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Notice.

New Jersey Supreme Court

Burns Holding Corporation, a body corporate, Relator, *vs.* The State Highway Commission of the State of New Jersey, Defendant.	On Mandamus. Notice.

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To the State Highway Commission of the State of New Jersey:

Please take notice that on Saturday, the Eighteenth day of January, 1930, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, we shall apply to the Honorable Clarence E. Case, Justice of the New Jersey Supreme Court, at his chambers, Central Building, Somerville, New Jersey, for an order to show cause why an alternative writ of Mandamus should not issue in the above entitled cause, requiring The State Highway Commission of the State of New Jersey to ascertain and pay to Burns Holding Corporation for the taking and/or diminution of the value of its lands in the Township of Woodbridge, New Jersey, and damages thereto resulting, from the construction and maintenance of New Jersey State Highway route No. 25, over, upon and through lands in said Township, now or formerly of John A. Delaney, and upon failure to

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agree with said Burns Holding Corporation upon the amount so to be paid and awarded, to institute and diligently to prosecute appropriate proceedings under the provisions of the statute in such case made and provided for the condemnation of said lands of said Burns Holding Corporation and
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the appraisal thereof and fixing of the compensation to be paid therefor and for damages thereto.

A true copy of the petition and affidavits upon which said application will be based is hereto annexed and served upon you with this notice.

Respectfully, &c.,

Autenrieth, Gannon & Wortendyke,
Attorneys for Relator.

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Filed January 18, 1930,

Fred L. Bloodgood,
Clerk, New Jersey Supreme Court.

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Petition.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, a body corporate, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Petition.

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To the Honorable Clarence E. Case, Justice of the New Jersey Supreme Court:

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The petition of Burns Holding Corporation, a body corporate, organized and existing under the laws of the State of New York, respectfully shows as follows:

1. Petitioner is and at all times herein mentioned was the owner in fee simple of certain lands and premises in the Township of Woodbridge, in the County of Middlesex and State of New Jersey, which are laid down and designated as lots Nos. 85 to 110, both inclusive, 264 to 283, both inclusive, 285 to 293, both inclusive, and 436 to 454, both inclusive, upon "Map No. 10 of property of the Realty and Commercial Co., Middlesex County, State of New Jersey," made by John A. Doolittle, C. E., and filed January 6, 1904, in the office of the clerk of the County of Middlesex in the State of New Jersey, a true copy of which said map is hereto annexed and marked Schedule A.

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2. One John A. Delaney was, and until June 13, 1929, continued to be, as petitioner is informed and verily believes, the owner of certain other lands and premises, laid out and delineated upon the map aforesaid, and known as lots 62 to 69, both inclusive, 124 to 132, both inclusive, 244 to
10 252, both inclusive, 305 to 312, both inclusive, 419 to 426, both inclusive and 462 to 469, both inclusive, which said lots form a strip of land running from northeast to southwest across the total area laid out upon and included within said map, and are a portion of the lots colored red upon Schedule A hereto annexed as aforesaid.

3. At all times herein mentioned, your petitioner was the holder of a certain mortgage made
20 by said John A. Delaney to your petitioner and dated January 16, 1928, to secure the sum of $5,292., and duly recorded on January 17, 1928, in the office of the Clerk of Middlesex County, in Liber 554 of Mortgages for said County, at page 296, which said mortgage covered the land and premises of the said John A. Delaney hereinbefore particularized, together with other lands, but which said mortgage has since been paid off, satisfied and cancelled of record.

30 4. By a certain order made by the Honorable Clarence E. Case, one of the Justices of this Court, on the 10th day of April, 1929, upon the petition of the State Highway Commission of the State of New Jersey, for the condemnation of lands of the said John A. Delaney as above particularized, Tuesday, the 23rd day of April, 1929, at the hour of 2:30 o'clock, Eastern Standard Time, in the afternoon of said day, was assigned and fixed as the time and said Justice's chambers, Central
40 Building, Somerville, in the County of Somerset and State of New Jersey, as the place for the

hearing of said petition before said Justice, which said petition was, as before indicated, for the appointment of commissioners to examine and appraise the lands and premises of the said John A. Delaney, and to fix the compensation to be paid therefor, and damages, if any, caused by the reason thereof, in the acquisition of said lands and premises for the use of the State of New Jersey, in the construction, widening, straightening and re-grading of State Highway Route No. 25, and notice thereof was therein directed to be given to the said John A. Delaney as owner of said lands and premises, and the persons interested therein, in the manner therein prescribed. 10

5. Pursuant to the said order, notice as therein directed was given to your petitioner, by virtue of its relation to the lands and premises by the said State Highway Commission sought to be acquired, as mortgagee thereof, and of other lands immediately thereto adjacent, a copy of which said notice was duly received by your petitioner, together with a copy of the petition of said State Highway Commission, for the appointment of Commissioners, said order made by said Justice as aforesaid, and of a map to said documents annexed and marked Exhibit A, entitled "New Jersey State Highway Dept. Route 25, Section 7, Edgar Road, Rahway to Route 4, Parcels No. 36A, 36B, 36C, 36E, 36F, J. A. Delaney, Woodbridge Twp., Middlesex Co., April 17, 1928", upon which said map so as aforesaid marked Exhibit A and annexed to said documents received by your petitioner, in the manner aforesaid, the route of the proposed highway over the lands and premises sought to be acquired therefor, was delineated in red, and was so made out and portrayed thereon as to satisfy your petitioner that the streets laid 20 30 40

out and shown upon the exhibit hereto annexed, and likewise appearing upon the map annexed to the documents received by your petitioner as aforesaid, would continue to remain open and available for public use, and by way of affording a means of access to and from all of the lands
10 and premises upon said map hereto annexed and marked Schedule A, laid out and shown, and not included within the parcels sought to be taken by the State Highway Commission as aforesaid, thereby leaving the balance of the entire tract or group of tracts as shown upon said map hereto annexed, available for the use and purposes for which laid out and reasonably intended suitable and available, wherefore, by reason of the premises, and in view of the fact that your petitioner
20 was satisfied that the remaining lands of the said John A. Delaney covered by the mortgage aforesaid, constituted adequate and sufficient security for the balance of the amount by said mortgage secured, and relying upon the situation appearing to your petitioner from an inspection of the State Highway Commission's map as aforesaid, to wit, that said streets thereon shown would remain open and usable for the purpose of access as aforesaid, your petitioner entered no appear-
30 ance before said Justice at the time and place fixed and designated in his order as aforesaid, nor did your petitioner take any further steps with reference to the said condemnation proceedings.

6. Your petitioner is further informed and verily believes that such further proceedings were had in this matter, that Thomas L. Hansen, William C. Wilson and Clarkson P. Stelle were
40 duly appointed Commissioners in said condemnation matter to view and examine said lands and

property sought by said State Highway Commission to be acquired for the purposes aforesaid, and further, that said Commissioners did thereafter make and file their report, wherein and whereby they did report that their just and equitable appraisement of the value of said lands and property of said John A. Delaney, and the damage by reason of the taking thereof, was the sum of $25,641.00, which said report, as your petitioner is informed and believes, was duly filed in the office of the Clerk of Middlesex County, New Jersey, on the 13th day of June, 1929. 10

7. On or about the 12th day of July, 1929, your petitioner received a notice that the said State Highway Commission of the State of New Jersey appealed from the award of said condemnation commissioners, and would apply to the Honorable Peter F. Daly, Judge of the Middlesex County Circuit Court on Tuesday, the 17th day of September, A. D. 1929, at the hour of 10 o'clock, Daylight Saving Time, in the forenoon of said day, at the Court House in the City of New Brunswick in said County and State, to frame the issue in said appeal, to fix a date for the striking of a jury and to fix a day of the trial of the appeal thereby taken and of which notice was thereby given, but your petitioner further says that it has no knowledge as to what proceedings, if any, were taken subsequent or pursuant to the notice of appeal aforesaid. 20 30

8. On or about the 3rd day of September, 1929, your petitioner, for the first time, became aware of the fact that upon the lands in these proceedings sought to be taken for public use as aforesaid, the State Highway Commission had proceeded to construct the State Highway route, and 40

that the same was being constructed upon an elevated embankment or fill, which was solidly constructed and continuous throughout and along the lands of said Delaney hereinbefore specifically designated, without including in said structure any bridge, trestle, tunnel, overpass, underpass,
10 or other aperture or opening which would permit of passage upon or use of the streets or highways upon the map hereto annexed, laid out and shown and known as Elliott Street, Elizabeth Street and John Street, but that on the contrary, said solid and continuous fill and embankment supporting said elevated highway completely closed and obstructed the said streets, thereby completely shutting off all access upon and along the same from points and lands to the northwest of said embank-
20 ment to points and lands to the southeast thereof.

9. The lands and premises now owned by your petitioner and hereinbefore specifically designated and enumerated by reference to said map, lie entirely to the southeast of said highway embankment and prior to the erection and construction thereof, were accessible only by means of and upon said Elliott, Eliazbeth and John Streets, respectively, said lands being entirely enclosed upon all of the other sides thereof, as indicated upon
30 said map hereto annexed, that is to say, upon the northeasterly side by a permanent and unbroken fence separating said lands from the lands of the New Jersey State institutions, through which there is no means or possible opportunity for access to your petitioner's lands; upon the south side thereof by the railroad to New Jersey State Institution and Rahway and Carteret Railroad, over or through which there is no access or opportunity for the same to your petitioner's said lands,
40 and upon the southwest, also by said railroad and

Perth Amboy and Woodbridge Railroad, rendering your petitioner's lands also on that side inaccessible, and through the construction of said solid and continuous elevated embankment by the said State Highway Commission upon the lands of said Delaney so as aforesaid taken and condemned, your petitioner has sustained great damage through the resultant depreciation in value of its said lands so as aforesaid rendered inaccessible, in that the same through their present inaccessibility, are rendered unsalable and useless both for the purposes for which the same were by your petitioner purchased, held, laid out, sub-divided and developed, and also for any other purpose.

10. Your petitioner further says that by virtue of the form of the proceedings taken by said State Highway Commission, for the condemnation of the lands of said John A. Delaney, particularly by virtue of the fact that your petitioner was made a party thereto and considered therein only as a mortgagee of the lands of said Delaney so as aforesaid sought to be taken and condemned, and not by virtue of its ownership of the lands and premises herein now specifically referred to, and through which it has been damaged by the taking of the lands of said Delaney, your petitioner was misled and deprived of any right or opportunity to be heard before said Justice or said commissioners in condemnation, upon the question of the damages by it sustained to its said non-adjacent lands, through the taking of the lands of the said Delaney and the use therof by the said State Highway Commission, for the purposes and in the manner hereinbefore set forth.

11. Your petitioner further says that said The State Highway Commission of the State of New

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Jersey has at no time, either before or since its entry upon and taking possession of the lands used for or affected by the laying-out, construction and maintenance of said State Highway route and appurtenances, offered, paid or secured to your petitioner any compensation for the destruc-
10 tion or deprivation of the value or beneficial use or right or means of enjoyment of its said lands and appurtenances, nor has it instituted, prosecuted or consummated any proceedings in accordance with the statute in such case made and provided for the condemnation of said lands, or the appraisal and fixing of compensation to be paid to your petitioner for the taking away of the means of beneficial enjoyment and user in and of said lands, whereby your petitioner has been
20 wholly or partially deprived of its property, through its taking for public use, without just compensation, to its great loss and damage.

12. Your petitioner further shows that it has heretofore apprised said The State Highway Commission of the State of New Jersey of the facts and circumstances hereinbefore set forth and has caused demand to be made upon said Commission for compensation for damages to and deprivation and taking of the value and means of enjoyment
30 and beneficial user of petitioner's said lands and appurtenances, but said Commission has failed and neglected and still fails to offer petitioner any compensation therefor or to take or institute any proceedings for the appraisal of the value thereof or the fixing of compensation therefor.

Your petitioner is without legal or equitable remedy other than that which the Honorable The Supreme Court of the State of New Jersey may make available to your petitioner under its pow-
40 ers in mandamus, and therefore respectfully prays

that your Honor may make an order directing The State Highway Commission of the State of New Jersey to show cause before the Supreme Court of the State of New Jersey, at a time and place to be therein designated, why a peremptory or alternative writ of mandamus should not issue out of and under the seal of said Court commanding and directing said The State Highway Commission of the State of New Jersey to ascertain and pay to your petitioner such sum as shall be found to be just compensation for the taking and/or diminution of the value of the lands of your petitioner hereinbefore described and damages thereto resulting from the construction and maintenance of said State Highway route, and, upon failure to agree with your petitioner upon the amount so to be paid and awarded, to institute and diligently to prosecute appropriate proceedings, under the provisions of the statute in such case made and provided, for the condemnation of said lands and the appraisal thereof and fixing of the compensation to be paid therefor, and for damages thereto.

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And your petitioner will ever pray, &c.

Autenrieth, Gannon & Wortendyke,
Attorneys for Relator.

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Filed January 18, 1930,

Fred L. Bloodgood,
Clerk, New Jersey Supreme Court.

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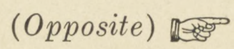
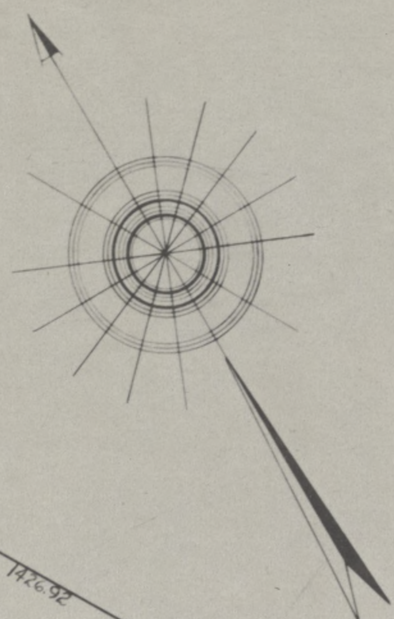
Schedule A.

(*Opposite*) 



MAP No 10

OF PROPERTY OF THE

REALTY & COMMERCIAL CO.

MIDDLESEX COUNTY

STATE OF NEW JERSEY

SCALE 60 FT. PER INCH

ARTHUR STREET

ELLIOT STREET

ELIZABETH STREET

JOHN STREET

RODGERS STREET

CLARENCE STREET

CHESTER STREET

LEEVILLE AVENUE

Uniform Steel Co's Foundry

Willner Wood Working Co's Factory

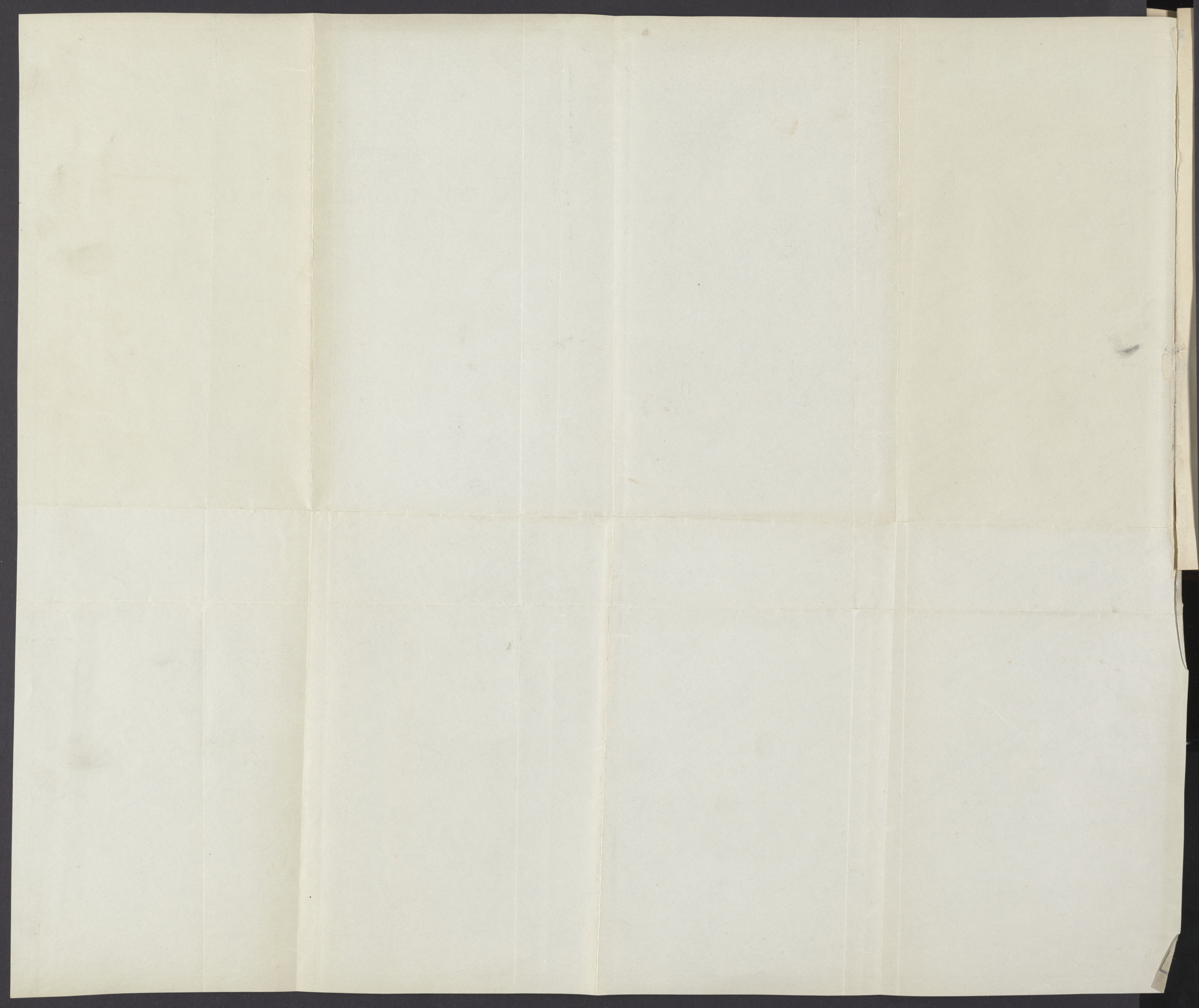
Perth Amboy & Woodbridge Railroad

Railroad to New Jersey State Institution

Rahway & Carteret Railroad

Sold

John A. Doolittle & Co, Eng'rs, Passaic, N.J.



—MAP—

Affidavit of Frank L. Burns.

State of New York, }
County of New York, } ss.:

Frank L. Burns, of full age, being duly sworn, according to law, on his oath deposes and says:

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1. I am President of Burns Holding Corporation, which is a body corporate, organized and existing under the laws of the State of New York, is in good standing in said State, and is duly licensed to transact business in the State of New Jersey.

2. As President as aforesaid, I have had personal charge of the affairs of said corporation
20 with reference to its title to and ownership of lands and premises in the Township of Woodbridge, in the County of Middlesex and State of New Jersey, and by virtue as aforesaid, I am personally cognizant of all of the details of circumstance affecting said lands and premises during the ownership thereof by said corporation, and am duly authorized by said corporation to make this affidavit. I have read the foregoing petition to which this affidavit is annexed, and the mat-
30 ters and things therein set forth and alleged are true of my own knowledge except such as are therein alleged upon information and belief, as to the which I verily believe same to be true.

3. From January 16, 1928, said Burns Holding Corporation was the holder of a certain bond and mortgage, made by one John A. Delaney, to secure the payment of the sum of $5,292, which mortgage covered certain lots forming a portion
40 of the lands and premises in the Township of

Woodbridge aforesaid, owned by said corporation, the said lands and premises of the said Delaney covered by said mortgage having been conveyed by said corporation to said Delaney, the said mortgage covering the same being a purchase money mortgage forming a part of the consideration for said conveyance. The said mortgage, however, has since the date thereof been fully paid off, satisfied and discharged of record. 10

4. Prior to the payment of said mortgage and while said Burns Holding Corporation was the holder thereof, the said corporation received what appeared to be a copy of a notice, petition, affidavit, map and order, in the matter of the petition of the State Highway Commission of the State of New Jersey, for the condemnation of lands of John A. Delaney, wherefrom it appeared that the said Burns Holding Corporation was made a party to said condemnation proceedings by virtue of its holding a mortgage as aforesaid upon the lands of said Delaney, part of which was sought to be taken for public use in said condemnation proceedings. Upon receipt of said documents, I examined the map annexed thereto, which is more specifically referred to in the petition to which this affidavit is annexed, and noted therefrom that the lands proposed to be taken for public use as aforesaid, were delineated upon said map and outlined in red thereon, in such a manner as to indicate to me that the streets as shown upon said map, upon which said lands abutted, to wit, Arthur Street, Elliot Street, Elizabeth Street and John Street, were not to be taken for the public use sought to be served by said condemnation, but would remain public streets available for public use and particularly

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for access along the same to other lands of said Burns Holding Corporation, still by it owned, and not having been by it conveyed to said Delaney, and lying at some distance to the southeast of the route of said proposed highway for which the lands of said Delaney were sought to be
10 taken, and at no point adjacent thereto and so situated as to be in no respect affected thereby, provided said streets hereinbefore named continued to remain open for public use and access as aforesaid. Knowing that the balance of the lands of said Delaney covered by said mortgage would constitute sufficient security for the payment of the amount secured thereby, even with the elimination of the lands of said Delaney actually sought to be condemned for the purpose of
20 said State Highway, I determined that the notice as aforesaid, that is to say, of the application by the State Highway Commission of the State of New Jersey, for the appointment of commissioners in condemnation, did not require any appearance on behalf of said Burns Holding Corporation as mortgagee, nor because of the map annexed to said notice, in any other capacity, and for that reason and that reason only, no appearance was made on behalf of said Burns Holding
30 Corporation before the Justice of the New Jersey Supreme Court at the time and place by him fixed in the order of April 10, 1929, for the hearing on said petition in condemnation.

5. On or about the 3rd day of September, 1929, Mr. H. Hansen, who is employed by said Burns Holding Corporation to manage the lands and premises by it as aforesaid owned in the Township of Woodbridge, informed me that the work
40 of construction of the said highway route over

the lands of Delaney condemned or sought to be condemned and taken for public use by the State Highway Commission of the State of New Jersey, had reached a point where in carrying the same across the streets hereinbefore named, the same had been effected by the construction of a solid fill embankment of appreciable height above the 10 level of said streets forming part of a continuous line of similar fill embankment, constituting the foundation of said highway for the entire length of the route over said lands of Delaney and said streets, with the result that all of said streets were and are now completely shut off and obstructed for any access along the same, this situation placing the lands of said Burns Holding Corporation hereinbefore referred to in a cul-de-sac, whereby they are rendered absolutely inac- 20 cessible and therefore worthless to said Burns Holding Corporation, either for residential or industrial purposes. The said lands being now cut off by the high embankment as aforesaid across the streets hereinbefore mentioned, precludes access to said petitioner's lands from the northwest, a high fence marking the boundary of the New Jersey State Institutions, constituting what is commonly known as the Rahway Reformatory, completely cuts off access to petitioner's said 30 lands from the northeast and east, the right of way and tracks of the railroad to New Jersey State Institution and Rahway and Carteret Railroad completely cut off access to petitioner's said lands from the southeast, south and southwest and the right of way and tracks of the Perth Amboy and Woodbridge Railroad completely cut off access to petitioner's said lands from the southwest and west. Because of the circumstances aforesaid, petitioner's said lands are entirely 40

bottled up and deprived of access, to petitioner's great loss and damage.

6. Promptly upon being made aware of the situation above outlined, I caused proceedings to be instituted on behalf of said Burns Holding Corporation and by way of Rule to Show Cause for the reopening of the condemnation proceedings above mentioned, in order that the value of the lands of said Burns Holding Corporation or beneficial interest therein or right of user or enjoyment thereof might be appraised in said proceeding and an award of compensation made therein for the taking and/or deprivation of said lands the beneficial interest and right of user and enjoyment therein.

7. I am informed and verily believe that such proceedings were dismissed but without prejudice to the right of said Burns Holding Corporation to institute other proceedings by way of a different remedy for the same cause. I have read the foregoing petition and know the contents thereof and the same are true.

8. I am advised and verily believe that unless said The State Highway Commission of the State of New Jersey is compelled by appropriate process of this Honorable Court to ascertain and pay to said Burns Holding Corporation, the value of the beneficial interest in its said lands and appurtenances, of which it has been deprived and for the damages by it sustained through injury to and diminution of said lands and appurtenances, or is compelled upon failing to agree upon the amount of said compensation so as aforesaid to be paid, to institute appropriate proceedings for the con-

demnation of said lands and appurtenances, to appraise the value thereof and fix the compensation to be paid for the taking for public use of the right and means of beneficial user and enjoyment thereof, through the construction of said State Highway route, the said lands and appurtenances of said Burns Holding Corporation will continue to remain absolutely valueless to it, and a practical confiscation of said lands and appurtenances and deprivation of the value thereof without compensation will result, through the construction and maintenance of said State Highway route and the occupation and possession by the said State Highway Commission for the purposes of the same of the lands now actually underlying the highway route aforesaid.

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Frank L. Burns.

Subscribed and sworn to before me this 9th day of January, 1930.

Edward R. Abbot,
Notary Public, New York County.

(N. P. Seal)

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Affidavit of Reynier J. Wortendyke, Jr.

State of New Jersey, }
County of Hudson, } ss.:

Reynier J. Wortendyke, Jr., of full age, being
10 duly sworn according to law, upon his oath deposes and says:

1. I am a member of the firm of Autenrieth, Gannon & Wortendyke, attorneys and counsellors at law of the State of New Jersey, with offices at No. 921 Bergen Avenue, Jersey City, N. J., being the attorneys for Burns Holding Corporation, a body corporate, the petitioner in the foregoing petition named, and am the member of said firm
20 who has had and now has in personal charge, the conduct of the various matters connected with the claims of said petitioner as in said petition set forth.

2. On behalf of said petitioner, I heretofore, as one of its attorneys, to wit on the 26th day of October, 1929, obtained in the matter of the petition of the State Highway Commission of the State of New Jersey for the condemnation of lands of John A. Delaney, an order in this Court
30 and in the said proceeding, directing the State Highway Commission of the State of New Jersey and others to show cause why said condemnation proceedings should not be reopened and the commissioners in condemnation appointed therein should not be directed to examine and appraise the lands of said Burns Holding Corporation in the foregoing petition described and affix the amount, if any, which should be awarded to said Burns Holding Corporation as compensation for
40 the taking or diminution in value of said lands

and consequential damages thereof, through the condemnation of the lands of said John A. Delaney and the construction and maintenance of the State Highway route for which said lands of Delaney were condemned.

3. Upon the return of said rule to show cause, the said The State Highway Commission of the State of New Jersey through its attorney, appeared before the Honorable Clarence E. Case, one of the Justices of the Supreme Court of the State of New Jersey, before whom said rule to show cause was made returnable, and after hearing argument thereon the said Justice discharged said rule but without prejudice and without costs, said order discharging said rule being entered in said Court on November 22nd, 1929.

4. On November 18th, 1929, I wrote a letter on behalf of said Burns Holding Corporation to the State Highway Commission of the State of New Jersey, c/o A. Lee Grover, Esq., Clerk thereof, addressed to State House Annex, Trenton, N. J., and enclosed the same in an envelope bearing the return address of said attorneys for said Burns Holding Corporation and having affixed thereto stamps of the requisite postage duly prepaid, did deposit said letter in the United States Post Office, at the City of Jersey City, New Jersey, for transmission to the addressee thereof. Since the date of mailing said letter which was the date of said letter, I have received no response whatsoever from said State Highway Commission, although said letter was never returned to the return address appearing thereon. A true copy of said letter is hereto annexed.

New Jersey State Library

5. After waiting several weeks and receiving no reply to said letter, I wrote to Col. George T. Vickers, at his office in Jersey City, who was the attorney appearing for said State Highway Commission in proceedings on rule to show cause hereinbefore mentioned, requesting that some reply be 10 forthcoming to my said letter to the State Highway Commission. I have, however, never received any reply.

6. I have read the foregoing petition and the facts therein alleged which have to do with transactions in which I was personally involved, are true.

REYNIER J. WORTENDYKE, JR.

20 Subscribed and sworn to before me this 9th day of January, 1930.

ALFRED H. GRIMMINGER,
Notary Public of N. J.

(Seal)

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Letter Annexed to Affidavit of Reynier J. Wortendyke, Jr.

November 18th, 1929.

The State Highway Commission of the
State of New Jersey,
c/o A. Lee Grover, Esq., Clerk,
State House Annex,
Trenton, N. J.

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Gentlemen:

We have been retained by Burns Holding Corporation, a body corporate, to invoke such remedies as under the laws of this state are available for what the said Burns Holding Corporation deems to have been a taking by your Honorable Body of lands of said Burns Holding Corporation in the Township of Woodbridge, Middlesex County, New Jersey, without the making of just compensation therefor. The lands in question owned by said Burns Holding Corporation with reference to which complaint is made, are known and designated as lots Nos. 85 to 110, both inclusive, 264 to 283, both inclusive, 285 to 293, both inclusive, and 436 to 454, both inclusive, upon "Map No. 10 of property of the Realty & Commercial Co., Middlesex County, State of New Jersey, made by John A. Doolittle, C. E., and filed January 6, 1904, in the office of the Clerk of the County of Middlesex in the State of New Jersey."

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The taking of which our client complains resulted from and by the construction of a certain portion of the State Highway system of the State of New Jersey, known as route No. 25 over certain lands in the township of Woodbridge in the County of Middlesex aforesaid, designated as parcels 36 A, B, C, E and F, as indicated by a certain plan filed in the office of the clerk of Middlesex

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Letter Annexed to Affidavit of Reynier J. Wortendyke, Jr.

County, showing particularly the location of the center line and right of way lines of the State Highway leading from Edgar Road, Rahway, to Route No. 4, as adopted by the State Highway Commission, which plan is entitled "New Jersey
10 State Highway Department, General Property Key Map, Route 25, Section 7, Edgar Road, Rahway, to Route 4, showing existing right of way and parcels to be acquired in the City of Rahway, Union County, and Woodbridge township, Middlesex County, March, 1928," and also shown on a plan attached to a certain notice dated April 12, 1929, in the matter of the Petition of the State Highway Commission of the State of New Jersey, for the Condemnation of lands of John A.
20 Delaney, entitled "New Jersey State Highway Department, Route 25, Sec. 7, Edgar Road, Rahway, to Route 4, Parcels Nos. 36A, 36B, 36C, 36E and 36F, J. A. Delaney, Woodbridge township, Middlesex Co., April 17, 1928," and in said notice to which said last mentioned plan was attached, more specifically bounded and described. The lands of said Delaney were by you duly condemned, and our client being made a party only by virtue of the fact of its ownership of a mort-
30 gage covering Delaney's lands, which has since been paid off.

Prior to your entry upon and taking for public use the lands of said Delaney last above referred to, the lands of our client hereinbefore designated, were accessible by a series of parallel streets shown upon the said Map No. 10 of Property of the Realty & Commercial Co., etc., as Arthur Street, Elliot Street, Elizabeth Street and John Street. The taking of said lands of Delaney and
40 the construction thereon of the high embankment or fill upon which your said new highway is con-

structured, completely shut off all of said streets, and in fact, every means of access to and from the lands of our client, with the result that the highway as presently constructed, leaves the lands of our client completely bottled up and inaccessible to any type of traffic, and therefore, valueless to our client. These lands, consisting of the 74 lots which we have itemized, were reasonably worth the sum of $200. per lot prior to the construction of the highway embankment in question, and are now worthless to our client.

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We, therefore, respectfully request and demand that for the damage which our said property has sustained through our client's having been deprived of the value of its said lots in the manner aforesaid, our client be forthwith compensated, and that upon failure of our said client and your Honorable Body to agree upon the amount to be paid and awarded our client for the taking as aforesaid, that you proceed forthwith to condemn said lands under and by virtue of the provisions of the Eminent Domain Act of 1900, and the amendments thereof and supplements thereto.

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We will thank you, not only to acknowledge receipt of this communication, but to accord us the courtesy of taking a definite position one way or the other with reference to the demand therein contained.

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Respectfully yours,

AUTENRIETH, GANNON & WORTENDYKE,
By: Reynier J. Wortendyke, Jr.,
Attorneys for Burns Holding Corporation,
a body corporate.

RJW,Jr/W

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Rule to Show Cause.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, a body corporate, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Rule to Show Cause.

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On reading the petition and affidavits filed in the above entitled cause, it is on this 18th day of January, 1930, ORDERED that The State Highway Commission of the State of New Jersey do show cause before this Honorable Court, at the State House, in the City of Trenton, on Tuesday, the sixth day of May, 1930, at eleven o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why a peremptory or alternative writ of mandamus should not issue out of and under the seal of this Honorable Court, commanding that the said The State Highway Commission of the State of New Jersey do take such steps and proceedings and enter into such negotiations as may be appropriate for the ascertainment by agreement if possible, of the amount of compensation to be awarded and paid to Burns Holding Corporation for the taking and/or diminution in value, or deprivation of beneficial user and enjoyment in the lands and appurtenances of the said Burns Holding Corporation in the Township of Woodbridge, Middlesex County,

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New Jersey, which are laid down and designated as lots Nos. 85 to 110, both inclusive, 264 to 283, both inclusive, 285 to 293, both inclusive and 436 to 454, both inclusive, upon "Map No. 10 of property of the Realty and Commercial Co., Middlesex County, State of New Jersey", made by John A. Doolittle, C. E., and filed January 6, 1904, and upon failure or inability to agree with said Burns Holding Corporation upon the amount of such award, to institute and diligently prosecute and consummate such proceedings for the condemnation of said lands and appurtenances and/or the interest of said Burns Holding Corporation therein and/or the fixing and awarding of compensation for damages thereto sustained as are provided and directed by the provisions of the Eminent Domain Act of the Legislature of the State of New Jersey of 1900 and the amendments thereof and supplements thereto, and it is further ORDERED that both parties hereto have leave to take depositions.

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Let this Rule be entered in the minutes.

CLARENCE E. CASE,
J. S. C.

Entered Jan. 20, 1930, on motion of
AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Relator.

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Filed Jan. 20, 1930,

FRED L. BLOODGOOD,
Clerk, New Jersey Supreme Court.

Service of certified copy of Rule to Show Cause acknowledged this 24th day of January, 1930.

WILLIAM A. STEVENS,
Attorney General.

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by GEORGE T. VICKERS,
Asst. Atty. General.

Stipulation of Facts.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, a body corporate, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Stipulation of Facts.

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It is hereby stipulated and agreed, by and between the respective parties hereto, that, in lieu of the taking of depositions by either of the parties as provided in the rule to show cause made herein on the 18th day of January, 1930, the following shall be taken and deemed to be the facts upon which the argument on the return of said rule shall be based and predicated, that is to say:

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1. Relator was on March 22, 1929, and still continues to be the owner in fee simple of certain lands and premises in the Township of Woodbridge, in the County of Middlesex and State of New Jersey, which are laid down and designated as lots Nos. 85 to 110, both inclusive, 264 to 283 both inclusive, 285 to 293, both inclusive and 436 to 454, both inclusive, upon "Map No. 10 of property of the Realty and Commercial Co., Middlesex County, State of New Jersey" made by John A. Doolittle, C. E., and filed January 6, 1904, in the office of the Clerk of the County of Middlesex in the State of New Jersey, a true copy of which said map is hereto annexed and marked Schedule A.

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2. Prior to the construction of the State Highway hereinafter mentioned, the only means of ingress to and egress from relator's said lands was that afforded by and over Arthur Street, Elliot Street, Elizabeth Street, John Street and Chester Street, as shown and laid out upon said map. 10

3. On or prior to October 23, 1928, the respondent determined to construct, widen, straighten and regrade State Highway Route No. 25, and, by its resolution adopted on the date aforesaid, determined to acquire, in the name of the State of New Jersey, for the purposes aforesaid, a strip of land extending 50 feet in width to either side of a centre line running from a point at or about the intersection of the northwesterly line of lot 65 with the 20 southwesterly line of Arthur Street as shown on said map and running southwesterly in a straight line to or about to the intersection of the southeasterly line of lot 576 with the northeasterly line of lands now or formerly of the Pennsylvania Railroad Company, all as shown on said map, the said strip being included within lands of one John A. Delaney, and portions of the street areas of Arthur, Elliot, Elizabeth and John Streets as laid out on said map. 30

4. Pursuant to said determination respondent proceeded to condemn said lands of Delaney, and in said proceedings gave notice to relator *qua* mortgagee of said lands, and an award was made to said Delaney of compensation for the taking of his said lands and damages and said Delaney thereafter paid off and satisfied relator's said mortgage.

5. Respondent has, as relator for the first time 40 learned on September 3, 1929, constructed said State Highway Route No. 25, upon, along and over

said strip of land so as aforesaid acquired upon an elevated embankment or fill, varying along its length from 20 to 30 feet in height, which is solidly constructed and continuous throughout, and is provided with no bridge, trestle, tunnel, overpass, underpass or other aperture or opening which would permit of passage upon or along Arthur Street, Elliot Street, Elizabeth Street or John Street, as laid out on said map, but, on the contrary, said embankment is continuous and completely shuts off all means of ingress and egress to and from relator's said lands unless a ramp or road be built connecting with said elevated highway.

6. Relator had no notice, either prior to or during said condemnation proceedings, except notice of condemnation proceedings as mortgagee, that the nature of the construction of the said highway would result in depriving relator's said lands of all means of ingress and egress, except by some ramp or road not now provided for.

7. The construction and location of said State Highway has substantially reduced relator's said lands in value.

8. Respondent refuses to make relator any offer to pay any sum of money as compensation for damages to relator's said lands, and refuses to take any proceedings for the condemnation thereof.

Autenrieth, Gannon & Wortendyke,
Attorneys for Relator.

William A. Stevens,
Atty. Gen. of N. J.,
by George T. Vickers,
Asst. Atty. Gen.,
Attorney for Respondent.

Filed Apr. 17, 1930,
Fred L. Bloodgood,
Clerk, New Jersey Supreme Court.

Per Curiam.

NEW JERSEY SUPREME COURT.

(No. 219—May Term, 1930.)

BURNS HOLDING CORPORATION,
Relator,

v.

STATE HIGHWAY COMMISSION,
Respondent.

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Argued May 7, 1930; decided May 26th, 1930.
On rule to show cause for a mandamus. 20
Before Justices Parker, Campbell and Bodine.
For the relator, Reynier J. Wortendyke, Jr.

PER CURIAM. The application is for a mandamus to require the State Highway Commission to institute and complete a proceeding under the Eminent Domain Act of 1900 (C. S. 2182) to assess and pay to relator the damage alleged to have been sustained by it on account of the building of part of a new state highway between Rahway and Metuchen, between the tracks of the Pennsylvania 30 Railroad and the state reform school. The Perth Amboy branch of that railroad crosses the tract of which relator's property is a part, from northwest to southeast.

No land of relator has been or is to be taken. The claim is exclusively for injury to the value of such land because by the construction of the highway on an elevated embankment to the westward of such land it is cut off from communication with the outer world unless at large expense it be con- 40

nected with the elevated new highway by one or more inclined causeways or ramps. There seems to be no denial of the claim—in fact, it is stipulated—that whereas before the construction relator's lands were accessible over certain mapped streets running northwest and southeast and parallel with the Perth Amboy branch of the railroad, the new embankment crosses said streets to the west of relator's land and effectually closes them unless they be graded up to the new land.

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Notwithstanding the apparent hardship of the case, we have to conclude that this rule must be discharged. Counsel for prosecutor cites no authority in this state in support of the rule; and while in some other jurisdictions the right to damages is recognized, such judicial opinion as we find in this state is apparently to the contrary, in the absence of statute conferring the right. In *Hatt* v. *Newark,* 79 N. J. L. 550, Justice Bergen, speaking for the Court of Errors and Appeals, said:

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> "The right of the state to destroy public improvements of this class without compensation is not limited by the constitution, and except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it, or the payment by the city of compensation to any land-owners for damages."

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See also *Newark and Bloomfield R. R. Co.* v. *Montclair,* 84 *Id.* 46. In *Harrison Land Co.* v. *Crucible Steel Co.,* 82 N. J. Eq. 419, the late Vice Chancellor Emery remarked, citing the above and other cases:

> "Complainant's land is apparently damaged or injuriously affected by the vacation of the street, but its land is neither taken nor

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appropriated, and therefore does not seem to come within the provision of Section 56 (of the charter) for compensation. Unless such provision is expressly directed by statute to be made, streets may, under our constitution, be vacated without compensation."

The rule to show cause will therefore be discharged; but as the quoted decisions seem to some extent *obiter,* we are disposed to accord to relator an opportunity to review this ruling. It may be that the case is within Section 6 of the Mandamus Act (C. S. 3216) which permits such review; but to avoid any question on that score, if the relator so elects, a record may be made up consisting of an alternative writ and return, and such other pleadings as will properly present the point now decided, with a judgment in accordance with the views above expressed, to the end that the matter may be reviewed by the Court of Errors and Appeals.

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Filed May 26, 1930,

Fred L. Bloodgood,
Clerk of New Jersey Supreme Court.

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Notice of Election.

NEW JERSEY SUPREME COURT

MAY TERM, 1930.

BURNS HOLDING CORPORATION, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. On Rule to Show Cause. Notice of Election.

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WHEREAS, as appears from its opinion filed on the 26th day of May, 1930, the Court has decided that the Rule to Show Cause herein should be discharged, but is nevertheless, disposed to accord to relator herein an opportunity to review the said ruling of said Court, and has accorded leave to relator if the latter so elects to have a record made up consisting of an alternative writ and return, and such other Pleadings as will properly present the point now decided with a judgment in accordance with the views expressed in its said opinion to the end that the matter may be reviewed by the Court of Errors and Appeals;

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NOW THEREFORE, notice is hereby respectfully given that Burns Holding Corporation, the relator in the above entitled cause named hereby, respectfully elects to take advantage of the leave accorded by this Court to make up a record for the review of this Court's decision in the Court of Errors and Appeals.

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for and of Counsel
with Relator.

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Filed, June 24, 1930.

FRED L. BLOODGOOD,
Clerk, New Jersey Supreme Court.

Alternative Writ of Mandamus.

NEW JERSEY SUPREME COURT

BURNS HOLDING CORPORATION, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Alternative Writ of Mandamus.

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NEW JERSEY, SS.:

THE STATE OF NEW JERSEY to THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, GREETING:

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1. Whereas Burns Holding Corporation, a body corporate, organized and existing under the laws of the State of New York, is and at all times herein mentioned was the owner in fee simple of certain lands and premises in the Township of Woodbridge, in the County of Middlesex and State of New Jersey, which are laid down and designated as lots Nos. 85 to 110, both inclusive, 264 to 283, both inclusive, 285 to 293, both inclusive, and 436 to 454, both inclusive, upon "Map No. 10 of property of the Realty and Commercial Co., Middlesex County, State of New Jersey," made by John A. Doolittle, C. E., and filed January 6, 1904, in the office of the Clerk of the County of Middlesex in the State of New Jersey; and

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2. Whereas prior to the construction, widening, straightening and regrading by the State Highway Commission of the State of New Jersey of

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the section of State Highway Route No. 25, hereinafter referred to, between Rahway and Metuchen, in this State, the lands of said Burns Holding Corporation hereinbefore mentioned, being then bounded on the northeasterly side by lands of New Jersey State Institutions and upon the
10 southerly and southwesterly side thereof by lands of said New Jersey State Institutions, of Rahway and Carteret Railroad Co. and of Perth Amboy & Woodbridge Railroad Co., were accessible only over, through or by means of Arthur Street, Elliot Street, Elizabeth Street, John Street and Chester Street, delineated upon the map hereinbefore referred to, which said streets had previously to the dates herein mentioned, been dedicated to public use; and
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3. Whereas the said The State Highway Commission of the State of New Jersey did heretofore take and condemn certain lands of one John A. Delaney laid out and delineated upon the map aforesaid as lots 62 to 69, both inclusive, 124 to 132, both inclusive, 244 to 252, both inclusive, 305 to 312, both inclusive, 419 to 426, both inclusive, and 462 to 469, both inclusive, which said lands form a strip of land running from northeast to
30 southwest across the total area laid out upon and included within the boundaries of said map, and did construct and erect a section of its certain state highway route No. 25 upon an elevated embankment or fill, solidly constructed and continuous throughout, of a width throughout of 100 feet, and varying along its length from 20 to 30 feet in height, and provided with no bridge, trestle, tunnel, overpass, underpass or other aperture, opening or ramp or any means or instrumentality
40 by means of which passage or repassage upon or

along said Arthur Street, Elliot Street, Elizabeth Street or John Street could be had, whereby ingress to or egress from the said lands of said Burns Holding Corporation could or now can be obtained, with the result that said lands of said Burns Holding Corporation became and still are entirely surrounded and enclosed by the said lands of said New Jersey State Institutions, Rahway and Carteret Railroad Co., Perth Amboy and Woodbridge Railroad Co. and the line of embankment of said state highway route No. 25, and are completely shut off from and deprived of all access to or from points lying without the area so thereby closed off and confined; and

4. Whereas through the actual taking in condemnation of said lands of said Delaney and the construction upon and along the same of said state highway route and embankment, the said lands of said Burns Holding Corporation, although not physically taken, have been rendered valueless to the owner thereof through the resultant deprivation of said owner's opportunity for the use and enjoyment of its said lands, by the complete closing up and shutting off of the same, and rendering the same inaccessible and the taking away from the same of the previously existing only means of ingress and egress through the cutting and shutting off of the public easements in the streets shown upon said map and by the filing thereof dedicated and known as Arthur Street, Elliot Street, Elizabeth Street and John Street; and

5. Whereas, although demand therefor has been duly made by said Burns Holding Corporation, said The State Highway Commission of the State of New Jersey has failed and refused to negoti-

ate and agree with said Burns Holding Corporation for the payment or awarding to the latter of such amount as will compensate said landowner for the deprivation of or diminution in value of its said lands resulting from their being deprived of all means of access as aforesaid, and
10 has also neglected and refused to institute or diligently prosecute or consummate such proceedings for the condemnation of said lands and the appurtenances thereof, and/or the interest of said Burns Holding Corporation therein, or the fixing and awarding of compensation for said damages thereto sustained, whereby said Burns Holding Corporation has been deprived of its substantial property without compensation;

20 6. The said Burns Holding Corporation charges and insists that the construction and maintenance of said section of said state highway route No. 25 upon and along the embankment and fill hereinbefore described, and the closing and deprivation of all easements thereby in Arthur Street, Elliot Street, Elizabeth Street and John Street, as laid out upon the map hereinbefore mentioned, and the resultant closing of said streets and deprivation of said Burns Holding Corporation of its theretofore existing sole means and opportunity of in-
30 gress to and egress from its said lands constitutes a taking of said lands of said Burns Holding Corporation to the extent of the total value thereof, and that the neglect and refusal of said The State Highway Commission of the State of New Jersey to pay to said Burns Holding Corporation and/or to take such proceedings as are provided by law, for the determination of an award of damages to said Burns Holding Corporation for the deprivation of or diminution in the value of its said lands
40 so as aforesaid cut off from and deprived of all

access, is contrary to and in violation of the mandates and provisions of the Fifth Amendment to the Constitution of the United States of America, of Section 16 of Article I of the Constitution of the State of New Jersey, of the Road Act of 1850 of said State of New Jersey, of the Eminent Domain Act of said State, of the State Highway Act, the various supplements to and amendments of the statutory enactments aforesaid and the decisions of the courts of this State and of the United States interpreting the foregoing statutory and constitutional provisions, and has resulted in depriving said Burns Holding Corporation of all means and right of beneficial user and enjoyment in its said lands and constitutes a taking of the said lands and property rights of said Burns Holding Corporation without just compensation, in violation of the statutory and constitutional provisions aforesaid, and further, contrary to the spirit and meaning of the first clause of Article I of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States.

We, therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that immediately after the receipt of this writ you do pay to Burns Holding Corporation, by agreement, if possible, an amount equivalent to the extent to which the value of said Burns Holding Corporation's lands hereinbefore described has been diminished or destroyed, and, upon failing to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be awarded to said Burns Holding Corporation as compensation for the damages by it sustained through the said diminution in or destruction of the value of its

said lands; or cause to us of the contrary therefore signify, lest in your default complaint come to us repeated; and how you shall execute this, our command, certify to our Justices of our Supreme Court of Judicature, at Trenton, on June 14th, 1930, together with this, our writ, and this
10 in no wise omit at your peril.

Witness, William S. Gummere, Esq., Chief Justice of our said Supreme Court, at Trenton, the 14th day of June, 1930.

Fred L. Bloodgood,
Clerk.

Autenrieth, Gannon & Wortendyke,
Attorneys.
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Allowed June 14, 1930.
Let it be sealed.
C. W. Parker, J. S. C.,
For the Court.

Filed, June 24, 1930.
Fred L. Bloodgood,
Clerk, New Jersey Supreme Court.

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Demurrer to Alternative Writ of Mandamus.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Demurrer to Alternative Writ of Mandamus.

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The State Highway Commission of the State of New Jersey, the respondent, by William A. Stevens, Attorney General of New Jersey, its attorney, comes and says that the alternative writ of mandamus allowed to relator herein should be dismissed for that the matters and things therein recited, alleged and charged as therein set forth are insufficient in law to entitle the relator to the relief by it therein and thereunder sought, and respondent, therefore, prays that said writ be dismissed.

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WILLIAM A. STEVENS,
Attorney General of the State of New Jersey, Attorney for Respondent.

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Filed, June 24, 1930.

FRED L. BLOODGOOD,
Clerk, New Jersey Supreme Court.

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Joinder in Demurrer.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, Relator, *vs.* THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent.	On Mandamus. Joinder in Demurrer.

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And the relator, Burns Holding Corporation, with reference to the demurrer of the respondent, The State Highway Commission of the State of New Jersey, to the alternative writ of mandamus herein allowed, says that:

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1. The matters and things in said alternative writ of mandamus set forth, alleged and charged are sufficient in law and that relator is entitled to the relief herein sought under and by virtue of the laws of the State of New Jersey, the Constitution of said State and the Constitution of the United States of America, and relator is ready to verify and prove the same as the Court shall direct, and prays judgment thereon.

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AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Relator.

Filed June 24, 1930,
FRED L. BLOODGOOD,
Clerk, New Jersey Supreme Court.

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Rule for Judgment.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION,
Relator,

vs.

THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY,
Respondent.

On Mandamus.

Rule for Judgment.

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An alternative writ of mandamus having been allowed by this Court to Burns Holding Corporation, the relator herein, commanding and enjoining The State Highway Commission of the State of New Jersey, the respondent therein, to pay to the said relator, by agreement, if possible, an amount equivalent to the extent to which the value of said relator's lands described in said writ has been diminished or destroyed, and, upon failure to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be awarded to said relator as compensation for the damages by it sustained through the diminution in or destruction of the value of its said lands, or cause to this Court of the contrary therefor to signify, etc.; and said respondent having filed its demurrer to said alternative writ of mandamus, contending that the matters and things therein set forth, alleged and charged are not sufficient in law to entitle the relator to the relief thereby sought; and relator having filed its joinder in said demurrer and having duly brought the issue framed thereby before this Court, for its decision; and

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It appearing that relator is the owner of certain lands and premises in the Township of Woodbridge in the County of Middlesex, and State of New Jersey, and that the respondent has heretofore taken in condemnation certain lands and

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premises in the vicinity of but not immediately abutting upon, contiguous to or owned by said relator, and has erected thereon a certain highway consisting of a fill or embankment by which certain mapped streets heretofore subject to public easement and affording the only means of access
10 to relator's said lands have been effectually closed and shut off and all access to said lands of said relator has been thereby effectually cut off from communication with the outer world, unless, at large expense, said lands be connected with said elevated new highway by one or more inclined causeways or ramps; and

This Court being of the opinion that relator has sustained damage through the cutting off of access to its said lands in the manner aforesaid, but
20 that the law of this State affords no authority for the granting to relator of the relief invoked for the causes set forth, alleged and charged in the alternative writ herein, and being further of the opinion that said matters and things in said alternative writ set forth, alleged and charged are not sufficient in law to entitle relator to the relief sought;

It is, therefore, on this 14th day of June, 1930, ORDERED and ADJUDGED that final judgment be entered herein against Burns Holding Corporation,
30 the relator herein, and in favor of the State Highway Commission.

Let the foregoing be entered in the minutes.

CHARLES W. PARKER,
Justice of the New Jersey
Supreme Court.

Rule actually entered this 24th day of June, 1930, on motion of Autenrieth,
40 Gannon & Wortendyke, Attorneys for Relator.

Filed June 24, 1930,
FRED L. BLOODGOOD,
Clerk, New Jersey Supreme Court.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

BURNS HOLDING CORPORATION, a body corporate, Relator-Appellant, *vs.* STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent-Appellee.	On Mandamus. Notice of Appeal.

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To the above named respondent-appellee, and Honorable William A. Stevens, Attorney General of the State of New Jersey, Attorney for said respondent-appellee:

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PLEASE TAKE NOTICE that Burns Holding Corporation, a body corporate, the relator above named, hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court.

Said appeal is based upon the following reasons, viz.:

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1. That the New Jersey Supreme Court committed error in sustaining the demurrer of the respondent to the relator's alternative writ of mandamus.

2. That the New Jersey Supreme Court committed error in awarding judgment in favor of said respondent and against said relator upon said demurrer.

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3. That the New Jersey Supreme Court committed error in refusing to allow to relator a peremptory writ of mandamus upon return of said relator's Rule to Show Cause therefor.

4. That the New Jersey Supreme Court committed error in discharging relator's Rule to Show Cause herein.

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Respectfully, etc.,

Autenrieth, Gannon & Wortendyke,
Attorneys for Relator-Appellant.

Filed July 24, 1930.

Fred L. Bloodgood,
Clerk, New Jersey Supreme Court.

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Service of the within Notice of Appeal is hereby acknowledged on behalf of the respondent-appellee this 21st day of July, 1930.

William A. Stevens,
Atty. Gen. of State of New Jersey.

George T. Vickers,
Asst. Atty. Gen. of State of New Jersey.

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113OCT.I.1930

New Jersey Court of Errors & Appeals.

BURNS HOLDING CORPORATION, a body corporate, Relator-Appellant, *vs.* STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent-Appellee.	ON BILL

BRIEF FOR RESPONDENT--APPELLEE

For the purpose of reviewing the decision of the Supreme Court adverse to the relator-appellant, and as suggested in the per curiam opinion of the Court below, an issue has been framed to bring the matter into this Court. The relator-appellant secured a rule to show cause why a peremptory writ of mandamus should not issue out of the Supreme Court requiring the State Highway Commission to institute and complete condemnation proceedings to assess damages to the relator-appellant on account of the building of part of a new highway over lands of another proximate to the lands of the relator-appellant.

In brief, the determination by the Supreme Court rests upon the fact that no land of the relator has been or is to be taken; and that its claim for damages is exclusively for injury to the value of such land because the highway, constructed upon an embankment created for

that purpose by the State Highway Commission isolates some of the land of the relator, unless at large expense that land be connected with the new highway by ramp or inclined causeway.

To visualize the facts important to an adjudication, the following statement appearing from the evidence in the case is submitted.

The relator-appellant owned a tract of land through which the new highway has been built. The land and slope right easements for the building of this highway were acquired by the State through condemnation proceedings in which the award ultimately terminated in a judgment for the value of the acquisition, together with resultant damages to the remainder. These condemnation proceedings were brought against one John J. Delaney, owner of the land to be acquired and the remainder abutting directly on both sides for the full length of that portion of the highway with which this case concerns itself.

The respondent-appellant, prior to and at the time of the condemnation proceedings, was the mortgagee of the lands and remainder involved in the condemnation proceedings and, as such mortgagee, was made a party defendant to the condemnation proceedings, receiving the usual legal notice, together with a map of the proposed highway route and rights to be acquired.

By reference to the map, made a part of the record in this case, and the extent and character of the holdings of Delaney, as evidenced by the lot numbers set forth in the stipulation of facts and shown on the map in question, it will be seen that, as a matter of law, ingress and egress of the remainder land, together with all consequential damages, by reason of the taking for this highway, were properly mat-

ters for consideration by the commissioners in condemnation and the Court and jury on the appeal which resulted in the judgment in favor of the land owner.

Neither in the condemnation proceedings nor upon the appeal, which was a trial de novo, did the relator-appellant intervene to make any claim; although given full notice of the contemplated taking by the State, as above indicated.

Against the State's contention that the relator-appellant is estopped at this time from any claim for damage, it asserts that its interest in the condemnation proceedings was only that of mortgagee. It cannot be successfully contended that relator-appellant was not apprised by being made a defendant in the condemnation proceedings of the construction character of the new highway. This for the reason that as a matter of common sense, as well as presumptive knowledge of existing laws of this State, the projected highway must necessarily be elevated to cross the railways bounding its property on the southeast.

It is a fair inference, taking the character of the conveyance made by the relator-appellant to Delaney, its retained conditional title interest in the land so conveyed and silent acquiescence in the award by the condemnation commissioners to Delaney for the taking and consequential damages; that the conveyance, together with such acquiescence, was purposeful with a view, at a later time, to compelling the State to pay double consequential damages.

The claim is now made by the relator-appellant that it had no knowledge of the solid embankment obstructing the streets in question until September 3rd, 1929; and that it was misled by the condemnation petition because "the route of the proposed highway over the lands

and premises sought to be acquired therefor, was delineated in red, and was so made out and portrayed thereon as to satisfy (your) the petitioner that the streets laid out and shown upon the exhibit thereto annexed, * * * * * would continue to remain open and available for public use," .

The condemnation petition with its Exhibit A (which is the map referred to) has not been made a part of this record. The Court will however take judicial notice through personal knowledge from a multitude identical condemnation proceedings that these maps attached to the petitions delineate in red the parcels of land to be acquired from the particular owner, and that the route, section and parcels are referred to by numbers upon the maps and in the petitions. In the instant case the areas within the streets occupied by the embankment were not the lands of Delaney and for that reason would not be delineated in red. By reference to the petition as well as to the indicated slope lines on the map, the relator- appellant could have been fully informed and was put on notice as to the character of the proposed construction. The fact that the relator had no actual knowledge of the embankment is not disputed; but it had all the required notice and information in the petition and map attached. Beyond this however the fact is, that at the time of the condemnation proceedings the solid embankment actually existed upon the lands of Delaney and across the streets. If the relator is in a predicament that is, to say the least, due to its lack of diligent inquiry for which the State should not suffer.

There can be no doubt that if the relator-appellant ever had any claim for damages it could have intervened with its claim as a party defendant in the condemnation proceedings; asserted its claim and, in the event of dispute

after the award, could have compelled the submission of the matter to the Court of Chancery for a determination. If this contention be deemed sound, relator-appellant's failure so to intervene, taken in conjunction with the nature of the conveyance above referred to; the present claim of relator-appellant constitutes a constructive fraud against the State, and should bar the claimant from any relief whatsoever.

RELATOR-APPELLANT HAS NO RIGHTS RECOGNIZED BY THE CONSTITUTION OF NEW JERSEY NOR BY LEGISLATIVE ENACTMENT PROVIDING FOR COMPENSATION IN THE MATTER OF PUBLIC HIGHWAY CONSTRUCTION.

Under the Eminent Domain Act of 1900, and its supplements and amendments, the Legislature of this State has provided for compensation and the means for obtaining it for land for highway purposes acquired by the State for public use. The provision in our Constitution of 1844 that land may be taken for public highways as heretofore until the Legislature shall direct compensation to be made, not only reserved the right to take land for such public purpose without compensation until such time as the Legislature exercised the power thus delegated; but limited the Legislature to providing for compensation for the taking of land.

In the case sub judice it is conceded that no land has been taken, nor in contemplation of taking, from the relator-appellant. It is therefore urged that any reference in the Eminent Domain Act, its amendments or supplements, or in the State Highway Act, referring to the power to take land *or other property to acquire any lands or rights therein*

must necessarily refer to other property or rights appurtenant to the land actually acquired. The acquiring of easements for slope right purposes or permanent drainage are illustrations of such acquisitions by which the land itself may not be taken in fee for highway purposes but, nevertheless, temporary or permanent acquisition takes place.

The Courts of this State have undeniably repeatedly held that for public use streets may be vacated, grades of existing streets and highways changed and that such vacation by the State for public highways or change of grade in existing streets and highways do not impose unlawful servitude upon private property.

As in the Hatt case (79 N. J. L. 540) referred to in the opinion of the Supreme Court, the elevation of the railroad was not properly considered by the commissioners as an element of damages; so in the instant case the elevation of the roadway upon the lands of the State was "but a lawful use by the landowner of its property," particularly in view of the fact that the landowner, in acquiring it, had paid consequential damages to the owner of the remainder land. In the Hatt case (supra) the Supreme Court set aside an award made by commissioners on two grounds, "first, because the commissioners awarded damages which they estimated to result to the land by the elevation of the railroad, and second, that the lands not abutting on the vacated portion of the street were not land which "will be damaged by such vacating of the street within the meaning of the statute." Upon appeal of that case in this Court the first ground was unhesitatingly approved. In dealing with the second ground the reversal of the judgment of the Supreme Court is based upon the limitations placed by the Legislature upon the City of Newark in its Charter.

The Legislature limitation of the right to vacate any street is that, if any land shall be damaged by such vacating the damage shall either be agreed upon by the owner and the city or, upon failure to agree, shall be ascertain and awarded by commissioners.

In dealing with that subject this Court said:

> "The right of the state to destroy public improvements of this class without compensation is not limited by the constitution, and except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it, or the payment by the city of compensation to any landowners for damages. But this statute requires the city to ascertain, by agreement, or appraisement by commissioners, the extent to which any land will be damaged by the vacation of a street, which damage the city is required to pay to the owner. It is not such damage as the owner may suffer in common with the public, but the impairment of the value of the land caused by the vacation of the street."

It is therefore self-evident that the right to recover damages under the facts in the Hatt case depends entirely upon the construction of the city charter respecting the power to vacate streets. The Hatt case differs from the case sub judice in one important particular; the embankment of the railroad company was a complete bar. In the case of the highway in question it is accessible to the relator and all others by way of the slopes in question, in which the State has acquired only an easement for lateral support of its roadway. Presumptively Delaney was compensated for the cost of providing ingress and egress from and

to his lands over this highway; for he had the lands directly abutting the property acquired by the State in fee and for easement purposes. It is conceded in the brief of the relator (page 2) that there are other owners. The question naturally presents itself, can such property owners seriatim present themselves and each claim damages to the extent of the cost of a ramp or incline to the new highway.

Point II of appellant's brief insists that its property has been taken as completely as if adversely occupied. This is controverted by two indisputed facts. Whatever *property* the Burns Holding Corporation had in the streets in question, they enjoyed only in common with the public at large; there is no adverse occupation, because the Burns Holding Corporation may *occupy* the highway traversing the occupied streets freely in common with the general public. If for the general public good access to and from the intersecting highway has been made less convenient to one individual in order to walk or ride upon his favorite street; that does not entitle him to be compensated for his inconvenience, unless his land has been taken for such intersecting highway.

Ward vs. Peck, 49 N. J. L. 42, cited in support of appellant's contention, on the contrary argues in favor of appellee's position that no right to compensation accrues in the instant case. Chief Justice Beasley recognizes the fact that an "appropriation of land," or, "land of a citizen permanently applied to the public use" in the basis of compensation. The learned Chief Justice says :

> "The Legislature has directed that when land be taken for public roads it shall be paid for."

It was because the property of Ward has been *seized* and the public had acquired a right

to the perpetual easement in the property burdened, that compensation was due. *Property* as used in this case certainly means *land.*

The attempted analogy between the structure of a New York City elevated railway upon pillars begs the question involved in the pending appeal. If the highway in the present case had been built upon pillars upon the land of Delaney instead of upon a solid embankment, it would have been a seizure of the land just the same. Damage to the remainder land of Delaney might have been thereby minimized through possible ingress and egress to and from one portion of such remainder to another, but his ownership of the land over which the roadway was constructed would have been as completely terminated under either method of road construction.

Having attempted to sustain its right to conpensation on grounds of constitutional guarantee, and because land and the kind of property alleged to have been taken are one and the same thing, and further on the grounds of express legislative direction in The State Highway Act; the appellant in desperation throws itself upon the court's notion of what is just and fair in the abstract rather than upon the authority of statute or decision in point.

We respectfully protest that notions of justice and fairness in the abstract, are not the guiding stars of our judicial decisions. If the rights of appellant have been invaded and the State can lawfully compensate it; the determination of those questions cannot be founded upon notions of justice and fairness; but must rest upon reason and established law. That the appellant has suffered a hardship, as is indicated in the opinion of the Court below, cannot of itself entitle it to compensation. Hardships for the general public welfare are incidents of citizenship and do not al-

ways fall evenly. They are in the nature of service for the common ~~wheel~~ weal and are compensated for in money from the public treasury only under express provisions of law.

We respectfully urge that the State Highway Commission has taken neither land nor any interest in land from Burns Holding Corporation, and that there is no authority in law permitting said Highway Commission to negotiate with this landowner for payment to it of any of the State's funds; nor to submit the matter to condemnation commissioners for an award of damages. If the situation created by the building of this highway has injured the appellant, a remedy must be sought by legislation.

Respectfully submitted,

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113OCT.T.1930

New Jersey Court of Errors and Appeals

BURNS HOLDING CORPORATION, a Body Corporate, Relator-Appellant, *vs.* STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Respondent-Appellee.	On Appeal.

BRIEF FOR APPELLANT.

Facts.

This is an appeal from a judgment of the New Jersey Supreme Court in favor of the appellee herein and against the appellant herein, upon issue joined upon a demurrer interposed by said appellee to an alternative writ of mandamus issued out of the New Jersey Supreme Court at the suit of said appellant. The alternative writ of mandamus directed the appellee herein to pay to the appellant herein, by agreement, if possible, an amount equivalent to the extent to which the value of lands of the appellant herein had been diminished or destroyed by reason of the acts and omissions of the appellee herein set forth in the charging part of said writ, and further directed that upon failing to agree in regard to the amount so to be paid, said appellee institute, prosecute and consummate proceedings for the determination of such amount in accordance with existing law.

The factual situation complained of and, for the purpose of deciding the issue, deemed to be

admitted in view of the demurrer to the alternative writ, is briefly as follows: The appellant, hereinafter referred to as the "Corporation", was and still is the owner of certain lands in the Township of Woodbridge, Middlesex County, New Jersey, and shown upon the map marked Schedule A and forming part of the State of Case herein (p. 12), as lots 85 to 110, both inclusive; 264 to 283, both inclusive; 285 to 293, both inclusive, and 436 to 454, both inclusive, which, it will be noted, constitute a continuous parcel consisting of all the land on said map lying south of Chester Street thereon, and the row of lots abutting upon the northerly side of said street. The Corporation had originally owned the entire tract included within the boundaries of the whole map, but had, prior to the happening of the events complained of, sold all but the lands which it now retains as above described to another or other parties. Prior to the acts of the appellee, hereinafter referred to as the "Commission", the only means of ingress to and egress from the Corporation's said lands, at least for vehicular purposes, were constituted by Arthur Street, Elliot Street, Elizabeth Street and John Street as shown on said map, in view of the fact that the Corporation's lands were inaccessible over the easterly, southerly, southwesterly and westerly boundary lines thereof as shown on said map.

At the time or times and in the manner which will appear from the State of Case (pp. 28-30), the Commission took and appropriated certain lands shown upon said map for the purpose of laying out and constructing thereon a route or branch of the State Highway system of the State of New Jersey. The said lands so taken and appropriated form a strip lying within the parallel lines shown upon said map and extending roughly across the entire tract in a northeasterly and

southwesterly direction. The lands included within this strip were principally those of one Delaney, a prior grantee of the Corporation, in connection with which due and proper proceedings were had for the condemnation thereof, under and by virtue of the provisions of the Eminent Domain Act of this State. The Commission proceeded to construct upon and along said strip of land a branch of its said State Highway system, known as Route No. 25, upon an elevated embankment or fill solidly constructed and continuous throughout, of a width throughout of 100 feet and varying along its length from 20 to 30 feet in height, but this embankment or fill, throughout its entire length over the lands and streets shown upon said map, was provided with no bridge, trestle, tunnel, overpass, underpass or other aperture, opening or ramp, or any means or instrumentality by means of which passage or repassage upon or along said Arthur Street, Elliot Street, Elizabeth Street or John Street could be had, and said construction thereby completely cut off all ingress to or egress from the lands of said Corporation. No offer was ever made nor any negotiations entered into by said Commission to or with said Corporation for compensation for the cutting off of access to its said lands in the manner aforesaid, nor were any proceedings taken for the condemnation of its property or rights therein, so as aforesaid taken or appropriated, and said Commission refuses to make any such offer or enter into or consummate any such negotiations or institute any such proceedings for the award of such compensation.

Appellant here contends that the Supreme Court committed error in giving judgment for the appellee upon the latter's demurrer to appellant's alternative writ of mandamus. The ground upon which appellant urges that the said judg-

ment below should be reversed is that by the acts and omissions of the appellee complained of, appellant's private property has been taken for public use without just compensation, and that, therefore, appellee is under a duty, pursuant to the Constitution and laws of this State, to pay or take proceedings for the award to appellant of the value of its property so taken.

ARGUMENT.

POINT I.

Appellant's right to compensation is guaranteed to it by the Constitution of the State of New Jersey.

Section 16 of Article I of the Constitution of the State of New Jersey as amended and now in force and effect, provides that "private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore, until the Legislature shall direct compensation to be made". Passing by, for the moment, the first clause of the provision just quoted, we find the proviso "but land may be taken for public highways as heretofore, etc.", which, at the very outset, demands consideration. The pertinent words of this proviso would seem to be "public highways", "heretofore" and "until the Legislature shall direct compensation to be made". Although this clause still stands as originally adopted, it may now be disregarded, in view of the very definite pronouncement of our Courts with reference to the present effect thereof. The legal situation to which the clause originally referred may best be described in the language of Nevius, J., in *Matter of Highway*, 22 N. J. Law 293, from which we quote as follows:

> "The practice of taking lands of private individuals for public roads without compensation to the owners has prevailed in the State of New Jersey from time immemorial, and, in the language of this (Supreme) Court in the case of The State *vs.* Potts, 1 South. 349, cannot at this day (1849) be questioned. It had its foundation, probably, in the grants of lands from the original proprietors which uniformly contained an allowance of five per cent. for roads and highways. This practice, too, is fully recognized and sanctioned by the present constitution of the State. The sixteenth section of the first article declares that 'lands may be taken for public highways as heretofore, until the Legislature shall direct compensation to be made'. This has not yet been done. The land, then, of private individuals can be taken for roads without compensation according to immemorial usage and constitutional sanction."

In the year following the decision from which we have just quoted, our Legislature adopted a supplement to the act, entitled "An Act concerning roads", approved March 1, 1850 (Laws of 1850, Section 1, above entitled). That act directed that thereafter the surveyors which then had charge in this State of the laying out of public highways should immediately, after laying out or altering any public road or highway, make an estimate of the damages which the owner of any land or real estate which may be taken for that purpose, will sustain by the laying out or altering of said public road or highway. This legislative enactment fulfilled the condition subsequent which the framers or amenders of the Constitution had in mind in using the words "until the Legislature shall direct compensation to be made".

In this connection we beg again to quote from the opinion of Van Syckel, J., in the decision of

this Court in *Cherry* vs. *Keyport,* 52 N. J. Law 544, as follows:

"Prior to the adoption of the Constitution of 1844, lands were taken for public highways by legislative authority without compensation. This power was upheld under the right of eminent domain because an allowance was made in grants of the proprietors of East and West Jersey for public highways. The old road laws, which failed to provide compensation, were held to be constitutional (citing State *vs.* Potts, 1 South. 348). The injustice of such deprivation of property was apparent, when lands became densely populated and were conveyed by strict measure. In the Constitution of 1844 this subject was left under Legislative control, but provision was made 'that private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore, until the Legislature shall direct compensation to be made'. In the Act of March 1st, 1850, surveyors of the highways, in laying out roads, were *required* (italics ours) to give damages to the owner of the lands taken. In The State *vs.* Seymour, 6 Vr. 47, Mr. Justice Scudder, in delivering the opinion of the Court, said: 'That after the Legislature has thus, in exercising the discretion committed to it by the Constitution, changed the policy of our law in a manner so accordant with the principles of natural law and exact justice, I should be unwilling to hold that it could take a step backward and thereby re-impose this onerous servitude upon private property.' If the Constitution had provided that the Legislature shall have power to give compensation for lands taken for highways, the subject would have been within the control of the lawmaker to grant or withhold it from time to time, according to Legislative discretion. But such is not the language used; by the express terms of the Constitution of 1844, the right to take without compensation was to continue

only until the Legislature should direct compensation to be made. When the Legislature exercised this power under the Constitution, its authority was spent, its control over the subject ceased and, in my judgment, the constitutional protection became irrevocable.''

We respectfully contend, therefore, in view of the foregoing authorities and also the later one of *Mangles* vs. *Hudson County*, 55 N. J. Law 88, that Section 16 of Article I of the New Jersey Constitution is now unconditionally to the effect that private property shall not be taken for public use without just compensation. It becomes pertinent, therefore, to determine next in order of logical analysis whether in the matter now before the Court, there has been a taking of private property for public use without just compensation.

POINT II.

Appellant's property has been taken as completely as if physically adversely occupied.

That whatever has been taken has been taken without compensation as far as appellant is concerned, needs no argument, in view of the State of Fact upon which this matter now rests. That what has been taken, if anything, has been taken for public use is likewise admitted. The issue narrows itself, therefore, to the question, Has appellant's property been taken? It may be asked then, first, what is property, within the purview of the constitutional provision, and what is ''taking'' as therein employed. Property is a comprehensive term and may be as variously defined as the variety of concept which the term implies. From the lay standpoint, the term is defined by Webster (Revised Unabridged Dictionary, G. &

C. Merriam Company, 1913), as the "exclusive right of possessing, enjoying and disposing of a thing; ownership; title," and further as "that to which a person has a legal title, whether in his possession or not; thing owned; an estate whether in lands, goods or money." Courts throughout the land have recognized the complex variety of concept involved in the term, and the universally accepted principle is expressed in the idea that the res or thing referred to by the term does not always have a tangible or physical existence, but may be an easement or anything else that becomes the subject of private ownership, and that property inheres in such ownership which is recognized as being that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all other, including not merely the corpus but the jus also, that is to say, certain rights which go with the physical concept of property and appertain to the use of the same and enjoyment thereof, and courts of at least a majority of our neighboring states have adopted the view that there is a taking of property within the spirit of the law when its use, benefit or enjoyment are permanently and physically interfered with.

> *Metropolitan West Side, etc., R. Co.* vs. *Goll,* 100 Ill. A. 323;
> *Tripp* vs. *Overocker,* 7 Colo. 72;
> *Denver* vs. *Bayer,* 7 Colo. 113,

the latter holding that the easement in a street connected with the lot of an owner is such "property" within the spirit of a similar constitutional provision, so that any interference therewith which results in injury to the realty must be compensated, and that whatever permanently precludes the owner's free use of the street for

ingress or egress to or from his lot permanently diminishes the value of his property as much as if some direct physical injury were inflicted thereon. A similar rule, applied in the particular instance to a diminution in the flow of a stream, was stated in our case of *Ten Eyck* v. *Delaware & Raritan Canal Co.,* 18 N. J. Law 200, wherein, although the proceeding was an action at law in the nature of trespass against a private corporation, the Court, nevertheless, restated the rule (through Mr. Justice Nevius, at page 203) to the effect that:

> "But I mean to say that the Government itself, for public purposes even, cannot take away or destroy the right itself without making compensation to the owner. The State may, by virtue of its right of eminent domain, take private property or destroy private rights for public purposes, upon making just compensation."

A similar question was before the Court in *Ward* vs. *Peck,* 49 N. J. Law 42, wherein damages were sought by a property owner abutting a highway by reason of the fact that the road overseer had, pursuant to statute, opened a drain on the plaintiff's property, for the purpose of carrying off water from the highway. In that case the Chief Justice (Beasley) said at page 43:

> "There can be no doubt that such appropriation of land as that just described is a taking of private property for public use. By laying the drain, the public acquire a right to a perpetual easement in the property burdened, and the owner *pro tanto* has been deprived of his property * * *. But the inquiry is, How can the land of the citizen be permanently applied to the public use unless upon the basis of compensation being made to him? * * * Since the introduction of this constitutional provision (Section 16 of Article

> I) the Legislature has directed that when land be taken for public roads it shall be paid for. By force of this clause of the constitution, effectuated as it has been, by this subsequent legislation, I see no reason to doubt that every vestige of the ancient *jus publicum,* to seize the property of the citizen without rendering to him its value, has been entirely abolished in this State * * *. But in point of fact the right so to appropriate this property is as inconsistent with the letter as it is with the spirit of this declaration of the organic law, for if we are to regard this authority conferred on the overseer as an authority separate from the authority to construct the road, then plainly it is abrogated by the general declaration that private property shall not be taken for public use without compensation, and if it is to be taken as a part of the power to construct the road itself, it is specially annulled by the latter clause of the section made effectual by the legislation which ensued.''

What specific attribute of or concept implied in the word ''property'' has been taken in this case? The factual basis indicates that prior to the construction of the high, solid and continuous embankment the only means of access to appellant's property was through the streets shown on the map and hereinabove named. The construction of the so-called improvement was not as is usually the case, the taking over and altering the grade of a previously existing highway or other public easement, but was rather in the nature of a solid and insurmountable wall, effectively and completely closing to the appellant in this case the previously available sole means of access to his property. The new road did not follow the course of any old highway, but cut across almost at right angles to the existing streets as shown, with the result that the interven-

tion of the act of the appellee changed the appellant's ownership to and in the lands in question from one of full, complete and untrammeled dominion with unlimited means and opportunity for enjoyment, to the bare record title to the lands in question. The lands were thereby surrounded and pocketed in such a manner as to deprive the owner thereof of all means and opportunity of making those uses of said lands for its pleasure or profit, which in this day and generation are considered essential to value. Value is always dependent upon salability, except in relatively few instances, principally in cases of heirlooms or articles creating benefit to the possessor alone. In the instant situation the very purpose and object which may be gathered from the lay-out of the lands as shown upon the map, for which the appellant purchased and held this property, was that of developing and disposing of the same. The locality and other surrounding circumstances rendered the land available for very definite purposes. Since, however, the same has been rendered inaccessible, it needs no discussion to point out that the greater part, if not all, of the value of the property in question to the owner thereof, has been taken away through the cutting off of the means of user and enjoyment, in the manner described. It is true that not one square inch of appellant's lands was actually physically occupied by the highway or its embankment, but can it be said that such a circumstance renders the appellant's position any more favorable than if its lands had actually been so occupied? Examples from everyday human experience without number suggest themselves by way of illustration of the point which we seek to make.

Let us assume, for instance, that the highway in question had not been built upon a solid fill but upon pillars in manner similar to the elevated

railways in the City of New York. Could it be said in such a case that only a few square feet upon which each pillar rested had been taken for purposes of compensation? Is it not rather the fact that the entire area of the property lying beneath the course of the elevated railway abutting that supporting the pillars and that lying between the same would have been taken as effectively and completely as in the case of a highway built upon a solid fill, where every square inch of the land has been occupied, and if this kind of reasoning would be applicable to lands lying actually within the course of the highway, but not physically occupied except to the extent of the footings for the supporting pillars, can it be reasonably distinguished from the situation in which the appellant finds itself?

The constitutional provision uses the words "property" and "taking". Property cannot be conceived of apart or divorced from its attributes. As is stated in the language of the Supreme Court of our State, through Mr. Justice Case, in *Frank J. Durkin Lumber Co.* vs. *Fitzsimmons* (not yet officially reported), 147 Atl. 555, at page 558:

> "The use of property is one of the essential attributes of ownership. Ownership without use is fatuous."

One of the most fundamental and essential attributes of property, particularly real property, is means of access to the same. This attribute has most certainly been taken in the instant situation. Is it not, therefore, property, and has it not, therefore, been taken so as to render applicable the constitutional provision in question? We submit that this question can be properly answered only in the affirmative.

POINT III.

Appellant is also entitled to compensation under the Eminent Domain Act.

The State Highway Act itself (Chapter 226, Laws of 1919, Section 12, subdivision e), in enumerating the powers of the State Highway Commission, the appellee in this cause, provides as follows:

> "To widen, straighten and regrade any state highway and to acquire any lands or rights therein by gift, devise, purchase or condemnation, according to the procedure as contained in an act entitled, 'An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900) approved March 20, 1900."

It will thus appear that the statutory means by which the appellee lives, moves and has its being, specifically subjects it in its functioning to the provisions and mandates of the Eminent Domain Act of this State. Before passing to an examination of the latter act, however, a passing glance seems to rivet our attention upon the words in the empowering section of the State Highway Act above quoted, viz.: "To acquire any lands *or rights therein*" (italics ours). Paraphrasing the provision further we have the specific statutory pronouncement that the appellee shall have the right to acquire not only lands but rights therein, and that such acquiring in the absence of its ability to do so by gift, devise or purchase, must be by condemnation according to the procedure prescribed in the Eminent Domain Act.

Land or real estate has been held to include easements such as a right of way (20 C. J. 593,

Sec. 83), and the Supreme Court of this State, in *McEwan* vs. *Penn., N. J. & N. Y. R. Co.*, 72 N. J. Law 419, has definitely held that an easement appurtenant to land is property subject to the power of eminent domain and within the provisions of the act concerning eminent domain. Being an easement as above stated, which is what has been taken in the instant case, it is within the purview of the words "land" or "real estate" and the provisions of the Eminent Domain Act, and would also seem most certainly to be within the provisions of the State Highway Act last above quoted from. Having, therefore, empowered the State Highway Commission to take lands or rights therein, the Legislature then directs that if the same cannot otherwise be obtained, resort shall be had to the procedure outlined in the Eminent Domain Act. That act, entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Revision of 1900)", (Compiled Statutes, page 2182, Sec. 1) directs that "whenever proper officers of the state, etc., having power to take land *or other property* (italics ours) for public use, shall have determined to acquire land *or other property* (italics ours) pursuant to authority conferred by law, etc. * * * compensation shall be ascertained and paid in the manner directed by this act", and Section 6 of the Act (Compiled Statutes, page 2184) provides that the commissioners in condemnation shall "make a just and equitable appraisement of the same (land or other property) and damage aforesaid". The particular words last above used, viz., "or other property", must of necessity have some meaning, if we are to follow the accepted rules for statutory interpretation. If only land as a physical object was in the Legislature's mind,

why should the words "or other property" be used in the Eminent Domain Act, and why, by the same token, should the words "lands or rights therein" have been employed? There would seem to be one answer to this query, and that is that these words connote a species of property concept that is commonly recognized as inhering in and not constituted solely by the physical material substance.

An interesting decision of our sister State of New York in *Rome, etc. R. R. Co.* vs. *Gleason,* 42 App. Div. 530; 59 N. Y. Supp. 647, in dealing with an almost parallel situation, definitely points out that it is just as much a taking of property within the spirit of the Constitution to deprive an owner of land of its free use or to diminish its value by the construction of an embankment as it is to enter into physical possession and occupation thereof, and that, consequently, upon no other principle can the provision of the Constitution forbidding the taking of private property for public purposes without just compensation be satisfied.

In passing it occurs to us that possibly some question might be raised in this matter as to the right or interest of the appellant in the streets laid out upon the map which were shut off by the improvement complained of. We do not deem it necessary to argue that the situation presents one of a clear dedication of the land included within the boundaries of all of the streets shown upon the map, and for our authorities refer, of course, to *Hoboken Land, etc.* vs. *Hoboken,* 36 N. J. Law 540; *Clark* vs. *Elizabeth,* 40 N. J. Law 172; *Price* vs. *Plainfield,* 40 N. J. Law 608; *Seabright* vs. *C. R. R. Co.,* 73 N. J. Law 631, and *Long Branch* vs. *Toovey,* 104 N. J. Law 335.

Upon the general proposition further an interesting line of decisions in this State, dealing with

the definition of taking of property as contemplated by the Constitutional and statutory provisions for compensation is to be found in the following, viz.: *Trenton Water Power Co.* vs. *Raff*, 36 N. J. Law 335; *Mehrhof* vs. *D. L. & W. R. R. Co.*, 26 Vr. 56; *Ryerson* vs. *Morris Canal, etc. Co.*, 69 N. J. Law 505; *Dickinson* vs. *D. L. & W. R. R. Co.*, 87 N. J. Law 264.

Conceding, however, that the issue now presented to this Honorable Court is one which must be decided upon the Court's notion of what is just and fair in the abstract rather than upon the authority of statute or decision in point, we feel that all aspects of the factual situation invoke the recognition of one of the most essential of those fundamental and inalienable rights which Americans universally consider undoubted, and as enunciated in Section 1 of Article I of the New Jersey Constitution, all men * * * have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring possession and protecting property. As was most pointedly stated in the opinion of the Court below in which the views which led it to the judgment appealed from were expressed, the hardship of the case as far as the appellant is concerned is apparent. This hardship cries aloud for a remedy. Under one of the oldest of our legal maxims, the appellant seeks at the hands of this, the court of last resort in this State, such an interpretation of the constitutional and statutory provisions applicable as will produce that remedy which the situation requires.

As will appear from the opinion of the Court below (Case, p. 31, *et seq.*), certain judicial pronouncements appearing in cases of this State were taken as authority for the judgment here appealed from. The cases in question are *New-*

ark vs. *Hatt,* 79 N. J. Law 548; *Newark & Bloomfield R. R. Co.* vs. *Montclair,* 84 N. J. Law 46, and *Harrison Land Co.* vs. *Crucible Steel Co.,* 82 N. J. Eq. 419. We respectfully urge that the decisions in these cases are susceptible of being definitely distinguished from applicability to the instant case and that if certain general statements are to be found in the opinions of the Courts in the cited cases, a careful examination of the latter will indicate that the Court was speaking obiter and that such pronouncements, therefore, are not and should not be controlling upon this Court in deciding the instant matter. We proceed to examine the cases referred to in order of reference.

In the *Hatt* case and the decisions of other States examined in the Court's opinion in that case, certain definitely distinguishing factual features are at once apparent. In the first place, the cutting off of access to the lands of the parties complaining did not render such lands entirely inaccessible. In the *Hatt* case, although the street vacation complained of cut off access to one of the streets which intersected it, access to the other intersecting streets still remained. In the case of *Smith* vs. *Boston,* 7 Cush. 254, referred to in the *Hatt* decision, the lands of the complaining parties were accessible by other public streets. A similar situation obtained also in *Chicago* vs. *Burcky,* 158 Ill. 103; *In re Melon Street,* 182 Pa. St. 397; *Dodge* vs. *Penn R. R.,* 16 Stew. Eq. 351. A further outstanding distinguishing feature of the cases last referred to, including the *Hatt* case, is the fact which uniformly appears in all of those decisions, that the damage, if any, which the complaining property owner may have sustained was not peculiar to him by reason of his ownership of the property but was shared by him in common with the public at large. In the case

now before this Court on appeal, however, the following important and controlling features seem to be present, viz., no street vacation by any municipal or other authority is involved. The erection of the highway embankment has rendered appellant's lands *completely inaccessible,* and the damage which appellant has sustained by reason of the circumstances is not one which equally affects the public at large. Of course, there could be no formal vacation of the streets involved in this matter, in view of the fact that as far as this record is concerned, and for that matter as far as appellant knows, although the streets had been dedicated they had never been accepted. The Stipulation of Fact in this matter (Case, p. 28, *et seq.*) leaves no question as to the complete shutting off of appellant's lands from access. Only appellant and possibly one or two other owners in the very limited area embraced within the "pocket" created by the highway structure, are affected by the embankment. As far as the rest of the public is concerned, it is not affected. But the most significant feature of all which appears from the *Hatt* case is the fact that the decision of the Court recognized the right of the plaintiffs in error to an award of damages. In this connection we quote from the opinion of Mr. Justice Bergen, at page 553:

> "We are of the opinion that such right of access is of special advantage to all land abutting a highway on a block between two streets, and that the vacation of a part of such street diminishes the value of all the land between the next adjacent cross streets and that in appraising the damage to the lands of the plaintiffs in error the commissioners of assessment should consider to what extent, if any, such lands are diminished in value because deprived of one means of ac-

> cess, but should not allow any damages on account of the track elevation."

and the opinion proceeded to state that the judgment of the Lower Court which set aside the award of damages should be reversed and the matter referred back to the assessment commissioners. But, although there was no formal vacation by any governmental authority of the streets involved in the instant case, the act of the State Highway Commission, in closing the streets, created the same result and effect as if the streets had been vacated. Under a formal vacation the lands lying within the limits of the streets as laid out would revert back to the abutting property owners. Thereafter anyone passing or repassing over the same would be a trespasser. In the instant situation the lands lying within the streets over which the highway embankment passes were actually taken and the public easement over the same destroyed. In the *Hatt* case the railroad already owned a right of way over the street vacated. It, therefore, had a perfect right to use its said land as it chose. In the instant case damage to the appellant resulted not from a change of use of lands previously owned by the Commission, but by the taking in the first instance of such lands and the construction thereon of such an embankment.

In summary, therefore, if this State recognized the right of compensation for damage consequential to the vacation of a street, that is, the relinquishment by the governmental authority of the public's right of way over the same, *a fortiori,* the cutting off of the only means of access to a private citizen's property by a governmental authority is compensable.

In the *Newark & Bloomfield R. R. Co.* case, there was also involved the vacation of a portion

of a street over which the lands of a railroad company crossed at grade, said vacation being made in the course of proceedings to abolish said grade crossing. In that case the Court apparently turns its decision upon the specific provisions of Section 61 of the Town Act of 1895, dealing with street vacations, and came to the conclusion that alleged damages to land owners abutting upon non-vacated portions of a street of which a portion is vacated are not compensable. In that case, however, it will appear that the complaining owners who abutted on a portion of Pine street not vacated, still retained access to their lands after said vacation by other means. Moreover, the Court specifically states in its opinion, through Mr. Justice Swayze, that the right in the case rests exclusively upon the section of the Town Act referred to. The case, therefore, very narrowly turns upon an interpretation of that Act, and in reaching its conclusion, leans heavily upon the fact involved in the case, that the damage resulting to the complaining property owners was not peculiar to them but shared with the public at large, and that because of the existence of its general public interest in the right of way, the municipal authorities had, as custodians of the public right, full power to abandon the same, but, as the Court, nevertheless, very specifically recognizes (foot of page 48), "If the rights of the landowners were property rights, the Legislature would, under our constitutional limitations, be powerless to take them without compensation."

In the *Harrison Land Company* case, Vice-Chancellor Emery bases his decision upon the controlling factual feature therein, that the rights of the complaining property owners were no different than those enjoyed by the public at large, and that their injury, therefore, was not different in kind from that which every other citizen sus-

tained through the vacation of the street extension involved. The decision, moreover, turned upon the interpretation of the charter of the City of Harrison, under the authority of which the street vacation was effected. Moreover, from the statement of fact appearing in the opinion, the complainant had no right of access over the street previous to an agreement between it and certain other parties, the legal effect of which had not been determined by a court of law, and therefore, could not be passed upon by the Vice-Chancellor in the injunction application. Moreover, it appears that by that agreement the complainant had given up to others private rights of way from those lands to other streets.

In conclusion on this phase of our argument, therefore, we respectfully contend that the facts presented upon this record render the instant case clearly distinguishable from those apparently followed by the Court below, and therefore, invoke the application of a rule or rules different from that or those enunciated in the cases referred to.

Wherefore, appellant respectfully urges that the judgment of the Court below be reversed and that the case be remitted to the New Jersey Supreme Court for such proceedings in connection therewith as will afford to the appellant that relief to which it claims to be entitled.

Respectfully submitted,

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