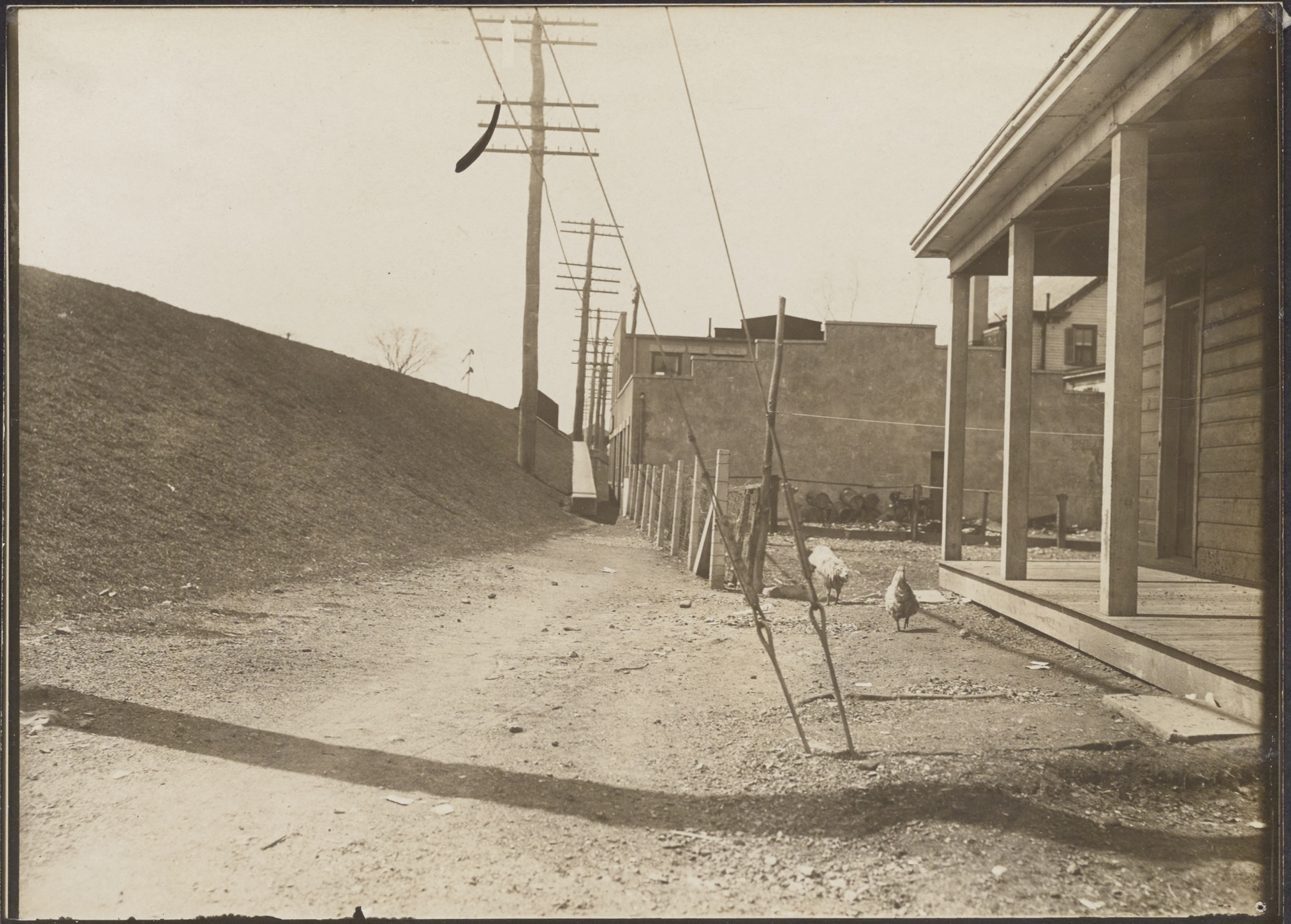

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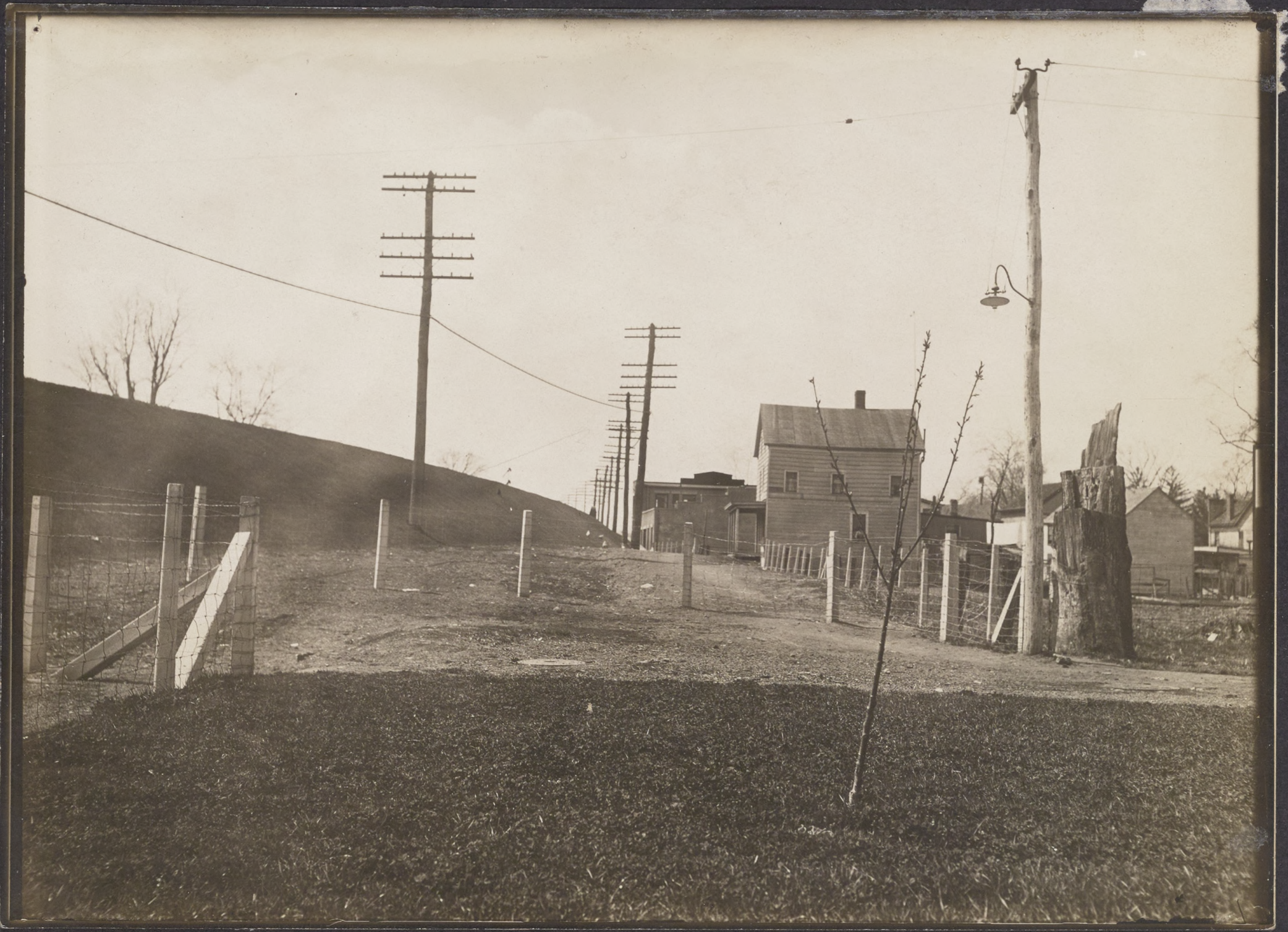

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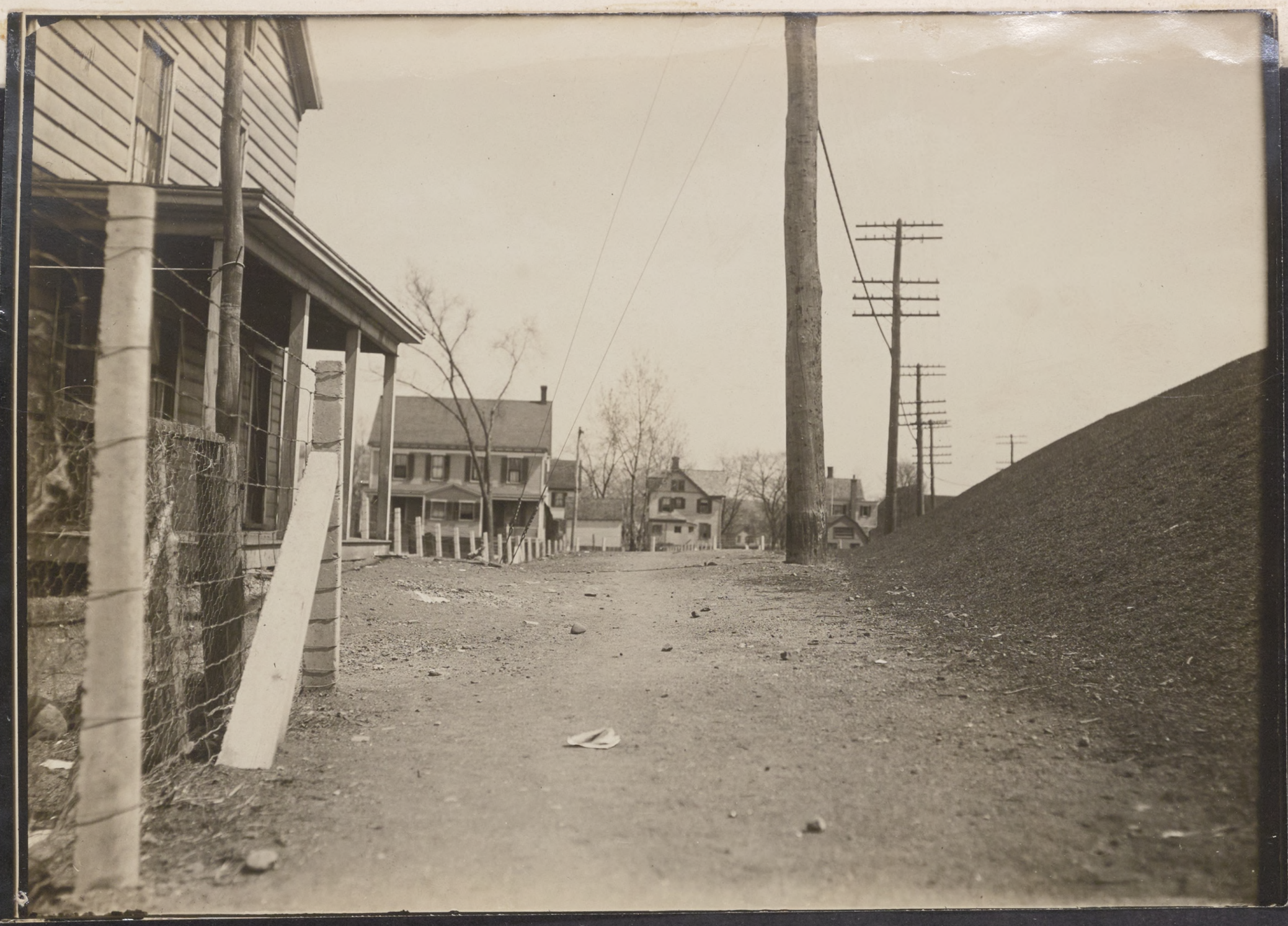

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EDNA DICKINSON, *Plaintiff-Respondent,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal From Supreme Court.*

Brief for Respondent.

Statement of Facts.

This action was brought to recover damages for a nuisance created and maintained by the defendant by continuing an embankment and wall along a street upon which the plaintiff's property was located, thereby preventing her from using said street for ingress and egress to and from her premises. A verdict was returned in favor of the plaintiff for $1,484.58 from which the appellant now appeals.

The plaintiff owned a tract of land in the Borough of Chatham, New Jersey, located upon a corner formed by the intersection of Passaic avenue and a certain unnamed street running from said avenue to Bowers lane (paragraphs 1 and 2 of Complaint), all of said streets being public highway (See opinion in first case, state of case p. 91).

The defendant in June 1913 upon and through the unnamed highway built and constructed a high wall and embankment, which ran parallel with plaintiff's property and only two or three feet from it, thereby partially obstructing the access to plaintiff's premises over said public

highway (paragraph 3 of Complaint, p. 5). Because of this obstruction the rental value of the plaintiff's property was decreased and she seeks damages therefor from May 16, 1914 to the date of the trial.

Plaintiff herein, together with one Lowe, one of her former tenants, in July 1913 instituted a suit in the Supreme Court against this defendant to recover damages for the erection of this same embankment and obtained a judgment of seven hundred and fifty dollars ($750) on May 16th, 1914, which said judgment was confirmed by this court (73 Atl. 703) and subsequently satisfied.

The defendant in addition to maintaining and continuing the wall and embankment complained of, in August 1915 erected a fence along the line of this unnamed street, consisting of concrete posts strung with square mesh wire and barbed wire on the top (p. 14, l. 6 to 30), thereby preventing the plaintiff from using the strip of land two or three feet wide which remained at the side of the embankment.

Upon this state of facts, upon which there is no dispute, and in accordance with the charge of the court, the jury returned a verdict fixing the damages sustained by the plaintiff from May 16th, 1914, to the date of trial at $936 and also giving $500 as punitive damages.

There is no objection made by the appellant to the amount of the verdict either as to the punitive or compensatory damages allowed; the appeal being taken simply to review the legal findings of the trial court.

Point I.

THE RECOVERY IN THE FORMER TRIAL BETWEEN THE SAME PARTIES FOR THE SAME KIND OF INJURY IS NOT A BAR TO THE PRESENT ACTION.

In order to determine what the situation was in the former trial, it will be necessary to turn to the record thereof.

It is admitted that the action there instituted was for erecting the same wall and embankment complained of in this suit, and the only issue in dispute is whether or not the damages awarded to the plaintiff in that suit covered all the damages to which she was entitled or only damages up to the date of the institution or trial of that suit.

The allegations or contentions of the plaintiff contained in his complaint as to what he is entitled to does not of necessity define the issues as determined by the trial court and submitted to the jury nor do the pleadings establish the measure of damages covering the situation complained of.

The plaintiff in his pleadings may claim a great deal more than he is entitled to, but this does not determine what he actually recovers. In order to ascertain this, it is necessary to find the issue and rule of damages as fixed by the court, and this can only be done by reference to the charge to the jury or decision of the court.

In her original complaint, the plaintiff claimed permanent damages, but this is perfectly immaterial and has no bearing on what the issue was in view of the fact that the court invoked the correct and legal measure of damages.

The charge of the trial court in the first case is printed on page 82 of the State of Case, and on

page 87 the trial court laid down the measure of damages, saying:

> Line 20—"The measure of damages in cases of obstruction to premises or places of business has usually been held to be the difference in the rental value or the receipt of profits before and after the injury complained of, and the value of the business obstructed is a proper item of damage to be taken into consideration by the jury in arriving at a conclusion. In order to consider the rental value there must be some evidence to that effect and mere speculative rent will not be considered. Where the loss is partial or limited the reduction in rental value has been accepted by the court as the measure of damages."

And again on page 88, line 9 the court in laying down the rule in reference to damages said:

> "In reference to Miss Dickinson the evidence shows that she occupied the corner with a real estate office, and there is no evidence in the case that she has suffered any loss by reason of this wall to her business as such, but there is evidence in the case that she suffered a loss of rental of the upper floor in the sum of $25 a month.
>
> "Now you see, you apply these facts to this rule of law which I have given you and make a verdict, if you find for the plaintiffs, under that rule of law, and here again the burden of proof is upon these plaintiffs to satisfy you by a fair preponderance of evidence as to the extent of their loss under the legal rule which I have given you from the courts applied to the facts as you find them in the testimony."

In other words the court in the former trial permitted the plaintiff to recover the same as the court in the present trial did, to wit, the difference in the rental value before and after the injury complained of covering the period up to the time of the trial of the issue.

Any other rule of damage would have been reversible error.

The record of the former judgment only works an estopped as to those matters capable of being controverted between the parties at the time of the proceedings in the action. *Mershon* v. *Williams,* 63 N. J. L. p. 398-401.

The facts themselves show that the former recovery should have no bearing upon the present action, because the damages herein claimed were not contemplated nor included in the former verdict, and this conclusion as a matter of law is sound and definitely decided and settled in this State.

Before citing cases to substantiate this contention, it is advisable to review the findings of the court in reference to the obstruction complained of. The court on page 20, line 15 to 29, said:

> "I do not see any reason why the court should hold that this embankment is necessarily a permanent structure. I do not see any right that this company had to build that embankment across a public highway and to build its foundation so secure as a physical fact that it would come into court and say that it is immovable, rendered so by the finesse and solidity of our construction. My judgment is that that is not a permanent structure as a matter of fact, and that the railroad company will be held to have bridged that highway as it bridges other highways and, if crossed by an embankment, that it could re-

move the embankment and supplant it by a bridge."

And again on page 21, line 1 to 10:

"I do not think that the court is under any obligation to assume that this is a permanent structure. In the law permanent structures are rendered permanent by their conforming to the rule of law which defines permanent structures, and they are not permanent merely by their physical characteristics, and therefore, if we view it from one side or the other, I must rule against your motion."

Nowhere does the appellant make any objection to this finding of the court, nor does he challenge the conclusion reached or note an exception upon the record for the purpose of review.

The decision of this court in the first case determines the rights of the parties in this suit and establishes and adjudicates that as between these parties this embankment is a nuisance. It is admitted by the defendant that it was continued during the period complained of and covered by this suit.

The measure of damages and the amount recoverable in a situation of this kind is determined in the case of *Delaware & Raritan Canal Co.* v. *Wright,* 21 N. J. L. 469 and *Ellsworth* v. *Central Railroad Company,* 5 Vroom 93, both of which cases are cited and followed on the case of *Brewster* v. *Sussex R. R. Company,* 40 N. J. L. 57. This case is very much in point, being an action to recover for damages for the obstruction by the defendant in the building of its railroad across the plaintiff's right of way. Van Syckel, *J.* on page 57 says:

"In this there was error. Judgments refer to the situation of parties at the com-

mencement of the suit and, as a general rule, damages are allowed in personal actions only to that date.

"In the case of continuing injuries compensation for subsequent loss must be sought in another suit after the damage is sustained.

Sedgwick On Damages 154-5;
Del. & Rar. Canal v. *Wright,* 1 Zab. 469;
Powers v. Ware, 4 Pick. 106;
Pierce v. *Woodward,* 6 Pick. 206."

The Court continuing on page 58 says:

"The charter of the railroad company imposes upon it the obligation of providing a way for the plaintiff from which it is not relieved by the verdict; the duty still subsists to give a passage to the land owner.

"The company may in the future perform that duty."

"In Ellsworth *v.* Central R. R. Co., 5 Vroom 93, which is an analogous case, this court held that the plaintiff was limited in her recovery to the damages sustained at the time the suit was commenced."

Hatfield v. *Central R. R. Co.,* 33 N. J. L. 251.

In *Collins* v. *Langan,* 58 N. J. L. 6, the court through Chief Justice Beasley says on page 7:

"That this was an untenable hypothesis is obvious at a glance. The court rightfully held that in raising this street the defendant was a mere trespasser, the consequence of course being that the act done by him was illegal and was possessed of no quality that would impart to it the character of a permanent condition. The earth illegally placed in the public highway andwhich elevated this grade could at any time be removed by the owner of the contiguous land. In fact at the trial the defendant, to make a case against

him, was proved to be a trespasser; and then to enhance the damages the thing done by him was treated as legal and therefore permanent. Let the judgment be reversed."

Church of Holy Comm. v. *Paterson R. R. Co.,* 66 N. J. L. 218;

Quinlan v. *Welsh,* 66 At. 950.

In *Ackerman* v. *Nutley,* 70 N. J. L. 438, Justice Swayze on page 441, says:

"His loss up to the time of bringing the suit was measured by the temporary inconvenience which he suffered; for any subsequent loss another suit might be brought."

Abbey v. *Weingarten,* 71 N. J. L. 42.

Hatfield v. *Central R. R. Co., Collins* v. *Langan* and *Ackerman* v. *Nutley, supra,* are all cited and followed in the case of *Lewis* v. *Pennsylvania R. R. Co.,* 76 N. J. L. 220 in which the court through Justice Voorhees, on page 221, says:

"Since the change of grade was an illegal act, it will not be assumed that the unlawful condition is a legal and permanent one by allowing a recovery once for all for the diminution in value of the premises.

"Damages recoverable by a property owner by reason of the unlawful change of grade of a street are confined to such as accrue to such property owner for the injury to his enjoyment of the property down to the commencement of the suit."

The above case is cited and followed in *Delamarre* v. *Bott,* 78 N. J. L. 234.

A recent case upon the question of damages for continuing a nuisance is *Ballantine & Sons* v. *Public Service Corporation,* 91 Atl. 94, Court of

Errors and Appeals case, in which the court, through J. Vredenburgh, on page 97 says:

"The authorities uniformly hold that the continuance and every use of that which is, in its erection and use, a nuisance is a new nuisance for which the party injured has a remedy for his damages.

Staple v. *Spring,* 10 Mass. 74;

Hodges v. *Hodges,* 5 Metc. (Mass.) 205.

"Every continuance of a nuisance is held to be a fresh one. 3 Blac. Com. 220.

"In actions for a continued nuisance a judgment recovered in the first cannot have an effect to bar the second, nor to diminish the measure of damages recoverable by it.

Baltimore R. R. Co. v. *Fifth Baptist Church,* 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784;

Troy v. *Cheshire R. Co.,* 23 N. J. 83, 55 Am. Dec. 177.

"In *Beatrice Gas Co.* v. *Thomas,* 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711, the gas company was sued for damages for permitting injurious matter to percolate through subterranean streams into plaintiff's well, and the court held that the injury was temporary and not permanent in character, and was capable of being avoided in the future, without permanent injury to plaintiff's land. Also, see case of *Van Veghten* v. *Hudson R. R. Co.,* 103 App. Div. 130, 92 N. Y. Supp. 956.

"In *Fairbank* v. *Bahre,* 213 Ill. 636, 73 N. E. 322, it was held that a nuisance by offensive odors was temporary in character for which successive actions could be maintained, but that plaintiff could not recover in the action for injury sustained after the institution of the suit.

"In *Hatfield* v. *Central Railroad Co.,* 33 N J. Law, 251, an action to recover damages for

> the erection and continuance of a nuisance, it was held that a verdict could not include prospective damages. See, also, *Lewis* v. *Penn. R. Co.*, 76 N. J. Law, 220, 68 Atl. 1077."

The reason for this rule is stated by Judge Speer in the trial of the action and is found on page 18, line 20:

> "The reason for that rule is so perfectly plain in my judgment and so perfectly sound as a matter of reason as well as a matter of law that it ought to be maintained. The reason is that when a court has once adjudicated a nuisance, it is not to be presumed that the defendant will proceed in continuing that nuisance where it exists, but that he will abate it. The presumption is not against a man's disobeying the law, but in favor of it and, if the nuisance be an obstruction to the public highway, that obstruction may be removed by an individual who suffers a special damage, or it may be suppressed by the municipality in which the nuisance exists."

It is apparent from these cases that it is immaterial whether or not the structure complained of was of a permanent character, the distinguishing feature being as to whether or not the defendant lawfully and rightfully maintained or continued it. If the defendant has no right to continue or maintain it, and this has already been determined by this court, then it became and is a nuisance and every continuance of it is held to be a fresh one and gives rise to a new cause of action.

This distinction should be borne in mind in examining the cases submitted by the appellant in his brief.

The case of *Powers* v. *Council Bluffs,* 45 Ia. 652, is cited by the appellant in attempting to show that successive actions would not lie where the nuisance was permanent in character. An examination of that decision, however, will show that the court said:

> "We have seen no cases where successive actions have been allowed for damages resulting from negligence combining with a natural cause, however, gradual the operation of that cause. *Successive actions are allowable only where the defendant is continuously in fault.*"

That case cites and follows the case set up by the appellant of the *Town of Troy* v. *C. R. R. Co.,* 3 Foster (N. H.) 83, a part of the opinion of which the appellant sets forth in his brief. This case as well as the Powers case is readily distinguishable from the case at bar, for in the Troy case the railroad had a right to continue the embankment complained of and that embankment was lawfully constructed upon the property by the defendant.

In *Stodhill* v. *C. B. & Q. R. R. Co.,* 5 N. W. 495, stated by the appellant the cases of *Powers* v. *Council Bluffs,* and *Troy* v. *C. R. R. Co., supra,* are cited and followed and the decision is based upon the same principle as therein stated.

In the case of *Chicago & E. I. R. Co.* v. *Loeb,* 8 N. E. 460, the court found that the obstruction complained of was a permanent one, while in the case at bar the finding of the court is exactly contrary. Likewise in the case of *Elizabethtown L. & B. S. R.* v. *Combs,* 10 Bush 393, cited by the appellant.

In *Fowle* v. *New Haven & North Hampton Company,* 107 Mass. 352, on Appeal 112 Mass. 334, cited by the appellant the court on page 335, said:

> "As a general rule a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisances where damages after an action brought are held not to be recoverable because every continuance of a nuisance is a new injury and not merely a new damage. The case at bar is not to be treated strictly in this respect, as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in the construction."

In *Baldwin* v. *Oskaloose Gas-Light Co.,* 10 N. W. 317, cited by the appellant, the direct question was submitted to the jury as to whether or not the gas works complained of were so built as to be regarded as permanent, and the damages were estimated upon this special verdict.

The same situation arose in the case of *Bizer* v. *O. H. Power Company,* 30 N. W. 172, cited by the appellant.

In *Irvine* v. *City of Oelwein,* 150 N. W. 674, the abstract printed in the appellant's brief shows that the parties intended that the nuisance should be permanent. There is no such intention in the case at bar, the assumption being, to the contrary, that because it was illegal it would be abated and removed.

The case of *Morris Canal & Banking Company* v. *Ryerson,* 27 N. J. L. 457, and *McFarlan* v. *Lehigh Valley R. R. Company,* 43 N. J. L. 605, both

follow the rule of law laid down in the New Jersey cases heretofore cited.

That portion of the court's opinion in the McFarlan-Lehigh Valley case, which is quoted in the appellant's brief, refers to a situation where the canal company through the authority given by its charter *lawfully* took and appropriated the land and water and was not a tort feasor in so doing.

The law as decided in New Jersey is followed in the case of *Carl* v. *Sheboygan & Fond-du-lac R. R. Company,* 1 N. W. 295. There the railroad ran its track and embankment through a public street upon which the plaintiff's lot fronted and a suit for damages resulted. On page 297 the court said:

> "The action was to recover damages for a continuous trespass or nuisance to real estate by a railroad company, and the measure of damages in such a case is not the amount which the real estate has been lessened in value. If such were the rule, then a recovery in this action should bar a recovery in any future action for a continuance of a nuisance; such, however, is not the case. The recovery in the present action would be a bar only as to damages sustained previous to the commencement of the same, and the plaintiff or her grantees could recover in another action for an injury caused to the lot by the maintenance of such railroad subsequent to the commencement of this action." Citing:
>
> *Blesh* v. *Railroad Co.,* 43 Wis. 183-195;
> *Ballishill* v. *Reed,* 18 C. B. 696;
> *Bare* v. *Hoffman,* 79 Penn. St. 71;
> *Sedgwick on Damages,* 162, and note;
> *Field on the Law of Damages,* 748;
> *Homes* v. *Wilson,* 10 Ad. and E. 503;

Thompson v. *Gibson,* 7 M. & W. 456;
Boyn v. *Cook,* 4 C. B. 236;
Pennoyer v. *City of Saginaw,* 8 Mich. 534;
David v. *Lambertson,* 56 Barb. 480;
Blunt v. *McCormick,* 3 Denio. 283;
Wagoner v. *Jarmain,* 3 Denio. 306;
Cumberland and Oxford Canal v. *Hutching,* 65 Me. 140.

The same rule is followed in *Fell, et al.* v. *Emmett, et als.,* 5 Atl. 17, a Pennsylvania Supreme Court case, in which the court said:

> "Every continuation of a nuisance makes a fresh one (1 Chit. P. L. 66) and for this recovery may be had. It follows that for every day's maintenance by the defendants of the obstruction, which flooded the plaintiff's land after the first recovery, a new action might have been brought."
>
> *Ramsdall* v. *Foot,* 13 N. W. 557.

There can be no gain by a further analysis or consideration of authorities out of this State, for our Rule of Law on this subject is clearly and definitely settled here and it seems right, both on principle and in practice.

If, in the first trial of this case, a recovery had been permitted on any other theory than the loss of rental value regarding the situation as a nuisance and a continuing trespass, the verdict would have been, of course, reversible under the Brewster, Ellsworth and Lewis cases before cited. If a recovery for permanent damage had been allowed, it would have been reversible under the well settled law of this State and under that situation, to hold now that the former recovery was a bar, would seem anomalous.

In fact, to permit any such rule to be established would in effect, provide a new method of involuntary condemnation.

It is respectfully contended that the obstruction complained of in this suit was a continuing nuisance; that it would have been impossible to have recovered damages for the period covered in this suit in the former suit, and that the judgment obtained by the plaintiff in the former suit is not a bar to the present action.

Point II.

THERE WAS NO ERROR IN THE EXCLUSION OF EVIDENCE.

The following questions on cross-examination were asked of the witness, Edward H. Lum, and upon objection by the defendant were properly overruled.

> "Q Could they carry it right from Passaic avenue up to the second story?" (Page 55, lines 36-37.)
>
> "Q Could a door be made on Passaic avenue opening out on Passaic avenue in front of Miss Dickinson's garage building and such stairway be carried up to the second story?" (Page 56, lines 30-34.)
>
> "Q If such a stairway were put in, would that relieve the loss in rental value of the upper floor to which you have testified?" (Page 57, lines 2-4.)
>
> "Q Could this stairway be constructed in the building furthest from the railroad tracks without interfering with the garage below?" (Page 57, lines 21-22.)
>
> "Q In your opinion what would be the relation of the cost of that stairway and entrance there to the loss you say is there by reason of its present access?" (Page 57, lines 20-30.)

The ruling of the trial court on the first four questions is not reviewable by this court because the appellant noted no objection upon the record for the purpose of review.

Coppola v. *Grande,* 96 Atl. 67;
Kargman v. *Carlo,* 85 N. J. L. 632;
Miller v. *Delaware River Trans. Co.,* 85 N. J. L. 700.

The ruling of the court on the fifth question is the only one to which an objection was noted, and this question was certainly immaterial and irrelevant without the admission of the preceding questions.

All of the questions should have been overruled by the court, as they were, because, firstly, they were not proper cross-examination, not being within the scope of the direct examination; secondly, because the defendant was attempting to obtain from the witness expert opinion upon the question of erection and construction of buildings without showing that he had any knowledge upon this subject or was at all qualified in this field; thirdly, because the questions were offered for the purpose of ascertaining whether or not the plaintiff's building could be reconstructed in order to mitigate the damages caused by the continuing wrong of the defendant.

To begin with, the appellant erroneously assumes that the embankment complained of was determined to be a permanent structure. It has already been pointed out herein that the trial court determined to the contrary and decided that it was not a permanent structure, but a continuing nuisance.

Inasmuch as the plaintiff had a right to rely upon the fact and assume that the defendant would abate or remove the nuisance complained of and so obey the law, it is perfectly illogical to argue

that she would nevertheless be under obligations to make extensive alterations and go to a large expense in attempting to overcome a difficulty which it is assumed and understood would not continue to exist.

The text book authorities quoted by the appellant refer only to a situation where the injury was a permanent one, while in the case at bar the injury is a continuing one, giving rise to different causes of action, as the nuisance is maintained.

The case of *Slavin* v. *State,* 152 N. Y. 45, cited by the appellant is not in point, for there the situation dealt with is not a continuing nuisance, while in the case at bar this element must be considered.

The case of *McCurdy* v. *Boise City Canal Co.,* 2 Idaho 226, 10 Pac. Rep. 623, cited by the appellant, so thoroughly and firmly fixes the law that there is no necessity for citing any other cases.

The appellant in setting forth this case first cites briefly the facts as therein found and then says:

> "On the trial the canal company endeavored to show that the plaintiff might have prevented the injury to his land by incurring a small expense."

He then stops and fails to go on and says that, as a matter of fact, the court determined that, although the canal company endeavored so to show, it was incompetent and, as a matter of law not admissible, and in so holding said:

> "We understand the rule to be that where one person suffers injury by the carelessness of another, occurring unexpectedly and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damages, if a temporary expedient or slight ex-

pense will do so; but, if the one whose careless or negligence caused a continuing injury to another, having knowledge of the evil of the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it and permits it to continue without attempting to prevent it he cannot avoid his responsibility by showing that the one injured might have avoided the damages by a slight expense."

In effect this point raises the same question involved in the first point. If the suit involved a question of permanent damages, then this evidence as to changing the character of the building would be properly admissible but under the present situation where the presumption is that the defendant will abate the nuisance at once the question of altering the form of a permanent structure would never arise.

In the present case the plaintiff has leased the garage, or down stairs part of the building and during the term of the lease could have no possible right to alter the tenants holdings with stairways or by changing the form and structure of the premises.

For the reasons herein stated it is respectfully insisted that the trial court committed no error in overruling the questions complained of.

Point III.

THE COURT PROPERLY REFUSED TO RECEIVE THE CONTRACT BETWEEN THE DEFENDANT AND THE BOROUGH OF CHATHAM.

The defendant made the offer on page 68 and on this and the subsequent page the situation is

fully covered by the argument of counsel and the rulings of the court.

The defendant stated the object of the offer on page 68, l. 19-30, and by his own statement shows the matter to be *res adjudicata.*

The question as to whether or not the defendant had a right to erect and maintain this embankment has already been decided in the former case. 93 Atl. 703.

The situation now complained of is exactly the same as formerly and the judgment in the former suit being directly in point between the same parties must control the issue. It was a matter capable of being, and as a matter of fact was, controverted between the parties in the original proceeding and the defendant cannot at this time show that it had a right to do what that court has already said it could not do legally. *Mershon* v. *Williams*, 63 N. J. L. 398; also *Hoffmeier* v. *Frost*, 83 N. J. L. 358.

The question could hardly be better covered than in the language of the trial court, page 69, lines 7, 14, 24 and 32.

The appellant in its brief intimates that the contract was offered to show the construction of the embankment; this was not the ground stated in court and cannot be relied upon, but were it not for this objection still it would be clearly inadmissible for the purpose suggested for the mere proof of the contract could not be any evidence that the work was done nor the structure completed according to its terms, and the evidence of Drake on this point not being controverted, the error then, if there were one, would be wholly immaterial.

The case of *Ellis* v. *Guttenberg*, 87 N. J. L. 313, cited by the appellant is clearly not in point.

That case deals with an ordinance permitting the vacation of streets and is in no wise applicable to the present situation.

The court properly refused to receive the contract in evidence, it being immaterial and irrelevant and the defendant was estopped from impeaching the judgment in the former suit.

It is respectfully insisted that there was no error in the trial of the case and the verdict should be sustained.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Attorneys for Respondent.

RALPH E. LUM,
Of Counsel.

INDEX.

TESTIMONY.

FOR PLAINTIFF:

FOR DEFENDANT:

PLAINTIFF'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice of Appeal.

(Filed Aug. 1, 1916.)

New Jersey Supreme Court.

EDNA DICKINSON, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

Lum, Tamblyn & Colyer,
Attorneys of Plaintiff.

Gentlemen:

YOU WILL PLEASE TO TAKE NOTICE that the above defendant, The Delaware, Lackawanna & Western Railroad Company, hereby appeals from the judgment and every part thereof rendered in the above Court the 23rd day of May, 1916, and that it herewith writes and sets down its grounds of appeal to be as follows:

1. Because the Trial Court erred in allowing the following question to be put to the plaintiff, Edna Dickinson over the defendant's objection:

> "Q. Since the trial have you received any rent for the upstairs part of the garage? A. None."

said objection comprehending and taking in a further set or series of facts assumed by the Trial Court and conceded by the plaintiff's attorney as though proved with all due formality, as by the record of said cause now fully appears.

2. Because the Trial Court erred in allowing the following question to be put to the witness, Edward H. Lum, over the objection of the defendant:

> "Q. With the street closed regardless of the embankment and in the condition it is now in with reference to ingress and egress, what is the effect of the depreciation of value? A. With the street closed and the building constructed for a special purpose, I think the up-stairs is valueless."

3. Because the Trial Court erred in refusing to allow the following question to be put to the witness Edward H. Lum, on cross-examination by the defendant:

> "Q. And could they carry it right from Passaic Avenue up to the second story?"

4. Because the Trial Court erred in refusing to allow the following question to be propounded by the defendant to the witness, Edward H. Lum, on cross-examination:

> "Q. Could a door be made on Passaic Avenue, opening out on Passaic Avenue in front of Miss Dickinson's garage building and such stair-way be carried up to the second story?"

5. Because the Trial Court erred in refusing to allow the following question to be propounded by the defendant to the witness, Edward H. Lum, on cross-examination:

> "Q. If such a stair-way was put in, would it relieve the loss in rental value of the upper floor about which you have testified?"

6. Because the Trial Court erred in refusing to allow the following question to be propounded by the defendant to the witness, Edward H. Lum, on cross-examination:

"Q. Could this stairway be constructed in the building further away from the railroad tracks without interfering with the garage below?"

7. Because the Trial Court erred in refusing to allow the following question to be propounded by the defendant to the witness, Edward H. Lum, on cross-examination:

"Q. In your opinion, what would be the relation of the cost of that stairway and entrance to the loss you say is there by reason of its present access?"

8. Because the Trial Court erred in refusing the defendant's offer as evidence, a certain contract between the defendant and the Borough of Chatham.

9. Because the Trial Court erred in refusing to charge the defendant's request that:

"The evidence in this case shows the railroad embankment and wall to be a permanent structure and a former recovery by the same plaintiff against the same defendant for damages on account of the same permanent structure to the same property, cannot be maintained."

FREDERIC B. SCOTT,
Attorney of Defendant.

Summons.

L. S.

THE STATE OF NEW JERSEY TO THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY:

YOU ARE SUMMONED to answer the annexed complaint of Edna Dickinson in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the

Clerk of the Supreme Court at Trenton within twenty days after service upon you of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this tenth day of January, Nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

Complaint.

(Filed Jan. 13, 1916.)

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

EDNA DICKINSON, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

The plaintiff, Edna Dickinson, residing at West Livingston, New Jersey, says that:

FIRST COUNT.

1. At the time of the grievances herein stated, the plaintiff was and ever since has been the owner in fee of a tract of land in the Borough of Chatham in the County of Morris, New Jersey, located upon the corner formed by the intersection of the easterly line of Passaic Avenue with the northerly line of a certain unnamed street, run-

ning at right angles to said Passaic Avenue, from said Passaic Avenue to Bowers Lane.

2. Said Passaic Avenue, Bowers Lane and the unnamed street connecting the two aforesaid streets and running at right angles thereto, are all public highways and for many years last past the public had and still has a right of way over the said streets to pass and re-pass freely at all times on foot and with horses and vehicles.

3. In the month of June, 1913, the defendant constructed and built a high wall and embankment upon and through the said unnamed highway, said wall and embankment being built practically parallel with the plaintiff's property line and distant only two or three feet therefrom, by reason of which access to the property owned by the plaintiff over said public highway is and was partially obstructed.

4. That on July 14th, 1913, the plaintiff instituted a suit against the defendant herein to recover damages for the injuries sustained by the plaintiff, by reason of the actions of the defendant, as aforesaid, and plaintiff was therein awarded damages for such injuries down to the inception of said suit, to wit, the said 14th day of July, 1913.

5. The defendant from that time on to the institution of this action has wilfully, unlawfully and without color of right continued to maintain upon said public highway the said wall and embankment as hereinbefore alleged, whereby and by reason whereof the plaintiff's real property, as aforesaid, has been rendered of little value and the rental income therefrom and the rental value thereof greatly depreciated, and whereby all gains and profits therefrom have been lost to the plaintiff.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1, 2 and 3 of the First Count.

2. During the month of August, 1915, and at divers and various other times the defendant wilfully and unlawfully took possession of the said public highway leading from Passaic Avenue to Bowers Lane and constructed fences, cement posts and other obstructions around and across it in such a manner that all access to such unnamed public highway was and is prevented, and all access to the premises of the said plaintiff by means of such public highway was and is prevented, and the said plaintiff was prevented from using the right of way which she had over and to said street, and was prevented from passing and repassing freely on foot or otherwise.

3. The defendant from the time as herein alleged has wilfully, unlawfully and without color of right continued to maintain the said fences, cement posts and other obstructions around, in and about said public highway, as hereinbefore alleged, whereby and by reason whereof the plaintiff's real property, as aforesaid, has been rendered of little value, and the rental income therefrom and the rental value thereof greatly depreciated, and whereby all gains and profits therefrom have been lost to the plaintiff.

THIRD COUNT.

1. The plaintiff re-alleges paragraphs 1, 2 and 3 of the First Count and paragraph 2 of the Second Count.

2. At all the times herein mentioned plaintiff was engaged in, carried on and conducted a real estate business, maintaining offices for that purpose in the building located upon said premises.

3. By reason of the wilful and unlawful acts of the defendant, as herein stated, the said plaintiff has been greatly and seriously injured in her said business and has been prevented from acquiring the profit and gain from her said business which she otherwise could and would have acquired and gained.

All to the damage of the plaintiff $10,000.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Answer.

(Filed Jan. 30, 1915.)

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

EDNA DICKINSON, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

The above defendant answering the allegations contained in the above plaintiff's complaint says:

1. It admits solely for the purposes of the above action the allegations contained in the first paragraph of the First Count of the plaintiff's complaint, except that it has no knowledge or information sufficient to form a belief as to answer the allegations contained in said paragraph that the said plaintiff "ever since has been the owner in fee" of the tract of land described and set forth in said paragraph.

2. It admits solely and for the purpose of this

suit and as between it and the plaintiff the allegations contained in the second paragraph of the First Count.

3. It admits solely and for the purpose of this suit and as between it and the plaintiff, the allegations contained in the third paragraph of the First Count.

4. It admits the allegations contained in the fourth paragraph of the First Count "that on July 14, 1913, the plaintiff instituted a suit against the defendant herein to recover damages for the injuries sustained by the plaintiff by reason of the actions of the defendant, as aforesaid," but denies the balance and remainder of the allegations contained in said paragraph.

5. It denies the allegations contained in the fifth paragraph of the plaintiff's First Count.

AND FOR A FIRST AND DISTINCT SEPARATE DEFENSE to the cause of action set forth in said First Count this defendant says:

1. That in and upon the trial of the issue had and joined between the parties hereto and specifically referred to in the fourth paragraph of the plaintiff's First Count as being instituted on July 14, 1913, the above plaintiff was then and there awarded damages for all the injuries and damages sustained by her, by reason of the actions of the defendant set forth and described in her above complaint from the time of the accrual of her said action against this defendant to the end of time, as will by the records and proceedings of said cause more fully appear.

2. That after the award of damages referred to in the preceding paragraph judgment was entered in the aforementioned proceedings for the full amount of said award and costs, and this defendant thereupon paid and satisfied said judg-

ment in full, as will by the record in said cause referred to more fully appear.

WHEREUPON, this defendant prays that the above first cause of action be dismissed against it with its costs.

AND FOR A SEPARATE AND DISTINCT SECOND DEFENSE to the cause of action set forth in said First Count this defendant says:

That the said plaintiff ought not to have and maintain its action against this defendant for that the character of the title to the land over and upon which the said alleged un-named street was found to be a public highway in the aforesaid mentioned action in the following particulars hereinafter mentioned and set forth was not put in issue upon the trial of the action mentioned in the plaintiff's complaint, to wit:

That the land over which the said un-named highway existed was the property of the Morris & Essex Railroad Company and that said property was covered by two mortgages, the first one of which was dated the 16th day of July, 1864, and was executed and delivered to James Brown and Peter Cooper for a term of fifty years, to wit: until May 1, 1914, and was duly recorded in Book I-2 at pp. 456 of Mortgages for the County of Morris, and another separate and distinct mortgage covering said property by the Morris & Essex Railroad Company, dated the 15th day of July, 1875, and executed and delivered to the Farmers Loan & Trust Company of the City of New York, for a period of forty years, to wit: until July 15, 1915, the said mortgage being recorded in Book C, p. 378, of Mortgages in the County of Morris, the mortgagees of said mortgages never having assented to the dedication of said property as a public highway or released the said property in question from the liens of said mortgages.

Answer.

1. Answering the allegations contained in the Second Count this defendant repeats and reiterates as its answers to the allegations contained in the first paragraphs of the Second Count, its answers to the allegations contained in its answer to the first, second and third paragraphs of the First Count.

2. It denies the allegations contained in the second paragraph of the Second Count.

3. It denies the allegations contained in the third paragraph of the Second Count.

1. Answering the allegations contained in the Third Count this defendant re-alleges as its answer to the first paragraph of the said Third Count, its answers to paragraphs 1, 2 and 3 of the First Count and its answer to paragraph 2 of the Second Count.

2. It has no knowledge sufficient to form a belief so as to answer the allegations contained in the second paragraph of the Third Count.

3. It denies the allegations contained in the third paragraph of the Third Count.

WHEREFORE, it prays that the above action be dismissed against it with its costs in the premises.

FREDERIC B. SCOTT,
Attorney of Defendant.

Reply to Answer.

(Filed Feb. 1, 1916.)

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

EDNA DICKINSON,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant.

The plaintiff by way of reply to the defendant's answer says that:

REPLY TO FIRST DEFENSE.

1. Plaintiff denies the first defense excepting as admitted in the plaintiff's complaint.

OBJECTION IN POINT OF LAW TO SECOND DEFENSE TO FIRST COUNT.

1. Plaintiff will object in point of law that the second defense discloses no defense to the plaintiff's complaint or cause of action and upon that ground and the additional ground that the defendant is estopped to set up said defense at this time will at the time of trial move to strike out the said second defense.

REPLY TO SECOND DEFENSE.

1. The plaintiff has no knowledge or information sufficient to form a belief as to the allegations contained in the second defense to the first count.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

EDNA DICKINSON, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*		Action at Law.

This case was tried before Judge William H. Speer, to whom it had been duly referred for trial, with a jury, at the Morris Circuit, on May third, nineteen hundred and sixteen.

The jury rendered a verdict against the defendand and in favor of the plaintiff for Nine hundred and thirty-six dollars ($936.) compensatory damages and Five hundred dollars ($500.) punitive damages, making a total verdict in favor of the plaintiff and against the defendant of Fourteen hundred and thirty-six dollars ($1436.).

WM. H. SPEER,
Circuit Court Judge.

Judgment.

This case was tried before Judge William H. Speer, to whom it had been duly referred for trial, with a jury, at the Morris Circuit, on May third, nineteen hundred and sixteen.

The jury rendered a verdict against the defendant and in favor of the plaintiff for Nine hundred and thirty-six dollars ($936.) compensatory damages and Five hundred dollars ($500.) punitive damages, making a total verdict in favor of the plaintiff and against the defendant of Fourteen hundred and thirty-six dollars ($1436.).

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of Nine hundred and thirty-six dollars compensatory damages and the sum of Five hundred dollars punitive damages, and her costs, which are taxed at the sum of Forty-eight dollars and fifty-eight cents, making in the whole the sum of Fourteen hundred and eighty-four dollars and fifty-eight cents.

$1436.00
48.58
$1484.58

Judgment entered May 10, 1916.

WM. S. GUMMERE,
C. J.

Testimony.

NEW JERSEY SUPREME COURT.

EDNA DICKINSON,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant.

Action at Law.

The above entitled action was tried at Morristown, N. J., May 23rd, 1916.

Before Hon. Wm. H. Speer, Judge and a jury.

For the plaintiff, Lum, Tamblyn & Colyer.

For the Defendant, Frederic B. Scott, Elmer King with King & Vogt, with Counsel for the Defendant.

EDNA DICKINSON, sworn for the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. LUM:

Q. You are the plaintiff in this action, Miss Dickinson? A. Yes, sir.

Q. Where do you live? A. Chatham.

Q. Do you own any property in Chatham? A. Yes.

Q. Do you own the property at the corner of Passaic Avenue and formerly an unnamed street? A. Yes.

Q. You were the plaintiff in a former suit? A. I was.

Q. And that suit was tried here two years ago? A. Yes.

Q. And resulted in a verdict in your favor? A. Yes.

Q. That has been paid? A. Yes.

Q. I want you to tell this jury very briefly whether there is any building on that property? A. Yes, I have a garage fronting on Passaic Avenue and there is a house—a tenant house in the rear.

Q. How many stories is this garage? A. Practically all of it is two stories.

Q. What is it constructed of? A. Hollow tile.

Q. What is over the hollow tile? A. Stucco.

Q. Besides the garage, is there an office there? A. I have a real estate office at one side and the garage and a room upstairs.

Q. What is the size of that room upstairs? A. 30 by 50 feet.

Q. How was the building planned with reference to an entrance to this room upstairs? A. Entrance on the side street.

Q. Is there anything on that street now? A. An embankment.

Q. Was it there when you built the building? A. No.

Q. When you first purchased the property, I believe there was a frame structure on the front of it? A. Yes.

Q. And you moved that to the rear? A. Yes, to the rear of the property.

Q. For how many tenants was it designed? A. Two.

Q. And how many tenants occupied it? A. Two.

Q. What rent did they pay? A. $12 a month each.

Q. And the garage cost you how much to construct? A. $6500.

Q. Was this upstairs room fitted or designed

particularly for anyone? A. Designed especially and built especially for Mr. Scott in Chatham.

Q. What was his business? A. Chatham Press.

Q. Publisher of the Chatham newspaper? A. Yes.

Q. Did he start to move in? A. Had several things moved there.

Q. Then what happened? A. The railroad question came up and he refused to occupy the building.

Q. Since the time of your last trial, has there been any change in the situation with reference to fences in this so-called street? A. Yes.

Q. What has happened? A. A fence has been erected all along the property.

Q. Along the line of this street running from Passaic Avenue to Bowers Lane? A. Yes.

Q. Tell the jury about this fence; is it wooden posts or what? A. Concrete posts, probably 8, maybe 10 feet apart.

Q. What was strung between the fence posts? A. Square mesh wire and barbed wire on the top.

Q. Was that strung across the lane? A. The entire length.

Q. When was it strung? A. Last August, latter part.

Q. After your case had been decided in the Court of Errors? A. A long time.

Q. At that time, how many tenants did you have in your property when the barbed wire fence was strung? A. Only one.

Q. And what rent was he paying?

MR. SCOTT: I object. I may be allowed to cross examine to show that this situation, which she is now testifying to, was the same situation or locus-in-quo at the time of the last trial.

MR. LUM: She said it was not.

THE COURT: She said that at the latter part of last August and since the last trial there has been erected a fence all along the line of the street—of the side street. What is the reason for cross examination?

MR. SCOTT: It is confined to this evidence.

THE COURT: I suppose there is a point of law with respect to this situation. We may as well clear it up and get it settled.

MR. LUM: The question is whether the other suit is a bar to this one.

THE COURT: I am ready to hear you.

MR. SCOTT: I don't think there is anything as regards evidence before the Court.

Q. Since the trial have you received any rent for the upstairs part of the garage? A. None.

MR. SCOTT: I object on the ground that the recovery at the former trial between the same parties in the same court for the same kind of injury and on account of the same things and matters, exclusive of the one count in the plaintiff's declaration as regards the erection of a fence, was an entire bar to the plaintiff having a recovery in this, the second suit.

THE COURT: I will hear you on that question now.

MR. SCOTT: I would cite one case I desire to call your Honor's attention to in Black on Judgments in which he points out at Section 1743 the distinction between permanent and recurring trespass on nuisance. He says that in this class of cases, it is important to inquire into the character of the injury complained of with reference to its being of a recurring nature or permanent. The rule is

that trespasses that are not of a permanent character, damage can only be recovered up to the time of the suit and every repetition or continuance of the nuisance, is a fresh injury, giving a right to a new suit, but as to a trespass which was of a permanent character, a single recovery must be had for the whole action. He then cites in the Miscellaneous Report, that the embankment of the stream was a permanent structure and must continue to turn the current of the river so as to wash away the plaintiff's land. For this wrong the plaintiff may recover in an action for the entire damages and the recovery is a bar to recover for injuries in the same case. That, succinctly stated, is the rule that I think applies to this case, although I am not quite certain myself, that at the present time, there is sufficient evidence before the Court to show the permanency of this structure; which is the first count or cause of action of the plaintiff, and on which she relies. Mr. King has suggested that in the original declaration, in the former suit, Miss Dickinson says that the plaintiff is, and was at all times seized in fee simple, of certain lands situated in the Borough of Chatham on the corner of Passaic Avenue and an unnamed public highway, said building having access on front and sides and said building being used as a pub lic automobile garage and in part, as offices and rooms for various purposes, and the complaint further sets forth a description of Miss Dickinson's building and stating that by reason of the location, and the entrances on both streets and the erection of the embankment, she was deprived of accessibility from the public highways and that she was

and is prevented from using the premises in question by way of such public highway, and her access was permanently obstructed.

MR. LUM: While it is true that a lawyer better versed in other things than law used those words, Mr. Scott forgot to inform the Court that the case was not tried on that theory and the charge of the Court to the jury which determines the issue went solely on the theory it must have gone, namely; that the plaintiff was entitled to the loss of rental value.

THE COURT: The decision of the Court of Errors, if I recall (I have not looked at it except casually) my recollection is that the decision of the Court of Errors distinctly eliminated the notion that there could be a recovery for the damage to the rental value for more than a year.

MR. LUM: Yes. And there was no such thought in the matter, and if there had been, it would have been an error. The rule of permanency is illy used as to the tenant and the owner. There was a double suit. At the time Lowe was tenant of the garage and he brought suit as well as the plaintiff and the testimony was exactly the same; nevertheless the Court says that the rule of damages is widely different. I have no idea that the man who drew it considered that permanent meant what it would to the ordinary man. The Court said page 104. The measure of damages has usually been held to be different in the rental value or the receipt of profits before and after the injury complained of and the value of the property is a proper consideration. In order to consider the rental value, there must be some evidence. A mere

speculative loss will not be considered. On the other page he says, she kept a real estate office and there is evidence to show that she suffered a loss of her business as such and she did suffer a loss of the rental value of the upper floor of $25 a month. That shows very clearly the theory on which the case was tried. The 67th section of the Practice Act provides that where damages are to be determined with respect to any continuing cause of action, they shall be determined at the time of trial, and then under a note it says that under a head of what was contended for; for illustration—

THE COURT: What are you reading from?

MR. LUM: 67th section of the Practice Act of 1912. Then we have in Brewster vs. The Sussex Railroad, that was a case where a railroad had obstructed a right of way and permanent damages were claimed and the Court said you can only have the damages up to the time of the bringing of suit. And the Court said further that the verdict cannot relieve them from performing their duty, and we may assume that a Grand Jury of Morris County will indict; and that this Grand Jury will restore this plaintiff to the right which she has suffered from. Along the same line as the Sussex Railroad case is the case of Lewis vs. Pennsylvania Railroad Co. in 47 Vroom at 220. "The action can be maintained to recover damages for the rental value where the terms are continuing", as they are here. Also Abby-Weingart.

THE COURT: Have you any cases at all Mr. King, or Mr. Scott in this State on that subject?

MR. SCOTT: I have none except the one I have presented.

THE COURT: It seems to me that this point is hardly open to any argument as a matter of law. As I understand the rule it is this: That in actions of nuisance each minute's continuance of the nuisance creates a new cause of action. The leading case as I recall it on that subject is the case of Atl. R. R. vs. Wright, 21 Law. There a nuisance had created 20 odd years before the suit was brought and in that case the Court held that the right of action was not the original wrong which created the nuisance; but the right of action in the particular case then being tried was the continuance of the wrong and the damages and he recovered for six years prior to the time of the commencement of the suit; that limitation being imposed by the Statute of limitation.

The reason for that rule is so perfectly plain in my judgment and so perfectly sound as a matter of reason as well as a matter of law, that it ought to be maintained. The reason is that when a court has once adjudicated a nuisance, it is not to be presumed that the defendant will proceed in continuing that nuisance where it exists, but that he will abate it. The presumption is not against a man's disobeying the law, but in favor of it, and if the nuisance be an obstruction of the public highway, that obstruction may be removed by an individual who suffers a special damage, or it may be suppressed by the municipality in which the nuisance exists. That rule is laid down in the case of the State against Smith and the judgment that the Court rendered against the corporation, defendant termed that obstruction a nuisance. Of course we cannot arrest a corporation and

we cannot use the ordinary judgment of conviction and imprisonment; but all they can do is to act upon the thing that the verdict of the jury says is a nuisance and they did so act, by rendering a judgment that it shall be squashed. And that I think is the law. This case of the Pennsylvania Railroad is directly in point and rules upon this point that you now raise but even if that were not so, it seems to me that the argument which you make proceeds upon a wrong assumption of fact. I don't see any reason why the Court should hold that this embankment is necessarily a permanent structure. I do not see any right that this company had to build that embankment across a public highway and to build its foundation so secure as a physical fact that it would come into Court and say that it is immovable, rendered so by the finesse and solidity of our construction. My judgment is that that is not a permanent structure as a matter of fact and that the railroad company, will be held, to have bridged that highway as it bridges other highways, and if crossed by an embankment that it could remove the embankment and supplant it by a bridge. I don't think there is evidence in this case that the municipality, if it had the authority to do so, ever gave to this railroad company, the right to cross that highway with an embankment, and thereby permanently obstructing the highway. It seems to me whether we view this thing as a matter of law or a matter of fact, that as a matter of law, even if this is a permanent structure, still it constitutes a continuing nuisance and each month's continuation of it is a basis of a new cause of action, and as a matter of fact,

I don't think that the Court is under any obligation to assume that this is a permanent structure. In the law, permanent structures are rendered permanent by their conforming to the rule of law which defines permanent structures and they are not permanent merely by their physical characteristics and therefore if we view it from one side or the other, I must rule against your motion; and I am doing this without any regard at all as to whether it is a fact that there is an insufficient basis of facts to rule upon it now; I am assuming for the sake of the argument and to facilitate the progress of the case, that it is in proof that the complaint in the original case, is as you have read and that the charge to the jury as has been read in excepts to me by Mr. Lum and I am assuming that the nature of the structure on the premises as a physical fact, is as you have stated it to be, and I state what these assumptions are so that you may review me. To facilitate the case I say that the objection is taken and overrule it and give you the right to have the objection noted on the record.

MR. SCOTT: It may be well to facilitate the trial of the case to ask Mr. Lum to consider the facts as assumed by the Court proved with every formality of proof and the Court ruled thereon and the defendant will not feel obliged to offer the proofs that the Court assumes proper to offer.

MR. LUM: I will so stipulate, and will say further that I will put in evidence, if you need it to help the stipulation, exhibits which are not on the records.

I will say, Mr. Scott that if I were dealing with the matter fully, I would say that the

part of the complaint that you read, in my judgment is a part of the complaint, if it stood alone, would have raised no cause of action against the railroad company. The part that you read was the part that had to do merely with the obstruction of air and light to this building.

MR. SCOTT: One other part which has been stated that its access has been permanently obstructed. Perhaps Mr. Lum will agree that the complaint and the Court's charge will be put in by stipulation.

MR. LUM: Yes, they are fixed and we cannot change them.

Q. The question was as to whether you had received any rent for the upstairs room since this embankment was put there? A. No.

Q. And what rent was Mr. Scott to pay for that upstairs portion? A. $25 a month for a 5 years' lease.

Q. And the office, the rear office, how much did you rent that for before the obstruction? A. $20.

Q. A month? A. Yes.

Q. Have you been able to rent it since? A. No.

Q. Who occupies it? A. I am occupying it.

Q. You say the house in the rear rented for $24? A. Yes. Two families.

Q. And since the last trial has there been any families in upstairs? A. No.

Q. And how much did the downstairs family pay? A. $10.

Q. To induce him to stay, what have you given him in the way of advantages? A. Garden space.

Q. I show you photograph that Mr. Scott consented to, the photographer not being called, do you recognize that? A. Yes.

Q. Does that correctly show the situation? A. Yes.

Q. And is that taken from Passaic Avenue, looking along the line of the wall? A. Yes.

MR. LUM: I offer that in evidence.
Received and marked Exhibit P-1.

Q. I show you another photograph and ask you if that correctly shows the situation? A. Yes.

Q. What does that cover? A. That is looking down towards Passaic Avenue and showing you the portion of the house and rear of the garage.

MR. LUM: I offer that in evidence.
Received and marked Exhibit P-2.

Q. I show you another photograph and ask you if that correctly shows the situation? A. Yes; that is the same place showing down towards Pierce's lane.

MR. LUM: I offer that in evidence.
Received and marked Exhibit P-3.

Q. Will you state where Bower's lane is? A. Parallel to Passaic Avenue.

Q. Perpendicular to the unnamed street? A. Yes.

Q. And runs to Main Street, Chatham? A. Yes.

Q. I show you another photograph and ask you if that correctly shows the situation? A. Looking up towards Passaic Avenue.

MR. LUM: I offer that in evidence.
Received and marked Exhibit P-4.

Q. You say that since this last trial there has been a change made in the situation with reference to the fence? A. Yes.

Q. Did you have the railroad notified with reference to this? A. Yes.

Q. Did you hear from your tenant since after the fence went up? A. Indeed I did.

Q. What way did he have to get out of his property? A. He walked down to my house one night—

Q. What did he have to do? A. I had to go to the adjoining property owner and ask him to take out a part of his rear fence so that my tenant could get out to Passaic Avenue.

Q. What did you do with reference to permitting that fence to be there? A. I consulted counsel and upon advice, cut it down.

Q. At the time you cut down the fence, you refer to the fence in front of the frame house? A. Yes.

Q. At that time, how was the situation with reference to Bower's lane, was it open? A. Yes.

Q. You could get out to Bower's Lane? A. Yes.

Q. When you got there you could get out? A. Yes.

Q. After you had notified the railroad and the fence had been taken down in front of your house for a few feet, later what did they do with respect to cutting you off from Bear's Lane? A. Closed that up entirely.

Q. About when did they close that up? A. Around the first part of September.

Q. What did you do after they closed that up? A. Cut that down.

Q. After you cut that down, what happened again? A. They put it up. It is up at the present time.

Q. You gave it up then? A. Yes.

Q. And it is still up. A. Yes.

Q. Do you know whether your tenant is inconvenienced by reason of that being there? A. Yes, I do.

Q. Do you know how he received his last lot of coal? A. I know that Friday afternoon he ordered a ton of coal—

Q. How did he get it?

MR. SCOTT: Just a minute; Mr. King has called my attention to the fact that the inconvenience to the tenant in this case, is not a proper element of damage for Miss Dickinson.

MR. LUM: I am not attempting to show that. I am attempting to show the aggravation.

THE COURT: I suppose it is inconvenient for any tenant that might be there and no tenancy would have some effect upon the rental value.

Q. The upstairs has not been rented?

MR. SCOTT: Just what you said it would have been evidential value of the house, but as I view it, they can only recover up to the time of this suit, then it would not have any evidential value to what might happen afterwards. You have already ruled that if they can recover, they can recover for a continuing wrong, I think they might have damages providing the tenant moved out, but Mr. Lum's assumption that someone might come in, is not relevant.

MR. LUM: The 67th Section of our new Practice Act, provides that damages shall be assessed up to the time of trial, so by the express language, it is up to the last of April.

THE COURT: Let us assume that that is so.

MR. LUM: Then of course the testimony of this witness is relevant; she says she has not received any rent from the upstairs floor and maybe the loss of the tenant for the downstairs, because there was no means of entering it. I want to show the whole situation and the inconvenience that they made and

whether it is reasonable to expect her to have had this loss. She has had the loss and it has been due to the wrong of this defendant.

THE COURT: I don't see how the attitude of mind or the inconvenience of the tenant who was actually there, has any relevancy at all with the inconvenience of a tenant who has been on the upper floor, that is inconvenience in receiving coal.

MR. LUM: I want to show the jury how any tenant gets his coal.

THE COURT: You can show that, how it is necessary to put coal in there, but I don't see how the bare expression of one tenant has any weight. You can show what the obstruction and barriers are and what it is necessary to do.

MR. LUM: That is all I want to do.

THE COURT: I will permit that.

Q. How was coal to be delivered to that frame dwelling in the rear? Not with reference to that particular tenant, but how would it be delivered generally? A. Coal was brought down and it was thrown over the fence and they had to go down with a wheelbarrow and wheel it back and forth to the house.

Q. And how much distance is that from Bower's Lane to the house? A. Probably about 20 to 25 feet.

Q. How were the entrances to the garage arranged before the obstruction was placed there? A. An entrance on Passaic Avenue and an entrance on the side street.

Q. So the cars could go in from Passaic Avenue and come out on the side street? A. Yes.

Q. After this obstruction was put there, what chance did cars have to get out on the side street? A. None.

Q. Miss Dickinson, what is your business? A. Real estate.

Q. How many years experience have you had in the business? A. Five.

Q. Have you made many sales and leases in the vicinity? A. A great many.

Q. Are you familiar with the value of sales and leases in that vicinity? A. Throughout Chatham.

Q. Will you tell us what you receive for the garage now? A. $25 a month.

Q. And with the garage on the corner as it was formerly, what, in your judgment, would be a fair rental value at this time? A. Fifty dollars.

Q. What is the fair rental value of your office on the corner as it is now? A. $10.

Q. And you say you could get $20? A. $20.

Q. With the rear house closed in as it is now, what is the reasonable rental value? A. $10.

Q. And have you been able to get anybody in the upstairs at all? A. No.

Q. That has been a complete loss? A. A complete loss.

Q. There has been some reference made by Mr. Scott to the concrete embankment as though this was of a concrete embankment; does this show—P-2 show the end of the concrete? A. Yes.

Q. And then is the railroad embankment in front of your house is just ordinary earth, with stone on it? A. Yes with stone.

Q. Easily removed? A. Yes.

Q. Did you consent to the railroad putting the wire across Bower's Lane? A. No.

Cross Examination by Mr. Scott:

Q. You had the garage under lease with one Mr. Lowe, which lease terminated in December, 1915, did you not, Miss Dickinson? A. Yes.

Q. By the terms of that lease, Mr. Lowe was to pay you up to December, 1915? A. I had one—

Q. By the terms of that lease, Mr. Lowe was to pay you up to December, 1915? A. I had a lease for one year with Mr. Lowe and we had a verbal agreement for five.

Q. You remember testifying on the former trial? A. Yes.

Q. And at that time, do you remember testifying that the terms of that lease, was it ran for five years? A. For five years.

Q. And there was a graduated scale of rental? A. Renewals.

Q. Which ran from 1911 to December, 1915? A. Yes.

Q. When was the judgment rendered against the railroad company in the other suit? A. In Morris County.

Q. In May 8th, 1914? A. Yes.

Q. Since that time, you have used that office as a real estate office? A. Yes.

Q. Just like you did before? A. Yes.

Q. And since the former trial, you have had a tenant in the upper story, some Progressive League or something like that? A. No, they just asked permission to hold meetings there during their campaign.

Q. Did they pay you anything for that? A. Not a penny.

Q. Have they paid you anything? A. Nothing, not a cent.

Q. On your direct examination, you made reference to the fact that one of the tenants left right after the trial, what was that tenant's name, one of the tenants in that rear house? A. I don't know his name—Sam something.

Q. An Italian? A. Yes.

Q. He occupied the upper story of that building? A. Yes.

Q. How soon after May 8th, 1914 did he leave, after the former trial? A. I did not have any tenant in there for some time.

Q. You have told us that one of the tenants left right after the trial? A. Yes.

Q. When did that tenant leave? A. I think it was within a short time afterwards.

Q. A month or so after your other trial? A. Yes.

Q. At that time, the rear fence you complain of, was not up? A. No.

Q. Did any other tenants go in that house, the upper floor since this tenant Sam, left? A. No.

Q. You have a tenant at the present time? In the lower floor? A. Yes.

Q. What was he paying to you as rent before the last trial? A. He was not in there then. He is one I have gotten in since.

Q. He has come since the last trial? A. Yes.

Q. Was there any tenant in there at the time of the last trial, on the lower floor? A. That I don't remember.

Q. Do you know what you rented the lower floor for prior to the last trial? A. Twelve dollars.

Q. To whom? A. Another Italian, I don't know his name.

Q. What are you renting the lower floor now for? A. I am renting the whole house for $10.

Q. To whom? A. Another Sam—I don't know his last name.

Q. Have you endeavored to rent the house separately? A. Yes, I have.

Q. What has been the nature of your endeavor? A. I have spoken to several Italians, to try and get tenants for me, but they have refused.

Q. Parties have refused to get tenants for you? A. Refused to take possession of the property under the present conditions.

Q. Your property that the garage is on, faces on Passaic Avenue and runs back on this unnamed street toward Bower's Lane? A. Yes.

Q. And back of that is vacant land or back yard? A. Yes.

Q. Back of that further is the house we are talking about? A. Yes.

Q. How far is that house back of that garage? A. About 120 feet.

Q. How large or how deep is this yard back of the garage, between that and the house? A. That is what I mean is 120 feet.

Q. And that is being used as a garden? A. Yes.

Q. Has been used for a garden for a long time? A. A couple of years.

Q. What was it used for before that? A. Nothing.

Q. This rear fence that you complain of, runs along this garden line in back? A. Yes.

Q. And runs beyond that? A. Yes.

Q. You remember having conversation with me in October, about October 11th, last year with respect to leaving a portion of that rear fence? A. Yes.

Q. And you remember stating at that time, that you had no objection to leaving the rear fence, up to the end of the garden or yard in the rear of the garage, up to the rear of the garden patch? A. Yes.

Q. And you really have no objection to leaving it there? A. Because it is right back up against the other fence.

Q. Right close to the old wooden fence you have there? A. Yes.

Q. And you really have no objection to leaving it there? A. Because it is right back up against the other fence.

Q. Right close to the old wooden fence you have there? A. Yes.

Q. The nature of these posts, what are they? A. Concrete.

Q. About how wide? A. Probably 8 or 10 inches in diameter; maybe more than that.

Q. Do you know how deep they are located in the ground? A. No, I do not.

THE COURT: Is there wire attached to these concrete posts?

WITNESS: Yes.

THE COURT: Was that wire taken down?

WITNESS: Just in front of my house it was.

THE COURT: By whom?

WITNESS: Mr. Scott.

THE COURT: Where is the wire that you are complaining of?

WITNESS: If I had one of these photographs, I could show you.

MR. SCOTT: The wire was not up on Bower's Lane at that time.

THE COURT: Is that the wire that you complained of, which is across Bower's Lane?

WITNESS: Yes.

THE COURT: Did you have any conversation with Mr. Scott about that?

WITNESS: No, he just consented to remove the wire in front of my house.

THE COURT: Was it removed?

WITNESS: The three posts in front of the house, but the rest of it is not.

THE COURT: Did you talk to Mr. Scott about the rest of the wire?

WITNESS: I don't know whether we discussed that or not.

THE COURT: You had a complaint about it, you did not want it there?

WITNESS: I don't remember whether Mr. Scott came out to see whether wire was stretched across Bower's Lane.

THE COURT: You say you complained about it?

WITNESS: I don't think it was there at that time.

Q. Look at P-2, Miss Dickinson. That shows the posts that we had a conversation about running back of your garage, up to the end of the garden patch? A. Yes.

Q. And there were two or three posts in front of the house, which were removed? A. Which were removed.

Q. And at that time, you did not speak to me about anything at Bower's Lane? A. I don't think there was anything at Bower's Lane at that time.

THE COURT: Who did you notify about this wire and ask to have it removed?

WITNESS: Mr. Lum.

THE COURT: You don't know whether notice was given to the railroad company yourself?

WITNESS: No.

Q. You planned that real estate office for yourself, Miss Dickinson? A. No, I did not.

Q. The office corner? A. No.

Q. Was it your intention originally to go into the real estate business in Chatham? A. No, I had that under lease for 5 years.

Q. The real estate office on the corner? A. Yes.

Q. To whom did you have that under lease? A. Mr. Cronin, Mr. Bradshaw and Mr. Manley.

Q. When was that executed? A. In 1911, just as the building was completed.

Q. For a term of five years? A. Five years.

Q. For how much did that rent? A. $20 a month.

Q. When did it expire? A. The people refused to take it when the railroad question came up.

Q. When did it expire, you say it was for five years? A. Right after the railroad question came up, I had to take the property back.

Q. Perhaps I don't make myself clear; you say you had a lease with Bradshaw and somebody else for five years? A. Yes.

Q. When was that lease made? A. In 1911.

Q. What month, do you know? A. It seems to me it was October.

Q. And it ran for a period of five years? A. For five years.

THE COURT: Was that in writing, that lease?

WITNESS: Yes.

BY MR. LUM:

Q. Have you it here? A. Yes.

MR. SCOTT: Did those tenants ever go in Miss Dickinson?

WITNESS: Yes.

Q. And they paid the rent for how long? A. I have receipts to show for four months.

RE-DIRECT EXAMINATION BY MR. LUM:

Q. This talk with Mr. Scott was about what time? A. You mean about what time of the year?

Q. Yes? A. It was right after the fence was erected.

Q. Was the fence erected at one time or only on the line first, and then at Bower's Lane later?

10 A. I think just along the line and Bower's Lane later.

Q. Had you cut the Bower's Lane fence when you talked with Mr. Scott? A. No.

Q. After you talked with Mr. Scott, you cut the Bower's Lane fence? A. Yes.

Q. And would you have done that if you had consented to the Bower's Lane fence? A. No.

Q. After you cut the Bower's Lane fence, was it put up again? A. Yes.

20 Q. How long later? A. Some time later.

Q. The tenant who occupied the garage before was Mr. Lowe? A. Yes.

Q. Who occupies it now? A. Mr. Reeves.

MR. SCOTT: What does he pay?

WITNESS: $25 a month.

MR. LUM: I call for the production of letters from my firm dated December 1st, 1915, October 1st, 1915, November 11th, 1915. And I offer in evidence letters to the railroad company dated September 7th, 1915, marked Exhibit P-5, October 1st, 1915, marked Exhibit P-6, October 5th, 1915, marked Exhibit P-7, October 26th, 1915, marked Exhibit P-8 and November 11th, 1915, marked Exhibit P-9.

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Henry C. Reynolds—Direct.

HENRY C. REYNOLDS, sworn for the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. LUM:

Q. What is your business, Mr. Reynolds? A. Real Estate, Morris County.

Q. How long have you been in business in Morris County? A. Probably 12 to 15 years.

Q. Have you been employed as an expert by the D. L. & W.? A. Yes.

MR. LUM: Do you admit his qualifications, Mr. Scott?

MR. SCOTT: I think it would be well to prove them.

Q. Are you familiar with the sale of real estate and lease values in Chatham? A. Yes.

Q. Do you know the property of Miss Dickinson? A. Have known it for several years.

Q. And you are familiar with values in that vicinity? A. I am.

Q. The upstairs room over the garage, are you familiar with that room? A. I have been in the room.

Q. Do you know whether it is rented at this time? A. I understand not.

Q. Do you know what the access or ingress to that room was? A. That was through the garage building, perhaps through the office, real estate office.

Q. Was there an entrance from the outside in the rear? A. Through the public highway there is an entrance.

Q. Can you get to that now? A. Only by a 4 foot 6 area way; I think about 4 foot 6.

Q. After you got through the 4 foot 6 area way, how would you get into the rear of the building, is there a fence there? A. There is a fence there.

Q. What would you consider as fair rental value for that upstairs with the property on the corner of two streets?

MR. SCOTT: I object on the ground that the witness has not shown any competency to testify because in all of these cases, as I understand the rule, of the Pennsylvania case and the tunnel case, witness must have a peculiar knowledge with respect to the character and nature of the things that affect the real estate value. Mr. Reynolds has only testified that he bought and sold property for the railroad company. That he is familiar with the property in Chatham. He has not shown special or necessary qualification to answer a question regarding what the effect of an embankment of this character would have on real estate.

MR. LUM: The Pennsylvania Tunnel case was the decrease of value for something occurring under the ground 400 feet down. And it was very properly held that there must be a qualification of a man to testify as to what affected the value in that particular situation, while we have not that situation at all. We have a situation which is entirely and radically different. We have here property on the corner and then we have an obstruction which makes it cease to be a corner property and then cuts off all access to it. It is a matter as purely aggravative to Miss Dickinson. It is proper to show whether that property being on the corner, what would be the fair rent for it, as it was before and if he says $25 or $30, whatever it is so if that was the value on the corner, now it is not on the corner.

THE COURT: The question as it is now asked and with the present qualification of the witness I sustain the objection.

MR. LUM: I desire an objection noted.

THE COURT: It will be noted.

Q. Mr. Reynolds, you were familiar with this property before the highway running from Passaic Avenue to Bower's Lane was obstructed? A. Yes.

Q. Before the obstruction was placed there, what was the fair rental value of the room over the garage? A. I should think $25 to $30 a month.

Q. Is it practical to get into that upstairs room now, as the property is now situated? A. No, it is not.

Q. And in that condition, has that upstairs part any value? A. I should say it has no value at all.

Q. You are familiar with the office? A. I am.

Q. Are you familiar with the garage? A. I am.

Q. Are you familiar with the little building—you saw in the rear, the frame building? A. Yes, I have seen that.

Q. Miss Dickinson said that before this obstruction was placed there, she received $24 for the frame dwelling in the rear, was that a fair rent? A. I should say that was a fair rent.

Q. With the access cut off by the wire fence along the line of Bear's Lane so that coal and produce could not be delivered there, and with the embankment in the highway as it is, would you think the rental value of the house would be decreased?

MR. SCOTT: I object to that question.

THE COURT: I sustain the objection. He has not shown any qualification whatever for

expressing an opinion with respect the embankment will have on the property of that or a similar nature and that is the ground of the ruling.

MR. LUM: May I say?

THE COURT: I don't care what you say, I have ruled on that a dozen times and it has been sustained two or three times.

Q. Have you had any experience in corner property and property similarly situated, except it was not corner property in that vicinity and others? A. Just at the moment, I don't recall anyone excepting the corner property of Miss Dickinson.

Q. You have no experience to show that corner property was more valuable? A. Oh, yes.

THE COURT: He does not have to tell us that. We all know that corner property is more valuable than others. That is not the point in issue.

MR. LUM: It is one of the points.

THE COURT: First you ask him, don't you know anything about the value of corner property and then the property in suit, and that is not the subject of expert testimony, and then you tried to slide in afterwards the information, what is the value of this corner property with an embankment in there. In other words, the logic of which are, what is the effect of the embankment on the property, and that I ruled out.

MR. LUM: I would say that is not my intention and I cannot proceed.

THE COURT: I don't know what your intention is, but I know what your action was. I don't intend to rule on your intention.

MR. LUM: Your Honor says—the effect of

that rule, obstructions in highways or unusua situations and under the rule, the first man that obstructs the highway could not have any damages against him because you could not find any people who had experience with a situation like that. Railroads are rather new and placing embankments in streets are new, under your Honor's ruling which I think is not entirely fair, I am prohibited from showing what my damage is.

THE COURT: I understand what you say.

MR. LUM: It does not make any difference whether it is obstructed by an embankment or whether it is closed off by something at the head of it, but it is changed in effect from being a corner property to property that is not on the corner. Your Honor has said that it does not need an expert to tell us, whether it is more or less valuable, but anybody could.

THE COURT: Not everybody, because that is not what I said.

MR. LUM: Therefore whether it is an embankment or a wall of any sort, he might have had experience with a canal; when a canal was put there, it would cease to be a corner property and I say whether it is a canal or an embankment, I repeat that to call a witness to show what is the value of a corner property, is competent. It is simply putting a hardship upon us if we are compelled to get a witness who knows the effect an embankment would have upon the value of property there. There is no former experience if there is no man who has any experience with the local values and who is also familiar with the effect of a railroad embankment, and if I am held to that rule, it seems to me as unjust. It seems to me I have a right to show that

there was a man who knows the local values and who knows the decrease when a corner ceases to be a corner in a particular locality. I want to ask this question.

THE COURT: I do not know to what this speech was directed except it was an argument, which would be the only possible thing it could be adjudged to, on the previous question. There was no question pending to which this argument was applicable and it seems to me to be a method or release and I let you have it. It seems you have builded a grotto and closed the entrance with a creature of your own imagination. It does not frighten me nor does it appeal to me and I hold to the ruling that I have heretofore announced.

Q. Mr. Reynolds, you say you have had experience with property to show you that there is a difference in value of property in that vicinity, whether it is on a corner or whether it is not? A. I have.

Q. What in your judgment, is the difference in rental value of property which is on a corner and property which is similarly situated except that one street is taken away or closed off so that the property is not on the corner?

MR. SCOTT: I object. This question imputes property in the same situation as the previous question and similar circumstances and which imputes the embankment in question, on which the witness has shown no knowledge.

THE COURT: I will permit this question. I have constantly and shall constantly rule that the question of the influence of a railroad embankment on property where the witness has shown no knowledge in the matter, at all, is

inadmissible. I am only permitting him to show that because he says he has had experience with property on other streets and property situated as this one is, and he only seeks to show difference in value of property in these different locations and that I am permitting.

MR. KING: I had in mind that this witness had not qualified as to rental value. He has not said that he knew anything about the rental value. He says he has bought and sold property.

MR. LUM: I asked if he had rented and he said yes.

Q. Have you had any experience with leasing property in Chatham either in making them yourself or knowledge of them? A. I have simply made one in Chatham.

Q. Are you familiar with leases made by others so that you have a knowledge of the rental values there? A. I have a knowledge.

Q. Do you know the general leasing value of property in that section? A. Not excepting this one case.

Q. I mean have you other leases that you know of, a general knowledge? A. I have a general knowledge, yes.

MR. SCOTT: In view of the disqualifications of the witness, I object to the question.

THE COURT: I will permit you to examine this witness yourself, as to what qualifications he has on rental value.

BY MR. SCOTT:

Q. With respect to rental values in Chatham, Mr. Reynolds, you have rented under only one lease; what lease was that? A. The case of Nathanial Niles.

Q. Where was that located? A. On Division Street On the division line between the Borough of Chatham and Madison near Main Street.

Q. Where was that? How near to the Dickinson property? A. 2,000 feet from this property and from Main Street.

Q. You say 2,000 feet from the Dickinson garage? A. Possibly 2,000 or 2,500 feet.

Q. Outside of that one instance, you have no personal knowledge? A. No, only general.

Q. Are you in business in New York? A. Yes.

Q. Are there most of the time? A. I am there more or less, yes.

Q. With respect to your other knowledge, gained from observation, will you detail how you know about the rental value?

THE COURT: Outside of this Niles property, have you rented any property in that neighborhood?

WITNESS: This is the only one.

THE COURT: Have you been present when property was rented?

WITNESS: No.

THE COURT: And the only knowledge you have is what is gained in the Nile lease?

WITNESS: Yes.

THE COURT: I think the witness is disqualified.

MR. LUM: May I recall to you the O. H. Smith lease?

WITNESS: That was property I owned on Main Street between Niles property and this property.

Q. Who leased that? A. I leased that. Of course, I don't recall the terms.

THE COURT: Both of these are on Main Street?

WITNESS: Yes.

THE COURT: And both are streets that are open at both ends?

WITNESS: Yes.

THE COURT: And both are streets that are open at both ends?

WITNESS: It is a main highway from Chatham to Madison.

THE COURT: I think he is not qualified to express opinion with respect to the difference in value of property that is on a highway that runs through and that on a—what might be called a cul de sac.

MR. LUM: I desire an objection noted.

THE COURT: It will be noted.

EDWARD H. LUM, sworn for the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. LUM:

Q. Where do you live, Mr. Lum? A. In Chatham.

Q. Lived there all your life? A. Practically, yes, I was born there.

Q. What is your business? A. Real estate.

Q. Have you done much real estate business throughout Chatham? A. Yes.

Q. You have an office in Newark also? A. Yes.

Q. How long have you done a general real estate business in Chatham? A. 26 years.

Q. Are you, of your own knowledge, familiar with both sales and rental value of property throughout that section? A. Very well, yes.

Q. Have you, by reason of the participation in the transaction, or by having knowledge of it, a knowledge of the rental values in the vicinity of Passaic Avenue? A. Both.

MR. LUM: You wish to cross examine, Mr. Scott?

MR. SCOTT: Not yet.

Q. Have you had any experience with property which was located adjacent to or on which there was a high railroad embankment? A. I don't recall definitely of that. I have been in business 26 years and have handled property along the Pennsylvania Railroad in Newark and the Morris & Essex Railroad.

Q. By your knowledge of these things, do you know whether a railroad embankment, if in a highway, would affect the value of the property adjacent to it?

MR. SCOTT: I object, because the witness up to the present time, has not shown any qualification.

THE COURT: You may cross examine.

Q. These properties with regard to the Pennsylvania Railroad, did you rent this property? A. I have rented some.

Q. That was along the Pennsylvania Railroad, was it in Newark? A. In Newark.

Q. Whereabouts, what part of Newark? A. Between the Pennsylvania station and the South Street station.

Q. How soon was it? A. I don't recall; it is a matter of 15 years ago.

Q. About 15 years ago? A. About that.

Q. None since? A. Oh, I think so, but I don't definitely recall any particular lots.

Q. When you rented this property was the em-

bankment already up? A. I rented property before the embankment was up and afterwards.

Q. Did you rent the same property after the embankment was built that you rented before the embankment was built? A. I cannot say I did.

THE COURT: Same or similar, in the same general neighborhood.

WITNESS: Yes.

Q. And with respect, you say, you had similar experience on the Morris & Essex? A. Yes.

Q. Where was this experience had? A. Near High Street, Newark, along there.

Q. When? A. Eight years ago.

Q. After the embankment was built? A. Before and after.

Q. High Street, that was a depression, was it not? A. High Street goes under the railroad there.

Q. With respect to these properties, did you rent them before and after the depression? A. I rented properties in the vicinity both times.

Q. Have you any specific recollection of renting properties before the depression was made and renting that property after the depression was made?

MR. LUM: The same or similar.

MR. SCOTT: The same or similar?

A. Yes.

Q. Have you any specific recollection? A. I cannot remember the details now.

Q. Have you any recollection at all? A. I recall renting properties up there between High Street and Water Street, up the hill along the railroad there, before the railroad was elevated.

Q. Before the railroad went through the depression? A. Yes.

Q. Did you rent these properties afterward? A. The railroad was on the level.

Q. Did you rent these properties after the depression was made—these or similar properties? A. The depression does not begin until you get above High Street.

Q. So that the properties you have in mind were not affected by the depression? A. Not especially.

MR. SCOTT: I desire to renew my objection.

THE COURT: In order that there may be no doubt or cloudiness about the general nature of the ruling of the Court as there seems to be now, I am going to state right on the record my reasons and just why I rule that way, and then either side may have the advantage of it. I think the rule of law is settled in this State on the matter of expertness and that a man is an expert or not, is that a person shall be qualified either by study or experience to express an opinion about the subject matter concerning which it is contemplated that knowledge of the matter, common people have not had an opportunity to experience. I say he is qualified either by study or experience and that is the doctrine laid down in Wheeler & Wilson against Buckhout. If a man owns a farm and if a railroad runs through that farm and he is to recover damages for injury to that farm by reason of the fact that a railroad is there, it requires an expert that can show what the damaging effects are to that kind of property, before he has a right to express a diminution of the value of the property. That is the rule as laid down by Chief Justice Beasley.

In this case, fine things have been constructed out of the imagination and the Court has been charged with having been unfair with the law as it is. I entertain a fine regard for the notion that things are as they are things will be as they will be. That, I say, is my notion of the rule of law and that does not prevent anybody from proving the difference in the value of property caused by such common things as that the street upon which some property is located runs through and that the street on which the same or similar property is located, is on what defence calls a cul de sac. You have a perfect right to show that there is a difference in properties of that kind, between properties thus located and to show that by an ordinary real estate agent—but the difference in that case, and asking the witness a plain question, what effect a railroad embankment has on that property, is the difference between asking a man who knows nothing about something about which he is asked and a man who knows something about it. That is the ground I am attempting to stand upon and if there be unfairness in that, I say, well, it is the unfairness of the law and in order to clarify the atmosphere, I rule that the witness must be qualified to show what the effect of a railroad embankment is upon property. A railroad embankment by the rule of logic connotes an increase of railroad engines, known tremor in the earth caused by the passage of trains, of smoke and cinders; and therefore to ask a man who has never had any experience before, and after, to relate what an effect such an embankment would have in closing a street—to ask a man about something he does not know, in other words,

to ask a man who is a real estate agent and who has been selling property on through streets and on closed streets, is to ask a man about something he has had no previous experience in. That I have ruled out and I shall continue to rule out until the Court of Appeals says I am mistaken about it.

Q. Coming to the Chatham property in this vicinity, will your knowledge enable you to say whether property situated on two streets is mose valuable than that situated on one? A. Certainly is.

Q. And to what extent? A. Ordinarily would be 25% more because it is on a corner.

Q. Both as to the sale and lease? A. Both as to sale and lease, yes.

Q. You have been in the property of Miss Dickinson, over the garage? A. Yes.

Q. You are familiar with the entrance to the garage out to the unnamed street? A. Yes.

Q. When both streets were open, what in your judgment, was a fair rental value of the up-stairs? A. $25 to $30.

Q. A month? A. Yes.

Q. Were you familiar with the house in the rear? A. Yes.

Q. What, in your judgment was the fair rental value of that? A. On Passaic Avenue?

Q. On the unnamed street? A. I have heard it testified that $24 was paid for it.

MR. SCOTT: I move to strike that out.

MR. LUM: All right.

Q. What, in your judgment was the fair rental value of the property? A. $24.

Q. With the street closed regardless of the embankment, and in the condition it now is with reference to ingress and egress, what is the effect of the depreciation of the value?

MR. SCOTT: I object to that, that has not been shown.

MR. LUM: I think it was in the photograph.

MR. SCOTT: We put up this embankment on our right of way. What was said in the other suit was that she had a right to get out over our property to get to the highway—it never was a street and she had an easement to go over this property. It was not a street; it ran into a freight station. It is a wrong assumption and Mr. Lum knows that and we object to that. It never was a street, but she may have had a right of way over it.

THE COURT: As I understand it, the Court of Appeals, (I don't recall the language of the Court) but the Court of Appeals seemed to indicate that it was a street and that it was adopted by a dedication and acceptance.

MR. SCOTT: I apologize to the Court, but there never was any acceptance or any dedication; what they proved was that people had been accustomed to go over there for twenty years or more.

THE COURT: The Court said that the public had used this and the Court left it open as a query whether anything short of 20 years, would establish a street or highway over which the public in general, had a right to pass, and the Court held it, as I understand it, and I think I am right about this, that this woman was damaged because this street was closed up, and that she had a particular right of damage, not because she had a mere easement, but because she was especially and peculiarly damaged by the reason of her ownership of the property fronting on it in a way and manner different from that which the general public suffered.

MR. SCOTT: The Court of Errors did not use the word street.

MR. LUM: One owning land on a public street, whose ingress and egress was shut off.

MR. SCOTT: That is the editor's syllabus.

THE COURT: The Court had to decide as a matter of law that that was a street, otherwise this woman had no right in that thing at all. She did not get a right of easement because she bought property on a highway which had been marked on a map and which she had a right to use because the public generally used the property as a public street.

MR. LUM: It must be apparent to any mind that the road in question, ran to the North of the railroad station, and freight house. The recovery could not be sustained otherwise.

THE COURT: My understanding of the logic is that the real basis of the right she had was the right that arose by the public use of that highway.

MR. SCOTT: Speaking of a street here, that would imply that there was some duty upon some public municipality to keep it in repair and I had in mind that there was no testimony about the word street as used in its ordinary sense that this was a street and that while she had a right to go on the street when it was a street, there was no obligation to repair on the part of anybody.

THE COURT: I don't think it is necessary for me to decide whether the railroad company is obligated to repair.

MR. SCOTT: Now if this witness had in mind a condition similar to this, if he has had some experience, that his evidence would be of value, if he did not, his evidence would be valueless.

If he has had an experience similar to this and where there was no obligation to maintain that street, his evidence would be of value and his evidence would be different where there were two streets. A man could tell the difference of the value of property on two streets and that which was between two streets.

THE COURT: I think I shall overrule the objection, because I think the condition of the street and whether it is worked or unworked, while it may have some effect upon the weight of the testimony whether the diminution in value is greater or less, the question now is, whether property that is situated on a street that runs through, differs in value and to what extent from that which is situated on a blind end, is a proper question, and I will permit it. You may have an objection noted.

THE WITNESS: With the street closed and the building constructed for a special purpose, I think the up-stairs is valueless.

Q. What method, with the situation that exists there, is there for getting up, if possible with the fence along the rear line? A. There is a little alleyway, about 4 feet or less in width, dark damp and windy, it is necessary to enter into for a distance of perhaps 15 feet, before turning into the building. To get up-stairs in the building there is a stair-way there and there is no other way to get up-stairs.

Q. Is it possible to move furniture through such a space? A. Furniture of ordinary size, no.

Q. Or machinery? A. No.

Q. The real estate office, was that more valuable on a corner than not on a corner? A. Certainly because it was a corner and because of the light and air.

Q. Regardless of the fact that it is cut off by a railroad embankment and just considering that it was formerly on a corner and is now on one street, what would you say was the depreciation of the rental value of that office? A. I should say one-third or more.

Q. What would you say was the fair rental value as the condition was before with an entrance on two streets? A. The fact that the office consisted of two offices, a front and a rear office and a connecting room, I should say from $18 to $20 was a fair rent for that suite of offices, with the outlet on the rear and front.

Q. The house in the rear as now situated, has it any way to get in or out with carriages? A. None whatever.

Q. Then it is situated in what has been called—properly called a cul de sac? A. Yes.

Q. Does that situation depreciate its rental value? A. Yes.

Q. How much? A. One-half or more.

CROSS EXAMINATION BY MR. SCOTT:

Bower's Lane, that would remove the obstruction?

Q. If these posts were taken up at the end of

MR. LUM: I object; you put them there.

THE COURT: It is relevant upon cross-examination to ascertain whether there was such a great depreciation. As to whether the taking up of the posts would cause such a depreciation as 50 per cent. I will admit the question.

THE WITNESS: You mean the posts and wire that obstructs Bower's Lane, so that you cannot drive through from Bower's Lane in front of this house?

Q. Yes. A. I think it would still be depre-

ciated because the main entrance is out on Passaic Avenue way.

Q. And these posts you have reference to at Bower's Lane, are shown in photograph P-3, down at the end? A. This line in here (indicating).

Q. These posts are practically the end of the unnamed street? A. They are here and run down this way (indicating). Bower's Lane comes down through here (indicating) doesn't it?

Q. On this photograph P-3, at the end of the unnamed street, there appears to be four wooden posts there? A. Yes.

Q. And these are the posts with the wire attached to them that constitutes the obstruction down toward Bower's Lane? A. Yes.

Q. And with these removed, what, in your opinion, is the depreciation, due to the closing up of the street in front of the rear house? A. One-third value.

Q. And with the posts remaining there, what do you think it was? A. Half the value.

Q. Your business is in Newark, Mr. Lum? A. Newark and Chatham, and I have actively been in business in Chatham for 26 years.

Q. Have you an office in Chatham? A. An office in my house.

Q. You go to business every morning? A. Part of the day I spend in Newark and part in Chatham.

Q. Part of each day? A. No, just as business requires; come up early in the afternoon and meet people and sell them property. I have kept tabs on everything that has been going on in Chatham.

Q. With regard to this upper story in Dickinson's place, the upper story has very large windows? A. Yes.

Q. Is it possible to move furniture in that way? A. Through the windows?

Q. Yes. A. By taking the windows out you

can move a great deal of furniture through, although there might be difficulty in moving heavy furniture.

Q. For all practical purposes, that place could be fitted up for any purpose that it might be used, by hoisting the furniture like they move pianos? A. I never heard of people renting property like that.

Q. For all practical purposes, that place could be fitted up for any purpose that it might be used for by hoisting the furniture like they move pianos? A. It is possible to do it, yes.

Q. Do you know of any reason why it could not be done? A. No, it is possible to do it.

Q. With respect to the entrance of that property, persons could get in off Passaic Avenue and up the stair-way that goes out of this unnamed street? A. By crawling through the alley-way.

Q. You say it is between 3 and 4 feet wide? A. Yes.

Q. Why do you use the expression "crawling in the alley?" A. Because it is such a narrow, damp alley.

THE COURT: You don't actually mean crawling?

WITNESS: No.

THE COURT: Why do you say that then?

WITNESS: That is a term I heard people use that went in there, they said "crawl."

THE COURT: Suppose they had said fly, would you have used that because they used it?

WITNESS: Might, yes.

THE COURT: That is the way you testify?

Q. It is a matter of walking; they could walk

right off of Passaic Avenue to this entrance to the door-way? A. Yes.

Q. How much property have you rented in Chatham in the last year? A. I think four properties.

Q. Where? A. I have rented four properties in the last year.

Q. Is that all the business you have done in Chatham in the last year? A. Oh, no.

Q. Did you ever have occasion in all of your experiences in Chatham of renting property on a similar kind of street as this unnamed street in the Borough of Chatham? A. I don't know of any similar case in Chatham. It is the only property of its kind.

Q. It is the only property of its kind that you ever knew anything about? A. In Chatham.

Q. Or any place elsewhere? A. I don't recall definitely any case just similar to it now.

Q. And your basis for testimony in respect to rental value throughout your entire direct examination was directed to corner property laid out on public streets kept and maintained by the municipality in which the properties were located? A. Yes.

Q. You are familiar with the Dickinson building in front? A. Yes.

Q. And the ground floor of the garage? A. Yes.

Q. Is there any practical objection that you know of to running a stairway directly from the floor of the garage up to this second story? A. Inside.

Q. Inside? A. No, I have thought that could be done.

Q. And could they carry it right from Passaic Avenue up to the second story?

MR. LUM: I object; we are not asking permanent damages and it is the theory of law that they will obey the law.

THE COURT: I think they have a right to assume that. Once a nuisance is expressed, they have no right to mitigate damages by changing the construction of their house.

MR. SCOTT: I have in mind that you made that remark.

THE COURT: I made no remark of that kind.

MR. SCOTT: I took it from your Honor's remark at that time, that your Honor embraced within them that they were under obligation to mitigate their damages.

THE COURT: I have not expressed any opinion on that, and if this is to try to get me to do so, it is going to fail. I have simply expressed opinion that they have a right to assume that you are going to obey the law and if you are going to do that, it would be wholly unlogical to say that they are under an obligation to change the construction of the building.

MR. SCOTT: The purpose of my question was to present to the Court that very feature.

THE COURT: The duty was to present to the Court every feature. I have ruled upon that question and overruled it for the reason I have stated.

Q. Could a door be made on Passaic Avenue, opening out on Passaic Avenue in front of Miss Dickinson's garage building and such stair-way be carried up to the second story?

MR. LUM: I object.

THE COURT: I sustain the objection for the reason I stated in sustaining the objection to the question previously asked and which this is supposed to be a repetition of.

MR. SCOTT: Would the Court permit Mr. King to ask a question he has in mind?

THE COURT: That is all right.

MR. KING: If such a stair-way were put in, would it relieve the loss in rental value of the upper floor about which you have testified?

MR. LUM: I object.

THE COURT: I sustained that objection before. If the object of this question is to provoke the ruling of the Court as to whether or not under any conceivable circumstances or action, the plaintiff is not under obligation to take any steps to mitigate the damages, I decline to rule on that as respect to this question on the theory that it can only be (and it can only be on the theory) that the nuisance is going to be continued. I say the whole theory of law is against because it is the theory of law that is going to be abated.

Q. Could this stairway be constructed in the building furthest from the railroad tracks without interfering with the garage below?

Objection by Mr. Lum on the same ground.

THE COURT: I sustain it on the same ground.

Q. In your opinion, what would be the relation of the cost of that stairway and entrance bear to the loss you say is there by reason of its present access?

MR. LUM: I object to that.

THE COURT: I sustain that. I would say that no question that you might ask along the line tending to show that by a transformation of the construction of the building, the amount of the damage done by this alleged nuisance can be mitigated. I will overrule that and you may have the objection on the record to that situation.

J. THOMAS SCOTT, sworn for the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. LUM:

Q. What is your business Mr. Scott? A. Newspaper proprietor.

Q. Proprietor of the Chatham Press? A. Yes, sir.

Q. Do you know the Edna Dickinson property on Passaic Avenue? A. I do.

Q. Do you know the up-stairs of that property? A. It was built for me.

Q. Do you have presses of a heavy weight? A. About a ton and a half.

Q. Did you start to move in these premises? A. I had a desk there and files and plates.

Q. How much were you to pay a month? A. $25.

Q. Did you ever move in? A. No.

Q. Was there any other reason excepting the railroad embankment? A. None whatever.

Q. Could you move in now if you desired? A. Could not.

CROSS EXAMINATION BY MR. SCOTT:

Q. How do you know that you could not now? A. Well, the pieces of machinery are too large to go in.

Q. What steps have you taken to ascertain that that is a fact or is it just your thought on the subject? A. That is my thought based upon a measurement of the premises.

Q. Have you had any experience yourself in moving machinery? A. That of an ordinary printer who has been in business something like 30 years.

Q. Thirty years in Chatham? A. No.

Q. Have you had any experience in moving from place to place, machinery of a similar kind? A. Yes.

Q. Where? A. We moved 460 to 463 Hudson Street, New York, which was from a ground floor to an upper story.

Q. Was that taken up by an elevator or by a hoist? A. Carried up the stairs.

Q. Would it have been possible to hoist the machinery through the windows? A. I thought of that, but the construction of the roof would not take the weight.

Q. You never made any attempt? A. I was not going to take the press apart to see whether it could be hauled up or not.

Q. How did you arrange to take the press up there through the side entrance? A. Miss Dickinson had the stairs constructed wide enough—she had built the stairs wide enough to permit easy access of the press.

Q. And the windows in front were much wider than the stairs? A. No.

Q. Do you know that as a fact? A. I never measured them with that idea but they are ordinary windows and the stairs are exceptionally large.

Q. Did you enter into any arrangement with Miss Dickinson? A. Simply a verbal arrangement. I was to take it for five years.

PLAINTIFF RESTS.

MR. SCOTT: I would like to take the stand myself Mr. Lum.

Frederic B. Scott—Direct.

FREDERIC B. SCOTT, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. KING:

Q. Mr. Scott, you are attorney of the D. L. & W. Railroad Co? A. I am.

Q. Have been such for how long? A. Six or seven years.

Q. Did you have a conversation or talk with Miss Dickinson, the plaintiff in this suit, concerning the erection of a post and wire fence along her property? A. I did.

Q. When? A. I think it was October 10th or 11th.

Q. What was the inducing cause of your going to see her? A. Mr. Lum wrote us a letter, one of his letters that he has read here and I was given his permission to interview Miss Dickinson.

Q. And was that concerning the erection of this fence? A. With respect to this wire fence.

Q. When did you interview Miss Dickinson? A. I think it was about the 11th of October.

Q. Where? A. At her garage and in this unnamed street.

Q. Did you at that time, represent the D. L. & W. Railroad Co.? A. Yes, I came from the railroad company.

Q. And had secured Mr. Lum's permission to interview his client? A. My recollection is that Mr. Lum had no objection to my calling upon Miss Dickinson.

Q. What did you say to her and she to you about the continued maintenance of these posts, speaking of the concrete posts and wire fence? A. It was the first time I was ever on the premises and we looked over the posts and fence which the railroad company had put up there. I wanted to obviate the situation and give Miss Dickinson the

relief she was entitled to as regards the elimination of the fence and as a result of our talk, it was agreed upon between Miss Dickinson and myself that certain posts should remain there and that certain other posts should be taken up.

Q. With reference to the posts on Bower's Lane, what conclusion did you and she come to about that? A. We had no talk about that. It was not called to my attention and I had no recollection that these posts or wire were there at the time.

Q. What is your best recollection about it? A. I have no knowledge from which to form a recollection.

Q. Did you inspect the posts and wire which were in front of the little frame building in the rear? A. At that time, the wire had been cut and there were two or three posts there.

Q. I show you this photograph P-3, does that show the building that you were discussing and the portion of the fence? A. In this photograph P-3, it shows Miss Dickinson's tenant house back of the garage to the left of the picture.

Q. Were there any posts in that position in front of that tenant house at the time you were talking? A. I think there were two or three.

Q. What was done with regard to these posts? A. I instructed the engineering department to remove them.

MR. LUM: I object and move that that be stricken out.

MR. KING: I consent to it.

Q. This photograph shows that they are in there at the present time? A. They are in there.

Q. I show you another photograph P-2, does this show the tenant house of which you spoke? A. Yes, that is the tenant house.

Q. There were posts in front of that tenant house? A. Posts and wire at the time I was there and talking to Miss Dickinson.

Q. Did you ever have a talk about the wire on Passaic Avenue in front? A. I had a talk about the wire that ran along the garden spot and up to the tenant house.

MR. KING: Mr. Lum, when were these taken?

MR. LUM: Very recently.

Q. What did you say about this? A. I called her attention to the fact that they were a better fence for practical purposes than the old wooden fence that was there and asked her permission to leave them there and she said she had no objection.

Q. Was this fence in the line of the old wooden fence? A. It was practically—the wooden fence was right alongside.

Q. Did that fence in any part of this unnamed street? A. It closed the side of her property as it ran from Passaic Avenue to Bower's Lane.

Q. Between the street and her property? A. It did not close either the Passaic Avenue side or the Bower's Lane side.

Q. I asked you something about the fence, and the posts in front on Passaic Avenue, was it the subject of discussion between you and Miss Dickinson? A. The subject of discussion was the posts running from the back of Miss Dickinson's garage parallel with this unnamed street and about two or three posts in front of her tenant house.

Q. Was that all the complaint she made against the company at that time? A. That was the specific complaint we knew of.

CROSS EXAMINATION BY MR. LUM:

Q. At the time you were talking to Miss Dickinson, there was nothing to prevent a tenant from getting from the frame house on to Bower's Lane? A. Yes, two or three posts had been removed.

Q. At the Bower's Lane end, there was no obstruction? A. It was not called to my attention.

Q. She did not call it to your attention that she was cut off there? A. No, I did not observe it.

Q. She did not give the railroad any consent to put a wire fence across Bower's Lane to shut her house in? A. She gave me no consent except to leave that portion of the fence along the garden.

Q. In there (referring to photograph)? A. Particularly in this photograph here P-2.

Q. Where there was a fence already, she told you it did not make any difference whether you had two fences there? A. She said we could use that as a fence for the garden.

(Witness showed the pictures to the jury.)

Q. Now these various letters of September 7th, and October 1st, were received in due course by your company, weren't they?

MR. KING: I object to that.

Question withdrawn.

Q. Mr. Scott you recognize that signature? A. That is my signature (referring to a letter shown to witness).

Q. Is that your letter? A. Yes, sir; that is my letter.

Marked P-10 for identification.

Q. This was written on October 4th, I believe, was it not, 1915? A. Yes.

Q. And at that time, you slushed Miss Dickinson?

MR. KING: I object to the word "slush" and move that it be stricken out.

Q. At that time, you wrote Miss Dickinson that you would take the matter up with the engineering department immediately?

MR. KING: I object, because he is attempting to read something here to the jury. I submit that he has no right to begin asking questions from the letter until I have seen it.

MR. LUM: I have marked it for identification and if you will permit it to go into evidence, I am willing to do so.

MR. KING: I don't want you to read from it.

Letter dated October 4th, 1915, marked in evidence, Exhibit P-10.

Letter read to the jury.

Q. Did you, as you stated in this letter, take the matter up with the engineering department? A. I first saw Miss Dickinson and then I took it up with the engineering department.

Q. You have no knowledge as to how soon after that, the wire fence was put across Bower's Lane? A. I have no personal knowledge of Bower's Lane fence being put up there.

Q. Nor whether it was put up there again after having been cut down, after you saw Miss Dickinson? A. I have no knowledge.

Q. You have no knowledge of its being put up there again? A. No.

MR. KING: I object to that.

THE COURT: I will sustain that as it would be an unwarranted assumption, the fact that it was put there once.

MR. LUM: I think that is right.

JOHN T. DRAKE, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, are you a civil engineer? A. Yes, sir.

Q. And in the employ of the Lackawanna Railroad? A. Yes, sir.

Q. Are you familiar with Chatham? A. Yes.

Q. And the railroad vicinity and neighborhood? A. Yes, sir.

Q. And were familiar with Chatham in 1911 and 1912 and up to date? A. Yes, sir.

Q. At my request, have you prepared a map of the vicinity of the railroad property between Passaic Avenue and Bower's Lane, showing the embankment and the concrete wall? A. Yes, sir.

Q. And do you recall when that work was finished? A. Some time—the entire work?

Q. The concrete wall and embankment? A. The concrete wall was finished in 1913, and the embankment put in at that time.

Q. And this map I have in my hand is the way you made? Is it drawn to scale? A. Yes, sir.

Q. Will you indicate on that map, Mr. Drake, the railroad embankment between Bower's Lane and Passaic Avenue on the side towards Main Street or the Dickinson garage? A. Here (indicating) is Bower's Lane and here is Passaic Avenue, and the two tracks running between, and this (indicating) is the slope of the embankment. Between these two streets the foot of the slope runs along this dotted line (referring to the map).

Q. The black portion beside the garage building, what is that? A. That is the concrete wall.

Q. What is the distance between the garage and the concrete wall? A. 3 feet 10 inches.

Q. And what is the distance between the end of the Dickinson property and the slope at the foot of the embankment? A. 20 feet.

Q. Prior to the erection of this embankment, can you point out where the railroad company's line was located—the property line? A. The property line has not been changed. It is the same now as it was before the embankment was made. It follows the line of the garage and then it continues back to the frame dwelling at the rear—the southerly side of the garage is on the company's line and the line continues in the direction of the side of the garage and proceeds on back to this frame dwelling and then runs north for a few feet and then continues east to Bower's Lane.

Q. What tracks are these shown on the map, Mr. Drake? A. These tracks are the main tracks as they are now.

Q. Will you tell the jury just the nature of that embankment? A. It is an embankment made of earth carrying elevated tracks.

Q. About how high is it? A. About 10 to 12 feet high.

Q. About how wide from the slope on the north side to the slope on the south side—to the bottom of the slope? A. The average width is about 72 feet.

Q. Will you tell the jury with respect to that embankment, does that start at Bower's Lane and end at Passaic Avenue? A. No, it begins a long distance east of Bear's Lane and continues a long distance west of Passaic Avenue.

Q. Did you have charge of the Chatham improvement at any time? A. Yes, sir.

Q. In the working drawing of the Chatham improvement, I notice at the end of Bower's Lane you have drawn a circle or a circular line? A. Yes, sir.

Q. Will you tell us what that is meant to indicate? A. That indicates a fence.

Q. With respect to the Chatham improvement, how does it come that it was circular in form?

MR. LUM: I object as immaterial, whether they show it by a circular line or straight across.

THE COURT: I don't see how it is material.

MR. SCOTT: I'll not press that for the time.

Q. I would like you to describe, Mr. Drake, in detail, the nature of this embankment, part of which is shown between Bower's Lane and Passaic Avenue on the map? A. I don't know how I can describe it any more in detail.

THE COURT: Is it solid dirt fill?

WITNESS: Yes.

THE COURT: What do you want him to say more than that?

MR. SCOTT: I don't want to suggest anything to my witness sir.

THE COURT: That is all you want him to say?

MR. LUM: No, sir.

MR. SCOTT: Mr. Lum seems to know what is in our mind so he is in the best position to.

Q. Across from the end of the embankment up toward Passaic Avenue, you have indicated something with black across Passaic Avenue? A. You mean these lines?

Q. Yes. A. They are girders of a bridge spanning Passaic Avenue.

Q. How are they supported? A. On concrete masonry.

Q. And that concrete masonry, one of which is the concrete wall shown next to the Dickinson garage? A. Yes, sir.

Q. What is the height of that viaduct over Passaic Avenue? A. It is about 13 feet.

(No cross Examination.)

Map offered in evidence by Mr. Scott. Received and marked Exhibit D-1.

MR. SCOTT: With the consent of Mr. Lum, I have subpoenaed the Borough Clerk of the Borough of Chatham to produce the original contract between the railroad company and the Borough of Chatham and Mr. Angel, the clerk is sick.

MR. LUM: I don't object to the copy, but I object on the ground that it is absolutely immaterial.

THE COURT: What is the materiality of it?

MR. SCOTT: I desire to connect it up, that the railroad companies have a right to make contracts to eliminate grade crossings and to make improvements, and that this is a contract between the Borough of Chatham and the railroad company, defendant here, for the purpose of such elimination of a grade crossing here, and that the improvement contemplated and included the embankment in question and the concrete wall and that the work was done pursuant to that contract.

THE COURT: This was offered in the former trial, wasn't it?

MR. SCOTT: Only one specific section of that with reference to the turning point at the end of Bower's Lane, which became an exhibit.

THE COURT: What is the legal bearing of that on this issue that is now being tried—it has been adjudicated that it isn't.

MR. SCOTT: I have stated if the Court should find that it is. If the railroad company and the Borough of Chatham under the law, had a right to make this improvement

and these improvements were made by virtue of law, and in conformity with that contract, the embankment, if it were constructed, then that which is authorized by law cannot be a nuisance.

THE COURT: It has been adjudicated as between these parties that that thing is a nuisance. You cannot remove that now. That is settled. You are trying to put in testimony relative to an issue that is not on trial.

MR. SCOTT: My position is to make the offer.

THE COURT: I will overrule the offer.

MR. SCOTT: As Mr. King suggests and as I have in mind, the question that the Court has ruled that it was a nuisance, I endeavored to show that it was something done by authority of law, although it does block that street it was done by virtue of a contract under the Railroad Law.

THE COURT: But the difficulty with the situation is that this obstruction to the street as between these parties, in the previous trial was termed by the verdict of the jury it being held by the Court above to have been a question of fact to be a nuisance. Now if that fact is formally settled between these parties and that condition of affairs still remains, it must be a nuisance.

MR. SCOTT: As I take it the opinion of the Court most favorable to Mr. Lum, was that it was an obstruction to the street, for which she was entitled at that time, and under the wording of the Court, is entitled at this time, to recover damages. But every obstruction in the street, I don't take to be a nuisance.

THE COURT: You have got to take that ob-

struction to be a nuisance because the facts that were involved and had to be determined in order to render a finding of liability against the railroad company in the previous trial, was that this was a public street and had become so by public usage, and while it was a public street, this defendant had obstructed that street and nobody needs to tell us that if it is a public street and it is obstructed, and the obstruction gives rise to an action for damages to a part of the public who is peculiarly damaged by reason of its presence there, that that obstruction is a nuisance. That must have been involved in the other suit, or there could not have been a recovery. That is the basis upon which recovery was obtained.

MR. SCOTT: Your Honor has ruled on it?

THE COURT: Yes, and I have stated why I think I have ruled correctly. You may have the objection noted.

Both sides rest.

In summing up to the jury, Mr. Lum made the following remarks, which were objected to.

When this good plaintiff had need to establish her right against the railroad and to show her right in that street, she had some other lawyer and that lawyer called in as counsel the best man he could get to establish that right against the railroad company, and that was Mr. Elmer King. He was brought in to convince the jury that she was entitled to something.

MR. SCOTT: I object and I ask for a mistrial on the remarks of counsel because I think it is entirely improper, and Mr. Lum is fully aware of that and knows that we have studiously kept away from certain facts that

would and could be used against Mr. Lum and it is prejudice I think that might affect the verdict.

MR. LUM: I understood Mr. King went far outside of the scope of the evidence in summing up.

THE COURT: We have a decision that lays down a salutory rule that where one party does wrong, it does not warrant the other party to do wrong. I shall not declare a mistrial, but I shall instruct the jury just now that whatever counsel has just said is in no way to have any effect upon your determination in the case, because it is something that has nothing to do with this case.

Mr. Lum apologizes to the Court and jury.

Note—Charge of the court as agreed to by counsel of respective parties.

Charge.

I suppose that before entering upon any charge with respect to legal rights in this case, it might be well to indicate to the jury that in the enthusiasm which quite naturally comes to counsel in summing up a case, too much is said that ought not to be said. This case and all cases if they are to be properly decided, are to be decided within the evidence and not by travelling outside of the evidence. The mere question for you to determine is whether or not this defendant is guilty of the act charged against it, and if it is, how much it ought to pay; first, by way of compensation and, secondly, if it ought to be obliged to pay anything at all, by way of punitive damages.

Let us look at this case for a minute, because that is all I think need be said upon it, to tell you what you need to know with respect to it. First, the plaintiff, Edna Dickinson, brings suit against the Delaware, Lackawanna & Western Railroad

Company, to recover damages for a nuisance which she says arose from the fact that they obstructed the street, which prior to the time of the railroad company placing this embankment across that street had existed there, and by means of which ingress and egress to and from her property was furnished. Now, of course, these parties have litigated this once before, as you gentlemen have often heard in this case. And in that litigation, it was determined that the presence on this street, as it has been called, of this embankment upon which the railroad company was to run its tracks and trains, was, in effect, a nuisance, an obstruction to travel, and that it thereby, especial damage, different in kind from that which the public suffered, was suffered by this plaintiff, because she owned property adjoining. Now that question has been settled between these parties and it cannot be re-litigated in this suit. The law judges that it is well for the common welfare that there be an end to litigation and, therefore, when parties have solemnly litigated and have determined a question between them, then the law says it is *res adjudicata,* and it is adjudicated and ended forever, between these parties it is settled and it is not to be reopened; therefore in this suit, you are so justified in determining and by your oath required to determine that this embankment on the highway constituted an obstruction to travel and was an injurious thing to this plaintiff with respect to her property, which she has testified she owns adjoining this railroad. So if nothing more were in the case, she would be entitled to recover at least nominal damages, which are known as six cents. Now the plaintiff says, however, that she is entitled to recover more than that. The plaintiff says the previous adjudication only measured her damages up to the 14th day of May, 1914, and

she says that this embankment, and some fence that had been erected subsequent, have continued this obstruction of the highway and have thereby done to her a new damage for which she is entitled to maintain a new suit, and she is entitled to recover further damages and it is that new suit that you are trying now. And she says that these damages, and I am speaking of what are known in the law as compensatory damages, consist in the rental value of these premises from the 10th of May, 1914, down until to-day, the date of this trial. Now the rule of law with respect to the allowance of damages of a compensatory kind for an injury of the character testified to, states that the measure of damages in cases of injury to premises, or places of business, has usually been held to be the difference in the rental value before and after the injury complained of. Now you see how plain and in accordance with the rules of common sense that measure of damage is. They say the party had a piece of property and it had a certain rental value before the alleged obstruction was placed there and how much it was. Then the obstruction was placed there and plaintiff claimed that the rental value was injured or destroyed by reason of the placing of the obstruction there and how much, after it was placed there, was the rental value, and then plaintiff claims that the difference between the rental value just before and just after the doing of the injury, if any injury was done, was the measure of the damage that she is entitled to recover. The Court further said that in order to consider the rental value, there must be some evidence to that and mere speculative rent will not be considered. What is meant by that is this: that the plaintiff comes here asking to be paid for the diminution in the rental value of the premises before and after the injury

complained of. If she seeks to be paid for that, she must show by the greater weight of the evidence, and the burden rests upon her to show that she has suffered it, that it, the alleged nuisance, had diminished the rental value of these premises during the period indicated; and then she must go further if she shows that there was a diminution of the rental value, and show the exact amount of that diminution. If she shows that by the greater weight of the evidence, why manifestly she would be entitled to have you say how much she is entitled to on that account. But she must establish, by the greater weight of the evidence, that the placing of the obstruction caused a diminution of value, and then she must show how much that diminution was, and then to that extent she would be entitled to be paid that for compensatory damages.

The Supreme Court said that where the use is limited the reduction in rental value is the proper measure of damage. You can see what the Court means by that: If the rental value has been entirely destroyed, she would be entitled to recover the entire amount, but if it has only been diminished or impaired, then she can only show how much it has been diminished or impaired.

That is the rule that shall determine whether there shall be compensatory damages over and above the normal damages, that is over and above six cents.

That brings us to the next point or what is known in the law as punitive damages or exemplary damages or smart money damages. Now the derivation of the words indicate punitive damages are given to punish the defendant; exemplary damages are given to make an example of the defendant and smart money damages, for a wrongful act, done from wrongful motives.

Charge.

Now, by giving you three names for this thing, I don't mean to indicate that there are three different kinds of damages. I have simply given you three names for the same thing. They are indiscriminately called by these three names. That brings us to inquire when are punitive damages allowed in actions of this kind. Our Court of Errors and Appeals has said that in an action of trespass when the injury is inflicted with a reckless and wanton disregard of the rights of the injured party, exemplary damages may be recovered. Many of our cases lay down the rule that the basis of such damage is the wrongful motive, and if that is proven by the greater weight of the evidence to exist, exemplary damage may be given. But where it is not proven by the greater weight of the evidence, they may never be given. That brings us to inquire what is the measure of this so-called punitive damages or exemplary damages. The law says that the jury may never exercise an arbitrary discretion, that the discretion should not be an arbitrary one. They are to be measured by the object that the law has in view in giving such damages. What is the object or objects of such damages? One is to make an example of, or to punish or to make the defendant smart, therefore to say whether you can accomplish the object you look at the situation and station of the party; you look at the act done and in considering the case, you look at these things and say how much money in the light of the case, would punish the defendant or make an example of him, so that neither he nor anyone else would be likely to offend by engaging in these transactions in the future. That is the way and the only way in which these damages can be measured. Now another thing is to be borne in mind with respect to this so-called law; this defendant

is a corporation and this act must in the nature of things, have been performed by an agent of a corporation. Now then, not every act of an agent of a corporation, no matter how aggravating it may be, lays the basis of punitive damages against the corporation. If, for instance, you men were members of a corporation and one of your drivers on a truck should jump down from his truck and attempt to maltreat somebody who is attempting to interfere with your horses, the corporation would not be responsible for punitive damages, even though he had succeeded in maltreating the man who was interfering with the horses, the reason for that being that, in law, punitive damages against any principle, whose agent is alleged to have done the act, you have got to bring the act home to the corporation or to express the same thought, in other words, the employer is not liable in punitive damages for the malicious and wanton act of its employee, unless participated in or, expressly or impliedly, by conduct authorizing or approving it, either before or after it was committed. Another case in the Court of Errors and Appeals lays down the rule in these words:

> "The right to recover punitive damages rests primarily upon the single ground of wrongful motive and when such wrongful motive is not inherent in the evidence, which fixes the defendant legally liable, the burden rests upon the plaintiff to present proof from which wrongful motive may be inferred. Punitive damages cannot be recovered against the master for the wrongful act of his servant unless he has knowledge of such act, and in the absence of proof, if the master did not authorize the servant's act before it was done or did not afterward ratify it, it does not supply the place of evidence that he did authorize it or ratify it."

Charge.

Gentlemen, these are the rules that I think it is necessary for you to have in order to properly determine the facts of this case and to eptomize them, they amount in effect to this: The plaintiff is entitled to a verdict here; at least she is entitled to recover nominal damages—that is, six cents, or she may be entitled to recover for compensatory damages. Whether she does or not, depends upon whether she has established, by the greater weight of the evidence, that the wrongful act of the defendant has been the proximate cause of the diminution or destruction of the rental value of her premises. And she may be entitled to recover punitive damages, which depends upon whether she has established that the act of the defendant in allowing this obstruction to continue or aggravate it, in any way, or that it allowed it to continue an aggravation, was prompted by a wrongful motive and that wrongful motive has been brought home, either expressly or impliedly to the defendant.

Counsel for the plaintiff has requested me to charge that punitive damages may be recovered, "when the act was a willful trespass or in known violation of the law." Subject to its being influenced by the rules I have given to you, that states the proposition given to you, already in different language, and by the rules, I mean those rules which I stated when I said that punitive damages cannot be recovered against the master for the malicious tort of his servant unless he has participated expressly or impliedly by conduct authorizing or approving it.

I am next requested to charge that it is not necessary for the plaintiff to prove that it was a willful act, in order to recover compensatory damages.

And lastly I am asked to charge that the word willful means intentional and contemplates the doing of an act intended to injure the rights of one and in the doing of the act, that the doer must be deemed to have intended that particular injury.

In order to state the same thing less verbosely, the word wilful there means a wrongful act done intentionally.

After the jury left, the following exceptions to the charge were taken:

MR. SCOTT: To make my entire case I desire to except to the Court's refusal to charge my second request.

THE COURT: The exception is allowed.

The Court recalled the jury to give them further instructions as follows:

Gentlemen, I want to say one thing to you, which I should have said and to which one counsel has called my attention and that is that whatever damages you allow of a compensatory kind, they will only be damages for the period between the 10th of May, 1914, and to-day when the trial has taken place.

After the jury retired, Mr. Lum requested the following exceptions:

MR. LUM: I wish to take an exception to that portion in reference to the observation to a corporation having a conscience and a corporation having a soul and the remarks with reference to a corporation acting to its Board of Directors in such a way as to become possessed of the joint consciousness of the board, and all of your Honor's remarks thereto.

THE COURT: I want you to have that. I think it is time the Court above said something about it.

MR. LUM: I also except to what your Honor said on the subject of exemplary or punitive damages, with reference to the jury not using an arbitrary discretion because it is my view that the jury is only bound to use its own discretion.

THE COURT: You may have that, but the cases are all the other way.

MR. LUM: I except to your Honor's statement with reference to exemplary damages as to what is meant by the word exemplary.

THE COURT: You may have a complete exception to what I said about punitive damages and every single item of it.

MR. LUM: And I desire to except to what was said about the agents of the corporation, on the ground that the letters brought the matter to the attention of the legal department and that the wrong was continued and increased so that the question of agency can have no application to the present situation.

THE COURT: You may have it.

MR. LUM: I except to what your Honor said about the agent of a corporation committing a wrong on the ground that there cannot be any want of knowledge by a corporation for a wrong that is committed, to which his attention is called and that it would almost necessarily create a misapprehension.

THE COURT: You may have an exception to any and every ground whatever it is.

MR. LUM: I except to what your Honor said with respect to the necessity for an express ratification of the act or approval of it.

THE COURT: You may have it.

MR. LUM: I want to except to the statement that a known violation of the law being necessary

—

THE COURT: That is your own request. You, yourself, asked me to charge that punitive damages could be recovered for a willful trespass or a known violation of the law. If you want an exception to my charging your own request, you may have it.

MR. LUM: I express the fact that your Honor did not charge the request in the words requested.

THE COURT: I did not charge that way.

MR. LUM: You repeated certain words twice.

THE COURT: Which one please, if there is any question, we will have it rectified.

MR. LUM: If you charged in the words of the request there is no value in any exception.

THE COURT: The object of the exception is to call the attention of the Court to something that is considered wrong, so that he may correct it. If you want to call my attention to anything, I am here to listen to what you have to say, but don't say I said something that I did not.

MR. LUM: You said—subject, however, to what I have read you, and then reading from a decision, which in my judgment destroyed the effect of my request.

THE COURT: You may have that, I read from Peterson against the Middlesex Traction Company.

MR. LUM: It seemed to me it negatived the effect of my request.

THE COURT: Whatever you think about it you can express later, but that much you can have.

The requests of the defendant which were denied are as follows:

Defendant's Request to Charge.

1. Under the act of the legislature known as the Railroad Act the Borough of Chatham and the defendant railroad company had a right to eliminate grade crossings and make improvements in the Borough of Chatham.

And I charge you if you find that the railroad company erected the embankment and concrete wall complained in this suit under and by virtue of a contract entered into by or between the railroad company and the Borough of Chatham, then the railroad embankment and concrete wall complained of is and was not a nuisance inasmuch as the plaintiff's suit is based on the fact that said railroad embankment and concrete wall was a continuing nuisance, her suit must fall and your verdict must be for the defendant on her cause of action on and for that cause.

2. The evidence in this case shows the railroad embankment and wall to be a permanent structure and a former recovery by the same plaintiff against the same defendant for damages on account of the same permanent structure to the same property cannot be maintained.

3. There is no legal or competent proof of loss or damage to the plaintiff's real estate office, real estate building, garage building, second story of said garage building or tenant house of the said plaintiff on account of the railroad embankment and concrete wall constructed by the defendant company.

Charge of Court in former case.

THE COURT: Gentlemen of the Jury, I should like to have your undivided attention in this case and perhaps it is not necessary for me to emphasize, but I will emphasize in part that within the province which is submitted to you, namely, the ascertainment of the facts, that you apply those facts carefully to the legal principles which the Court will give you for your guidance. That means that we are here now conducting this case, or attempting to, according to the principles of law that are laid down by the Appellate Courts for our guidance, and not simply what we think, or don't think, should be the result in this case.

Now the mere fact that this defendant company builds an embankment on its property thereby indirectly doing damage is no ground, standing by itself, why you should give these plaintiffs a verdict. You should give them a verdict only when in the exercise of your duty, under the testimony that has been submitted to you, you find facts which when applied to the legal principles give these plaintiffs a right to a verdict.

Now what is it you are called upon to decide? First and foremost, and principally, a single question of fact, namely, did this property which is on Passaic street in Chatham acquire a right, through user, by the public, to have the strip of land left open over which it is alleged by the plaintiffs that the public had traveled without protest by the defendant company. That will be submitted to you to decide, and if you find in the negative your verdict must of necessity be for the defendant. If you find for the plaintiffs under the instructions which the Court will give you, you then next come to the question was that the proximate cause of the alleged injury, and if so,

under the rules of law which the Court will give you, how much money should you mete out to these plaintiffs for damages which you then will have found to be done.

There are two plaintiffs in the case, Gustave F. Lowe, the tenant, and Edna Dickinson, the owner of the property, and the rule of damages applied to each of them is widely different.

First, shall you find in favor of the plaintiffs on the question of user, remembering that the title to this property is in the defendant company, and unless it has lost its right by user it has a right to do whatever it wishes within the law with its property the same as you have and this defendant company stands before you and these plaintiffs, and should stand before you on terms of absolute equality, each having their case fairly and impartially judged by you.

Now, then, before you can tell whether they are entitled to a verdict, you must know what the law is and in this class of cases the Supreme Court of the State in its wisdom has laid down certain principles applicable to situations of this kind as the law of this State, and subsequently the Court of Appeals, the highest Court in the State, approved and sanctioned the principles as laid down by the Supreme Court, and therefore it becomes my duty to give you, for the purpose of aiding you, those legal principles which govern the different rights of these parties, and as I said previously that when you find the facts to apply them to these legal principles.

And now I would ask your careful consideration to this language of the Supreme Court and in your deliberation to follow it carefully when you come to reach a verdict and to say whether or not, and that is what is submitted to you to de-

termine, whether or not the testimony as presented squares with the rules of law laid down here by the Supreme Court.

The Court in the case of *Wood v. Hurd,* reported in Fifth Vroom, 88, and the opinion is by Mr. Justice Van Syckel, used this language:

> "To constitute such road, the land occupied by it must have been given up or dedicated by its owner for the purposes of a by-road to all who may wish to enjoy it. The doctrine of dedication rests on the principle of the common law, which is of great importance and almost universal application, that whenever a person has made representations or pursued a line of conduct with a view to lead others to adopt a particular course of action, and such representations or conduct have produced that effect, they shall be binding and conclusive against him, and he cannot afterwards be permitted to retract or repudiate them.
>
> "Its vital principle is the *animus dedicandi* —those are two Latin words meaning the intention of dedication—and whenever that is manifested, the dedication, so far as the owner of the fee is concerned, is complete, and he is concluded from his power of retraction, without acceptance by the public authorities or public user—acceptance being essential only where the question is whether the public authorities are chargeable with reparation."

In this case there is no attempt to show that the public authorities ever attempted to exercise any authority over this alleged by-way or street.

> "Time is not an essential ingredient in the act of dedication; where it rests upon express declaration or act, it takes effect instantaneously; but it is a material element in the evidence of dedication, where it rests upon user under the acquiescence of the owner of the

fee. It is in all cases a question of intention, and must be proved or disproved by the acts of the owner, and the circumstances under which the use has been permitted. In the numberless cases on this subject, search has been made for the intention to dedicate, and wherever that has been found to exist, the dedication has been declared to be complete, upon acceptance by the public, which, in this State, is not essential to conclude the donor. It is therefore a mixed question of law and fact, to be found by the jury under the direction of the Court, upon consideration of all the circumstances of the case."

Now, gentlemen, the concrete application of that is under all the circumstances of this case, the fact that the defendant company owned in fee the land; that it was used by it for the purpose of having access to its freight station, that the testimony shows that in the course of time others used it to connect with Bowers Lane—now then the concrete question for your decision is, can you from this testimony as a matter of fact find that there was an intention on the part of this defendant company to subject that strip of land to public use by the public at large in addition to its own use for its own patrons. If you find that it was not so impressed with the public use, this case falls and your verdict must be for the defendant. Is that clear? The burden of proof is upon the plaintiffs to satisfy you by a fair preponderance of evidence that that fact exists.

To continue in the language of the Court, the Court further says:

"The length of time necessary to raise a presumption of dedication from user must depend upon the circumstances of each particular case; no absolute rule can be laid down to govern it; but where the only evidence of

dedication is used by the public, unaccompanied by any circumstance or act indicating an intention to dedicate, or where the public or individuals have not acted upon the acquiescence in such a way that its retraction would materially affect the public accommodation and private rights, and thus evince bad faith in the owner, the weight of authority, is, that such user, from analogy to the statute of limitations, must be for twenty years, to establish the public right. This view of the law is supported by the authorities and will reconcile a mass of cases, in which the courts have spoken of time with reference to the particular facts of the case before them.

"The right of the public accrues by such acquiescence as carried within the intention of the owner to subject his fee to the public use."

So you see, gentlemen, the Court, all through this case, uses the word "intention," that is, the intention to submit that land to another use other than its own.

"and mere acquiescence for twenty years, unaccompanied by any act which repels the presumption of such intention, is conclusive evidence of abandonment to the public. It must be a use by the public of the neighborhood, not a use confined to one or two individuals. By such individual use, if adverse title to a right of way may be acquired by the individual, but no right in the public can be founded upon it.

"This theory of the law is, where proof of devotion rests upon user, that the essential intention existed at the beginning of the use, and continued through the whole period necessary to evince a conclusive dereliction, and thus the user for the whole time of limitation must necessarily be of right; therefore, user by mere license, which is subject at any time to revocation, will afford no foundation from which to presume the gift."

Gentlemen, I cannot make the law any clearer than in that clear exposition of the law by Mr. Justice Van Syckel, speaking for the Supreme Court. Does it seem clear to you, gentlemen?

The essential thing that you must decide now as I have said, and as this opinion holds, is that if there was no intention to impress the land with a public user, then your verdict must be for the defendant. If on the other hand you find that there was such as a matter of fact, then the next question is, is the building of this work that goes on the proximate cause of the alleged complaint, and thirdly, if so, how much damages should you give. This question is a troublesome question in the law and the rule for damages is as follows, and you should give careful attention to this and not go outside of it in case you find for the plaintiff.

The measure of damages in cases of obstruction to premises, or places of business, has usually been held to be the difference in the rental value, or the receipt of profits before and after the injury complained of and the value of the business obstructed is a proper item of damage to be taken into consideration by the jury in arriving at a conclusion. In order to consider the rental value there must be some evidence to that effect and mere speculative rent will not be considered. Where the loss is partial, or limited, the reduction in rental value has been accepted by the courts as the measure of damages.

Now, then, when you come to apply that you will find that Mr. Lowe was in the occupancy of the garage, but there is no evidence in the case that he lost any customers, therefore you must consider that in making up damages for him, and the only evidence as I remember it was that there was a loss in space of some four hundred feet.

Now it requires on your part good judgment to apply that and to say whether or not under the evidence Mr. Lowe is entitled to anything more than nominal damages. It is for you to take the evidence and apply it to this rule which I have given you.

In reference to Miss Dickinson, the evidence shows that she occupied the corner with a real estate office and there is no evidence in the case that she has suffered any loss by reason of this wall to her business as such, but there is evidence in the case that she suffered a loss of rental of the upper floor in the sum of $25 a month.

Now you see you apply these facts to this rule of law which I have given you, and make a verdict if you find for the plaintiffs under that rule of law, and here again, the burden of proof is upon these plaintiffs to satisfy you by a fair preponderance of the evidence as to the extent of their loss under the legal rule which I have given you from the courts applied to the facts as you find them in the testimony.

In addition to this I have been requested by the defendant to charge a series of requests, No. 1 in reference to Mr. Lowe:

And in determining that depreciation, it is manifest that one of the main elements in arriving at his damages in his past profits and gains in said business and his probable future profits and gains. As to those profits and gains both past and future, I charge you there is no evidence in this case as to them from which you can figure and ascertain the same, and if you are unable to determine from the other facts and evidence in this case how much the acts of the defendant company damaged or depreciated the plaintiff, Gustave Lowe's use of the premises, then you cannot give any other than nominal damages.

I so charge you.

No. 2 in reference to Miss Dickinson:

Under the evidence in this case, it appears that the plaintiff, Edna Dickinson, is the owner of the land and building which she complains is greatly damaged and depreciated by the acts of the defendant railroad company, but the evidence is also undisputed that she is only in possession of part of said premises and not in the possession of the whole of the said premises, therefore, as regards her damages in his suit for the depreciation of the land and building, she can recover only for so much of the land and premises of which she is in possession, and I further charge you that as regards her claim for damages as to her real estate office which is a part of said building, there is no competent evidence in this case from which you can give her any but nominal damages for the depreciation and damage to said real estate office and the land upon which it is situate.

I so charge you.

No. 3 in reference to Miss Dickinson:

I charge you that there is no evidence in this case upon which you can give substantial damages to the plaintiff, Edna Dickinson, on this claim in her complaint that her real estate business has been, is and will be greatly damaged by the acts of the defendant railroad company and your allowance to her for damages, if at all, must be nominal for damage to her real estate business. "For damage to her real estate business" I have added. I give you that charge with that modification. I so charge you.

The fourth I refuse to charge.

So take the case, gentlemen, and find a verdict according to the facts as they appear to you applying these principles, and I ask you to de-

cide this case, as all cases, after a careful, conscientious, independent judgment, treating these three people precisely on terms of equality.

Now are there any exceptions to the charge by either side?

MR. SCOTT: Just so much of the Court's charge relative to the loss of rental to the upper floor which was embodied in the fourth request to charge which your Honor has refused.

THE COURT: Yes, very good. Take the case.

The fourth request reads as follows:

I charge you that under the evidence in this case the plaintiff, Edna Dickinson, was not at the time of the commencement of this suit in possession in the eyes of the law, of the upper or second story of the building which she owns and which second or upper story she has testified was built for one Scott.

Exhibit D-2.

Opinion of Court in Former Case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 69 November Term, 1914

EDNA DICKINSON and GUSTAVE F. LOWE, *Plaintiffs-Respondent,* *v.* DELAWARE LACKWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	On Error to the Supreme Court.

HENRY M. LUMMIS and ELMER KING. For the plaintiff-respondent.

FREDERIC B. SCOTT. For the defendant-appellant.

The Opinion of the Court was delivered by Kalisch J.

The appellant appeals from a judgment entered in the Supreme Court upon a verdict rendered against it, in the Morris Circuit, in favor of Edna Dickinson for $750.00 and in favor of Gustave F. Lowe for six cents.

The two plaintiffs below joined in a single action, under the new practice act, to recover their respective damages which they claim resulted peculiarly to them from the erection by the appellant company, of a concrete wall upon a public highway in the Borough of Chatham, thereby closing up the highway to public travel and ingress and egress to and from a garage and premises, abutting on the highway, which the respondent Dickinson owned and partly occupied for business purposes and a portion of which premises she had let to the respondent Lowe.

At the close of the plaintiff's case, in the

court below, counsel for appellant moved for a nonsuit, upon the ground that the proof submitted was insufficient to support a finding that the road in question upon which the concrete wall was built was a public highway, since it appeared that the road was upon land owned by the appellant company and was used by it for railroad purposes and therefore the public could not acquire any easement in it through public user, which motion was denied.

We think under the facts of this case and the legal rule applicable thereto, the motion was properly denied.

The appellant company owns land on the north side of its freight and passenger stations which stations are north of its right of way.

The land over which the public road is claimed to exist is not a part of the right of way of the appellant company and therefore the question reserved in *Hulse v. Penn. R. R. Co.* 59 N. J. L. 54, viz., whether an ordinary right of way, either public or private, can be acquired by prescription over a strip of land expressly devoted by the legislature to use as a public highway of a special kind, is not involved.

The road in question, upon the appellant company's land, connects two public streets, Fairmount Avenue with Bowers Lane.

There was plenary proof that the road had been used upward of forty years by pedestrians and vehicles in going from Passaic Avenue to Bowers Lane and from Bowers Lane to Passaic Avenue, without regard to any use for railroad purposes.

The locus in quo is practically identical with that which existed in the case of the *Township of Riverside v. Penn. R. R. Co.*, 74 N. J. L., 476.

Exhibit D-2.

It was there held that a public way by prescription could be acquired over lands of a railroad company, which were similarly situated as in the present case, and that such a way could be shown to exist by proof of a continuous public user extending over a period of twenty years and acquiesced in by the railroad company; acquiescence for that period unaccompanied by any act showing that it was not the intention of the railroad company to subject its fee to the public use, being considered to be conclusive evidence of abandonment to the public.

In the case *sub judice* there was proof of public user of the road for twenty years and that such user was acquiesced in by the railroad company, for there is no proof that it did any act which repelled the presumption that it was its intention to subject the land to that public use. The evidence in the case under consideration from which acquiescence could be inferred was like that in the case of *Township of Riverside v. Penn. R. R. Co., supra.* The like may be said as to the proof of public user. It is true that there was evidence in the case last cited that the highway had been worked and repaired by the public authorities, but that of course was not evidence of a dedication by the railroad company, but of an acceptance of a dedication by the public authorities, and long continued public user is itself evidential of such acceptance if it continue for twenty years, even though the public authorities do not work the road. *Smith v. State,* 23 N. J. L., 720 and 727. The mere fact that the railroad company made use of the road in approaching its freight house and its passenger station is not sufficient to repel the presumption of dedication arising from a public use, by a long and continued public user for twenty years.

Exhibit D-2.

It must be borne in mind that the road in question runs over land north of the railroad station and freight house from one public highway to another, which in their turn connect with other thoroughfares in the Borough.

It is therefore unlike the situation where a road or approach on a railroad company's land leads to and ends at the railroad station. It may be said that as it was necessary for the railroad company to keep the road open as a means of communication to and with its freight station and freight yard, therefore it could have done nothing to prevent the acquisition of a public right by prescription for the reason that mere denials of the right or prohibition of user, unaccompanied by any act which would amount to a disturbance of the right would be ineffectual to destroy it under the rule laid down by this Court in *Lehigh Valley R. R. Co., v. McFarlan,* 14 Vr. 605.

A similar situation was presented in *Titus v. Penn. R. R. Co.,* decided by this Court at the November term, 1914, but not yet reported, where it was held that a railroad company by maintaining a line fence along its right of way for a period of twenty years for the protection of its passengers against accident which might be caused by trespassing of cattle, or perhaps human beings, upon its track, rendered itself liable to have a claim of prescriptive right asserted against it by the adjoining owner to have it maintain that fence perpetually thereafter for his benefit; and that notwithstanding its protests it was the duty of the adjoining owner to maintain the fence and its remonstrances for his failure to perform that duty.

Thus it is clear from the decisions of this court that a direction of a non-suit or of a

verdict for the defendant by the trial judge upon the facts before him would have been without legal justification, and we must affirm his rulings thereon, unless we are prepared to overrule the legal principles enunciated by us in those decisions.

It is to be observed that the damages claimed by the respondent Dickinson, were not only those resulting from the interference of her user of the way for the purpose of travel, but also for the interruption of light and air to her garage. It may be that if her only claim was for compensation for the latter injury, she would be without remedy. But this question has not been raised by the appellant and is not necessarily involved in the case, because the proof show a special and particular damage to her, in the interruption of the user of the highway, by reason of the adjacency of her property to this public way, and for that damage she was entitled to maintain this action under *Ryerson v Morris Canal and Banking Co.*, 69 N. J. L. 505, and was entitled to compensation for that damage, if the jury found that the alleged public way in fact existed.

Judgment will be affirmed with costs.

Endorsed:

"Filed March 1, 1915,

DAVID S. CRATER,

Clerk."

NEW JERSEY COURT OF ERRORS AND APPEALS.

EDNA DICKINSON, *Plaintiff-Appellee,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law.	10

BRIEF OF APPELLANT.

Statement.

This is an appeal from the judgment entered upon the verdict of a jury in the Morris Circuit on May 10, 1916, for $1,484.58 in an action which arose under the following circumstances: 20

In July, 1913, the plaintiff and one Lowe, a tenant, brought suit against the defendant claiming that the appellee Edna Dickinson was seized in fee simple of certain land with a building or buildings thereon situated in the Borough of Chatham upon the corner formed by the intersection of the easterly line of Passaic Avenue with the northerly line of a certain other unnamed public highway which land and building had a large frontage upon both of said highways. That during the month of June, 1913, or thereabouts, the appellant took possession of said public highway leading from Passaic Avenue to Bowers Lane and constructed a wall and embankment upon the same, being practically parallel with the appellee Edna Dickinson's line and only a distance of some two feet from her said building. The appel- 30 40

lee, also claimed in said suit that the unnamed public highway was wholly occupied by said construction and wall, and that access to said unnamed public highway was permanently prevented. Her claim in the suit of 1913 was that her said building and the upper floor of said building had been rendered valueless by reason of its only access being thereby permanently obstructed, stating in the twenty-first paragraph of her complaint in the suit of 1913,

> "that wholly as a result of the aforesaid acts and omissions of the defendants the said property of the plaintiff Edna Dickinson has been, is and permanently will be greatly damaged and its value both in land and building vastly depreciated, and her said business has been, is and will be greatly damaged by reason thereof."

On the trial of said issue of the suit of July, 1913, a judgment was recovered in favor of the appellee Edna Dickinson and her tenant Lowe, which judgment was entered in the Supreme Court on May 16, 1914. An appeal was subsequently taken to this court, and at the November Term, 1914, this court rendered an opinion in said cause, which will be found to be reported in 87 N. J. L., at page 264, and is also printed as Exhibit D-2 at page 91 et seq. of the state of case. This judgment was satisfied.

On January 13, 1915, the appellee brought another action against the appellant, the complaint in which consisted of two counts. The first count alleged substantially the same situation as in the complaint of the suit of July, 1913, and the second count contained a new and separate cause of action on account of the construction of certain fences and posts and obstructions across the unnamed public highway, alleging that they prevented all access to the premises. In its answer this appellant admitted, solely for the purposes of the instant action, the allegations with respect to the construction of the wall or embankment

pleaded in the first count of the plaintiff-appellee's complaint, but set up as a special and separate defense that the plaintiff-appellee in her suit in July, 1913, "was then and there awarded damages for all the injuries and damages sustained by her by reason of the actions of the defendant set forth and described in her above complaint from the time of the accrual of said action against this defendant to the end of time", and, further, that the said judgment in the suit of July, 1913, had been paid and satisfied, and prayed that the first cause of action be dismissed against this appellant with its costs.

On the trial of the issue in the instant case, the jury awarded a verdict against the defendant and in favor of the plaintiff-appellee for $936 compensatory damages and $500 punitive damages. Judgment was entered herein upon this second verdict on May 10, 1916, and an appeal has been taken to this court to review said judgment.

The questions presented by the present appeal may be well divided into three propositions, the first one of which is that the trespass or nuisance alleged and sued for in the suit of July, 1913, being for a trespass or nuisance which was of a permanent character, the damages recovered in the suit of July, 1913, barred the plaintiff-appellee from maintaining the second or instant suit. The second proposition presented by this appeal brings forward the question as to whether, in a suit for damages on account of a nuisance, the party who is alleged to have been injured is obliged to mitigate her damages. And the third proposition involved in this appeal was with respect to the refusal of the trial court to admit a certain contract offered on behalf of the defendant-appellant between it and the Borough of Chatham with respect to the authority of the appellant to construct the wall and embankment which is alleged to have caused the injury to the appellee.

ARGUMENT.

POINT I.

Ground of Appeal No. 1, Page 1.

On the trial of the instant case it appeared that the appellee was the plaintiff in the former suit (page 12, lines 36 to 40), and that the verdict which resulted in her favor had been paid (page 13, lines 1 to 4). Proceeding with the examination of the appellee at the trial the following question was asked of her:

> "Q. Since the trial have you received any rent for the upstairs part of the garage? A. None" (page 15, lines 18 to 20).

To which question objection was made by the appellant on the ground that the recovery at the former trial between the same parties for the same kind of injury and on account of the same things and matter, exclusive of the one count in the plaintiff's complaint as regards the erection of a fence, was an entire bar to the plaintiff having a recovery in this the second suit. The trial court, sensing the fact that the parties here involved were approaching the vital issue in this case and for the purpose of "facilitating the progress of the case" (page 21, lines 15 and 16), assumed that the structure, wall or embankment was a permanent structure, and thereupon overruled the objection taken to said question. The colloquy between the court and the respective attorneys of the parties herein set forth at pages 15 to 22 shows that the question was precisely presented to the court and that its ruling thereon was made *on the point that the structure, wall or embankment was a nuisance of a permanent character.*

Reliance was placed upon the case of *Ryerson v. Morris Canal & Banking Company,* 69 N. J. L., 505, as controlling the instant action, because un-

doubtedly the said case was cited by this court as authority for the right of the plaintiff to maintain her first action. However, an examination of that case discloses that the issue as presented to the trial court in the instant case was not present, because in the Ryerson case it appeared that the special and particular damage which the plaintiff sustained was due to the fact that the banking company failed to keep and maintain in proper repair a bridge across the canal so as to prevent any inconvenience to the plaintiff in the use of the highway, the neglect to keep the bridge in proper repair, allowing it to become unsafe and unavailable for use being the negligence claimed on the part of Ryerson, and the question of the permanency of the structure in question was not there raised at all.

In 2 *Black on Judgments,* 2nd Edition, Section 743, the author illustrates the contention of the appellant in the following words:

> "In the class of cases now under consideration it is important to inquire into the character of the injury complained of with reference to its being of a periodical and recurring nature or permanent and unalterable. The rule is that if trepasses or nuisances are not of a permanent character, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, and every repetition of the trespass or continuance of a nuisance is a fresh injury giving a right to a new action, but as to trespasses and nuisances that are of a permanent character a single recovery may and must be had for the whole damage resulting from the act and no second action will lie."

From the appellant's witness John T. Drake (page 65 et seq.) it appeared that the railroad embankment and wall was constructed for the purpose of carrying the elevated tracks of the appellant. This construction, for the purposes of

this suit it has already been pointed out, the court assumed to be of a permanent character (page 21, lines 20, 21, 22 and 23).

In *Powers v. Council Bluffs,* 45 Ia. 652, the question was raised as to what was a permanent nuisance, and it was held that where such a nuisance was of such a character that its continuance is necessarily an injury that when it is of such a character that will continue without change from any cause but human labor it is permanent and the damage is original and may be at once fully estimated and compensated and that successive actions would not lie and that the statute of limitations commences to run from the time of the commencement of the injury to the property.

The same rule was again recognized in the *Town of Troy v. C. R. R. Co.,* 3 Foster (N. H.) 83, in which case the defendant railroad company had constructed an embankment of its railroad upon a part of the highway, and in an action brought to recover the damages the plaintiff claimed that it was entitled to recover for entire damages for the permanent injury. The court, passing upon the nature of the construction, there said:

> "The railroad is in its nature, design and use a permanent structure which cannot be assumed to be liable to change. The appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent diversion of that property to that new use and a permanent dispossession of the Town of it as the place on which to maintain a highway. The injury done to the Town is, then, a permanent injury at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their damages."

In *Stodghill v. C. B. & Q. R. R. Co.,* 5 N. W. 495, it appeared that the plaintiff was the owner of a farm of some 480 acres part of which consisted of a tract of 29 acres of creek or pasture land. The natural channel of the creek ran across the right-of-way of such tract and meandered through it and recrossed the north line of the land and right-of-way. It appeared further that when the railroad constructed its bridges across the creek which spanned the channel it cut the channel on the north side of its right of way and filled in the bridge where the stream entered the plaintiff's land with earth, which diverted the stream into the new channel. Stodghill commenced an action against the defendant for damages to his land by reason of the diversion of the stream. He recovered a verdict and a judgment in said action, and, having died devising the 29 acres with other lands to the plaintiff, subsequently action was commenced to recover damages for continuing to divert the water from the natural channel of said creek. Stodghill's devisee having recovered on the second action, the case was taken on appeal, and the Supreme Court of Iowa in deciding the said appeal held that

> "where damages result to land from a nuisance permanent in its character so that they may be fully estimated and compensated for in one action, successive actions for such damages will not lie",

and that the adjudication was final and conclusive not only as to matters actually determined but as to every other matter which the parties might have litigated and decided as incident to or essentially connected with the subject-matter of the litigation.

In *Chicago & E. I. R. Co. v. Loeb,* 8 N. E. 400, the Supreme Court of Illinois, dealing with the proposition here involved, stated:

"There is quite a weight of authority to the effect that one may bring suit for the deterioration in value of real property from a nuisance alleging its permanency, and that by such an action the plaintiff consents to the continuance of the nuisance and accepts the judgment recovered as a compensation therefor; that such a recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain" (p. 462).

In *Elizabethtown L. & B. S. R. v. Combs,* 10 Bush 393, the court said:

"We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action, but that was in case of injury not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of."

In a further discussion of the proposition in the case of *Chicago & E. I. Co. v. Loeb,* supra, the court said at page 463:

"The same question was presented there as here,—whether the plaintiff might recover for damages she had sustained by the continuance of the obstruction since she purchased. The solution of that question was found by the court in the determination that the character of the cause of injury was such, from its permanency, that one recovery would be a bar of all future actions growing out of the erection of the structure; that Maher, the original owner, might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time or in the future; that, that being true the right of action was in him for a re-

> covery of all damages that were or might be caused by the structure, and as that right could not be transferred to his grantee, the plaintiff, there was in her no right of recovery * * * * * The decision was not rested on the point of that act of trespass committed being the only cause of action, but upon the permanent character of the structure as giving a right of recovery once for all."

In *Fowle v. New Haven and Northampton Company,* 107 Mass. 352, the defendant was sued because it had wrongfully so constructed its roadbed along the bank of the river as to have filled up with earth and stones and other obstructions the bed and channel of the river, which from time immemorial had been accustomed and ought to flow against the westerly embankment of the plaintiff's land. At the trial in the Superior Court the plaintiff put in evidence a copy of the record of the former action brought by him against these defendants in the Superior Court upon a declaration in precisely similar terms, except that the quantity of soil alleged to have been detached and washed away was different. The defendants, however, objected, that the plaintiff could not recover for damages sustained since the former action and that the record of the former action showed that the damages therein recovered were in full of all arising from the same cause, which objection was overruled. On appeal Gray, Justice, said:

> "The embankment of the defendant was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a

bar to another like action between the parties for subsequent injuries from the same cause."

On further appeal it was said in this case (112 Mass. 334):

> "And if it (the injury) results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable injuries."

In *Baldwin v. Oskaloosa Gas-Light Co.,* 10 N. W., 317, it appeared that an action was brought against the Gas Light Company for a nuisance in the erection and maintenance of gas works, rendering the plaintiff's property in the vicinity uninhabitable, and the jury found that the works were permanent.

> "'If,' said the Court at page 318, 'the works were of a permanent character, and the erection and beginning of the use thereof a permanent injury to the plaintiff's property, then the cause of action is barred by the statute, because the works were erected in 1872, and this action was not commenced until 1878. * * * For such permanent injury the plaintiff was entitled to recover all the damages sustained in one action, and therefore the action was barred, and the Court should have rendered judgment for the defendant on the special verdict'" (p. 319).

In *Bizer v. O. H. Power Co.,* 30 N. W., 172, it was found that a dam constructed by the Power Company was of a permanent character. At page 173 the Court said:

> "Where an injury is permanent it is such as is spoken of in the books as original, that is, accruing wholly when the wrongful acts were done, and is distinguished from an injury which is to be regarded as continuing, that is, an injury that could and should be terminated and is to be compensated strictly

with reference to the past and upon the theory that it would be terminated. Where the injury is permanent but one action can be maintained, and a recovery is allowed for all damages past and prospective. The right of an action in such cases accrues wholly against the party doing the injury."

In *Irvine v. City of Oelwein,* 150 N. W., 674, the Court said:

"The general rule is that where the nuisance is permanent and the damages are to the land itself and all the parties intend that the nuisance shall be permanent, the cause of action arises when the land is first flooded and a recovery must be for the full amount of damages done the property, measured by the difference between the value of the land before and immediately after the dam was constructed and the flooding done."

In *Joyce on Nuisances,* Section 259, the learned author lays down the rule as follows:

"In an action to recover damages for an injury caused to abutting property upon the highway which is not permanent in its nature, the damages should be limited to those sustained up to the time of the commencement of the suit, and should not be estimated on the basis of the diminution of the value of such property. Where, however, the nuisance is a permanent one, there may be a recovery of permanent damages based generally upon the depreciation of the value of the property injured."

Investigating the cases in the State of New Jersey, attention may be called to the case of *Morris Canal & Banking Company v. Ryerson,* 27 N. J. L., 457, and the comments thereon and the exceptions taken to the same in the case of *McFarlan v. Lehigh Valley Railroad Company,* 43 N. J. L., 605. In the Ryerson case, *supra,* the plaintiff claimed damages for injuries to his land caused by the erection of two dams and embankment and their not being kept in the proper

state of repair. The Court there laid down the rule that in an action for damage for something which is in its erection and use was nuisance its continuance is a new nuisance for which the party injured has a remedy for his damages. However, the Ryerson case did not present the feature of a permanent structure, contended for in the instant case.

It appears from an inspection of the pleadings in the Ryerson case that they only embraced damages accruing between specified dates, and, as said with respect to said case in *Lehigh Valley Railroad Company v. McFarlan*:

> "If the party saw fit to make up and try an issue on the theory that the injury complained of was a temporary injury not resulting from a permanent devotion of the owner's property to the company's use by an absolute taking of it, the Court was not called upon to consider or determine any other issue. On the theory on which the Seward and Ryerson cases were tried, that there had been no permanent taking of property and only a temporary injury to it, the action and the pleadings in those cases were in proper form" p. 616.

However, the McFarlan case, *supra,* deals directly with the question as now presented, and contended for in the following language:

> "If the injury be one that in its nature is temporary and recurrent such as might arise from the company's negligence in allowing its works to be out of repair or from the temporary diversion or throwing back of water arising from a regular supply of water from extraneous sources or the management of the gates of the canal locks or from the occasional use of flash boards as a temporary expedient, successive actions for damages sustained from time to time may, under the circumstances, be the appropriate remedy, but when the company has effected a com-

plete appropriation of the property by the location of its canals on lands or the appropriation of water rights to its use by the construction of works designed to effect a constant and continuous diversion or flooding back of waters, such lands and waters are taken and the damages consist in the entire value of the property taken." (Pages 610 and 611.)

In the same case the Court said that:

"In all cases where property, whether it be lands or water rights, have been permanently appropriated by the company to its use, the damages sustained are a unit and are recoverable as such and not by piecemeal." (Page 613.)

The Trial Court in the instant case, having based its ruling on the assumption—which assumption was conceded by the appellee's counsel—that the wall and embankment in question was a permanent structure, the Trial Court erred in allowing said question to be submitted and answered. That the jury on the former trial was allowed to take into consideration the depreciation of the plaintiff's land and building is apparent on an examination of the charge of the Court in the former case, where it charged that the

"measure of damages in case of obstruction is a proper item of damage to be taken into consideration by the jury in arriving at a conclusion" (page 87, line 20, et seq.);

and this appellant's second request to charge on the former case, which appears in the record in the instant case at page 89, lines 3 et seq., where the Court allowed the jury to consider the appellee's damages in that suit for the depreciation to her land and building.

Error having thus been shown to have been committed by the trial court in the instant case, the judgment rendered in the Supreme Court should be set aside.

POINT II.

Grounds of Appeal 2, 3, 4, 5, 6 and 7 pages 2 and 3.

It having been assumed for the purpose of this case that the wall and embankment in question was a nuisance of a permanent character, the appellant endeavored to show by a series of questions to one Edward H. Lum on cross examination that the appellee could have mitigated her damages with respect to the effect which the building of the wall and embankment had upon it. For that purpose, therefore, inquiry was made to ascertain whether there was any practical objection to running a stairway directly from the second floor of the building in question up to the second story, and the following questions were submitted on cross-examination to the witness, Edward H. Lum:

"Q. And could they carry it (the stairway) right up from Passaic Avenue up to the second story?" (page 55, lines 36 and 37)).

"Q. Could a door be made on Passaic Avenue opening out on Passaic Avenue in front of Miss Dickinson's garage building and such stairway be carried up to the second story?" (page 56, lines 30 to 33).

"Q. If such a stairway were put in, would that relieve the loss in rental value of the upper floor to which you have testified?" (page 57, lines 2 to 4).

"Q. Could this stairyway be constructed in the building furthest from the railroad tracks without interfering with the garage below?" (page 57, lines 21 and 22).

"Q. In your opinion, what would be the relation of the cost of that stairway and entrance there to the loss you say is there by reason of its present access" (page 57, lines 28 to 30)?

In *McCurdy v. Boise City Canal Company*, 2

Idaho, 226; 10 Pac. Rep., 623, the action was to recover damages to the plaintiff's land caused by the leakage from the defendant's irrigation ditch, a defect which the defendant knew of and which it permitted to continue for more than a year. On the trial the Canal Company endeavored to show that the plaintiff might have prevented the injury to his land by incurring a small expense.

This offer the appellate court held should have been allowed.

The general rule as laid down in Sedgwick on Damages is that

> "if a nuisance results in a permanent injury to the realty, the measure of damages is the diminution in the market value of the land, unless it is possible to repair the injury at an expense less than such diminution" (Section 947).

It is contended by the appellant that the questions put to the witness Lum, which were objected to and disallowed by the Court, would have shown that it was possible to lessen the alleged injury to the second story of the building of the appellee, for, as said by Sutherland on Damages, Volume 4, Section 1055:

> "Where, however, the plaintiff has access to the nuisance or the means or opportunity of avoiding it or mitigating the injury it causes, it is his duty to abate it or to take the proper measure for preventing or lessening the damages therefrom."

In Joyce on Nuisances, Section 500, he says that:

> "Where the suit is for permanent injury to land, it is proper to consider whether the injury could be obviated in whole or in part by a reasonable expenditure in removing the obstruction, and no distinction exists as to a case where it is sought to recover damages to crops for use and occupation resulting from

a continuing nuisance, so that in trespass on the case to land by flooding owing to the alleged improper construction and maintenance of the defendant's railroad upon and adjacent to plaintiff's land, if the plaintiff could by the exercise of reasonable diligence, *by work on his own land, have lessened the damages or obviated them in whole or in part, it was his duty to have done so.* In such case the measure of damages would be the loss sustained before he could, in the exercise of reasonable diligence, have abated the nuisance, together with all costs and expense of abating it." (Citing *Atchison, Topeka and Santa Fe Railroad Company v. Jones,* 110 Ill. Appeals, 626.)

In *Slavin v. State,* 152 N. Y., 45, it appears that the state deepened a canal near the building of the plaintiff in Mechanicsville; that thereafter the water which was let into the canal rose and flooded the cellar of the owner. The Court of Appeals, in dealing with the measure of damages in this case, said:

"The ordinary rule of damages in case of an unlawful injury to real property is the depreciation in value caused thereby. Where the injury is to a building and is one which admits of reparation at a reasonable cost, and this would be the ordinary method of remedying the injury, the cost of the reparation would generally measure the depreciation and the indemnity to which the owner would be entitled. In addition he would be entitled to recover any loss in rental value, if any, during such reasonable time as would be required to make repairs. In the nature of the case there can be no exact ascertainment of the loss incurred by the owner, but the rule stated will in most cases work out substantial justice. The right of action accrues as soon as the wrong is complete, and the owner cannot lie by, neglecting to make the necessary reparation, and hold the wrongdoer liable for loss of rental value for an indefinite period" (page 48).

POINT III.

Grounds of appeal, 8, p. 3.

In the opinion of this Court in the former case, no reference was made to the fact that there was introduced in evidence and made to form a part of said case an agreement between the Borough of Chatham and the appellant for the purpose of eliminating grade crossings in the Borough of Chatham, said agreement being made by virtue of Section 30 of the act entitled, "An Act Concerning Railroads, Revision of 1903, approved April 14, 1903, Chapter 257, and the Amendments thereof and Supplements Thereto," and that said agreement had reference to the unnamed street involved in the present case. On the trial of the instant case the said contract was again offered in evidence, the appellant stating to the Court that it was its "desire to connect it up, that the railroad companies have a right to make contracts to eliminate grade crossings and to make improvements, and that this is a contract between the Borough of Chatham and the Railroad Company, defendant here, for the purpose of such elimination of grade crossings here, and that the improvement contemplated and included the embankment in question and the concrete wall and that the work was done pursuant to that contract" (page 68, lines 19, et seq.). The appellant further stated to the Trial Court in the instant case, that the offer of said contract was to show that the construction of the embankment in question and the wall was one authorized by law (page 68, lines 38 to 41, and page 69, lines 1 to 6). The offer of the contract in question appears to have been made at page 69 of the printed case, lines 12 and 13.

That said contract was material to the issue in the present case and that the appellant was

not estopped from introducing it is apparent, because if the construction of the wall and the embankment in question was on the unnamed street, the contract in question was plenary proof of the fact that the town has forever renounced any right to accept the dedication of the street in question and thus eliminated from the case the feature of a continuing nuisance.

In *Ellis v. Town of Guttenberg,* 87 N. J. L., 313, it appears that the railroad companies had made an agreement under the 30th Section of the Railroad Act with the Town of Guttenberg, that certain streets known as North, South and Water Streets were merely dedicated streets never accepted by the municipality. The Supreme Court in the memoranda opinion filed in that case and affirmed by this Court in 87 N. J. L., 314, said that:

> "No vacation of the public easement seems, therefore, to have been necessary, and the proceeding to vacate amounted, as counsel for the railroad companies argue, only to a renunciation of any future right to accept dedication."

Under this case it is apparent that the refusal to allow the offer by the appellant, of the contract in question was error, because it would have established fully the fact that the wall and embankment in question was not a continuing nuisance.

POINT IV.

For the reasons herein urged, it is respectfully insisted that error on the trial of the instant case is manifest and that the same was prejudicial to the appellant to such an extent as to require a reversal of this cause.

Respectfully submitted,

FREDERIC B. SCOTT,

Attorney of Appellant.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.