situation created by the railroad, and the rail-

road company has no greater public right. The telegraph company is just as much a quasi public corporation as the railroad. Its right in the highway is just as high and as public as that of the railroad.

Cf. N. Y. N. H. & H. R. R. vs. Cohasset Co. 216, *Mass.* 291.

But if the situation be considered by the state as one not justifying the requiring of the railroad company, as a regulation of it, to make the improvement at its own expense, the only alternative is that it is a new public improvement, the cost of which should be paid for by the railroad company, or the public, or both, just as if the railroad were seeking for the first time to cross the highway, or the state were laying out a new highway across River Road.

In this aspect, *Gr. Northern Ry. vs. State*, 173 *Pac.* 40, and *N. Y. Tel Co. vs. N. Y.*, 169 *App. Div.* 310, (cited *supra*), are very much in point. In the former case, the State of Washington was constructing a highway, and in the course thereof necessarily obstructed the railroad's tracks temporarily with earth, rock and other materials. It was held that such damage was a "taking" by the state and the railroad was entitled to compensation therefor.

In the latter case, the state in the construction of a barge canal, necessarily required the relocation of the telephone company's line. It was held that this was not a valid regulation of the telephone company's use of the highway, but a taking for which compensation must be paid.

Respectfully submitted,

MALCOLM G. BUCHANAN,

Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

POSTAL TELEGRAPH-CABLE CO. OF
N. J.,

Complainant-Appellant,

and

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD Co., *et al.*,
Defendants-Respondents.

On Appeal
from Chan-
cery.

BRIEF FOR RESPONDENTS.

Statement.

This appeal brings up for review a final decree of the Court of Chancery dismissing the complainant's bill for injunction.

Prior to the year 1916 the public highway in the Township of Acquackanonk (now the City of Clifton), in Passaic County, known as River Road, crossed the tracks of the defendant railroad company at grade.

The highway is under the custody and control of the defendant Board of Chosen Freeholders, and maintained at the expense of Passaic County (case, p. 26, l. 39, p. 27, ll. 1-10).

The defendants entered into a contract dated August 26, 1915, to eliminate the grade crossing by passing the road beneath the track level. The changed grade of River Road necessitated a corresponding change in the grade of William Street

(an intersecting township highway) in order to meet the new level of River Road. (See Exhibit C, case, p. 31, etc.) The authority for the contract is to be found in Sections 30-31 of the General Railroad Law (Comp. St., p. 4234).

In order to carry out their contractual obligations, the Freeholders and the Township Committee passed a resolution and ordinance, respectively, changing the grade line of the River Road to one agreed upon by the contracting parties (case, p. 28, Stip. XII).

The Railroad Company, by the contract, was obligated to do the work of depression (case, p. 29, Stip. XIV), while the duty devolved upon the municipal authorities to procure the removal or relocation, as occasion might require, of telegraph poles and the like, which interfered with the prosecution of the work (case, p. 29, Stip. XIII).

At the time of the commencement of the excavation one of the Telegraph Company's through lines stood within the lines of River Road (case, p. 27, Stip. VI), having been maintained there for over ten years (case, p. 27, Stip. VII). Seven of the poles forming a part of this through telegraph line had to be removed in order that the work to be done by the Railroad Company could be carried on (case, p. 29, Stips. XVI, XVII). The Telegraph Company was duly notified of the change in the grade of the road, of the necessity of getting its poles out of the way for the time being, and advised that upon completion of the work the poles could be restored to positions within the lines of the highway (case, p. 30, Stip. XX). Upon refusal of the Telegraph Company to comply with the defendants' request to remove its poles, the defendants were about to proceed with the excavation work,

regardless of consequences to the Telegraph Company's pole line, when the latter filed its bill in the court below, praying that an injunction issue to restrain such action.

An order to show cause was issued with interim restraint, upon the return of which it developed that the plaintiff was ready to make such readjustment of its pole line as the occasion required, providing the defendants would pay the bill. At the conclusion of the hearing on the rule Vice Chancellor Lewis advised an order directing the plaintiff to move its poles temporarily to positions outside the lines of the highway, leaving the question of liability for the cost of such removal and other expenses to abide final decree (case, pp. 23-25). When the work was completed and the telegraph poles restored to within the lines of the road the cause was brought on for final hearing before Vice Chancellor Griffin, the only question at that time being who should pay the expense incurred by the Telegraph Company in complying with the order advised by Vice Chancellor Lewis. Vice Chancellor Griffin held that the defendants were not liable (case, p. 39) and advised a decree dismissing the bill (case, p. 42), from which the Telegraph Company appeals.

Argument.

In the court below the Telegraph Company endeavored to justify its refusal to make such changes in its pole line as the occasion required (unless defendants would pay the cost), on the ground that it occupied the highway under the New Jersey Telegraph Act (Comp. St. 5312) and the Act of Congress approved July 24th, 1866 (case, pp. 27-28, Stipulation VIII). On the other hand the defendants con-

tended that the elimination of the grade crossing was a proper exercise of the police power of the municipalities, as was also their demand that the Telegraph Company get its pole line out of the way for the time being, so that the work could proceed, and, further, that the right of the Telegraph Company to maintain its pole line in the highway, under either statute, was subject at all times to reasonable police regulations; in short, that the Telegraph Company had acquired no vested right, as against the police powers of the municipalities, to perpetually maintain its poles in the particular locations where they stood at the time of the commencement of the work.

I.

The right of the complainant to maintain its pole line in River Road was permissive only and subject to reasonable regulation.

As stated above, the authority of the Telegraph Company to maintain its poles and wires in River Road is to be found in the New Jersey Telegraph Act and the Federal statute of 1866. An examination of the statutes and the decisions of the courts, however, shows that the complainant's contention that it has "an absolute and paramount right to maintain its line" in the road (Brief, p. 4, etc.) is not well grounded.

The New Jersey Act (Sec. 8, C. S. 5314) by express terms makes the corporation, in the exercise of its rights in the highways of the state, subject to such police and other regulations and restrictions as may be deemed for the best interests of the municipalities. There ap-

pear to be no reported cases in New Jersey in which the precise question here involved has been considered. We do not dispute the soundness of the doctrine that where municipal consent has once been given and the poles and wires installed, such consent cannot be revoked and the company arbitrarily ousted from the street (*Telephone Co. v. Jersey City*, 49 N. J. L., 303; Complainant's brief, p. 6); and we are in accord with decisions in *Telephone Co. v. Bound Brook*, 66 N. J. L. 168 and *Summit v. Telephone Co.*, 57 N. J. E. 123 (Complainant's brief, p. 6) to the effect that the municipal authorities may not arbitrarily refuse to designate a route for poles and wires or impose conditions not authorized by statute; but we respectfully submit that such decisions are not now in point. It is one thing for the owners of telegraph poles to say to the municipality, "you cannot arbitrarily oust or exclude us from the street," and quite another to say "we will not make such adjustment in our facilities in the street as will permit you to carry out municipal improvements unless you pay the bill."

The notion that the complainant acquired some sort of a vested right to maintain its poles in River Road at the locations originally selected, which was superior to the power of the local authorities to lower the grade of the highway, is directly opposed to the decision of the Court of Chancery in *Jersey City v. City of Hudson*, 13 N. J. E. 420. It was there held that a water company, authorized by legislative enactment to use the soil under public roads for the purpose of constructing its works, having laid its pipes across the street of a city, would be compelled to lower them so as to conform to a new grade of the street, established by munic-

ipal authority. See, also, 28 Cyc. Municipal Corporations, page 886, par. IV.

In *American T. & T. Co. v. Millcreek Township*, 195 Pa. St. 643, the telephone company sought an injunction to restrain defendants from removing or interfering with its poles. In the judgment of the road commissioners the increased travel on the highway and the construction of street railway tracks thereon required the removal of the plaintiff's poles to the property line on the side of the road. Plaintiff was notified to that effect. The Trial Court held that the road commissioners were justified in requiring the plaintiff to remove its poles and that such removal should be at the plaintiff's expense. The bill was dismissed. On appeal, the decree was affirmed by the Pennsylvania Supreme Court, which held:

"A telegraph or telephone company by erecting its lines of poles in a certain place in a highway with the express or implied assent of the road authorities, does not thereby acquire a vested right perpetually to maintain said lines of poles in that particular location; and in after years, if changed conditions render it necessary for the public good that such line of poles be moved to a different part of the highway, the road commissioners have the right in the proper exercise of their discretion to compel such removal."

So far as the Federal statute is concerned the position of the complainant in the court below was no better than under the ^{State} statute. The decisions of the courts are practically uniform in holding that the Federal Act is permissive only, and except in the sense that the corporation cannot be arbitrarily excluded or ousted from

the public highways nor subjected to unreasonable burdens, it is not the source of positive rights.

In *Western Union v. Mass.*, 125 U. S., 430, 31 L. ed., 790, it was held that the Act of 1866 was permissive only and did not carry with it any exemption from the burdens of taxation.

The right of the municipality to make a reasonable rental charge for the use of streets was upheld in *Western Union v. St. Louis*, 148, U. S., 92, and in the case between the same parties reported in 63 Fed., 68 (73).

In *Richmond v. So. Bell T. & T. Co.*, 174 U. S., 761, 43 L. ed., 1162, while denying the applicability of the Act of 1866 to telephone companies, the Federal Supreme Court defined its scope and effect as follows:

“The Circuit Court of Appeals, while holding the plaintiff was entitled to avail itself of the provisions of the Act of 1866—a question to be presently considered, adjudged that the rights and privileges granted by the act were to be enjoyed *in subordination to public use* and private rights, and *subject to any lawful exercise of the police power belonging to the state or to one of its municipalities*. This was in accordance with what this Court had adjudged to be the scope and effect of the Act of 1866” page 771 (1162). (Italics ours.)

The same rule was reiterated in *Western Union v. Richmond*, 224 U. S., 160, 56 L. ed, 710 and the validity of a local ordinance sustained which conferred very broad regulatory powers upon municipal officers.

In *Essex v. New England Tel. Co.* 239 U. S., 313, a decree was entered in the court below enjoining the municipality from ousting the Telegraph Company from the highway. The judg-

ment was affirmed on appeal, but modified by the insertion of the proviso:

“that nothing herein shall be so construed as to prevent the Board of Selectmen of the Town of Essex from subjecting the location and operation of the company’s lines to reasonable regulation.”

The case of *Ganz v. Ohio Postal Telegraph-Cable Co.*, 140 Fed., 692 is closely analogous to the case at bar. It there appears that the commissioners having jurisdiction of the road endeavored to have the telegraph company move its poles to one side in order to permit of the widening of the macadamized roadway. The telegraph company applied for an injunction to restrain the commissioners from enforcing their demands. A cross-bill was filed praying a mandatory injunction requiring the telegraph company to move its line as directed by the commissioners. On appeal the judgment of the Trial Court granting the telegraph company’s prayer for an injunction was reversed and the case remanded with directions to dismiss the bill and grant the prayer of the cross-bill. The Federal Circuit Court of Appeals (Sixth Circuit) there held:

“The right given to telegraph companies by Rev. St. Sec. 5263 (U. S. Comp. St. 1901, p. 3579), to use post roads for their lines, on compliance with certain conditions, is permissive only, and the statute was not intended to interfere with the proper control and regulation of highways by the states, counties, or municipalities which have them in charge.”

See, also, *Cook on Corporations*, 7th Ed. vol. 4, p. 3934, Sec. 935 to the effect that telegraph companies which have accepted the provisions

of the post road act of Congress must comply with reasonable regulations of municipalities; and 37 Cyc. p. 1622, par. A, where it is said (pp. 1623-4):

“The act is merely permissive, and the franchise or privilege granted must, like any other franchise, be exercised in subordination to both public and private rights.”

II.

The requirement of the authorities having jurisdiction of River Road was a reasonable regulation.

The complainant (brief, p. 10) states that the facts show that the action of the local authorities was not a case of the exercise of the police power or reasonable regulation. With such contention we, of course, do not agree. There was no denial of the complainant's right to occupy the highway with its poles, nor any attempt made to exclude them permanently (case, p. 30, Stip. XX). All that was required was that the complainant get its lines out of the way for the time being, so that the work could be done (case, p. 29, Stip. XVII). But the complainant says, in effect, that because it contributed in no way by the presence of its poles to the necessity of changing the street grade, and was in no way responsible for the presence of the grade crossing, there can be no equity in *penalizing* it in order to aid in the correction of a dangerous situation in the creation of which it had no part (brief, p. 10). The answer to such contention is that the Telegraph Company was not *penalized* but simply required to perform its uncompensated duty to look after its own property, which occupied

the road by permission only. The water company in *Jersey City v. City of Hudson, supra*, by the presence of its pipes in the street contributed in no way to the necessity of changing the grade of the latter, yet it was decreed that the water company should bear the expense of lowering its pipe line. So, too, in *American Telegraph and Telephone Co. v. Millcreek Township*, and *Ganz v. Ohio, etc., Telegraph Co., supra*, it did not appear that the presence of the telegraph poles had anything to do with the necessity for widening the paved roadways, but the cost of moving the poles to one side was nevertheless properly decreed to be borne by their owners.

The case at bar, in our opinion, is substantially on all fours with the two cases last above referred to. In both of those cases the increased vehicular traffic on the highways and the presence of trolley tracks thereon (the latter placed subsequent to the installation of the pole lines) were the factors which called for the widening of the paved roadways and the consequent shifting of the telegraph poles to one side. We are unable to perceive any distinction in principle between cases where the increased travel on the highway contributes to the necessity of increasing the width of the pavement and those cases where, as here, it is one of the causes which give rise to the situation requiring a change in the street grade.

Nor is there any merit in the complainant's contention that the change in the grade of the road was, notwithstanding the conclusion of the learned Vice Chancellor to the contrary, really for the benefit of the railroad company (brief, p. 21), a situation, which, if true, might have some bearing on the question of the reasonableness of the local authorities' requirements. The munic-

ipality and all persons using the road receive a direct benefit from the improvement and the Legislature of this State for more than twenty-two years has recognized the fact by authorizing the expenditure of public funds in furtherance of such projects. See P. L. 1896, p. 139; P. L. 1900, p. 312; P. L. 1901, p. 116; P. L. 1902, p. 47; also Section 31 of the General Railroad Law, 3 C. S., 4234. The courts, too, have enforced contracts of municipalities under which they agreed to contribute large sums of money toward the cost of grade crossing eliminations (*M. & E. R. R. Co. et al v. Newark*, 76 N. J. L., 555).

But we are not wholly dependent upon the common law to justify our contention that it was the uncompensated duty of the complainant to adapt its facilities to the changed conditions at its own expense. The Fielder Act (P. L. 1913, Chap. 57), empowering the Public Utility Commission to order the elimination of grade crossings, expressly provides:

"4. Where the order of said board shall require changes in, or the removal of the property or constructions of any telegraph, telephone * * * or other company or corporation, co-partnership or individual, they shall, *at their own expense*, move or change the grade or location of their property or constructions in conformity with the order of said board. * * *"

We therefore submit that the complainant's rights in the highway being only permissive (Point I, *ante*) and its legal obligation to remove its poles at its own expense clear, the requirements of the local authorities vested with jurisdiction over River Road were in every respect reasonable.

III.

Complainant was not entitled to compensation.

Counsel for the complainant, on page 17 of his brief, argues that the action of the local authorities was a taking of the complainant's property without compensation and an impairment of its franchises in violation of State and Federal constitutional provisions. He also contends (brief, p. 11, etc.) that the complainant was entitled to damages on account of the change in the grade of the highway, under Section 70 of the Road Act (C. S., 4461).

The contention that there was a taking of property or an impairment of franchises is directly opposed to the decisions of the courts which we have heretofore cited under our first point. There certainly is no taking of property nor impairment of franchises in requiring a corporation to comply with a legal duty, and nothing more was done in the case at bar.

Nor are we impressed with the argument of complainant's counsel that the Telegraph Company should have been awarded damages under Section 70 of the Road Act on account of the change of grade. He construes the word "building," appearing in the statute, to mean "telegraph pole" in order to bring the case within the act, although no authority is cited to sustain the definition. We do not think the word can be so enlarged. As stated in *Words and Phrases*, p. 889:

"In its broadest sense it can only mean an erection intended for the use or occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting an edifice, such as a church, a house or shed."

Furthermore, the decisions of our courts indicate that it was the intention of the legislature to limit the application of the statute to the owners of buildings fronting upon or abutting the street lines, as distinguished from a structure standing inside. Of a similar statute (P. L. 1889, p. 378, C. S., 710, Sec. 475), the Supreme Court in *Railroad Co. v. Summit* (77 N. J. L., 438, 72 Atl., 83) said:

“We conceive that the legislative intent was to limit the damage to the building or buildings *fronting* upon or possessing an entrance upon the street the grade of which was raised.” (Italics ours.)

It is respectfully contended for the respondents that there is not the slightest semblance of authority for the strained construction of the Road Act contended for by complainant's counsel, and in view of the provisions of the Fielder Act expressly indicating a contrary legislative intent, the scope of the Road Act should not be enlarged.

IV.

The decree of the Court of Chancery should be affirmed, with costs.

Respectfully submitted,

WM. B. GOURLEY,
F. W. VAN BLARCOM,
W. J. LARRABEE,

Of Counsel for Respondents, City of Clifton, Board of Chosen Freeholders of the County of Passaic, and The Delaware, Lackawanna and Western Railroad Company, respectively.



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