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SUMMONS.

(Filed Oct. 24, 1927.)

THE STATE OF NEW JERSEY TO ELMER E. STEVENS, JR.,
AND MILDRED WILKINS STEVENS:

You are summoned to answer the annexed complaint of Louis R. Blouch in
(Seal) an action at law in the Camden County Circuit Court. And take notice that unless you file your answer to said complaint with the clerk of the said Camden County Circuit Court, at Camden, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

Witness RALPH W. E. DONGES, Judge of the Camden County Circuit Court at Camden, this twentieth day of October, nineteen hundred and twenty-seven. 20

CHARLES F. WISE,
Clerk.

WADDINGTON & MATHEWS,
Attorneys.

(Endorsement on back of summons
and complaint):

I hereby depute and appoint John Campbell to execute the within writ. 30

Witness my hand and seal this 21st day of Oct., A. D. 1927.

Walter T. Gross (Seal),
Sheriff Camden County,
By J. M. Ackley,
Under Sheriff.

Duly served, October 21st, A. D., 1927, on Elmer E. Stevens, Jr., by delivering and leaving with a member of his family above the age of 14 years to wit: Mildred Wilkins Stevens, his wife, a true copy of the annexed summons and complaint, and on Mildred Wilkins Stevens, personally, a true copy of the annexed summons and complaint, at their dwelling or usual place of abode, 308 No. 43rd Street, City and County of Camden, New Jersey.

Walter T. Gross,
Sheriff,

By John Campbell,
Special Deputy Sheriff.

Sheriff Fees \$3.62.

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AMENDED COMPLAINT.

(Filed Dec. 19, 1927.)

CAMDEN COUNTY CIRCUIT COURT.

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LOUIS H. BLOUCH,	}	Action at Law. Amended Complaint
<i>Plaintiff,</i>		
v.		
ELMER E. STEVENS, JR., AND MILDRED WILKINS STEVENS,		
<i>Defendants.</i>		

20

The plaintiff, who resides in the Borough of Merchantville, County of Camden and State of New Jersey, says that:

FIRST COUNT.

1. On or about the 26th day of April, 1927, he, the plaintiff, as buyer, entered into a written agreement with the defendants, as sellers, a true copy of which agreement is hereto attached, made part hereof and marked Exhibit 1, for the sale and purchase of certain lands and premises situate in the Township of Pensauken, County of Camden and State of New Jersey and other collateral undertakings in the said agreement contained.

2. Section 4 of the said agreement provided as follows:

“All adjustments shall be made as of the time of final settlement and possession shall be given the Buyer at the time of final settlement.”

3. Section 10 of the said agreement provided as follows:

10

“The Sellers agree to extend the existing railroad siding from its point of termination in the proposed right of way to a point three hundred twenty-five feet from the intersection of the said proposed right of way with the Northwest-erly line of Cove Road, such extension to be made and completed by June 1st, 1927, the Buyer to be granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding and right of way adjacent to his own lands to and upon the lands herein described in any direction or location, provided there shall be no encroachments of the said extension or any part thereof upon lands not belonging to the grantee, but this provision shall not be construed to limit the right of the grantee to use such part of the right of way as might be necessary to be used in connection with the building of said extension.”

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4. The defendants, however, notwithstanding their agreement to grant to the plaintiff the privilege of extending the said siding from its terminal point to and upon his own premises, did, on or about the 1st day of May, 1927, by a contract in writing, which contract covered the purchase and sale of certain lands situated near those of the plaintiff, and

other collateral undertakings, agree with another, to wit, one Richard W. Neumann of the Borough of Merchantville, County of Camden and State of New Jersey, to grant to the said Neumann the identical privilege of extending the said siding from its terminal point to and upon his own premises, which they had, as above set out, previously agreed to grant to the plaintiff and which, in its nature, was exclusive and was not capable of being granted to more than one person or group of persons. 10

5. The defendants further allowed the said Neumann to take possession of the lands which they had agreed to sell to him and to go upon said lands and upon the said right of way before the date set for the passage of title and delivery of possession in the contract between the said Neumann and the said defendants and before the date of settlement and delivery of possession in the contract between the plaintiff and the defendants, and to extend the said siding from its terminal point to and upon the lands which he the said Neumann had agreed to purchase from the said defendants, thereby depriving the plaintiff of the privilege which they, the said defendants, in the contract aforesaid had agreed to grant to him, which action on the part of the defendants constituted a breach of their said contract with the plaintiff. 20

6. Thereafter, the plaintiff made demand upon the defendants for a compliance by them with their obligation under the said contract to grant to the said plaintiff the privilege of extending the said siding from its terminal point to and upon the premises, but the defendants failed, neglected and refused to comply with their said obligation under the contract and still fail, neglect and refuse so to comply. 30

7. As a result of such failure, neglect and refusal by the defendants to carry out the terms of the said contract on their part, the plaintiff has been compelled to expend the sum of eight hundred forty-two dollars (\$842.00) to have a switch and frog placed in the said siding in order to connect the same with certain trackage upon his own premises.

10 Plaintiff demands as damages on the first count the sum of eight hundred forty-two dollars (\$842.00) with lawful interest thereon from August 15th, 1927, the date on which the said sum of eight hundred forty-two (\$842.00) was expended, together with costs of suit.

SECOND COUNT.

20 1. Paragraph #1 of the first count is made paragraph #1 of the present count for purposes of brevity.

2. Section 9 of the said agreement provided as follows:

30 "The Sellers agree to grade all of the proposed right of way hereinbefore mentioned extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr. and the United New Jersey Railroad & Canal Company as shown on the plan herein mentioned and referred to and also to furnish on the herein described premises all necessary earth required to grade the parcels of land herein described so that they may conform to the grade of the said Cove Road and the proposed right of way. All of said work shall be completed by June 1, 1927."

3. The defendants notwithstanding their agreement to furnish on the premises in question all necessary earth required to grade the said premises so that they conform to the grade of the said Cove Road and the proposed right of way, failed, neglected and refused to furnish sufficient earth for this purpose, the amount of earth actually furnished being one thousand nine hundred and fifty (1950) cubic yards less than the amount necessary to comply with the terms of the said agreement. 10

4. By reason of the defendants' failure, neglect and refusal as set out in the preceding paragraph, the plaintiff is placed under the necessity of obtaining the said earth at his own trouble and expense, the cost of one thousand nine hundred and fifty (1950) yards of earth amounting to two thousand nine hundred and twenty-five dollars (\$2,925.00).

The plaintiff demands as damages on the second 20
count, the sum of two thousand nine hundred and
twenty-five dollars (\$2,925.00) together with costs
of suit.

WADDINGTON & MATHEWS,
Attorneys of Plaintiff.

EXHIBIT 1.

THIS AGREEMENT, made the 26th day of 30
April, A. D., 1927.

BETWEEN Elmer E. Stevens, Jr. and Mildred
Wilkins Stevens, his wife, of the Township of Pen-
sauken, in the County of Camden and State of New
Jersey, parties of the first part, hereinafter called
the Sellers:

AND L. H. Blouch, of the Borough of Merchantville, in the County of Camden and State of New Jersey, party of the second part, hereinafter called the Buyer:

WITNESSETH, that the Sellers agree to sell and convey, and the Buyer agrees to buy all those certain lots, tracts or parcels of land and premises, situate in the Township of Pensauken, County of Camden and State of New Jersey, more particularly described as follows:

10 Tract No. 1. BEGINNING at a point formed by the intersection of the Northwesterly line of Cove Road with the Southwesterly line of a certain proposed right of way of a minimum width of thirty feet as shown on survey and plan of lands of Augustus Reeve, deceased, Pennsauken Twp., Camden Co., N. J. made by Remington & Vosbury, Civil Engineers, January 2, 1926, and extending
20 thence (1) Westwardly along the Northwesterly line of Cove Road two hundred fifty feet to a point, thence (2) Northwestwardly at right angles to Cove Road two hundred five feet to a point, thence (3) Northeastwardly to a point in the Southwesterly line of said proposed right of way, which point is distant three hundred thirty-five feet from the Northwesterly line of Cove Road measured along the aforesaid Southwesterly line of the proposed right of way, and thence (4) Northeastwardly along
30 five feet to the point and place of beginning.

Tract No. 2. ALL that certain triangular plot of ground adjoining Tract No. 1 and beginning at a point in the Southwesterly line of said proposed right of way distant three hundred thirty-five feet from the intersection of the Northwesterly line of Cove Road with the said Southwesterly line of the proposed right of way, and extending thence (1)

Northwestwardly along the same the distance of twenty-five feet to a point, thence (2) in a Southerly direction a distance of forty feet more or less to a point on the Northwesterly boundary line of Tract No. 1 distant twenty-five feet from the Southwesterly line of said proposed right of way measured along said boundary line for the aforesaid distance of twenty-five feet to the point and place of beginning, for the price or sum of Six Thousand Dollars (\$6000.00), under and subject to the following terms 10
and conditions:—

1. A first payment of Five Hundred Dollars (\$500.00) receipt of which is hereby acknowledged by the Sellers.

2. The balance of the purchase price, namely, Fifty-five Hundred Dollars (\$5500.00), shall be paid in cash at the time of final settlement which shall be made at the West Jersey Title & Guaranty Company, Third and Market Streets, Camden, New Jersey, on or before June 1, 1927, or the deposit of Five Hundred dollars (\$500.00) made herewith may be applied, at the option of the sellers, on account of the purchase price or be forfeited as liquidated damages to the Sellers and not as a penalty, provided that the necessary title searches can be obtained from said West Jersey Title & Guaranty Company by that date. Should there be any delay not the fault of the Buyer in the procuring of such 20
searches, the time for the final settlement shall be extended until such searches can be obtained. 30

3. The title of the premises shall be free and clear of all encumbrances, including municipal liens and assessments, except as hereinafter expressly

provided and except municipal improvements in the course of construction and not assessed, obvious easements and exceptions other than mortgage exception stated in title policy of the West Jersey Title & Guaranty Company under application No. 53537, and exceptions pertaining to telephone and telegraph poles, etc., and shall be a marketable title and the Sellers shall tender a general warranty deed conveying such title at the time of the final settlement or in the event that such title at the time of the final settlement or in the event that such title cannot be as above, then the deposit of Five Hundred Dollars (\$500.00) herein mentioned shall be returned to the Buyer, and in addition thereto, the Sellers shall forfeit and pay to the Buyer the sum of Five Hundred Dollars (\$500.00) which is hereby agreed upon as liquidated damages to the Buyer and not as a penalty against the Sellers.

20

4. All adjustments shall be made as of the time of final settlement and possession shall be given the Buyer at time of final settlement.

5. The parties hereto agree that the deed given or tendered to the Buyer in pursuance of this agreement shall contain the following conditions, covenants, restrictions and agreements:

30

Provided, however, that this conveyance is made subject to the following express conditions, covenants, restrictions and agreements, viz:—

That the grantee herein named and his successors in title who may own all or any part of the land hereby conveyed adjacent to and abutting upon the right of way hereinbefore men-

tioned, shall assume and pay a share of such future costs of repair and maintenance as may be expended with respect to a certain railroad siding now located on or which may hereafter be extended along the said right of way adjoining the premises hereby conveyed, said cost of maintenance to relate only to the repair and maintenance of that part of the siding extending from the clearance point adjacent to the main tracks to and along and within the lines of said right of way to a point not nearer than three hundred twenty-five feet to the Northwesterly line of Cove Road and not to any portions of said siding which shall be nearer than three hundred twenty-five feet to said line of Cove Road or which shall be in the nature of spurs leading from the main siding tract on to the lands of adjacent owners. Said share shall bear the same proportion of the entire cost of such repairs or maintenance as one-half of the frontage of the grantee's land or those claiming under him adjacent to and abutting upon said right of way shall bear to the entire length of said siding from a point in the boundary line between lands now or late of said Elmer E. Stevens, Jr. and lands now or late of United New Jersey Railroad & Canal Company to a point in said right of way not nearer than three hundred twenty-five feet to the Northwesterly line of Cove Road. And also subject to the condition that the right of use by the grantee herein named, his heirs and assigns, of said right of way shall be restricted to such use as may be incident to the operation of trains over a railroad siding thereon constructed and the loading and unloading of cars operated along said siding. Such stipulations as to use of the

siding or any part thereof, excluding maintenance obligations, as are mentioned in a certain agreement dated November 12, 1926 and made between the Pennsylvania Railroad Company, Elmer E. Stevens, Jr. and Mathew C. Borch and Anders Remstad, co-partners trading as Superior Varnish & Drier Company. It is expressly understood and agreed that the above conditions, covenants, restrictions and agreements shall attach to and run with the land and bind all future owners and the said Elmer E. Stevens, Jr. for himself, his heirs, executors and administrators, doth covenant and agree to and with the said party of the second part, his heirs and assigns, that he shall and will in every deed of conveyance of any land now owned by him adjacent to or abutting upon said right of way hereafter made by him or any of them, insert and include conditions, covenants, restrictions and agreements to the same effect and identical in all respects, with the foregoing mentioned conditions, covenants, restrictions and agreements.

And the said Elmer E. Stevens, Jr. for himself, his heirs, executors and administrators, doth covenant and agree to and with the said party of the second part, his heirs and assigns, that he shall and will upon the refusal, neglect or default of any of the owners of lands adjacent to or abutting the right of way hereinbefore mentioned to maintain his or their proportionate part of the said railroad siding in the manner herein set out, himself pay the share or shares of such refusing, neglecting or defaulting owners, it being expressly understood and agreed that all contributions to the cost of such maintenance shall be due and payable

within thirty days after the rendering of a bill therefor and in the event of said Elmer E. Stevens, Jr. being required to pay the share of any other owner as aforesaid, then such payment on his part shall be made within twenty days after such default.

6. The Buyer shall pay for searches and all other expenses, except the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the Sellers. 10

7. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

8. Time is the essence of this agreement.

9. The Sellers agree to grade all of the proposed right of way hereinbefore mentioned extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr. and the United New Jersey Railroad & Canal Company as shown on the plan herein mentioned and referred to and also to furnish on the herein described premises all necessary earth required to grade the parcels of land herein described so that they may conform to the grade of the said Cove Road and the proposed right of way. All of said work shall be completed by June 1st, 1927. 20 30

10. The Sellers agree to extend the existing railroad siding from its point of termination in the proposed right of way to a point three hundred twenty-five feet from the intersection of the said proposed right of way with the Northwesterly line

of Cove Road, such extension to be made and completed by June 1, 1927, the Buyer to be granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding and right of way adjacent to his own lands to and upon the lands herein described in any direction or location, provided there shall be no encroachments of the said extension or any part thereof upon lands not belonging to the grantee,
10 but this provision shall not be construed to limit the right of the grantee to use such part of the right of way as might be necessary to be used in connection with the building of said extension.

11. All costs of surveying and placing of monuments shall be borne by the Sellers.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals, dated the day
20 and year first above written.

Elmer E. Stevens, Jr.
Mildred Wilkins Stevens
L. H. Blouch

Signed, sealed and delivered
in the presence of
(Insertion in line 23 page 5 made
and noted before signing.)
Howard S. Tilton as to L. H. Blouch

State of New Jersey }
County of Camden } ss.

BE IT REMEMBERED that on this 27th day of April, in the year of our Lord one thousand nine hundred and twenty seven, before me, a notary public in and for the State of New Jersey, personally appeared Elmer E. Stevens, Jr. and Mildred Wilkins Stevens, his wife, who I am satisfied are the grantors mentioned in the above agreement for sale of land and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified. 10

(Seal) Philip J. Gomez,
Notary Public of N. J.
My commission expires June 15, 1930.

20

[ENDORSED]

Service acknowledged December 13,
1927.

Clifford A. Baldwin,
Att'y for Defendants.

30

ANSWER.

(Filed Dec. 16, 1927.)

CAMDEN COUNTY CIRCUIT COURT.

10

LOUIS H. BLOUCH,

Plaintiff,

v.

ELMER E. STEVENS, JR.,

AND MILDRED WILKINS

STEVENS,

*Defendants.*Action at Law.
Answer.

20

The defendants, Elmer E. Stevens, Jr., and Mildred Wilkins Stevens, of the Township of Pensauken, in the County of Camden and State of New Jersey, answering the amended first count of the complaint herein filed, say that:

1. They admit the first, second and third paragraphs of the first count.
2. They deny the remainder of the first count, to wit: the fourth, fifth, sixth and seventh paragraphs thereof and the claim of damages therein set forth.

30

FIRST SEPARATE DEFENSE TO FIRST COUNT.

Whatever covenants were contained in the agree-

ment of sale referred to in the complaint were merged into the deed delivered by defendants to plaintiff at the time of settlement under said agreement and defendants will, at the trial of this cause, produce said deed or evidence thereof and thereby show that none of the matters and things complained of by the plaintiff constitute a breach or breaches of the covenants in said deed contained.

CLIFFORD A. BALDWIN,
Attorney for Defendants. 10

AMENDED ANSWER.

(Filed Feb. 23, 1928.)

CAMDEN COUNTY CIRCUIT COURT.

20

LOUIS H. BLOUCH,
Plaintiff,

v.

ELMER E. STEVENS, JR.,
AND MILDRED WILKINS
STEVENS,

Defendants.

Action at Law.
Amended Answer.

30

The defendants, Elmer E. Stevens, Jr., and Mildred Wilkins Stevens, of the Township of Pensauken, in the County of Camden and State of New Jersey, by this their amended answer to the second count of the complaint herein filed, say that:

1. They admit paragraph 1 and 2 of the second count.
2. They deny paragraph 3 of the second count.
3. They deny paragraph 4 of the second count.

10 FIRST SEPARATE DEFENSE TO SECOND COUNT.

Plaintiff is estopped from charging defendants with the breach of contract referred to in the second count for the reason that at the time of the settlement calculations and negotiations under the agreement referred to, it was arranged that plaintiff's attorney should retain the settlement funds until plaintiff had had an opportunity of examining the premises in question and determining from said examination whether defendants had or had not
20 complied with the provisions of said agreement as to grading and that in pursuance of said arrangement, said settlement funds were held by plaintiff's attorney and not turned over to the defendants until after plaintiff had made his said examination and instructed his said attorney that it was agreeable to him to have said funds turned over to defendants.

30 SECOND SEPARATE DEFENSE TO SECOND COUNT.

Whatever covenants were contained in the agreement of sale referred to in the complaint were merged into the deed delivered by defendants to plaintiff at the time of settlement under said agreement and defendants will, at the trial of this cause,

produce said deed or evidence thereof and thereby show that none of the matters and things complained of by the plaintiff constitute a breach or breaches of the covenants in said deed contained.

CLIFFORD A. BALDWIN,
Attorney for Defendants.

—

10

[ENDORSED]

We hereby acknowledge service of the within amended answer this 21st day of February, 1928.

Waddington & Mathews,
Attorneys for Plaintiff.

20

30

REPLY.

(Filed Mar. 2, 1928.)

CAMDEN COUNTY CIRCUIT COURT.

10

LEVI H. BLOUCH,

Plaintiff,

v.

ELMER E. STEVENS, JR.,

AND MILDRED WILKINS

STEVENS,

*Defendants.*Action at Law.
Reply.

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The plaintiff, Levi H. Blouch, of the Borough of Merchantville, in the County of Camden and State of New Jersey, replying to the answer and amended answer of the defendants heretofore filed in this matter, says that:

1. As to the first separate defense to the first count in the said answer contained, reserving his right to strike out the said first separate defense to the first count at the time of the trial on the ground that the same is insufficient in law to constitute a defense, he denies that whatever covenants were contained in the agreement of sale referred to in the complaint were merged into the deed delivered by the defendants to the plaintiff at the time of settlement under the said agreement and he specifically

denies that the covenants contained in Section 10 of the said agreement were merged into the said deed.

2. As to the first separate defense to the second count contained in the amended answer heretofore filed, reserving his right to strike out the said first separate defense to the second count at the time of trial on the ground that the same is insufficient in law to constitute a defense, he denies each and every allegation therein contained. 10

3. As to the second separate defense to the second count contained in the amended answer heretofore filed, reserving his right to strike out the said separate second defense to the second count at the time of trial on the ground that the same is insufficient in law to constitute a defense, he denies that whatever covenants were contained in the agreement of sale referred to in the complaint were merged into the deed delivered by the defendants to the plaintiff at the time of settlement under the said agreement and he specifically denies that the covenants contained in Section 9 of the said agreement were merged into the said deed. 20

WADDINGTON & MATHEWS,
Attorneys of Plaintiff.

30

[ENDORSED]

Service of the within acknowledged
this 29th day of February, 1928.

Clifford A. Baldwin,
Att'y of Defendants.

ORDER TO AMEND.

(Filed Mar. 2, 1928.)

CAMDEN COUNTY CIRCUIT COURT.

10

LOUIS H. BLOUCH,

Plaintiff,

v.

ELMER E. STEVENS, JR.,

AND MILDRED WILKINS

STEVENS,

*Defendants.*Action at Law.
Order to Amend.

20

It appearing to the Court that the name of the plaintiff herein is Levi H. Blouch and not Louis H. Blouch and the attorney of the defendants consenting that the title to the action be amended so that the name of the plaintiff will appear as Levi H. Blouch, it is on this second day of March, nineteen hundred and twenty-eight, on motion of Waddington & Mathews, attorneys of the plaintiff, ordered that the title of the action be and the same is hereby amended so that the name of the plaintiff will appear as Levi H. Blouch.

FRANK B. JESS,
Judge.

Order entered this 2nd day of March, 1928.

I hereby consent to the entry of the foregoing order to amend.

CLIFFORD A. BALDWIN,
Att'y to Defendants.

NOTICE OF APPEAL AND GROUNDS.

(Filed Aug. 30, 1929.) 10

CAMDEN COUNTY CIRCUIT COURT.

LEVI H. BLOUCH,	} Plaintiff,	} Action at Law.	} 20
ELMER E. STEVENS AND			
MILDRED WILKENS STE-	} Defendants.	} Notice of Appeal and	}
VENS,			

To Clifford A. Baldwin, Esq., Attorney of the Defendants, or to whom it may concern:

Sir:

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit: 30

1. Because the Court erred in granting the defendants' motion for a non-suit, as to the first count

JUDGMENT.

Therefore, the sheriff is commanded that he cause to come before the Judge of our Circuit Court, at Camden, in the County of Camden, on the third day of October, A. D. nineteen hundred and twenty-eight, twelve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also came who to speak the truth of the matter within contained be chosen, tried and sworn: and after evidence being given to them thereupon, the defendants moved the Judge to direct a non-suit by reasons that the matters aforesaid so given in evidence as aforesaid, by the plaintiff do not support the case set forth in the complaint, and the argument of counsel being thereupon heard and due consideration had, it is deemed that the plaintiff be non-suited, whereupon the jury are discharged from the further consideration of the premises.

Therefore, it is considered that the plaintiff take nothing by his writ, but that he be in mercy, etc., and that the defendants do go thereof without day, etc., and it is further considered that the defendants do recover against the plaintiff the sum of sixty-three dollars and ten cents for their costs and charges by them about their defense in their behalf laid out and expended, by the Court here adjudge to the defendants, and with their assent, and that the defendants have execution thereof, etc.

Judgment signed and entered this third day of October, A. D. one thousand nine hundred and twenty-eight.

A. DAYTON OLIPHANT,
Judge.

of plaintiff's complaint upon the evidence given at the trial.

2. Because the Court erred in granting the defendants' motion for a non-suit as to the second count of plaintiff's complaint, upon the evidence given at the trial.

Respectfully yours,
WADDINGTON & MATHEWS,
Attorneys of Plaintiff.

10

[ENDORSED]

Service of the within notice of appeal and grounds is hereby acknowledged, this 30th day of August, 1929.

Clifford A. Baldwin,
Atty. of Defendants.

20

30

TESTIMONY.

CAMDEN COUNTY CIRCUIT COURT.

LEVI H. BLOUCH, 10
Plaintiff, }
v. *Action at Law.* }
ELMER E. STEVENS, JR., }
et al., }
Defendants. }

Camden, N. J., October 2 and 3, 1928. 20

APPEARANCES:

For the plaintiff, WADDINGTON & MATHEWS, ESQS.
For the defendants, CLIFFORD A. BALDWIN, ESQ.

Before OLIPHANT, J., and a jury.

Mr. Waddington: May it please the Court, the answer set up two defenses and the plaintiff, in the reply, reserved the right to move to strike those answers, and as they both involve questions of law, and one of them, if sustained, will probably end this case immediately, I anticipate it will probably be proper to determine those questions on the motion, before we start with the testimony. The answer 30

sets up that whatever covenants were contained in the agreement of sale were merged in the deed delivered to the plaintiff at the time of settlement.

The Court: Well, apparently a part of the original complaint was stricken out, was it not, and then an amended complaint filed?

10 Mr. Waddington: That is right. And then an amended answer. Now, that was the defense in the answer to the first count. Now, the defenses in the answer to the second count are two. One is on the ground of estoppel and the other is that whatever covenants were contained in the agreement were merged with the deed. Now, clauses 9 and 10 of the agreement are the ones that are in question.

The Court: Well, No. 10 refers to the siding and No. 9 to the grading, does it not?

20

Mr. Waddington: That is right, your Honor. In going over the agreement you will notice that paragraph 5 particularly specifies that certain conditions, covenants and restrictions shall be contained in the deed and carried over to the deed. They are contained in that paragraph 5. Then paragraph 6 goes on with other matters and seven is in regard to other matters, eight is in regard to time being the essence of the contract, and nine is that "the sellers agree to grade all of the proposed right-of-way here-
30 inbefore mentioned, extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad and Canal Company, as shown on the plan herein mentioned and referred to, and also to furnish on the herein-described premises all necessary earth required to grade the parcels of land herein described so that

they may conform to the grade of the said Cove Road and the proposed right of way. All of said work shall be completed by June 1, 1927." I also want to call the Court's attention to the fact that under this agreement settlement could be made at any time prior to June 1st, and settlement actually was made on May 28th, so that there was still time in which grading work could be done.

The Court: You mean between May 28th and June 1st, 1927? 10

Mr. Waddington: Yes, sir. In other words, there were two working days in which work could be done on the grading of this property. In other words, it shows that settlement could be had before the day on which the final grading must take place. Section 10 provides, "The sellers agree to extend the existing railroad siding from its point of termination in the proposed right-of-way to a point three hundred twenty-five feet from the intersection of the said proposed right-of-way with the northwesterly line of Cove Road, such extension to be made and completed by June 1, 1927, the buyer to be granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding and right-of-way adjacent to his own lands to and upon the lands herein described in any direction or location, provided there shall be no encroachments of the said extension or any part thereof upon lands not belonging to the grantee, but this provision shall not be construed to limit the right of the grantee to use such part of the right-of-way as might be necessary to be used in connection with the building of said extension." Now, it is our contention that those two clauses are independent covenants and were not merged with the deed. The 20 30

covenants there contained are relating to work to be done and performed and are not usually matters which would be contained in a covenant to convey real estate. They are entirely separate and distinct in their nature from anything which would ordinarily be carried over into the deed, both the one in regard to the filling of the ground and the one in regard to the right to connect up to the railroad terminal.

10

The Court: Wouldn't that be in the deed?

Mr. Waddington: No, sir. That is a right with a terminal on a siding on an adjacent piece of ground, the right to connect to that piece of ground, to go over that siding on to your own, and it is not of course such that could be put in a deed, but there are two things here: One is that it is not in the paragraph which specifies the things which shall go in the deed, and the other is that it is not called for to be done until the first of June, and settlement on the property may be at any time prior to the first of June and was actually had prior to the first of June, so that it is in the line of those things which are independent and collateral to the deed.

20

(After further argument:)

Mr. Waddington: Now, it seems to me to be obvious that in this particular contract these covenants in regard to fill and in regard to the right to attach to the railroad track are independent and collateral to the agreement to convey and therefore was not merged with the deed. We submit that that defense should be stricken out. Now, the second one is the question of estoppel. Admitting the facts which they have alleged in their answer to be true, it does

30

not set up a state of facts which shows an estoppel. Their claim is that at the time of settlement we agreed to pay them so much money and receive a deed, and that pending that payment of money we went out and viewed the property, saw what it looked like and then came back and paid the money. That is what their answer practically alleges.

(After further argument:)

10

Mr. Waddington: Therefore we submit that that answer should be stricken out.

Mr. Baldwin: I am going to ask your Honor to amend that particular defense so as to call it a waiver rather than an estoppel. I think in law it might be more properly called a waiver than an estoppel, and I would like to amend that defense so as to have it constitute an allegation of waiver rather than an allegation of estoppel. 20

The Court: Is there any objection to that?

Mr. Waddington: I don't suppose that it makes any difference what he calls it, waiver or estoppel. There is no defense there.

The Court: I will hold your motion for the present.

30

(Mr. Waddington opens the case for the plaintiff to the jury.)

(Mr. Baldwin opens the case for the defendants to the jury.)

THE CASE FOR THE PLAINTIFF.

LEVI H. BLOUCH, sworn.

By Mr. Waddington:

Q. Mr. Blouch, did you have some business trans-
10 actions with Elmer E. Stevens and Mildred Stevens
in 1927?

A. I did.

Q. And as a result of those transactions, did you
enter into a written agreement for the purchase of
certain real estate?

A. I did.

Q. I show you an agreement dated the 26th of
April, 1927, between Elmer E. Stevens, Jr., and Mil-
dred Wilkins Stevens, his wife, and Levi H. Blouch,
20 and ask you whether or not that is the written agree-
ment which was entered into between the parties?

A. That is the original copy.

Mr. Waddington: I offer it in evidence.

(Said agreement marked Exhibit P1.)

Q. Mr. Blouch, after entering into this agreement
—or, first, will you explain to the jury the character
30 of the piece of ground which you were to purchase
under this agreement, the nature of it, where it was
located and what it was?

Mr. Baldwin: If your Honor please, I submit that
the agreement speaks for itself with respect to what
it covers.

The Court: Yes, it may as to what it covers, but not as to the nature of the ground.

Mr. Baldwin: I didn't mean that part. I meant the last part.

A. The characteristic of the ground was, it was an old brickyard, out of a portion of which they had excavated to make bricks. Along Cove Road there was quite an elevation they hadn't dug away, about fifty feet. From there it dropped off in quite a hurry and there was quite a hole. Mr. Stevens was after me to buy that piece of ground for several months —

Mr. Baldwin: I object. I ask that be stricken out.

The Court: Strike it out.

Q. I wanted the character of the ground. Now, under section 9 of the agreement, P1, it provides that the seller is to fill the ground. Now, will you tell the jury how much of that ground is filled?

Mr. Baldwin: I again object that the agreement speaks for itself, and counsel has made a misstatement. There wasn't any agreement to fill the ground. There was an agreement to furnish the necessary earth.

The Court: The agreement seems to be "to grade all of the proposed right of way," and to "furnish on the herein-described premises all necessary earth required to grade the parcels of land herein described so that they may conform to the grade of the said Cove Road and the proposed right of way."

Q. Mr. Blouch, what is your business?

A. I am a sales engineer.

Q. And you graduated from a college or institution in regard to engineering?

A. I am a graduate from Pennsylvania State College, full four-year course, held a bachelor of science degree in mechanical engineering, held a bachelor of science degree in electrical engineering, and a master degree, all from State College.

10 Q. And you followed that engineering work since you left college down to the present time?

A. I have.

Q. And as a result of that work, did you make a certain plan of this property?

A. I did.

Q. I show you a plan and ask you whether or not that is a plan of the property as made by you?

A. It is.

20 Q. And when did you make that up, as near as you can give it to us?

A. During the month of May, 1927.

Q. And was that prior to the date of your contract or subsequent to the date?

A. That was subsequent to it.

Q. The contract is dated April 26, 1927, and —

Mr. Baldwin: In the first place, I object. I think I am objecting properly to the qualification of Mr. Blouch.

30

The Court: There is no offer on the record.

Mr. Baldwin: It has just been handed to me, I suppose with that in mind, and frankly I do not know the course in mechanical engineering and electrical engineering, but I don't think it is in civil engineering, and I think the —

The Court: Let me ask counsel, what does the map purport to show?

Mr. Waddington: The map purports to show the right of way to the piece of ground that Mr. Blouch purchased.

The Witness: It shows the grades.

10

Mr. Waddington: And shows the grades on the property. That is the part —

The Court: Well, I don't know that he is properly qualified, Judge, to testify as to grades and maps.

Mr. Waddington: I will just ask a few more questions.

Q. Mr. Blouch, in the course of your study and the course of your work in mechanical engineering, do you have anything to do with determining the distance between points, as to the bottom and the top or between the certain distances on one side and another, in that course of work?

20

A. We have.

Q. And is that required to be before you at all times?

A. Yes, sir.

Q. And is work similar to grading of real estate, determining the amount necessary to fill a certain place, within the line of your work as a mechanical engineer?

30

A. For the past ten years I have been doing nothing but grading and cutting down retail coal yards.

Mr. Baldwin: I ask that be stricken out.

The Court: Strike it out.

Mr. Waddington: Repeat the question.

(Question repeated.)

A. It does.

10 Q. And have you since your college studies, from that time down to the present time, been engaged in work which would be necessary to determine the amount of earth or similar substance to fill a certain cavity?

A. I have.

Q. And is the determining of the grade on this particular map which I am showing you similar to the work which you have been carrying on in your engineering duties since your graduation from college?

A. It is identical to it.

20 Mr. Waddington: I submit that I am entitled to offer it in evidence.

Mr. Baldwin: I would like to cross-examine him.

The Court: Yes.

By Mr. Baldwin:

30 Q. Now, Mr. Blouch, did you make this survey yourself?

A. Yes, sir.

Q. Did you run the lines?

A. Yes, sir.

Q. What instruments did you use?

A. Keuffel and Essel.

Q. That is the make of something? What is the instrument called?

A. That is the name of the instrument.

Q. Is it a transit or what?

A. Yes, sir.

Q. How many surveys have you made since your graduation from college?

A. I should say thousands.

Q. Of plots of land?

A. Yes, sir.

Q. And is that connected in any way with your experience as a sales engineer? 10

A. Yes, sir.

Q. What do you sell?

A. Coal-handling equipment.

Q. In selling that to your customers, do you have to go out and make surveys?

A. Yes, sir.

Q. Where did you get the information from which you plotted these elevations?

A. From the land, piece of property. 20

Q. Didn't you use someone else's survey?

A. A portion of it. Not for the elevations. Is it a question for elevations or boundary lines? Which do you refer to?

Q. Anything that is on here. Did you use someone else's information for the means of plotting this?

A. Plotting the entire map?

Q. Any part of it?

A. The grades were received from myself and the property lines were received from a map I believe Mr. Stevens gave me. 30

Q. So the property lines are not the result of your own work, are they?

A. No, sir.

Mr. Baldwin: I object to the offer.

By Mr. Waddington:

Q. I understand these property lines were taken by you from a map furnished by Mr. Stevens to you of this particular property?

A. Yes, sir.

10 Mr. Waddington: I think that is proper to be admitted in evidence.

Mr. Baldwin: If your Honor please, we don't know that the map Mr. Stevens gave him is correct. We don't know what map it is. It is not here.

Q. Mr. Blouch, in determining this grade which is on here, you were out on the ground to do it?

A. Yes, sir.

20 Q. And when you were determining that and putting it upon the map, you were on your own piece of property that you had purchased or were about to purchase?

A. The one that I was about to purchase.

Q. And your checking of those grades was done within the lines of the property which you subsequently purchased?

A. Your question isn't clear to me.

Mr. Waddington: Just repeat it to him.

30 (Question repeated.)

Q. In other words, your work was done within the piece of ground you subsequently purchased?

A. I had to go outside to get a point. I had to go down where the railroad siding was.

Q. But your checking of grades was entirely

within the piece of ground which you were about to purchase?

A. Yes, sir.

Q. And the grades as laid out on this map are entirely within the lines of the piece of ground which you subsequently purchased?

A. Yes, sir.

Q. And in the course of your checking these grades to determine them, you actually checked the grades of your property, of the boundaries of your property? 10

A. Yes, sir.

By the Court:

Q. Have you since checked the lines on the blueprint with the lines contained in the deed?

A. Yes, sir; we have another exhibit there that is made by —

Q. Just answer the question. 20

A. Yes, sir.

Mr. Waddington: I feel that this is entitled to be admitted in evidence, having been checked with his deed for the property.

Mr. Baldwin: Now, if your Honor please, I still object to this offer, on the ground that it has not been shown in any way that these contours as plotted were on the day Mr. Blouch might have made his investigation the same as they were on the day of settlement. In other words, there might have been more fill put in there after this survey was made. I don't know. 30

The Court: I will admit it.

(Said map marked Exhibit P2.)

By Mr. Waddington:

Q. Now, Mr. Blouch, your survey shows the condition of the ground prior or subsequent to the fill?

A. Prior to it, prior to the time I purchased it.

Q. That shows the condition prior to Mr. Stevens putting in the fill which he was required under the
10 contract?

A. Yes, sir.

Q. Now, then, was there a plan made?

Mr. Baldwin: I beg pardon?

Q. Was there a plan made subsequent to the fill being made?

A. Yes, sir.

20 Mr. Baldwin: May I renew my objection, then, to the survey, on the ground it is immaterial, if it shows what conditions were before any fill was put in? I don't see that is material to this issue.

The Court: How otherwise could you determine the amount necessary to conform to grade?

Mr. Baldwin: It may tie up with something later on.

30 The Court: You may renew your objection at a later point.

Q. Who made that plan?

A. Mr. Bowden.

Q. And is Mr. Bowden here?

A. He was a while ago. Yes, sir; he is back there.

Q. Do you have a copy of the plan that Mr. Bowden made?

A. I have.

Q. Where is it?

A. You have it on your desk there with other blueprints.

Q. Is this the plan that you refer to (indicating)?

A. Yes, sir; this is the plan showing the finished grades ——— 10

Mr. Baldwin: I object. The question has been answered.

Mr. Waddington: May I have it marked for identification?

(Said plan marked Exhibit P3 for identification.)

Q. Now, Mr. Blouch, will you tell the jury what took place in regard to the railroad siding which you were privileged to connect up with or extend on to your property? 20

Mr. Baldwin: May we fix that as to time?

The Court: Yes.

Mr. Baldwin: After the settlement, before, or when? 30

Q. What was the condition of the railroad siding when you purchased the property or agreed to buy the property, I mean?

A. Before I answer the question, I would like to ask what you call the purchase date.

The Court: No, do not ask questions. If you do not understand a question, just say so.

The Witness: I don't understand the question.

Q. What was the condition of the railroad siding? How far built at the time you entered into the agreement to purchase the property?

10 The Court: The agreement marked **Exhibit P1**, dated the 26th day of April, 1927.

A. I would say that instead of being 325 feet from the intersection of Cove Road and River Road, it was approximately seven to eight hundred feet from the intersection of River Road and Cove Road.

Q. Now, subsequent to the entering into of this contract, was that road brought up to within 325 feet of Cove Road?

20 A. It was.

Q. What was the condition of that particular piece of road when you went there to connect your siding?

A. It wasn't filled up to the grade that it was supposed to have been filled up.

Mr. Baldwin: I object to the question. That only seems to deal with the right of way. That is not an element in this case.

30

The Court: Well, the condition —

Mr. Baldwin: There is no complaint made here that the right of way, that the forty-foot strip of land was not built. The complaint seems to be about trackage connections.

The Court: Well, that is all under the first count.

Mr. Baldwin: Yes, it would be. But there is no complaint there that the right of way, the forty-foot strip of land was not constructed or graded properly.

The Court: Might it not come in under the second count?

10

Mr. Baldwin: No, sir. The second count deals with the grading or furnishing of earth on Mr. Blouch's own land.

Mr. Waddington: I will withdraw the question for the time being and come back to it later.

Q. Mr. Blouch, who determined the number of feet, the number of square yards' shortage of dirt in the fill of the property?

20

Mr. Baldwin: I object. There is no testimony that there was a shortage.

Mr. Waddington: What I am trying to find out is whether Mr. Bowden did that or Mr. Blouch himself did it and checked the amount of shortage there.

The Court: Well, I can see no objection.

30

Mr. Baldwin: If your Honor please, that is what this case is about, whether there was or was not a shortage. Judge Waddington just asked the question who determined the shortage, as if there was a shortage.

The Court: I think the question probably better be reframed, Judge.

Q. Mr. Blouch, who made the investigation of the property as regards the amount of fill that had been made there?

A. Mr. Bowden.

10 Q. Mr. Blouch, from your knowledge and experience and work, do you know anything about what it costs to obtain fill for a particular piece of property?

Mr. Baldwin: I object.

The Court: Answer yes or no.

A. I do.

20 Q. And will you explain to the jury how you have gotten that experience and knowledge?

A. By the actual purchasing of the same.

Q. I did not hear you.

A. By the actual purchasing of the same.

Q. And on how many different occasions have you purchased?

A. Hundreds of them.

Q. And where?

30 A. East of Altoona, in the State of Pennsylvania; east of Cumberland, in the State of Maryland; District of Columbia; Virginia; east of the Shenandoah Valley and south of the New England States; New York, south of Poughkeepsie.

Q. And those various places and others you have actually purchased and made fill of dirt?

A. I have.

Q. Will you tell the jury, to the best of your judgment and knowledge, what it would cost per square

yard to fill and bring up the grade to the level required by the contract between you and Mr. Stevens, on your piece of property?

Mr. Baldwin: In the first place, that question calls for a conclusion as to how much dirt would be required, and in the second place his qualifications do not extend to this section of the country. Dirt here might cost one thing, twice as much in Reading. 10

The Court: Objection sustained.

Q. Have you had any experience in regard to purchase of dirt for fills in this vicinity?

A. I have. The nearest one to this property is 36th and Rosedale, in the City of Camden, and Howard Brothers in Merchantville.

Q. Have you, from your knowledge of conditions—cross that out. Can you, from your knowledge of conditions, state the value per square yard of dirt necessary to fill, cost of dirt necessary to fill the particular piece of property which you purchased from Mr. Stevens? 20

A. I can.

Q. How much per square yard would it cost you to fill that particular piece of ground?

A. Earth is usually valued by cubic yards instead of square yards.

Mr. Baldwin: It calls for a money figure. 30

The Court: Yes. Answer the question.

A. \$1.50 per cubic yard.

Mr. Waddington: My mistake. It should have been cubic yard instead of square yard.

By the Court:

Q. \$1.50?

A. \$1.50.

By Mr. Waddington:

10 Q. Now, Mr. Blouch, have you been able to purchase any dirt at a cheaper price than that, for this particular piece of ground?

A. I did.

Q. And will you explain to the jury what you paid for that particular dirt and where it came from and how it came?

A. I haven't paid anything for it yet.

Q. What have you agreed to pay for it?

A. Fifty cents a load. A load is supposed to be one cubic yard.

20 Q. And where does that dirt come from?

A. From Mr. Stevens' property.

Q. Is that adjoining you?

A. Yes, sir; next door.

Q. And can you tell us how much dirt you got at that figure?

A. Yes, if you allow me to refer to my file.

Q. All right. That is a memorandum you made or a bill sent to you or which?

A. The reason it hasn't been paid, there's a dispute of —

30 Q. I don't want the reason you haven't paid it. I want to know approximately how much dirt you got there at that figure.

A. Approximately 200 yards.

Q. Now, Mr. Blouch, turning to the other part of the case with regard to the railroad siding, you put a siding into your property?

A. I did.

Q. And when you went to put that siding in, in what condition did you find the siding which Mr. Stevens had put in?

A. It had been projected on to the adjoining property.

Q. What property is that?

A. The Newman's property at that time.

Q. You mean projected on to the Newman property. Had Mr. Newman put in a switch? 10

A. No, sir; he had extended the siding or track in the right of way.

Q. He had extended the siding or track in the right of way?

A. Yes, sir.

The Court: Excuse me, Judge, if I ask a question.

By the Court: 20

Q. You testified that at the time of the signing of the agreement the track was 700 or 800 feet from the Cove Road. Now, do you mean by your answer to the last question that it had been extended farther along toward Cove Road?

A. Oh, yes, it had been extended.

Q. Up to within the 325 feet?

A. Yes, sir; and from the point 325 feet it has been extended by Newman on to his property. 30

By Mr. Waddington:

Q. Now, will you tell the jury where Mr. Newman's property is as related to yours and the right of way?

A. The right of way is between my property and Mr. Newman's property. He is on the north side of the right of way and I am on the south side of the right of way and the right of way contains this side-track.

Q. And Mr. Newman had brought this right of way on up further and on to his property?

A. That's right.

10 Q. Now, under that condition, what became necessary for you to do to make a connection to that siding?

Mr. Baldwin: I object to the question as immaterial. No, I will withdraw my objection and make it later.

20 A. To purchase what they call switch ties, which are approximately twice the length of ordinary ties, to purchase a switch point, to purchase a frog and sufficient track to lead away from the track that had already been installed, commonly known to the railroad company as clearance point. In other words, I had to purchase from the switch point to the clearance point to get the equivalent right.

Mr. Baldwin: Well, I don't want this witness to draw conclusions.

30 The Court: Yes. Strike out the last three or four words. I may not be clear.

By the Court:

Q. I understood you to say the track had been continued from a point, that is, on the right of way, from a point 700 or 800 feet in Cove Road, up to a point 325 feet?

Mr. Baldwin: By Mr. Stevens.

A. That's right.

Q. Now, I understand you to say it had been extended on to Mr. Newman's line. Is that correct?

A. Yes, sir, beginning from the point of 325 feet. Not the 700 point, but the 325 feet. There are two points in that right of way we are talking about.

By Mr. Waddington:

10

Q. Now, could you, at the time you went to lay your siding, connect with the terminal point of the track as laid out by Mr. Stevens?

Mr. Baldwin: I object. If the answer is yes or no, I have no objection, but I think the answer can be limited to that.

The Court: Yes.

20

A. No.

Q. Now, you stated to the jury that it became necessary for you to purchase certain things to make your connection with the siding put in by Mr. Stevens. Who did that work for you?

A. Mr. Shaner.

Q. I show you a bill rendered by Mr. Shaner to you and ask you whether or not that is what he charged you for making the connection of your switch to the siding put in by Mr. Stevens? 30.

A. That is the correct amount.

Q. And how much is it?

Mr. Baldwin: I object to the amount of it. That is not the proper way to prove it.

The Court: Objection sustained.

Q. You paid the bill?

A. Yes, sir.

Cross-examination.

By Mr. Baldwin:

10 Q. Now, after your settlement, you had Mr. Bowden make the investigation as to the earth that had been put on your land, did you not?

A. Yes, sir.

Q. When you engaged Mr. Bowden, did you give him any particular instructions as to what you wanted him to do?

A. Yes, sir.

Q. What were those instructions?

20 A. Those instructions were to give me a detailed survey of the existing levels at the time the survey was made and also to check the property lines.

Q. Of course you had in mind only levels on your own land?

A. Yes, sir.

Q. He did not give you any levels outside your own land, did he?

A. May I refer to the blueprint?

Q. Yes.

A. Yes.

30 Q. Now, why do you suppose or do you know why he gave you levels outside your own boundary lines?

A. I do.

Q. Why?

A. Because he knew the purpose of the survey.

Q. Because you had explained it to him?

A. Yes, sir.

Q. And what had you told him was your purpose in getting him to make that survey?

A. To find out the difference of the grades as they were then as compared to what they should have been formed by a point, that point being in the center of the right of way or at the point of where the sidetrack was at the time I entered into the sales agreement with Mr. Stevens, which was this seven or eight hundred foot point from Cove Road and River Road. In other words, there was one point and all the rest of the grade was to be brought up to a plane formed by center point on Cove Road. That is the only other point on this blueprint. 10

Q. That is your conclusion of what the agreement meant?

A. That was the understanding when I entered into the agreement.

Q. So to find out whether the dirt that had been put on your land did cause that land to conform to the grade of the right of way and of Cove Road, you had your engineer go up the right of way 700 or 800 feet for a starting point, did you not? 20

A. Explain. I don't understand your question. I don't understand the starting point.

Q. One side of your land goes out to Cove Road?

A. Yes, sir.

Q. The other side of your land away from Cove Road is 335 feet from Cove Road on the right of way?

A. Yes, sir. 30

Q. How much farther up the right of way was this point you are talking about?

A. Probably between three and four hundred feet more.

Q. So that point was not anywhere near your land, was it?

A. No, sir.

Q. The right of way extended along your land for only the 335 feet?

A. That's right.

Q. And Cove Road extended along your land for how long a distance?

A. 250 feet.

Q. Did you also have him go farther up Cove Road than your land extended, to get a point?

10 A. Yes, sir; to the intersection of the right of way on Cove Road, which is the starting point.

Q. That was adjacent to your land?

A. It is further up Cove Road.

Q. 25 feet?

A. At that time, I don't know. I suppose within 50 feet.

Q. You didn't have him go up Cove Road 300 feet to get a point?

A. No, sir; that wasn't necessary.

20 Q. What you did have him do, as I understand it, was to go up this right of way about 300 feet away from any of the lands you purchased and put a stake out on Cove Road, didn't you?

A. I don't know what he did. I don't know whether he did that or not. I wasn't there when the survey was made.

Q. Why did you have him plot any levels outside of your own boundary lines?

A. Because I had to have that one point to establish the yardage.

30 Q. You were not entitled to have any dirt put in by Mr. Stevens outside your own boundary lines, were you?

A. No, sir.

Q. Did Mr. Stevens level and grade the dirt that he put there?

A. A portion of it.

Q. As far as you know, is the calculation and the

print of Mr. Bowden based upon a point 300 feet up the right of way and not at a point on the right of way adjacent to your own land?

A. Repeat the question, please?

Mr. Waddington: I object to the question on the ground it is something Mr. Bowden can testify to.

The Court: I think the witness has already testified, and from Mr. Bowden's map. 10

Q. I will state the question in a different way. Did Mr. Bowden carry out your instructions?

A. Yes, sir.

Q. And is that the result of his work?

A. Yes, sir.

Q. Now, what about this dirt that you know \$1.50 a cubic yard was paid for? How far was it hauled?

A. About a mile and a quarter.

Q. Where was the dirt hauled from that was put on your land? 20

A. On Mr. Stevens' property.

Q. Right adjacent?

A. Yes, sir.

Q. And does that account for the difference in price between \$1.50 and fifty cents a load?

A. That's one of the items, and the other item is Mr. Stevens had a hill he wanted to get rid of and I understand the man that delivered to me got fifty cents from Mr. Stevens and fifty I paid him, that made a dollar, and he in his own letter states that he gave it to me at half the price, due to the fact his excavator was standing there and he didn't have any work at the time. 30

Q. You didn't actually go out and buy any dirt and pay any price for it, except this dirt taken from the hill?

A. No, sir.

Q. And you haven't made any effort to get dirt?

A. No, sir.

Q. So you don't know what it would cost you?

A. Yes.

Q. How do you know, if you have made no effort to get it?

A. From the cost of other fills.

Q. Aren't there other hills out that way?

10 A. Yes.

Q. And have you asked the owners of any of those hills if they would like to have them cut down?

A. Yes, I have.

Q. How far away?

A. Over on Crescent Boulevard, between Federal Street and Marlton Pike.

Q. Did they tell you no or yes?

A. No or yes to what?

Q. To whether they would cut down their hill?

20 A. No, I asked them whether they wanted to dump some earth on my ground and what they wanted for it.

Q. Did you make any arrangement?

A. What do you mean by arrangement?

Q. Do business with them?

A. I did not.

Q. So you haven't had any dirt brought there?

A. I haven't, other than the approximate 200 yards delivered by Mr. Cramer.

30 Q. And you paid fifty cents for that?

A. I haven't paid it, but I have a bill for that.

Q. Do you think that is too much?

A. No.

Q. Have you been quoted by anybody a price for furnishing earth to this particular ground of yours?

A. Yes.

Q. And how far away was that dirt to be brought from?

A. About a mile and a half.

Q. Wasn't there any nearer dirt than that that you could get?

A. Not that I knew of.

Q. Where did you put the dirt, this 200 cubic yards that you bought?

A. Within my property lines.

Q. And you built a building on that land, didn't you? 10

A. Yes, sir.

Q. And it was necessary to grade up to that building, wasn't it?

A. Yes, sir.

Q. And that is where you put the dirt?

A. Yes, sir.

Q. You didn't put any dirt on any part of the land which Mr. Stevens sold you except such as was necessary to grade up to that building, did you? 20

A. Will you repeat the question?

(Question repeated.)

A. You didn't? I don't understand your question.

Q. Well, did you?

A. Yes, I did.

Q. Where?

A. Outside of the building, along the railroad siding. 30

Q. That is, grading up to the building?

A. No, could use the building without the grading; we used it for a while.

Q. How did you get in?

A. Through the doorway.

Q. What means did you use for getting up to the level of the doorway?

A. The same means I have now.

Q. Isn't the entrance to the doorway above the level of the land as Mr. Stevens left it?

A. Since it has been filled in, yes, sir.

Q. No, since the building has been built?

A. Since it has been filled.

10 Q. When did you put the building there?

A. In January, 1928.

Q. And that was after you made your settlement with Mr. Stevens?

A. Yes, sir.

Q. Now, when you put the building there, where was the level of the doorway with respect to the land as Mr. Stevens had left it?

A. Exactly the same; had not changed.

Q. At grade?

A. Yes, sir.

20 Q. So that when you put more dirt in between your building then and the tracks, what did that do with respect to your doorway?

A. That raised a corresponding height, because at the same time the grade was brought in within the building line.

Q. And you put some of the dirt inside the building line?

A. Yes, sir.

30 Q. About how much frontage does this building of yours have?

A. Fifty feet.

Q. Adjacent to the right of way?

A. No, sir.

Q. How far away from the right of way?

A. Approximately 100 feet.

Q. So it was in that rectangle of 50 by 150 you put this 200 yards of earth?

A. Portion of it.

Q. You didn't go outside that rectangle?

A. Yes; give me the map and I will show you.

Q. Which side?

A. The east, north and west side.

Q. In other words, you built slopes of earth to cause it to level down to the level of the land as Mr. Stevens had left it?

A. I don't understand your question.

Q. The dirt you put in you sloped down and graded it so that it would get down to the grade of the land as Mr. Stevens had left it on the sides? 10

A. No, sir.

Q. Did you put any dirt in there before you built your building?

A. No, sir.

Q. Did you put any dirt anywhere near Cove Road?

A. No, sir.

Q. Was the grading as Mr. Stevens had left it along Cove Road satisfactory to you then? 20

A. I will answer that if you will specify distance. Right on the edge of Cove Road, yes; ten feet inside, no.

Q. Not ten feet inside?

A. No.

Q. Now, with respect to this track, do I understand from you that Mr. Newman extended the track from this point 325 from Cove Road straight down the right of way? 30

A. No, sir.

Q. What did he do?

A. He started to curve it as fast as he could, as fast as the minimum curvature is allowed by the Pennsylvania Railroad.

Q. He didn't attempt to bend the track which Mr. Stevens had put there on to his own land, did he?

- A. I don't know.
- Q. Where did he hook up with Mr. Stevens' track?
- A. Where Mr. Stevens ended it.
- Q. Is that still where Mr. Stevens left it?
- A. I don't understand your question.
- Q. Is that point where Mr. Stevens ended his track still at the same location?
- A. Is it there now?
- Q. Yes.
- 10 A. I don't know.
- Q. You had attempted to do the same thing, haven't you?
- A. No, sir.
- Q. Didn't you attempt to make an extension of that track on to your own land?
- A. After Mr. Newman extended his portion; unfortunately, we had the same contract.
- Q. And had he locked up his connection with the track as Mr. Stevens had put it there?
- 20 A. I don't understand your question by the word "locked."
- Q. How do you lock a track?
- A. I don't know; I never heard such a word used.
- Q. Had he joined up his track with the end of Mr. Stevens' track?
- A. He had.
- Q. In what manner?
- A. The customary manner, connecting the two pieces of rail to each other.
- 30 Q. And how are those rails fastened?
- A. Nuts and bolts.
- Q. Is there anything funny about it? Now, had you similarly tried or did you, after Mr. Newman did that, to do the same thing, connect up with the end of the track with nuts and bolts?
- A. No, sir, I tried to throw the track Mr. Newman had laid over on my property.

Q. He had laid some track on your property?

A. Yes, sir.

Q. What did you do?

A. Instructed my contractor to throw the track over on my property, to build my track.

Q. By connecting up with the terminal point in a straight line, is that right?

A. No, I didn't specify that.

Q. But you adopted this switching method, you did 10
try to get that track on to your own land, didn't you?

A. Again I don't understand your question.

Q. What did you do before you finally adopted the switching method of getting the track on your own land?

A. Just as I repeated before, I instructed the contractor to get the present siding on my property.

Q. In what manner?

A. By extending the rail and curving it on my 20
property.

Q. And where was that curving to start?

A. Anywhere on my property line.

By the Court:

Q. How could it have been continued on to your property if it had been already continued on to Mr. Newman's property?

A. I think at the time we told him that the track 30
hadn't been laid on Mr. Newman's property. The rails and ties were there and just temporarily connected. I believe the contractor didn't have sufficient material there to reach over on to Mr. Newman's property and he had only started to curve the track in the right of way in the Newman property.

By Mr. Baldwin:

Q. There was a temporary connection of some kind there?

A. No, sir.

Q. You have just said there was?

A. On my property.

Q. No, on Mr. Newman's track, you said it was temporarily connected. Now, what kind of temporary connection was that?

A. Three or four sections of rail connected on to the end of the side track in the right of way, slightly curved in toward Newman's property. Whether it was on his property line or not, I don't know.

Q. And you caused that temporary connection to be unfastened?

A. No, it wasn't unfastened; just picked up and turned over.

Q. Bent around on your property?

A. Towards my property.

Q. In doing that, were you using any of Mr. Newman's track?

A. No, sir, not to my knowledge.

Q. Who did those extra sections belong to?

A. To Mr. Shaner, at that time.

Q. He was contractor for both of you?

A. Yes, sir.

Q. When Mr. Shaner had put those sections there, he had put them there for Newman, hadn't he?

A. I presume so.

Q. Was Mr. Stevens' track a straight rail as it came down this right of way?

A. No, sir.

Q. How far from its terminal point was it straight, then?

A. I couldn't tell you that.

Q. More than 200 feet, wasn't it?

A. Probably; I don't know, never measured it.

The Court: Approximately, if you know.

Q. You are a sales engineer, aren't you?

A. Yes, sir.

Q. And you can calculate distance. Wasn't the track that Mr. Stevens laid down there, to the point he terminated it, a straight piece of track for 200 feet? 10

A. From that point back toward the main track, yes, sir.

Q. Yes, toward the main track?

A. Yes.

Q. And that end where he had left it was ten feet nearer Cove Road than the large piece of property you had bought from Mr. Stevens connected with the right of way, wasn't it? 20

The Court: It ran along the front of your property for ten feet, didn't it?

The Witness: I would have to refer to my map.

Q. You have a frontage of 335 feet from Cove Road. Wasn't the frontage of the large piece of ground which you bought from Mr. Stevens 335 feet from Cove Road, measured along that right of way? 30

A. Yes, measured along the right of way. That isn't the total length. It is 360.

Q. So taking the large piece of ground you bought from Mr. Stevens, he had extended the track ten feet along your frontage of the big piece of property, hadn't he, before he stopped it?

A. Yes.

Q. Now, in addition to that big piece of property, you had also acquired a triangular piece adjacent to that that had some frontage along the right of way?

A. Yes, sir.

Q. And what was that frontage along the right of way?

A. I think that was 25 feet.

10 Q. So Mr. Stevens had built this track in front of your property for a total length of 35 feet, and that was a straight piece of track?

A. Yes, sir.

Q. Now, when you instructed Mr. Shaner to bend the sections that he had hooked on to Mr. Stevens' rails over on to your property, where did that point of curvature start?

A. At the end of 325 feet from the intersection of Cove Road and River Road.

20 Q. Not before that?

A. No, sir.

Q. Didn't you make any use of this triangle you purchased?

A. No, not for that siding.

Q. How many sidings have you?

A. Only one at the present time, but I expect to have three on there.

Q. You do expect to have three?

A. Yes, sir.

30 Q. So it is your understanding when you started to bend that track on to your property, you didn't do it except from a point 325 feet from Cove Road?

A. Yes, sir.

Q. You didn't go up the triangle any or go up the right of way any?

A. No, sir.

Q. And that is pretty clear in your mind, is it?

A. Yes, sir.

Q. Now, when you bought these switch ties and frog, where were they installed?

A. On the right of way.

Q. Were they installed at the terminal point where Mr. Stevens had stopped his track?

A. No, sir.

Q. They were up the right of way further?

A. Yes, sir.

Q. And you had hooked into that right of way 10 further along the track with a switching device?

A. Yes, sir, and even beyond my property line.

Q. Well, you had that right under the agreement to make use of the right of way, just so you did not use any privately owned property?

A. That's right.

Q. And in bringing that track on to your property, you further made use of the triangular piece of ground?

A. Yes, sir.

20

By the Court:

Q. When did you buy the triangular piece?

A. At the same time I bought from Mr. Stevens. It was bought with Mr. Stevens' knowledge of what it was bought for.

By Mr. Baldwin:

Q. You knew what you bought the triangular piece for? 30

A. Yes, sir.

Q. You wanted to run a track along it?

A. Yes, sir.

Q. But the terminal point where Mr. Stevens constructed it was beyond that triangle?

- A. Yes, sir.
- Q. It was at least ten feet into your other frontage?
- A. Yes, sir, that's right.
- Q. Now, you answered no to a question, could you connect with the siding at the terminal point. Now, why did you say no to that?
- A. Because I couldn't. It had already been connected; it had already been extended.
- 10 Q. You connected with the track further up the right of way?
- A. Connecting and extending are two things. You can connect to almost anything, but you can only extend to one part.
- Q. Isn't the track on your land now an extension of that siding?
- A. No, sir, it is a connection to that siding.
- Q. It doesn't extend the siding on to your property?
- 20 A. No, sir.
- Q. How do the cars get on it?
- A. By means of a connection to that siding.
- Q. It joins up with it, doesn't it? In other words, a car can get on to your land without any difficulty?
- A. Yes.
- Q. By coming up the siding and then going on to the track you installed?
- A. Yes, through a switch and a frog.
- Q. You knew you were going to connect with that
- 30 right of way further up the track, then, when you made the agreement?
- A. At some future date.
- Q. Yes, you were going to have three sidings?
- A. Yes, sir.
- Q. And you knew it would take a switch to get into it?
- A. For two of them; for one of them, not.

Q. Well, then, you haven't bought any switch or you haven't done anything yet as a means of getting into the terminal point, have you? The switch you bought was in line with one of your other proposed sidings, isn't that right?

A. Will you repeat the question?

(Question repeated.)

A. I don't understand your question.

10

Q. The switch you bought you were going to have three sidings?

A. Yes, sir.

Q. You have got one of them?

A. Yes, sir.

Q. And you have that by means of a switch you bought or expected to buy?

A. Not at the time I bought it.

Q. Have you made any switching connection with the track at this terminal point?

A. No, sir.

Q. Has Mr. Stevens kept you from making any?

A. Yes, sir.

Q. A switching connection?

A. Oh, not a switch.

Q. Has Mr. Stevens kept you from doing that?

A. No, sir.

By Mr. Waddington:

30

Q. What price was quoted to you on the dirt which you had within a mile and a half away?

A. \$1.50 a yard.

Mr. Waddington: That is all.

By the Court:

Q. From your experience, by means of a switch or other device, could the track be extended from the point 325 feet from Cove Road on to your property?

A. Could it by means of any other device?

Q. Well, switching device or whatever devices railroads use?

10 A. At this time, yes, since the track has now been extended, you could take that particular point so far as distance is concerned, but so far as trackage is concerned, in other words, the idea of this purchase was —

Q. Not the idea of the purchase. What I am trying to get at, could the track be extended from a point 325 feet from Cove Road on to your property?

A. It could not, because it is already extended.

20 Q. Wait. By means of a switching device or other device used in railroad construction?

A. It could not be extended, but it could be connected, therefore a connection could be made, but not extended.

By Mr. Baldwin:

Q. Let me ask you this. Is your arm an extension of your body?

30 A. I am not in a position to answer that. I am no doctor.

WILLIAM G. SHANER, SWORN.

By Mr. Waddington:

Q. Mr. Shaner, you are a contractor?

A. Yes, sir.

Q. And you are engaged in business where?

A. Well, within a radius of 150 miles of Philadelphia. 10

Q. And during 1927, did you have any business arrangement with Mr. Blouch in regard to work, labor and material on his siding out here near Cove Road?

A. Yes, sir.

Q. And what did you do for Mr. Blouch?

A. Well, the first thing I done for Mr. Blouch, Mr. Newman, I constructed or extended the present siding, I put in there for Mr. Stevens, I extended that for Mr. Newman, and Mr. Blouch wanted me to extend his track into his property, and I told him that we couldn't extend it for two people, it was already extended for Mr. Newman. I told him that the only way he could get in his property was by putting in a switch. 20

Q. And as a result of that, what happened, what did you do?

A. Well, the first place, Mr. Blouch asked me to put the track, extend the track on to his property and by doing that, I had to cut the track leading to Mr. Newman's track and throw it over on to Mr. Blouch's property. 30

Q. What then happened?

A. Mr. Newman, after Mr. Newman seen what I had done, he took a few men and went back and disconnected this track and put it back to its original location for Mr. Newman.

Q. And that is where it stayed?

A. That is where it stayed for—I don't remember how long—a short time.

Q. Now, then, did you ever — Well, what happened next after that?

A. The next thing happened, Mr. Blouch called me up and authorized me to lay his track for him by putting in a switch in Mr. Stevens' track.

Q. And did you perform that work?

10 A. Yes, sir.

Q. And did you render Mr. Blouch a bill for doing the work?

A. Yes, sir.

Q. I show you a statement and ask you whether or not that is the cost of putting in the switch?

A. That is my bill.

Q. And making the connection for Mr. Blouch?

A. That's right.

Q. And how much is it?

20

Mr. Baldwin: I object; in the first place, this was a switch put in under one of the other options Mr. Blouch had from extending from a point in the siding.

The Court: Well, it looks to me, Mr. Baldwin, as if it is going to be a purely legal question. I can't see any objection to it going in.

30 Mr. Baldwin: I think so, too, and I don't want any adverse testimony in that I can keep out.

The Court: I will let it in, and recess until one-thirty.

Q. What is the amount of the bill?

A. \$842.00.

(At this point, a recess was taken until 1:30 o'clock P. M.)

(Trial of the cause resumed at 1:30 o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

WILLIAM G. SHANER, resumed.

By Mr. Waddington:

10

Q. Mr. Shaner, how long have you been in business of a contractor?

Mr. Baldwin: I admit Mr. Shaner's qualifications.

The Court: Qualifications are admitted.

Q. You were employed by Mr. Stevens for the purpose of laying the railway track along the right of way which is mentioned in this agreement here?

20

A. Yes, sir.

Q. And you laid the right of way from a point 700 feet back from Cove Road up to the piece of 325 feet?

A. I don't know how far it was, but I know I laid up to within about 325 feet of Cove Road.

Q. And you were also employed by Mr. Newman to place the track over to his piece of ground?

30

A. Yes, sir.

Q. And what kind of connection did you make for Mr. Newman?

A. I didn't make any connection; I just extended his, Mr. Stevens' track, into Mr. Newman's track.

Q. You extended Mr. Stevens' track on over to Mr. Newman's property?

A. Yes, sir.

Q. What would have been the cost to Mr. Blouch had you been able to extend the track over to his property at the point 325 feet from Cove Road?

A. It wouldn't have cost him anything.

Q. What would be the cost to Mr. Blouch to make a switching connection at the point 325 feet from Cove Road at the time that you were requested to make the extension of that track for him?

10 A. I don't quite catch that question; I am not clear on it.

Q. What would be the cost to Mr. Blouch to make a connection at the point 325 feet from Cove Road with the track after the extension had been placed into Mr. Newman's property?

A. It would cost him about the same as what he did pay, around \$840.00.

20 Q. Now, after he had spent the \$842.00, would he then be on the same basis that he would have been had he been able to extend the track on to his property?

A. Practically the same basis, yes, sir.

Q. Now, in the laying of the track up to the point 325 feet from Cove Road, what did you do in the line of grading?

Mr. Baldwin: I object as immaterial and irrelevant to this case.

30 The Court: I don't see how it is material, Judge.

Mr. Waddington: It goes to the question which was raised by Mr. Baldwin's cross-examination in regard to the going back to a point where the road had stopped for the grade and bringing it on to a grade up to the point 325 feet from Cove Road.

You see, the contract calls for it to grade the proposed right of way to the hereinbefore mentioned extending from Cove Road, and so forth, calls for the grading of that, and I wanted to know what grading was done on bringing that up.

Mr. Baldwin: There is no complaint in this case that the grading was not done or that it was improperly done.

10

The Court: Well, the section provides that there shall be sufficient earth provided to make the grade conform with the grade of Cove Road and the proposed right of way. The previous part of the section provides that the seller agrees to grade all of the proposed right of way hereinbefore mentioned. I presume the question goes to or deals with the fact as to what the grade of the right of way was.

20

Mr. Waddington: That is right.

The Court: I will allow the question.

Mr. Baldwin: That was not the question asked, if your Honor please.

The Court: Maybe I misunderstood the question.

Mr. Baldwin: He asked Mr. Shaner what he did in the way of grading, and I don't think that is material in this case. I don't know that Mr. Shaner did the grading; maybe he did and maybe he did not.

The Court: I will allow the question.

Mr. Waddington: Will you repeat the question, please?

(Question repeated.)

The Court: If anything.

A. My recollection is that I done the grading for the width of my track up to that point, is my recollection of it.

Q. Was that a uniform grade from the point up to the other point 325 feet from Cove Road?

A. I could not state that; I don't know whether it was uniform or not. My recollection is that we were furnished stakes to go by and I don't know what those stakes were.

Q. Now, Mr. Shaner, if you were given a certain point on the line of Cove Road and a certain point on the line of the right of way and were instructed to place enough earth there required to grade the land so that it conformed to the grade of the said Cove Road and the proposed right of way, what would you take that to mean as regards fill?

A. That would mean that it would be the same as stretching a string between the two points to make it uniform.

Q. And bring the fill up to that string?

A. Bring the grade up to that point.

Mr. Waddington: Cross-examine.

Cross-examination.

By Mr. Baldwin:

Q. Now, Mr. Shaner, if Cove Road, for instance, ran at a grade so that one point on it was higher

than another point, I presume that if you took a stake on the higher point and ran your line there would be more fill underneath the line required than if you put your stake at one of the lower points on Cove Road?

A. Yes, sir, naturally.

Q. Not only Cove Road, is that true, but also along the right of way?

A. Anywhere.

Q. So that if the right of way elevated as it went away from Mr. Blouch's property, there would be more grading required underneath the line to fill up to it the further along you got that right of way for your stake, isn't that right? 10

A. That's right.

Q. Now, the only grading you did along the right of way was the width of your tracks?

A. I think so.

Q. And you did not grade the right of way itself?

A. No, sir, I did not. 20

Q. Only what was necessary to?

A. Lay my ties.

Q. To lay your ties? Now, you were asked the question if you had made a switching connection with this siding at a point 325 feet from Cove Road, what it would have cost, and you said approximately the same as the switching connection he did make?

A. Pretty close to it.

Q. So you could have made a switching connection with the track at its terminal point 325 feet? 30

A. Any place along that siding.

Q. And when you did Mr. Newman's work for him, I think you said you did not make any connection with the right of way, as Mr. Stevens had built it. Is that quite accurate?

A. I just extended Mr. Stevens' track.

Q. That was a connection?

A. No, it was an extension.

Q. Well, didn't the things connect?

A. It connected all two rails, but it was what we call extending the track. A connection necessitates a switch and a frog, a connection.

By the Court:

10 Q. How would you extend the track from any other point than at the terminal?

A. That isn't quite clear, your Honor.

Q. Well, the agreement says that the buyer is to be granted the privilege of extending the siding from the said terminal point thereof or from any point in said siding.

A. From any point in said siding would have to put in a switch.

Q. Then would that be extending?

20 A. And at the end of it, the terminal, he could extend it.

Q. Well, he could also extend it, could he not, by putting a switch in at any point?

A. That wouldn't be extending the existing track; that would be an additional track.

By Mr. Baldwin:

30 Q. Now, Mr. Shaner, you have worked for all three of these men, Mr. Stevens, Mr. Newman, and Mr. Blouch, haven't you?

A. Yes, sir.

Q. And after you had done Mr. Stevens' work and built his track up to within 325 feet of Cove Road, you were through with Mr. Stevens, were you not?

A. Yes, sir.

Q. Now, whose work did you start to do next?

A. Mr. Newman's.

Q. And I understand you did get a few lengths of track extended, as you call it, from the terminal point in connection with that job of Mr. Newman's, when Mr. Blouch came along and had you cut that connection in some way?

A. I had several rails.

Q. That was your own rails, ties, bolts and things?

A. Oh, yes; Mr. Newman, of course, was paying 10 for them.

Q. That wasn't any part of Mr. Stevens' job?

A. No, sir, nothing connected with Mr. Stevens.

Q. About how many lengths had you hooked on to Mr. Stevens' track when Mr. Blouch got you to do that?

A. I can't answer that off-hand. I think—well, I am positive I had six or eight rail lengths in; I suppose somewhere around there.

Q. Now, when you made your disconnection, 20 where did you make it, at the end of Mr. Stevens' track?

A. Mr. Newman's connection, you mean?

Q. No; when Mr. Blouch got you to cut the connection?

A. I cut it at the end of Mr. Stevens' track.

Q. And then what did you do?

A. I started to lay Mr. Blouch's track.

Q. Direct from that point?

A. Direct from that point, from his end of the 30 present siding.

Q. Did you bend any of Mr. Stevens' track on to Mr. Blouch's land?

A. I am not positive of that; I don't recall exactly whether I did or not.

Q. Now, it is possible that you started curvature

on to Mr. Blouch's land further up the track where Mr. Stevens had put the siding in?

A. Do you mean at the first time?

Q. Yes.

A. I am not positive.

Q. When you disconnected Mr. Newman's lengths of rail, that you had laid for him and then decided to do Mr. Blouch's work, didn't you bend some of Mr. Stevens' track over on to Mr. Blouch's land?

10 A. I am not positive whether I did or not.

Q. Is it possible you might have?

A. It is possible.

Q. Now, did you understand where Mr. Blouch's land boundaries were when you did this work?

A. I did.

Q. And did you understand where Mr. Stevens had terminated his track was ten feet inside the property line of Mr. Blouch on the large piece of ground and thirty-five feet of ground when you took

20 the triangle in connection with it?

A. I don't recall that.

Q. If you had made an extension or any kind of a connection with the track at its terminal point where Mr. Stevens had put that terminal point, would you have been able to lay Mr. Blouch's siding where it is now laid?

A. No, sir.

Q. To get Mr. Blouch's siding where it is now laid, you would have to start your curvature further up the track, wouldn't you?

30 A. Yes, sir.

Q. And do you know whether in making Mr. Blouch's siding for him you used the triangular piece of ground owned by him?

A. Yes, sir, I think we did.

Q. You did use that? With respect to Mr. Newman's land, how far beyond the terminal point that

Mr. Stevens had fixed did Mr. Newman's land start, approximately?

A. I don't get you.

Q. Was it right there?

A. No, it wasn't right there.

Q. You had to go up the right of way some before you could bend on to Mr. Newman, didn't you?

A. We started, as I would call it, to bend at the end of Mr. Stevens' track to get on to Mr. Newman's track, started to bend at the end of Mr. Stevens' track. 10

Q. Mr. Newman's land wasn't alongside of the terminal point?

A. No, sir.

Q. It was pretty well down the right of way?

A. I don't know whether you would call it down or not; it is toward Cove Road, River Road, I guess it is—isn't it?

Q. No, I think it is Cove Road. It doesn't matter; it is down toward the corner, the intersection? 20

A. Toward the corner, yes.

Q. Would it have been possible for Mr. Blouch to have made the switching connection with the siding at this terminal point in such a manner as to get a siding track on Mr. Blouch's land?

A. Yes, sir.

Q. Did the fact that Mr. Newman might have also joined with that track at the terminal point interfere with making such a switching connection? Is there room at the terminal point, in other words, 30 for a switching connection on to Mr. Blouch's land as well as the connection to Mr. Newman's land that was there?

A. By putting in a connection.

Q. There were no physical obstacles to that, were there?

A. No.

Q. As a matter of your experience, wouldn't it have been possible also at that same point, the terminal point, to have put in still another connection?

A. You mean three?

Q. Yes.

A. Well, it wouldn't have been a very good job to operate, from an operating standpoint.

Q. No, but it could have been done?

10 A. It could have been done by using a lot of special material.

Q. How much did you charge Mr. Blouch for the whole job that you did for him?

A. I don't recall now.

Q. What did you do, separate your charge, Mr. Shaner?

A. Yes, sir.

Q. And did this \$842.00 of yours represent only the switching device?

20 A. The switching device up to what we call the clearance point.

Q. You did do other work for Mr. Blouch and charged him separately for that?

A. Yes, sir.

Mr. Baldwin: I think that is all.

30 RICHARD W. NEWMAN, SWORN.

By Mr. Waddington:

Q. Mr. Newman, did you have some transactions with Mr. Stevens in regard to the purchase of some ground?

A. Yes, sir.

Q. In 1927?

A. Yes, sir.

Q. And did you enter into a contract with him for the purchase of some of the ground?

A. I did.

Q. I show you a contract and ask you whether or not that is your signature to the same?

A. It is.

Q. And is that a copy of the contract that was 10 entered into between you and Mr. Stevens?

A. Yes, it is.

Mr. Waddington: I offer it in evidence.

The Court: No objection?

Mr. Baldwin: No objection. I might say that this is not a fully executed copy, but the contents are the same as in the working copy. 20

Mr. Waddington: I believe Mrs. Stevens' signature was not put to it.

(Said paper marked Exhibit P4.)

Q. Mr. Newman, after you entered into this contract, did you take any action relative to a railroad siding being put in on your property?

A. Yes, I did. 30

Q. What did you do in that respect?

A. Why, I ordered Mr. Shaner to—he was laying the rail for Mr. Stevens at the time—to continue right on into my property.

Q. Mr. Stevens or Mr. Shaner?

A. Shaner.

Q. Did your work of laying it into the property?

A. He did.

Q. That was made, a connection right on the end of Mr. Stevens' —

A. Track.

Q. — track as laid up the right of way?

A. Yes, sir.

Q. It was not necessary for you to put in any switch or anything of that kind?

10 A. No, sir, it wasn't.

Q. You just continued the track right on?

A. Continued the track right on into the yard.

Q. Subsequent to Mr. Shaner starting work, how many lengths of track were disconnected by Mr. Shaner on your land or removed over to Mr. Blouch's land?

A. Well, there wasn't any removed off my land; that was on the right of way.

Q. Just disconnected on the right of way?

20 A. On the right of way, yes. Well, I couldn't say exactly—I forget about it—but I judge it was two or three rails, something like that. I don't remember, tell you the truth; I wouldn't say, because I don't remember.

Q. And Mr. Shaner moved that over on Mr. Blouch's land, and the next day you put it back, is that it?

A. Why, yes, the next day I put it back.

30 Q. Now, was the railing which you put back on to the line of the right of way from Mr. Blouch's land, which side of the 325 feet point was it on, Mr. Blouch's side or on Mr. Stevens' side?

A. On Mr. Stevens' side.

Q. That is, it was further away from Cove Road than the 325 feet?

A. I judge it was; of course, I don't know, but I judge it was.

Q. Oh, you don't know exactly?

A. No, I don't know exactly.

Mr. Waddington: Cross-examine.

Cross-examination.

By Mr. Baldwin:

Q. Mr. Newman, before anybody did any more 10
work than Mr. Stevens had done on this siding, were
you familiar with the location of the terminal point
as Mr. Stevens had fixed it?

A. No, I wasn't, because Mr. —

The Court: No, no reason.

Q. When you went to put the track back on your 20
land, where did you find the end of the track that
Mr. Stevens had laid?

A. Well, I wasn't putting any track back on my
land, there wasn't any off my land; on the right of
way, this occurred.

Q. Didn't you say that after your length of track
had been disconnected that you put it back?

A. Yes.

Q. What did you put back?

A. The track that had been cut or bolted and
placed over to shoot into Mr. Blouch's yard here,
I pushed that back in line again to try to bring it 30
up the best I could.

By the Court:

Q. You mean on to the right of way?

A. Yes, back on the right of way.

By Mr. Baldwin:

Q. You found it, then, on Mr. Blouch's land?

A. Well, I don't know about that; I don't know where the lines were or anything like that, Mr. Baldwin.

Q. Well, had the track Mr. Stevens put there been removed in any way?

10 A. Yes, this track had been moved where that terminal point was, I do not know whether Mr. Stevens' track or my track, because they had continued on with my track right off the end, the extension off the end.

Q. You didn't have any difficulty making a connection with the track at its terminal point, did you?

A. No, Mr. Shaner didn't say anything about having any trouble.

20 Q. And after Mr. Shaner had done your work, Mr. Blouch wanted to do the same thing, is that right, take advantage of that terminal point without a switch in place of your connection made in that manner?

A. I believe so.

Mr. Waddington: I object to that question as a conclusion.

The Court: Yes, strike it out, if you don't know.

30 Q. Well, what work was done on Mr. Blouch's behalf when you saw it? Had the track been extended on to his land at all?

A. Well, I don't know; I don't know where the line was; I don't know.

Q. Well, was there any more track there than Mr. Stevens had put there?

Mr. Waddington: Mr. Stevens did the whole work.

A. No, I don't think there had been.

Q. When you saw this track that you said you were going to push back or did push back, was it straight track or curved?

A. It was curved.

Q. So that if the track that Mr. Stevens had laid was entirely straight from its terminal point to at least 200 feet away, there was other track there than that curved track? 10

A. Yes, there was other track laid, yes, sir.

Q. And which way did it curve, toward your land or away from you?

A. Away from me; you mean the track on this side where it was cut or the piece that had been cut? I don't quite get you on that.

Q. Whatever you found there; you found your track had been cut? 20

A. Yes, the track had been cut.

Q. And some more work had been done after the cutting?

A. Yes.

Q. And that work that had been done after your cutting laid toward Mr. Blouch's land?

A. The track on that side, toward the river.

Q. And was it curved track?

A. It was curved, yes.

Q. Where did the curve start? 30

A. How do you mean, Mr. Baldwin?

Q. Well, there was straight track there for some of the distance, wasn't there?

A. Yes.

Q. And where did the curve start—where did the straight track end and the curved track start?

A. Well, you mean the curved track on Mr. Blouch's place?

Q. Yes.

A. Well, now, I couldn't give you any measurements of distance on that, but it was back off the track that was coming in toward my ground; that's what it was.

Q. Did it start to curve at that point where your connection had been cut?

10 A. Well, that's what I have been trying to explain to you. I don't know where my connection was. I know the track was completed right on into my property, and this had been cut back in a certain distance, but how many feet back, I don't know.

Q. Well, to get the track back so it would again connect with your track, you had to push it back?

A. I had to put it back with crowbars and three

20

By the Court:

Q. Was that track that you brought back with crow-bars straight track or curved?

A. It had been straight before, but curved then. That was where the cut was and bent over toward Mr. Blouch's place.

Q. You mean to say you straightened the curved rail with crowbars?

30 A. Yes, that's practically what I done.

By Mr. Waddington:

Q. How many feet had it been curved off the line, if you can say how many feet it was; was it very far, the width of this room or the width of this table, or what?

A. Well, say the rail on this side had come over, I guess, about two or three foot past the rail on the other side; that's the idea.

Q. Now, this piece which you curved over was up close to where your line of property starts, wasn't it?

A. No, it wasn't.

Q. How far back approximately, if you can say?

A. I think, if I am not mistaken, on the right of way I had to lay about 125 feet of my own before I could get into my ground. 10

Q. Now, that was curved or straight?

A. That was straight for a certain distance, until Mr. Shaner had to bring a curve into it to get on to my property.

Q. Now, was this break which took place in the straight part of the track or in the curved part?

A. Straight part of the track.

Mr. Waddington: All right; that is all. 20

By Mr. Baldwin:

Q. Mr. Newman, when you went there and found that your connection had been broken and instead of taking steps to restore it, you had chosen to make a connection with the siding track at its terminal point, would you have been able to do it in any way so as to extend the track on to your land?

A. Would I be able to connect to the track, you mean? 30

Q. Yes; if you were satisfied to let Mr. Blouch have the direct extension of the rails, would you have been able to have made your connection with the track at its terminal point, with any kind of device?

A. I wouldn't have been able to extend the track; I would have been able to connect to it with a switch.

Q. That would not have been an extension?

A. That would not have been an extension.

Q. You say you had to go down the right of way with some straight track before you were able to bend it on to your land?

A. Yes.

10 Q. Is that the idea?

A. Yes, that's the idea.

E. WARREN BOWDEN, SWORN.

By Mr. Waddington:

20 Q. Mr. Bowden, where do you live?

A. Merchantville.

Q. And what is your profession?

A. Civil engineer.

Q. And what school are you a graduate of?

Mr. Baldwin: I admit Mr. Bowden's qualifications.

The Court: Qualifications are admitted.

30 Q. You were employed by Mr. Stevens in regard to giving him certain lines for his property out near Cove Road?

A. I was.

Q. And you were also employed by Mr. Blouch in regard to lines on his property?

A. Elevations.

Q. Elevations on his property? In other words, you made the survey of Mr. Stevens' property and laid out the lines of the property?

A. Correct.

The Court: Do you call that the topography of the ground?

The Witness: Yes.

10

Q. And in making the survey of Mr. Stevens' property, you placed the monuments on the proposed sale of the property to Mr. Blouch, didn't you?

A. Yes, I monumented the property to be bought by Mr. Blouch.

Q. And also by Mr. Newman, is that right?

A. That is correct.

Q. Now, in doing that, you made the complete survey then of all of Mr. Stevens' property that he had there, is that right? 20

A. That is correct.

Q. Then you gave him grades for a fill that he was to make in Mr. Blouch's property, did you not?

A. I was asked to make a topographical survey to determine the ground as it stood in its raw condition and to submit that to him, in order that he might determine the fill required to bring it to grade.

Q. And is this the map which you made or plan that you made showing that condition of the ground? 30

A. I believe it is; yes, it is.

Q. Now, will you explain these lines which are irregular and tell us what those lines are?

A. The full irregular line indicates the ground level before the ground had been touched in any

way. The other lines on there, this dash line, indicates the finished grade after the grading had been completed and the grading contractor had leveled the work. The difference between the original grades and the finished grade I computed for the purpose of paying the contractor.

Q. Now, what is this solid straight line across here?

10 A. The solid straight line is a study made to determine how many yards would be required. That is the first line, first study line which I made, and that line would be a plane passed from the point down the right of way to the crown of Cove Road.

Q. And this plan here was made by you for Mr. Stevens?

A. For Mr. Stevens.

Q. And to show him the amount of fill necessary to put in on Mr. Blouch's land, is that right?

20 Mr. Baldwin: I object to the word "necessary."

Q. Well, to grade the land to the lines indicated?

A. No, I would answer that. May I add?

Q. Yes; go ahead.

A. That this grading was for the entire piece of property owned by Mr. Stevens to the side of the right of way and doesn't indicate on here in any way which of it is Mr. Blouch's property.

30 Q. In other words, this is the entire piece of Mr. Stevens' land?

A. Yes.

Q. Shows the entire part?

A. To this side of the right of way. He owned some land on the other side of the right of way which isn't shown here.

Q. That is this side of the right of way—you

mean the right of way on which Mr. Blouch's land is located?

A. Exactly, right.

Q. Now, can you tell us from this map which you have here how much of this plan shows on Mr. Blouch's land and how much of it shows Mr. Stevens' other land?

A. It is very difficult to say: I can plot it from notes, but offhand it is rather difficult to show you exactly where the line is. 10

Q. Now, will you tell us why the change was made from the original study across here of the straight line to the dotted line?

A. The original change, that is the dotted line, is the result of my having first made a study to see how many yards would be required, the full line, and then going out to try to determine how the grading might be done to save a lot of that yardage.

Q. In other words, the dotted line which was the work finally done, was the line reached to save a lot of the yardage, is that right? 20

A. That's true.

Q. And at whose instruction was that line made and that grade given?

Mr. Baldwin: Well, I object, unless the time of those instructions is fixed in some way.

The Court: Yes, I presume the time should be fixed. 30

Q. When was this work done, this plan made by you for Mr. Stevens?

A. It was made before I knew of any sale whatever to anyone, and I don't remember the exact date offhand.

Q. And at the time that the change was made from the plain, straight line to the dotted line, had a sale then been made?

A. Not to my knowledge. Might I add that I think I am partly responsible for the dashed line, inasmuch as Mr. Stevens asked my advice on the best way to secure a good looking job without undue expense.

10 Q. Wasn't there anything said between you and Mr. Stevens relative to changing the lines so that it wouldn't cost him so much to fill Mr. Blouch's land?

Mr. Baldwin: I object, unless it is shown whether or not that took place before or after the Blouch sale.

The Court: Yes.

20 Mr. Waddington: May I have that question again?

(Question repeated.)

Mr. Waddington: It seems to me the question implies it was Mr. Blouch's land then to be filled.

Mr. Baldwin: All right; I withdraw the objection.

30

A. At that time I had no knowledge of Mr. Blouch's property, inasmuch as the monumenting was done after this was all finished. In other words, the lines were laid out on the finished grade and not on any rough grade, so that I had no knowledge of Mr. Blouch's holdings.

Mr. Waddington: May I have that stricken out and ask him to answer the question?

The Court: Yes; repeat the question.

Mr. Baldwin: I think the first part is certainly responsive.

The Court: It probably is, but the question may be repeated and re-answered. 10

(Question repeated.)

A. No, nothing was said.

Q. In other words, you didn't have any conversation with Mr. Stevens relative to the grade which you had established costing too much to fill Mr. Blouch's land?

A. Mr. Blouch's name wasn't mentioned, to my knowledge. 20

Q. Now, what are these figures here and this notation here at the bottom—what do they refer to?

A. They refer to fill and cut. The irregularity here shown gives you the fact that some of the irregular original material had to be cut down and that some material put in the hollow places; that is, it wasn't all below grade but there was considerable quantity above grade and also a considerable quantity below grade, and this notation at the bottom is an attempt to show the balance between the fill and the cut and it shows that the fill — 30

Mr. Baldwin: Well, I object to what it shows.

The Court: Yes.

Mr. Waddington: I don't see any reason for the objection.

The Court: The question doesn't contemplate. You just asked what the figures were, Judge.

Q. Will you explain those figures there to the jury?

10 Mr. Baldwin: I object on the ground that what the engineer would be reading from is not in evidence.

The Court: Yes.

Mr. Waddington: I will offer the map in evidence.

20 Mr. Baldwin: I object to the offer. In the first place, the plan is a topographical survey of a large tract of land, namely: Mr. Stevens' entire holdings in that right of way, and the engineer has confessed from inability of not having notes here, it fails to indicate the Blouch land. It might be possible a great deal of grading would be needed on Mr. Stevens' whole plot. I don't see that the plan is admissible, for that reason.

30 The Court: I don't see how it is relevant, in its present shape. As I remember, the witness said he knew nothing about the Blouch purchase and that the map did not designate the Blouch holdings, but was a map of the whole Stevens property, and the figures that the witness is now —

Mr. Waddington: I will ask some further questions.

Q. This side of the map, where does that start from on the ground in question?

A. That starts from the far side of the right of way, from Mr. Blouch.

Q. The far side of the right of way from Mr. Blouch?

A. Including the right of way.

Q. Then this side of this plan would be Mr. Blouch's land?

A. It would.

10

Q. And the full length of it?

A. Not to the full length.

Q. Now, what do these small lines here indicate, the square, that make the little squares?

A. They indicate feet of elevation and horizontally they indicate distances on the ground.

Q. Horizontally, this way means so many feet from the right of way?

A. Exactly.

Q. And then Mr. Blouch's land would be so many feet from this right of way across this way?

20

A. Yes.

Q. And what is along this side of the property?

A. At this first section is taken near the crown of Cove Road.

Q. In other words, the portion, then, of Mr. Blouch's property which is along Cove Road would be affected by this first section on this plan?

A. Yes.

Q. And then Mr. Blouch's property would extend 30 feet from this corner a number of feet in this direction that he owned and the number of feet in this direction that he owned, is that right?

Mr. Baldwin: The witness didn't say that. The witness said on this side of the plan beyond the

right of way, first of all, before you start to get to Mr. Blouch's land.

The Court: Well, he may answer the question.

The Witness: Repeat the question, please?

(Question repeated.)

10 A. Mr. Blouch's property plus the width of the right of way would extend along in this direction, would extend along the bottom of this chart, and the other holdings might be indicated by these sections; these sections occur at regular indicated intervals, they are marked on there.

Q. And how many feet are they?

A. They average about thirty feet apart.

Q. Then, given the size of Mr. Blouch's piece of property, you can designate which part of this plan
20 is his property, is that right?

A. Yes; it would be a little difficult without notes, but it is possible.

By the Court:

Q. Do you know or did you know the topography or do you know what the topography of the Bowden land was on the 26th day of April, 1927?

30 Mr. Waddington: You mean Blouch's land, not Bowden's.

The Court: That is true.

A. I made a topographical survey; I don't remember the date.

Q. Well, from that topographical survey, is it possible to tell how much earth was required to bring the grade of that property in conformity with the grade of Cove Road and the right of way?

A. I think it is.

Q. Do you know that?

A. Might I add that the grade of the right of way determines that?

Q. Wasn't the grade of the right of way fixed or constant? 10

A. I wouldn't say that it was, that is, not to my knowledge of it.

Q. Well, the right of way had a grade, didn't it?

A. Exactly.

Q. And Cove Road had a grade, didn't it?

A. Cove Road is at right angles, approximately right angles, to the grade.

Q. But when you talk of bringing ground into conformity with grades, that is a common expression in the engineering field, isn't it? 20

A. That's true, it is.

Q. And isn't it easy to determine the amount of earth necessary to bring a certain piece of ground to a certain grade or in conformity with other grades?

A. In laying a piece of track, you might have to lay a vertical curve if the ground was low or in passing over an elevation you might make the curve the other way. In other words, the grade might 30 change its percentage; if it rose two and a half feet in one hundred at the beginning, you might have to find it necessary to rise three and a half at the end.

Q. That is a question of averages, isn't it?

A. That is true, yet it wouldn't be a straight point from one end of the line to the other.

By Mr. Waddington:

Q. Did you give the grade for the laying of the right of way, the railroad on the right of way for Mr. Stevens?

A. Yes.

10 Q. And in making up that grade, did you use a line between the lands of Elmer E. Stevens and the United New Jersey Railroad and Canal Company as shown on a plan? Did you have anything to do with that line in fixing your grade?

A. I took a point at the end of the track as it then stood, the extended siding as it then stood, that is the beginning of the work which was also part of the other land belonging to Mr. Stevens, and a point in Cove Road and, as I say, made a study to determine the yardage required to fill it, and then tried to balance the cut and fill in such a way to save, if possible, and produce the results.

20 Q. Now, you were given the proposition to grade all the proposed right of way, that is, the right of way along this particular piece of ground mentioned, extending from Cove Road to a line between the lands of Elmer E. Stevens, Jr., and the United New Jersey Railroad and Canal Company, as shown on the plan herein mentioned and referred to. Would you consider that to be a straight line between those two points to reach your grade, or would you have hills and hollows in it?

30

Mr. Baldwin: If your Honor please, I object to that question on the ground counsel is now dealing with the grade of the right of way. All the witness knows about is the grade of the Blouch land. There is no complaint that the right of way hasn't been properly graded or how it might have been graded.

The Court: Well, I must confess it may be my denseness, but it seems to me that we are wasting considerable time. Now, as I say, I may be entirely mistaken and it may be my denseness, but it seems to me an easy matter to determine how much earth it would take or should have taken to make this ground conform to the grade of the right of way and Cove Road. Now, if I am mistaken in that, please correct me, but it strikes me as if we are beating around the bush a great deal to get at a simple engineering problem, and I think after that we will take a recess for five minutes. 10

(At this point, a recess was taken for five minutes.)

E. WARREN BOWDEN, resumed.

20

By Mr. Waddington:

Q. Mr. Bowden, at the request of Mr. Blouch, did you make a plan or map of the amount required to bring up his ground to the level of the right of way and Cove Road?

A. I did.

Q. And is this the map or plan that you made?

A. It is.

Q. And did you, for Mr. Blouch, calculate the amount of dirt necessary and required to fill the piece of ground? 30

A. I did.

Q. And what was that amount?

A. 1950 cubic yards.

Q. And that is the number of cubic yards neces-

sary to bring Mr. Blouch's land up to the grade of the Cove Road with the grade of the right of way?

A. With the grade of the ideal right of way.

Q. What do you mean by the ideal right of way?

A. These figures give the yardage required to fill with the plane surface determined by the center line of Cove Road to a point down the right of way.

10 Q. Why did you take a point down the right of way?

A. That was the point where the original track extension had ended.

Q. In other words, you took the point where the original track extension had ended and took a straight line from there to the Cove Road, is that right?

A. That is right, that is true.

Q. And your calculation here is based on the grading of that right of way on that straight line?

20 A. It is.

Mr. Waddington: There is another point in this matter I wanted to take up, if I might, now.

The Court: Very well.

Q. Mr. Bowden, you have had experience in regard to the cost of fill?

A. I have.

30 Q. And what would be the cost per cubic yard of dirt to fill this piece of ground of Mr. Blouch's?

A. It would depend upon the distance required to be hauled; it might vary from fifty cents to \$1.50 or more if hauled further.

Q. In other words, it depends on the haul and where you get it from as to what the cost might be?

A. Very largely.

Q. And do you know of very many cases where you can get dirt for fifty cents, as cheap as that?

A. I do not.

Q. And that is not the average, is it?

A. I would say that.

Q. What would be about the average?

A. Something under a dollar, I would say; eighty-five. I have had some work recently at about a dollar.

10

Q. Mr. Bowden, how far is the point on which you drew your straight line to Cove Road from the line between Mr. Stevens' land and the United New Jersey Railway?

A. I can't recall exactly, but I think it is very near it.

Q. Very near it?

A. Very near it, as I recall.

Q. And is this line, then, or the straight line that you drew approximately the correct grade line between the New Jersey line and Stevens' line and Cove Road?

20

A. Yes.

Mr. Waddington: Cross-examine.

Cross-examination.

By Mr. Baldwin:

30

Q. Mr. Bowden, before you started on this work for Mr. Blouch, did he give you any instructions?

A. Mr. Blouch asked me to go out, make a topographical survey to determine the grades as they then existed, the grading being complete, and to determine the yardage required to fill to a plane, which

plane was to be determined by the crown of Cove Road and the point on the right of way where the original track had been.

Q. Was that point on the right of way where the original track had been anywhere near Blouch's land?

A. It isn't, no.

Q. Pretty well up the right of way, wasn't it?

A. About 300 feet or so.

10 Q. This map that you made then shows the levels where you found them after Mr. Stevens had finished his work, that is one thing it shows?

A. Correct.

Q. The other thing it shows is a computation by you, or does that show it? You have testified to a computation made by you of the amount of cubic yards of earth required to fill up from where Mr. Stevens had left the grading to a line which you would call the ideal elevation, isn't that right?

20 A. That's true.

Q. Now, that line by which you fixed the ideal elevation was fastened on one end to the crown of Cove Road, wasn't it?

A. It was.

Q. And on the other end you went up the right of way considerably beyond Mr. Blouch's boundary line and established another stake up there, didn't you?

A. That's right.

30 Q. You then stretched a line, or theoretically you did stretch a line between that stake on the crown of Cove Road and the stake away up the right of way?

A. I did.

Q. Does that right of way slope upward or downward?

A. The right of way runs upward toward Cove Road.

Q. Upward toward Cove Road?

A. Cove Road is the highest point in this whole property.

Q. Suppose instead of going out the right of way as far as you did with your stake to fix the ideal elevation you had chosen a point on the right of way which was really adjacent to the Blouch land, would that cause a slighter or greater number of cubic yards of fill? 10

Mr. Waddington: I object to that question, may it please the Court, on the ground that the line to be graded to is the line between the Elmer E. Stevens ground and the United New Jersey Railroad and Canal Company as shown on the plan and which line is approximately, he said, or within a very few feet within the point of where he started 20 and the grade under the contract is to be carried from one point to another on this right of way.

Mr. Baldwin: That is undoubtedly true as to the right of way itself, but that was to be graded to a point near the United New Jersey Railroad land, but we are talking now about the grading of Mr. Blouch's land and the right of way ran by Mr. Blouch's land on one side and Cove Road on the other, and this contract with respect to the grading 30 of the Blouch land says all Mr. Stevens is to do is to put earth in there so that the Blouch land may conform to the grade of Cove Road and the proposed right of way. Now, manifestly that means that part of the right of way adjacent to the right of way.

The Court: Now, in the first place, the proposed right of way was to be graded between the lands of Stevens and the United New Jersey Railroad and Canal Company as shown on the plan herein mentioned. Now, where is the plan?

Mr. Baldwin: It is not here.

10 The Court: Now, isn't it necessary to start with that plan and get your grade of your right of way and then the Blouch land, according to this agreement, must conform to the grades of this proposed right of way and Cove Road.

Mr. Baldwin: That is right, but if your Honor will read the agreement, you will find that it isn't said how even the right of way shall be graded.

20 The Court: I don't know; it says here, "on the plan herein mentioned."

Mr. Baldwin: It says the sellers agree to grade all of the right of way hereinbefore mentioned extending from Cove Road to the line between lands of Elmer E. Stevens, Jr., and the United Railroad and Canal Company. In other words, that was the territorial extent of the right of way, but it didn't say the right of way had to be graded from Cove Road at one end at a certain level to the other.

30 The Court: Does the plan say so?

Mr. Baldwin: No, there are no grade levels on the plan. I don't know that we can prove it; part of it was made by Remington and Vosbury and part by Mr. Bowden. I am perfectly willing it be used to help out.

The Court: Cannot counsel agree as to whether or not the levels of the right of way are mentioned in the plan?

Mr. Baldwin: No, there are no levels on the plan. It is a boundary survey.

Mr. Waddington: The plan as mentioned was a boundary survey, as mentioned in the contract. 10

The Court: Then, according to the agreement, all that Stevens had to do was to grade this right of way, no particular level.

Mr. Baldwin: I say all he had to do with respect to Blouch.

The Court: I am perfectly clear as to what he had to do with respect to Blouch; I am trying to get straightened out on the right of way. 20

Mr. Waddington: May I ask Mr. Bowden a question?

The Court: Certainly.

By Mr. Waddington:

Q. Mr. Bowden, given the question of to grade all the proposed right of way hereinbefore mentioned extending from Cove Road to the line of the lands between the said Elmer E. Stevens and the United New Jersey Railroad and Canal Company as shown on the plan, would you take that to mean that was to be graded from one point to the other in a straight line or would that mean that it was to be graded up hill and down dale? 30

Mr. Baldwin: Well, I object as immaterial in this case. The grading of the right of way isn't in issue. The issue is how should Blouch's land be graded.

The Court: I am afraid I will have to sustain the objection.

(After further argument:)

10

Mr. Baldwin: I will admit that the right of way was to be graded evenly.

By the Court:

Q. What do you mean by grading a piece of property, a strip of property?

A. By grading a strip of property, I would understand the reduction of irregularities.

20

Q. That is, to take out the hills and valleys and make it —

Mr. Baldwin: Plane surface.

Q. Plane surface?

A. To grade a piece of property, if it were a field you would have to iron out all the irregularities and leave a plane surface.

30 Q. But that plane surface could be on an up-grade or down-grade, couldn't it?

A. It could.

Mr. Baldwin: In other words, I will admit, if it will save any time, that the right of way was to be smoothly graded, but I won't admit Blouch was to have all the fill necessary on his land to bring him

to the highest point or to the lowest point in that right of way.

The Court: I will sustain the objection to the question as it is.

Mr. Waddington: May I have an exception?

The Court: Yes, certainly.

(Exception noted for the plaintiff.)

10

By Mr. Waddington:

Q. Mr. Bowden, then to have graded the line between Cove Road and the line of the New Jersey Railroad and Canal Company and Mr. Stevens' land, it would mean a straight line between those two points without any ups and downs in it?

20

Mr. Baldwin: I object, immaterial and irrelevant, because the right of way was not to be graded in that fashion. I admitted it was to be graded evenly, but I didn't say it was to be graded to the line of land of the United New Jersey Railroad and Canal Company. We had nothing to do with the elevation of it.

The Court: Read me the question.

(Question repeated.)

30

The Court: I will allow the question.

A. Yes, sir.

Q. Now, has the right of way between the Cove

Road and the Elmer E. Stevens and United New Jersey Railroad and Canal Company been graded to that straight line?

A. It doesn't reach a straight line between those two points.

Q. And is it lower or higher, that line?

Mr. Baldwin: I object to the grade of the right of way; that is not in issue in this case. There has
10 been no complaint made that we haven't carried out that part of our agreement. We said we were to grade the right of way. It is not in the suit.

The Court: But it is in the suit that it must be graded to conform to the grade of Cove Road and the proposed right of way.

Mr. Baldwin: That is right.

20 The Court: Now, Mr. Bowden says that the railroad isn't on the proposed right of way, isn't on that grade.

Mr. Baldwin: Well, it hasn't been complained about before. I never heard of it until today, that we haven't put our right of way where it should be put. There isn't a single allegation in the complaint that deals with it. What we are trying to find out is how much earth was needed on Blouch's
30 land.

The Court: Yes, but it is complained about that the necessary earth was not provided to grade the premises to conform to the grade of Cove Road and the proposed right of way.

Mr. Baldwin: Then what was the proposed grade,

then, of the right of way? There is no testimony to that.

The Court: Mr. Bowden says it was a line between the land of Stevens and the United New Jersey Railroad and Canal Company.

Mr. Baldwin: Mr. Bowden wasn't even present when these parties entered into the agreement. I ask that his answer to that question be stricken out, 10 on the ground it isn't binding on the defendants. He does not know what the agreement was between these parties, unless he can show that he does.

The Court: No, I refuse to strike it out.

Mr. Baldwin: I should have objected earlier, but I did not understand that was what he was saying.

Mr. Waddington: Will you repeat the question? 20

(Question repeated.)

Q. That line, referring to the line between the New Jersey Railroad and Canal Company line and Cove Road?

A. A straight line between those two points?

Q. Yes.

A. The right-of-way line is a line below a straight line between those two points. 30

By the Court:

Q. Let me ask you, Mr. Bowden, when you say a straight line, what do you mean?

A. I mean a line.

Q. A straight line to the lay mind is the shortest distance between two points. Is that what you mean?

A. A straight line is the shortest distance between two points.

Q. I mean, is that the way you are using it here?

A. Yes, my question included without I have ups and downs in it; I mean to answer to that that I wouldn't have ups and downs in it.

10 Q. Do you know the condition of the right of way now?

A. I do.

Q. Has it ups and downs in it?

A. Not to my knowledge.

By Mr. Waddington:

Q. It has a curve down between the two points at the end, doesn't it?

A. It does.

20 Q. Is there any point of it higher than the line between those two points, the straight line between those two points?

A. Not to my knowledge.

Q. And the survey which you have there before you was made to conform with that straight line?

A. It was made to conform to the straight line.

By Mr. Baldwin:

30 Q. Where is the right of way lower than the line which you have mentioned adjacent to Mr. Blouch's land or not?

A. The right of way, the tracks on the right of way and the grading on the right of way rises with a gradually increasing grade from the point in consideration up toward Cove Road.

Q. Then as it approaches Cove Road, the right of way gets higher?

A. The right of way becomes higher.

Q. So is there any part of that right of way along the 360 feet of Blouch's frontage that is lower than that imaginary line?

A. Repeat the question, please?

(Question repeated.)

10

A. The larger part of it is below the imaginary line.

Q. And does it get lower as you go away from Cove Road?

A. All grades are down from Cove Road.

Q. Well, then, the answer is yes?

A. Yes.

Q. So that the highest part of the right of way is in front of Mr. Blouch's land, isn't it, because Mr. Blouch's land runs to Cove Road? 20

A. Yes, sir.

Q. Given the problem, Mr. Bowden, of grading a piece of land which is adjacent on one side to one thing that has physical existence such as a street or road or right of way or what not, and has another side of it adjacent to another street or road extending along one of those streets or roads for 360 feet and along the other one for 250 feet, and you are given the problem to grade that parcel of land so that it may conform to the grade of those two boundary elements, now what is the proper engineering method of determining how to grade that piece of land so as to conform to those two boundary levels? 30

A. I would try to pass a plane such as it would contain both the lines.

Q. Would you go any further down the one street

than the 250 feet, or would you go down the other street any further than the 360 feet to get your starting point?

A. No.

Q. You would limit yourself to that part of the grade of those streets that was adjacent to the land which you were to grade, wouldn't you?

A. I would.

10 Q. Couldn't it happen that if you did go down the street four, five, six or seven hundred feet to get a point and pass your plane through that point, if you try to grade to that plane that you might grade your land itself so high that it wouldn't meet the street or road or avenue adjacent to it?

A. That is true.

20 Q. Would you consider it a proper engineering determination of how to make this piece of land conform to the grade of Cove Road on this side and the grade of this right of way on this side to go down that right of way as far as you went to get your starting point, or did you take your point there because somebody told you to?

30 Mr. Waddington: I object to that question. It seems to me, may it please the Court, this matter is to come down to the grade as called for in the contract and not some possible prospective grade that may sometime be taken. It has got to be the definite grade as called for in the contract and not something that may be taken at his discretion.

Mr. Baldwin: I will ask a preliminary question.

Q. When you made this determination of the amount of fill, was the right of way completed?

A. It was.

Q. And it is with the right of way as you found it that you made this determination, isn't it?

A. All grading had been finished at the time this map was made.

Q. And the right of way had been finished?

A. It had.

Q. This point on the right of way from that 800 feet down the same was on top of the right of way as then finished, wasn't it?

A. That point had never been moved. 10

Q. Yes, you took that point as you found it?

A. Yes.

Q. Now, again going back to our question, would it be proper engineering practice if you were going to grade a piece of land so as to make it conform to the two boundary levels to go down three or four or five or six hundred feet away from the piece of land itself to establish your plane?

Mr. Waddington: I object to that question. It should be the boundary level called for by the contract and not a boundary level as made at that time, which was incorrect. 20

Mr. Baldwin: Again I say there is no boundary level in the contract, there is nothing in the contract about what the grade of the right of way should be. The right of way is finished; it was finished when Mr. Bowden made this. Taking the right of way as he found it, if Mr. Blouch is entitled to have that conform on one side with Cove Road and the other with the right of way, it must be the right of way as presently finished, because there has been no complaint that it was not properly finished. 30

The Court: According to the contract, there

doesn't appear to be any grade fixed for the right of way. I will allow the question.

Mr. Baldwin: Will you repeat the question?

(Exception noted for plaintiff.)

(Question repeated.)

10

A. It would not.

Q. Have you computed how much the yardage of 1950 cubic yards would shrink or increase if no point for the determination of your plane were taken beyond the 360 feet along the right of way or the 250 feet along the Cove Road?

A. I have never made any such computation.

Q. Would it shrink or increase?

20

Mr. Waddington: I object to the question.

Mr. Baldwin: Well, he hasn't made any computation, but he may have some general idea.

The Court: If he knows, he may say.

(Exception noted for plaintiff.)

30

A. There would certainly be less yardage required to fill, considering the property lines only of the plot.

Mr. Baldwin: Will you repeat the answer?

The Witness: There would certainly be less yardage to fill, considering only the property lines adjacent to the plot.

Q. Are you able to say how much less?

A. I don't think I could.

By the Court:

Q. Mr. Bowden, you testified that from the computations made by you, it would take 1950 cubic yards to make this fill?

A. To bring it to that grade.

Q. If 1950 cubic yards of earth were put in there, then the property would not be to the grade of the right of way or would not conform to the grade of the right of way and Cove Road, would it? 10

A. Not as it now stands.

Q. Can you determine from your notes and maps the amount of fill necessary to make this property conform to the grade of the right of way and Cove Road?

A. As it now stands?

Q. Yes.

20

A. Yes.

Mr. Baldwin: I will ask that that be done overnight and the witness return in the morning with the information.

The Court: Anything further of this witness?

Mr. Baldwin: That is all I have.

30

Mr. Waddington: We rest.

The Court: Well, you make that computation overnight.

Mr. Waddington: I will offer that map in evidence.

The Court: It may be offered.

(Said map marked Exhibit P3.)

PLAINTIFF RESTS.

10 Mr. Baldwin: I would like to make a motion, first,
with regard to the first count. Two agreements have
been offered in evidence, one with Blouch and Rich-
ard W. Newman, both dated the 26th of April, 1927.
There has been no testimony which of those agree-
ments preceded the other in point of time. In the
first place, the privileges of extending the track
from its terminal point or from any point in it were
not in their nature exclusive, but if they were, there
has been no testimony that the making of the New-
man agreement by Stevens deprived Mr. Blouch of
20 that privilege or that Mr. and Mrs. Stevens in any
other way deprived him of the privilege; in other
words, even taking their allegations as true that we
did or their meaning of the agreement as being a
proper interpretation of it, there has been no testi-
mony that we have broken the agreement, but after
all the question does resolve itself into one of what
the agreement means. Now, the parties themselves
have used the word "extension" and I don't think
any quibbling or equivocation or that it might be
30 called a connection or extension has any place in the
case.

The Court: Well, let me say to counsel that it
seems to me that the agreement is clear and speaks
for itself, and that there is no ambiguity in it. I
am not shutting off counsel from arguing by stating
my views.

Mr. Baldwin: On that ground, and on that ground alone, I base my motion for non-suit on the first count, because the parties themselves have used the word "extension."

The Court: Just to get my thought on it. The parties themselves say that the buyer is granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding. Now, the parties had in mind the granting by the buyer, or the seller to the buyer of connecting on to that right of way, either at the end of it or at any point along it, and used the word "extension" applying both to an addition on the end of the right of way or a connection by way of a switch or other contrivance. The testimony seems to be that the defendant has given the plaintiff everything he contracted to give him under this clause of the agreement. The testimony as it now stands is that the plaintiff could either connect his extension, using the word "extension" as it is in the agreement, from the point 325 feet from Cove Road, or from any point along the right of way. Now, Judge, I would be glad to hear from you.

(Mr. Waddington replies.)

The Court: Well, I will be glad to hear further from counsel in the morning, if they want to add anything.

(At this point, a recess was taken until October 3rd, 1928, at ten o'clock A. M.)

Camden, N. J., October 3, 1928.

(Trial of the cause resumed on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.)

The Court: Judge, I will be glad to hear further from you.

(After further argument:)

The Court: Now, what is the motion before the Court?

Mr. Baldwin: The motion is to non-suit as to the first count of the complaint.

The Court: I think, for the purpose of the record, there should be a decision by the Court on the motion to strike out the separate defenses.

Mr. Baldwin: They don't deal with this situation. One is merger and one is waiver.

The Court: They relate to the second count, do they not?

Mr. Baldwin: There is also an allegation as to merger as to the first count, but I think if the present motion is dispositive of it, the present merger wouldn't come in until the defendant's case.

The Court: Well, I will grant the motion as to the first count.

Mr. Baldwin: The non-suit?

The Court: Yes.

Mr. Waddington: May I have an exception?

The Court: Yes.

(Exception noted for plaintiff.)

Mr. Baldwin: Now, I would also like to move for a non-suit as to the second count, on the ground that no testimony is here today that there is any violation on the part of the defendants of that paragraph of their agreement wherein they agree to furnish all the necessary earth required to grade the parcels of land so that they might conform to the grade of said Cove Road and the proposed right of way. 10

The Court: Well, the Court yesterday afternoon instructed Mr. Bowden to be here this morning with figures, and I think that testimony should be taken. 20

Mr. Baldwin: Now, may I recall to the Court what that question was? "Can you determine from your notes and maps the amount of fill necessary to make this property conform," and so forth.

The Court: Mr. Bowden —

Mr. Waddington: May it please the Court, I object to this testimony. I objected to several questions yesterday leading to it and I want to note my objection thoroughly on the record in regard to it now. 30

Mr. Baldwin: I don't insist on the testimony.

Mr. Waddington: I think there is sufficient testi-

mony before the Court in regard to this contract showing under the terms of the contract the amount necessary to fill. In other words, Mr. Bowden's testimony was that it took 1950 yards to fill that to the grade of the line between Cove Road and the line of the United New Jersey Railroad and Canal Company and Mr. Stevens' line. Now, on that situation, it seems to me that that line is the grade line.

10 (After further argument:)

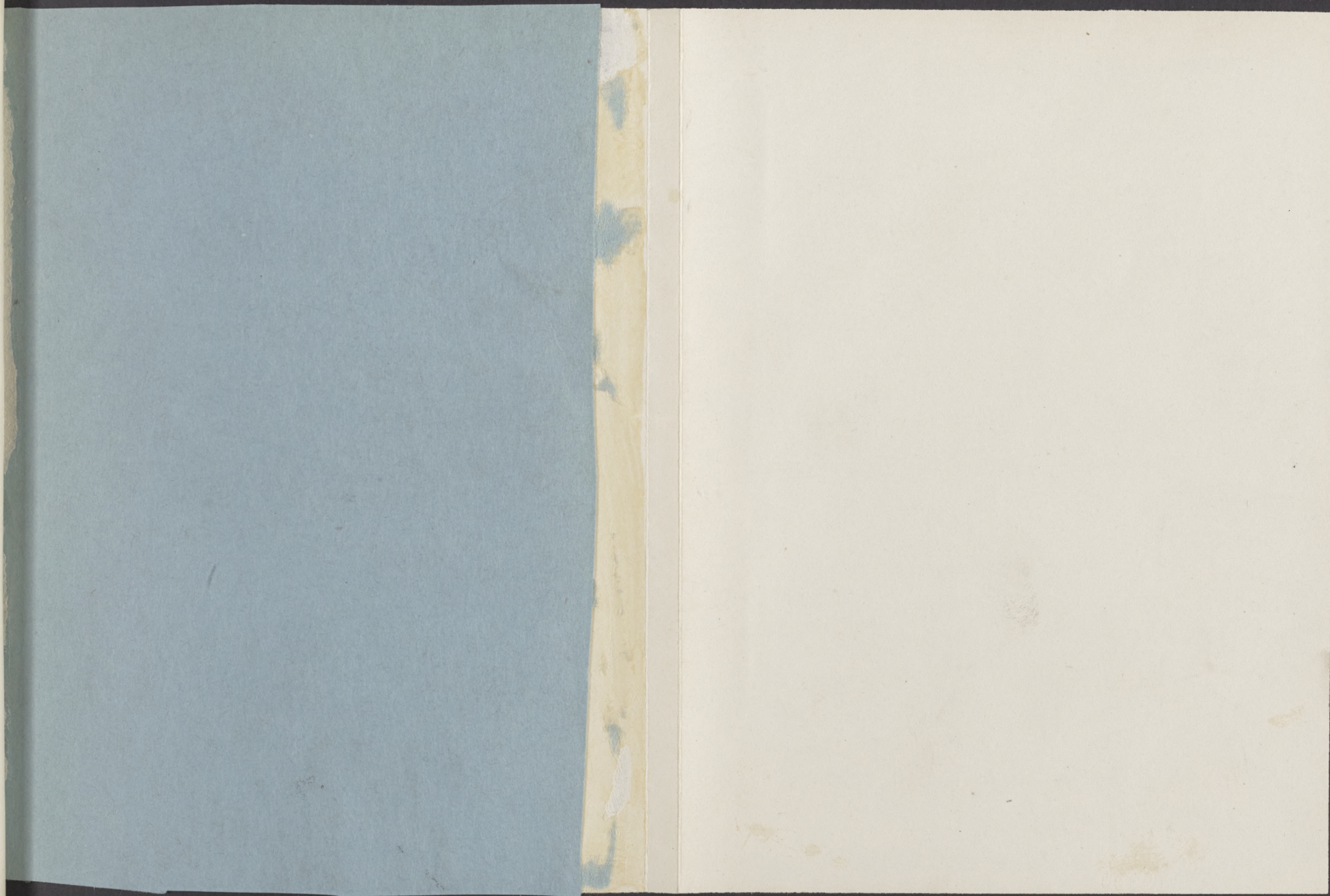
The Court: I understand that plaintiff does not desire to recall Mr. Bowden.

Mr. Waddington: That is right.

The Court: Then I will grant the motion as to the second count, and grant you an exception.

20 (Exception noted for plaintiff.)

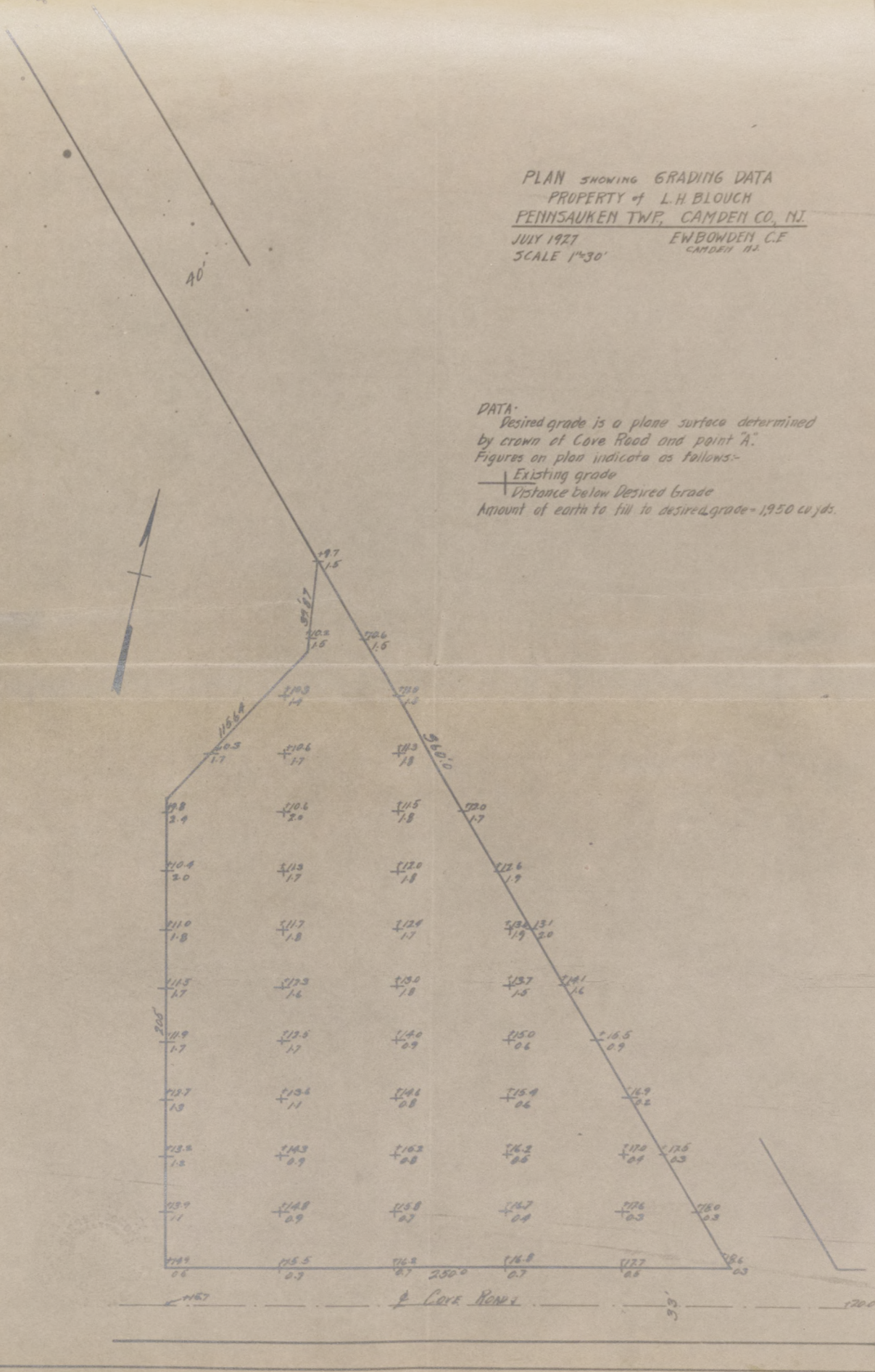
30



"A" Former end of siding.
 53

PLAN SHOWING GRADING DATA
 PROPERTY of L.H. BLOUCH
 PENNSAUKEN TWP, CAMDEN CO, NJ
 JULY 1927
 SCALE 1"=30'
 EWBOWDEN C.F.
 CAMDEN NJ

DATA:
 Desired grade is a plane surface determined
 by crown of Cove Road and point "A".
 Figures on plan indicate as follows:-
 — Existing grade
 | Distance below Desired Grade
 Amount of earth to fill to desired grade - 1,950 cu yds.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

LEVI H. BLOUCH,
Plaintiff-Appellant,

v.

ELMER E. STEVENS and MILDRED STEVENS,
Defendants-Appellees.

ACTION AT LAW.

ON APPEAL.

REPLY BRIEF ON BEHALF OF PLAINTIFF-
APPELLANT.

The reply brief is devoted entirely to the second count as argued by the attorney for the defendants-appellees, and is given so that there might be no mistake relative to why the engineer, Bowden, went to the point marked "A" on Exhibit P3, in the back of the State of the Case, and took the line from that point to Cove Road for determining the quantity of fill necessary to grade the plaintiff's land. The defendant, in their brief, call attention of the Court

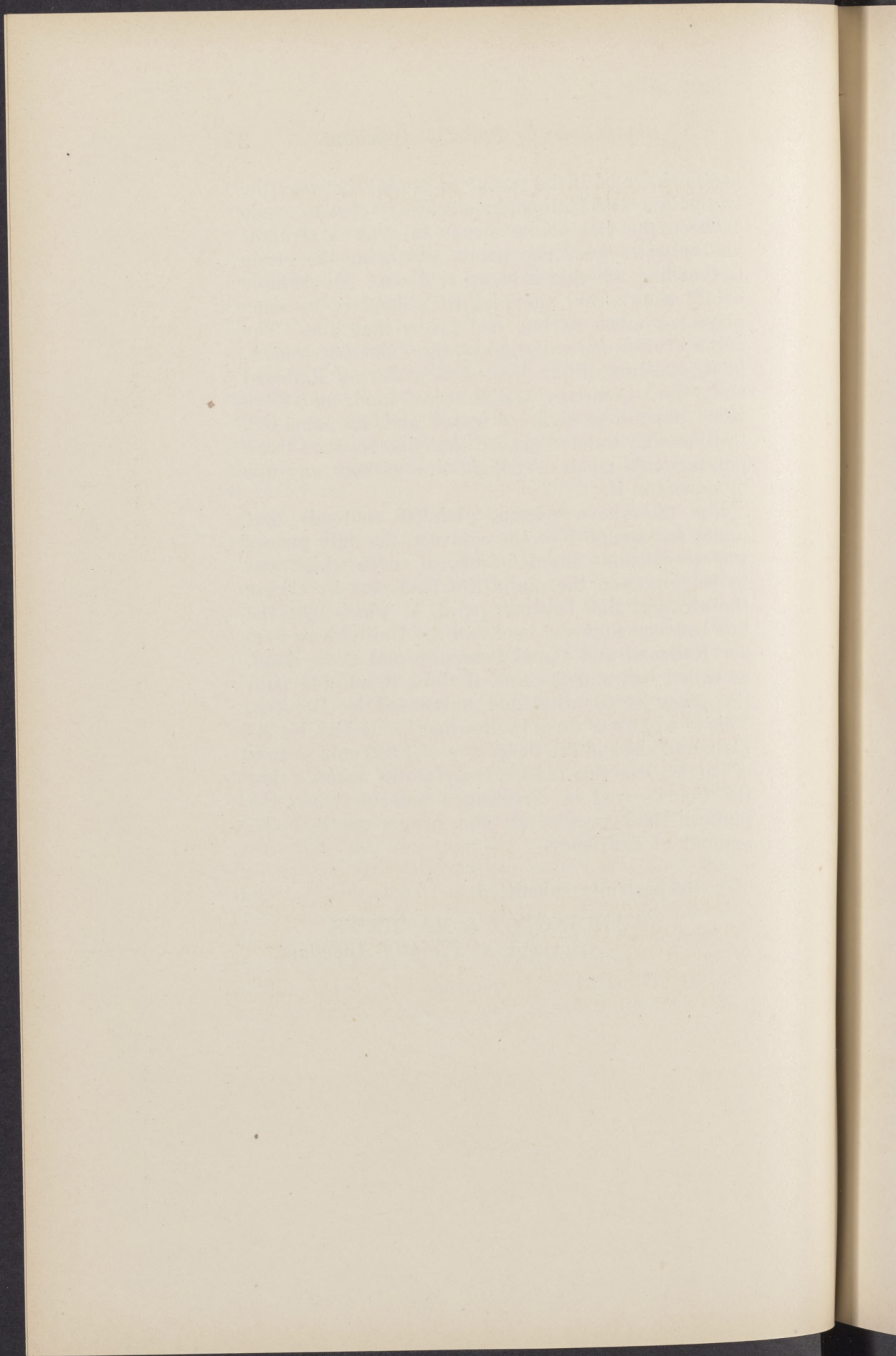
to testimony on page 17 of the brief as regards the distance which Mr. Bowden would go down the right of way to start to take the plane which he has testified to and as set forth on page 16 of the defendant's brief through the lines surrounding the property. Bowden, on page 107 of the State of the Case, line 22 to line 36, states that the proper way to grade the piece of ground would be to pass a plane which would contain both of the lines of the property, indicating that to grade a piece of ground or a right of way, it would be necessary to pass a plane between the two points and bring the right of way or the piece of ground up to the level or cut it down to that level. Point "A" on Exhibit P3 is the end of the old siding and the line between Stevens' land and the United New Jersey Railway and Canal Company, which is the point designated in the contract, Section 9, as being the points between which the right of way is to be graded. Defendant's attorney accepts the testimony of Bowden to be proper as to grading the piece of ground such as that purchased by Blouch, by passing a plane across it, but denies that that would be the proper way to grade the right of way, and refers, on page 15 and 16, to the grading between Trenton and Bordentown, which is an entirely different proposition. To grade any road, as designated in the *Gas & Electric Securities Company v. Manhattan Traction Company*, 256 Fed. 625, correctly speaking, is to establish a level by mathematical points and lines and then to bring streets and highways to the level by elevation or by dredging of the natural surface to the line fixed. In the example of the defendant, there would be several grades fixed between the two points, which is of considerable distance, but in the case at hand, which is only a short distance, the

parties have used the term "to grade" between the two points, and both engineers testify that to grade between the two points means to draw a straight line between those two points and bring the grade to that line, whether it be up or down. An example of P3 shows that the plaintiff's land is in some places as much as two feet below that line. The engineer Bowden calls the straight line between A, being the line of the United New Jersey Railroad and Canal Company and Stevens' land, and Cove Road the "ideal right of way," and, on page 103, testifies that to have graded that line between those points would mean a straight line without any ups or downs in it.

For the above reason, plaintiff contends that under paragraph 9 of the contract, the only proper way to calculate the deficiency of earth which was to be put upon the plaintiff's land was by taking the straight line between point A, which was the line between Stevens' land and the United New Jersey Railroad and Canal Company and Cove Road, as called for, and the line of Cove Road, and pass the plane across the land purchased by Stevens. This is what was done by Bowden in his Exhibit P3 plan, and showed the deficiency of 1,950 cubic yards of earth. For this reason, the plaintiff submits that the Court erred in directing a non-suit when the plaintiff had proven by the proper method the amount of deficiency.

Respectfully submitted,

WADDINGTON & MATHEWS,
Attorneys of Plaintiff-Appellant.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

LEVI H. BLOUCH,
Plaintiff,

v.

ELMER E. STEVENS, JR., *et al.*,
Defendants.

ACTION AT LAW.

BRIEF ON BEHALF OF PLAINTIFF-
APPELLANT.

Plaintiff brings this suit to recover damages by reason of loss occasioned by breach of contract entered into with defendant, said breaches being as follows:

FIRST COUNT.

The contract, Exhibit P1, State of the Case, provides in Section 10 as follows:

“The Sellers agree to extend the existing railroad siding from its point of termination in the proposed right of way to a point three

hundred twenty-five feet from the intersection of the said proposed right of way with the northwesterly line of Cove Road, such extension to be made and completed by June 1st, 1927, the Buyer to be granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding and right of way adjacent to his own lands to and upon the lands herein described in any direction or location, provided there shall be no encroachments of the said extension or any part thereof upon lands not belonging to the grantee, but this provision shall not be construed to limit the right of the grantee to use such part of the right of way as might be necessary to be used in connection with the building of said extension."

Defendants thereafter entered into a similar agreement with one Richard W. Newman, and agreed and did grant to said Newman the identical privilege of extending said siding from its terminal point to his, Newman's, premises, and said Newman entered upon said right of way and extended said railroad over on to his premises, and thereby excluded the plaintiff from his right to have the said railroad extended upon his land, and to obtain use of the said railroad, plaintiff was required to place a switch in the said siding and then bring the track over to his land. The cost of the said switch for the connection with the railroad was \$842. The Court determined that, under the contract, the plaintiff was not entitled to receive payment for the switch required to make a connection with the siding, and that the contract as entered into between the parties did not entitle the plaintiff to anything further than

to make a connection to the said siding, and did not entitle the plaintiff to have the said track extended on to his lands from the terminal point thereof, and therefore non-suited said plaintiff, from which the plaintiff-appellant appeals.

The second count of the complaint is for the failure of the defendants to fill the ground purchased by the plaintiff to a height required by the grade line set in the contract. The contract provided as follows:

“The Sellers agree to grade all of the proposed right of way hereinbefore mentioned extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad & Canal Company as shown on the plan herein mentioned and referred to and also to furnish on the herein described premises all necessary earth required to grade the parcels of land herein described so that they may conform to the grade of the said Cove Road and the proposed right of way. All of said work shall be completed by June 1, 1927.”

The plaintiff contended that it was the duty of the defendants to grade the proposed right of way to a straight line extending from Cove Road to the line between the lands of the said Elmer E. Stevens and United New Jersey Railroad & Canal Company, and that the plaintiff was entitled to have sufficient earth to grade to a height of a straight line between Cove Road and the proposed right of way, as it should have been graded under the contract. The Court refused the plaintiff the right to recover and granted a non-suit, from which the plaintiff appeals. The argument will be taken up on the two counts, in their order:

First. The testimony shows that one Newman, who had an identical agreement as that of the plaintiff, but entered into at a later day, usurped the right of extending the said siding from the terminal point thereof, and that it was not possible then for the plaintiff to extend said siding from the terminal point thereof. It is the contention of the plaintiff that Section 10 of the contract as given above, and page 13 of the State of the Case, gives the plaintiff exclusive right of extending from the said terminal point of the siding and that that right being denied to him, and he being forced to place a switch in said siding to get a connection with his lands, he is entitled to recover the cost of making connection by the switch. This has been denied to him by the trial Judge in granting a non-suit, on motion of defendant. The extension of a railroad, as the word signifies, is a prolongation of it from one of its *termini* to some other designated point. *Trenton Street Railway Co. v. Penna. R. R. Co.*, 63 N. J. Eq., p. 276, Court of Errors and Appeals, 1901. It is claimed on behalf of the defendant, and the trial Judge took the same view, that the Section 10 of the contract did not give plaintiff any further right than to make a connection to the siding, but the plaintiff contends that the word "extending" as used in the said clause does not mean "connection" or "connecting," but does mean extending from the said terminal point, and the Court took the view that the word "extending" meant "connection" or "connecting" with said siding. Plaintiff claims that there is no authority or warrant for such interpretation of the said contract, and that there is nothing in either testimony or the contract itself which shows that the parties did other than use the terms in their ordinary meaning. The word "extending"

as defined in Webster means to carry forward, as to extend a railway, or to extend a visit. It certainly cannot be defined as meaning a connection. It simply means to continue from a terminal point that had already been designated. See testimony of William G. Shaner (engineer), page 71, line 32, to page 72, line 25.

Plaintiff therefore submits that the trial Judge's decision should be reversed for the above reason; that the plaintiff should not have been non-suited, but that the same should have been allowed to go to the jury on the amount of damages sustained by the plaintiff.

SECOND COUNT.

Plaintiff, in the second count, sues for the value of 1,950 cubic yards of dirt, which were not placed on the ground purchased. Plaintiff showed that there was short 1,950 cubic yards of earth (see page 95, lines 30 to 35, State of the Case). Plaintiff showed that under the contract to grade the proposed right of way meant a straight line between Cove Road and the lands of Elmer E. Stevens, and the United New Jersey Railway and Canal Company (page ~~86~~ lines 17 to 28, and page 103, lines 12 to 32), and showed that the proposed right of way was not graded to the height of that line (page 103, line 35, to page 104, line 8, and page 105, lines 22 to 30), and showed further by the testimony that to properly grade, as used in engineering terms (and also as used in Webster's Dictionary), means a straight line between the two points, and that the roadbed should be raised to that straight line.

Plaintiff then showed that taking that line as being the proper height of the proposed right of way, that then there was a shortage of 1,950 cubic yards of earth between Cove Road and the proposed right of way, as called for in the contract.

The Court non-suited the plaintiff for the reason that the proof of damages above described was not in accordance with paragraph 9 of the contract. The Court, on page 109 of the State of the Case, stating that according to the contract there doesn't appear to be any grade fixed for the right of way, and the Court took the view that, the contract not fixing any grade for the right of way, the grade as put in by Stevens was the one which should bind the plaintiff, and if there was any deficiency of earth between the right of way as graded at the present time, and Cove Road, that then the plaintiff might recover, and instructed the engineer to calculate the amount of yardage required to make the fill to that height (see pages 110 and 111, State of the Case). Plaintiff refused to accept that testimony, contending that the contract did fix the grade at which the right of way was to be established and that the calculation of shortage above given, of 1,950 cubic yards of earth, was correct. Section 9 (State of the Case, page 13) specifies that the sellers agree to grade all of the proposed right of way hereinbefore mentioned, extending from Cove Road to the line between the lands of the said Elmer E. Stevens, Jr., and United New Jersey Railroad & Canal Company, as shown on the plan herein mentioned and referred to. The plan herein mentioned and referred to was a boundary survey only (see page 101, from lines 1 to 10), and in lines 11 to 13 the Court states: "Then according to the agreement, all that Stevens had to do was to grade this right of way no particular

level." The contention of the plaintiff is that the plan in question was referred to only for the purpose of boundaries and not for the purpose of fixing any levels to which grading should be done, but that the grading should be done as specified in the paragraph to grade all the proposed right of way hereinabove mentioned, extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad & Canal Company, the boundaries of which were shown on the plan, and that "to grade" meant between the two points, Cove Road and the line between the lands of Stevens and the United New Jersey Railroad & Canal Company, and that a straight line should be taken between those two points and the right of way graded to that height.

There was no complaint in regard to the right of way, as the plaintiff suffered no damage by reason of the failure to grade it to its proper height. The complaint, however, is in regard to the plaintiff's lands which he purchased and which should have been graded to the line between Cove Road and the proposed right of way, and the plaintiff contends that the line of the proposed right of way is a straight line between Cove Road and the line between the lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad & Canal Company, and that it was to that line and that grade that the 1,950 cubic yards of earth were calculated. On page 103, lines 15 to 35, Mr. Bowden testifies that to have graded the line between Cove Road and the line of the United New Jersey Railroad & Canal Company and Elmer Stevens' line would mean a straight line between those points, without any ups and downs (see answer in line 34).

And to the same effect is the testimony of Wil-

liam G. Shaner, on page ~~27~~²⁰, lines 17 to 30. Not only do the two engineers, who are disinterested in the case, and who were used by both parties, testify as to what to grade the line of the proposed right of way meant, between Cove Road and the line between the land of Elmer E. Stevens, Jr., and land of the United New Jersey Railroad & Canal Company, but the Courts have held to the same effect, as follows:

In the case of *Gas & Electric Securities Co. v. Manhattan Traction Corp.*, 266 Fed. 625, the Court states that to grade a street or highway, correctly speaking, is to establish a level by mathematical points and lines and then to bring the surface of the street or highway to a level, by elevation or dredging of the natural surface, to the line fixed. In the case of *Louisville and N. R. Co. v. State*, 193 Southwestern 113, 137 Tennessee 341, the Court states that grading includes filling as well as cutting, and technically means reducing the earth's surface to a given level, and may include the filling or excavating, or both. To the same effect, *Davis v. City of East Saginaw*, 66 Mich. 37, 32 Northwestern 919; *Bissell v. Village of Sawmont*, 67 N. Y. Supp. 962.

The whole question, then, rests upon the Court's determination that Section 9 of the contract did not fix any grade for the right of way, while it is the contention of the plaintiff that the contract does fix the grade of the proposed right of way, as that therein specified, as from the Cove Road to the line between the lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad and Canal Company. The fact that the proposed right of way was not graded to the height called for in the contract should not militate against the right of plaintiff to recover because his land was not filled to the

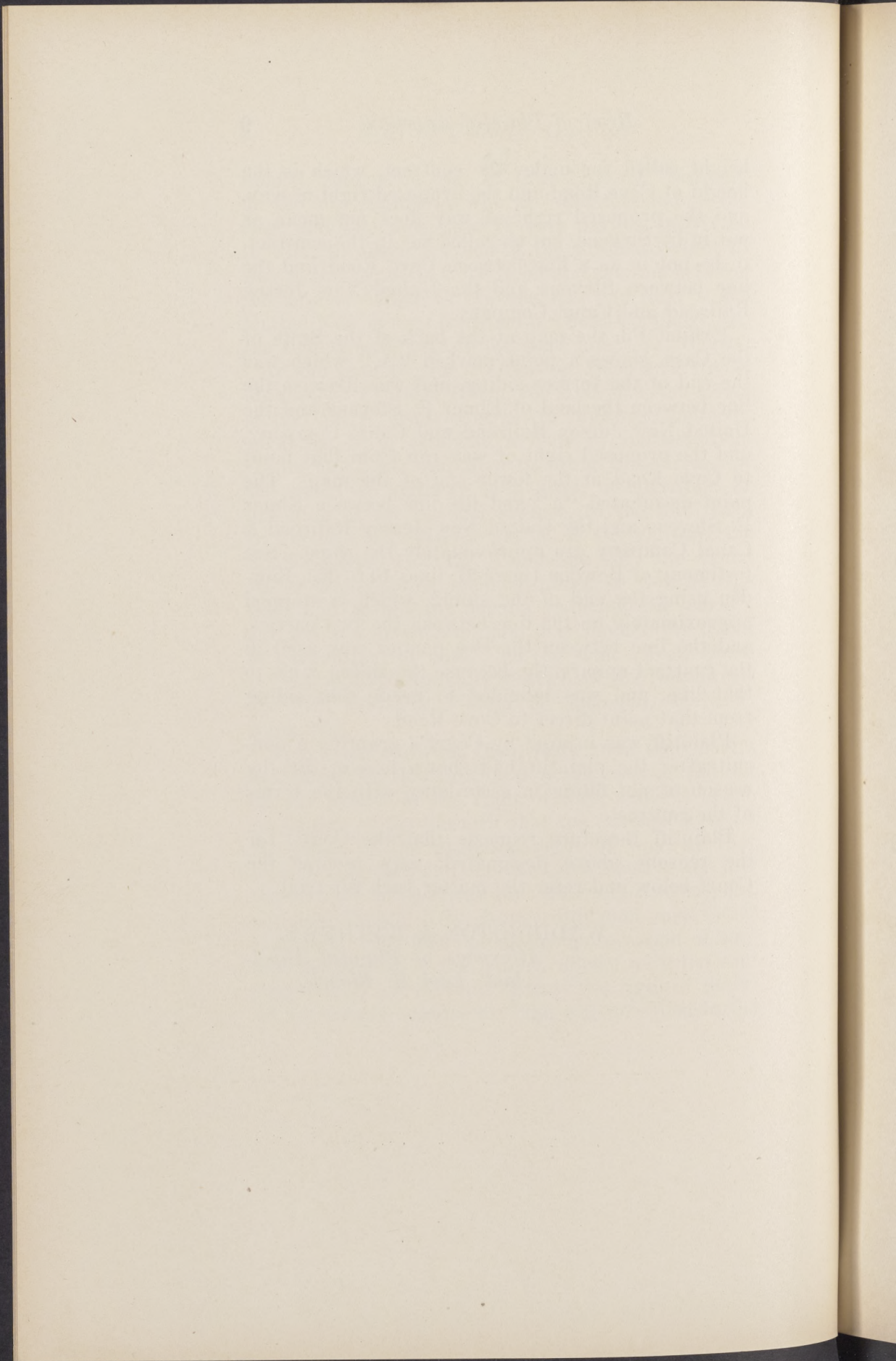
height called for under the contract, which is the height of Cove Road and the proposed right of way, and the proposed right of way does not mean as put in by Stevens, but as called for in the contract, to be put in as a line between Cove Road and the line between Stevens and the United New Jersey Railroad and Canal Company.

Exhibit P3, the map at the back of the State of the Case, shows a point marked "A," which was the end of the former siding, and was likewise the line between the land of Elmer E. Stevens and the United New Jersey Railroad and Canal Company, and the proposed right of way ran from that point to Cove Road at the lower end of the map. The point designated "a" and the line between Elmer E. Stevens and the United New Jersey Railroad & Canal Company are approximately the same. See testimony of Bowden (page 97, lines 10 to 25), Bowden using the end of the siding, which is stopped approximately on the line between the two parties, and the line between the two parties was used in the contract apparently, because the siding came to that line, and was intended to grade that siding from that point direct to Cove Road.

Plaintiff was injured by Court's granting a non-suit after the plaintiff had shown loss of dirt by reason of not filling in accordance with the terms of the contract.

Plaintiff therefore requests that the Court, for the reasons above designated, may reverse the Court below and refer the matter back for trial.

WADDINGTON & MATHEWS,
*Attorneys of Plaintiff-Appel-
lant, Levi H. Blouch.*



NEW JERSEY COURT OF ERRORS
AND APPEALS.

LEVI H. BLOUCH,
Plaintiff-Appellant,

v.

ELMER E. STEVENS, JR., and MILDRED WILKINS
STEVENS,
Defendants-Appellees.

ACTION AT LAW.

ON APPEAL.

BRIEF OF BEHALF OF DEFENDANTS-
APPELLEES.

The complaint in this suit embodied two counts as hereinafter discussed. The only grounds of appeal urged in this Court as causes for reversal relate to the granting of defendants' motion for a non-suit as to both of said counts after the plaintiff had rested his case.

New Jersey State Library

STATEMENT OF THE FACTS.

Defendants made an agreement with plaintiff for the sale of certain premises in the Township of Pensauken, County of Camden, under which they undertook:

(a) To extend an existing railroad siding from its then point of termination in a proposed right of way to a point 325 feet from the intersection of the said proposed right of way with the northwesterly line of Cove Road, the buyer to be granted the privilege of extending the said siding from the said terminal point thereof or from any point in said siding and right of way adjacent to his own lands to and upon his said lands in any direction or location, provided that no part of said extension should encroach upon lands not belonging to the grantee.

(b) To grade all of the said proposed right of way extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr., and the United New Jersey Railroad & Canal Company and to furnish on the premises sold to the plaintiff all necessary earth required to grade said premises of the plaintiff so that they might conform to the grade of the said Cove Road and the proposed right of way. (Said Cove Road was a public highway adjacent to the plaintiff's premises on one side and the said proposed right of way running into Cove Road bounded the plaintiff's premises on another side.)

The first count of the complaint alleged a breach of the provisions of said agreement of sale set forth in subdivision (a) above. It was admitted that the

defendants had extended the then existing railroad siding to the point 325 feet from Cove Road mentioned in the agreement, but it was alleged by the plaintiff that the privilege granted to him of extending the said siding from the said terminal point thereof was a privilege exclusive to him and that defendants had breached their contract in making a similar agreement with one, Neumann, which gave him also the privilege of extending the siding from its said terminal point or from any point therein to and upon his lands, which lay on the opposite side of the right of way from the Blouch land. It was shown that said Neumann took advantage of his said privilege by simply continuing the siding track, rail for rail, from its terminal point on to his land. The plaintiff complained that by reason of said Neumann's earlier action, he was prevented from doing a similar thing and that in order for his trackage to connect with the siding, he was obliged to expend eight hundred forty-two dollars (\$842.00) for switching devices.

The second count of the complaint alleged a breach of contract on the part of the defendants in that it charged them with not furnishing the necessary earth required to grade the parcels of land purchased by Blouch so that they might conform to the grade of the said Cove Road and the proposed right of way which partially bounded said Blouch land as aforesaid. The plaintiff claimed that the earth furnished to the premises by the defendants was short to the extent of 1950 cubic yards and that the plaintiff was accordingly damaged to an amount of twenty-nine hundred twenty-five dollars (\$2925.00). At the trial it was admitted by the plaintiff that the proposed right of way had been graded by the sellers, but that the sellers had failed to grade it to

its proper height. There was no complaint made nor were any damages claimed, however, by the plaintiff against the defendants because of the alleged failure to grade the right of way to its proper height. In fact, the appellant's brief in this proceeding says, "There was no complaint in regard to the right of way as the plaintiff suffered no damage by reason of the failure to grade it to its proper height." The gravamen of the plaintiff's contention was that there was a height to which the right of way should have been graded (denied by defendants) and that using that theoretical height or grade of the right of way as one of the elements of computation, there was not enough earth dumped on the plaintiff's premises to cause said premises to conform to the grade of Cove Road and the theoretical grade of the right of way.

The Court granted a motion of non-suit with respect to both counts of the complaint and the propriety of that action is now challenged by the plaintiff-appellant.

AS TO THE FIRST COUNT.

The Court's action in granting the non-suit as to this count was decidedly proper, for nothing more was involved than a common-sense determination of what the plaintiff was entitled to under his agreement. A careful reading and interpretation of the language of the agreement made it apparent that the privilege granted to the buyer of extending the siding track on to his own land, either from the terminal point of said siding or from any point therein, was not exclusive to the buyer nor did it in any way serve to guarantee to spare him the cost of a switch or other appropriate device should be

care to make one or more of such extensions. Manifestly, if he cared to avail himself of the privilege which he had of extending the siding from any point therein other than the terminal point, he would require a switch. The appellant, however, argues that since he desired to avail himself of the privilege of connecting with the siding at its terminal point, he should have had the exclusive right of merely continuing the siding tracks, rail for rail, on to his own property without having to spend money for a switch in order to make the connection with the siding at that point. If he had done so first, perhaps Neumann would have been the one compelled to expend money for a switch. As it was, Neumann availed himself first of the privilege of connecting with the siding at its terminal point and by reason of being the first so to do, he was able to make the connection without a switch. It is apparent that the defendants breached no obligation which they owed to the plaintiff in this suit when they placed in the Neumann agreement provisions as to the use of the siding, which were identical with those in the Blouch agreement, for it is respectfully submitted and the proof indicated, that both of said opposite owners might connect up with the siding track at its terminal point. In fact, it might have been possible for still a third connection to be made with the siding track at its terminal point. See the cross-examination of William G. Shaner, the plaintiff's engineering witness, page 75, line 22 to page 76, line 11:

“Q. Would it have been possible for Mr. Blouch to have made the switching connection with the siding at this terminal point in such a maner as to get a siding track on Mr. Blouch's land?

A. Yes, sir.

Q. Did the fact that Mr. Newman might have

also joined with that track at the terminal point interfere with making such a switching connection? Is there room at the terminal point, in other words, for a switching connection to Mr. Blouch's land as well as the connection to Mr. Newman's land that was there?

A. By putting in a connection.

Q. There were no physical obstacles to that, were there?

A. No.

Q. As a matter of your experience, wouldn't it have been possible also at that same point, the terminal point, to have put in still another connection?

A. You mean three?

Q. Yes.

A. Well, it wouldn't have been a very good job to operate, from an operating standpoint.

Q. No, but it could have been done?

A. It could have been done by using a lot of special material."

The point is urged, however, by the plaintiff in this appeal, in spite of the foregoing testimony, that when in their agreement the parties used the language "extending the said siding from the said terminal point thereof," it could have meant nothing but a rail for rail prolongation of the siding track, sparing to said Blouch the cost of a switch.

It is respectfully submitted that the word "extension" and the word "extending" are not words of art, and having no legal or technical significance, said words may mean whatever the parties intended when contracting. *Guie v. Byers*, 95 Wash. 492, 164 Pac. 75, 77.

It is said in 25 C. J. 225, that "the word 'extend'

is, both by etymology and by common usage, exceedingly flexible, lending itself to a great variety of meanings, which must in each case be gathered from the context, owing to the fact that it is essentially a relative term, referring to something already begun; hence in a concrete sense, it has no persistent meaning, although abstractly, it always implies increase or amplification as distinguished from inception, as, for instance, to extend a man's business or his line of credit, or the due time of his debts. It is not confined to mere linear prolongation. The word may, in its primary sense, when applied to a line, import a continuation of the line without a break, but it is not always used in this restricted sense." The controversy, therefore, as to what the word "extending" meant in this case become one of construction by the Court and it is respectfully submitted that in this case the Court did not err in its construction thereof and in granting the non-suit that had to result from a proper interpretation of the word.

The cardinal rule for the construction of a written contract is to ascertain and give effect to the mutual intention of the parties. *Basic Iron Ore Co. v. Dahlke*, 103 N. J. L. at page 638 (Court of Errors and Appeals, 1927) citing 6 R. C. L. 835, Sec. 225; 13 C. J. 521, Sec. 482 (2). See also *Jersey City v. Jersey City Water Supply Co.*, 93 N. J. Eq. at page 624 (Court of Errors and Appeals, 1922).

The best guide, therefore, in this case to the ascertainment of the intention of the parties is the manner in which they themselves used the word "extending" in their agreement, for they said, "The buyer to be granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding." If an intermediate connection to the siding, that is, one not at the

terminal point, was to be considered as "extending" the siding (it certainly not being a mere linear prolongation), then certainly a connection at the terminal point by means of a switch was also "extending" the siding. There was no more reason why the defendants should indemnify the plaintiff against the cost of a switch, should he "extend" the siding track from its terminal point, than if he chose to "extend" the siding track by hooking into it with a switch at some intermediate point. It would be the limit of absurdity to read into the contract a provision that the sellers of the land would pay for any switch necessary to "extend" the siding from an intermediate point. It is just as absurd to read such a provision into the contract with respect to "extending" the siding from its point of terminus 325 feet from Cove Road, where the defendants agreed to take it and where they did take it. As a matter of fact, the proofs in the case disclose that the connection which the plaintiff did ultimately make with the siding track was not at the terminal point and that the switch he paid for was not a switch at the terminal point and that he switched into the siding track at a point in the right of way further up the siding from Cove Road. See the cross-examination of the plaintiff himself, page 61, line 2 to line 12:

"Q. Now, when you bought these switch ties and frog, where were they installed?

A. On the right of way.

Q. Were they installed at the terminal point where Mr. Stevens had stopped his track?

A. No, sir.

Q. They were up the right of way further?

A. Yes, sir.

Q. And you had hooked into that right of way further along the track with a switching device?

A. Yes, sir, and even beyond my property line.”

The plaintiff further in his cross-examination, page 62, line 10 to end of page, explains the connection which he did make with the siding track as follows:

“Q. You connected with the track further up the right of way?

A. Connecting and extending are two things. You can connect to almost anything, but you can only extend to one part.

Q. Isn't the track on your land now an extension of that siding?

A. No, sir, it is a connection to that siding.

Q. It doesn't extend the siding on to your property?

A. No, sir.

Q. How do the cars get on it?

A. By means of a connection to that siding.

Q. It joins up with it, doesn't it? In other words, a car can get on to your land without any difficulty?

A. Yes.

Q. By coming up the siding and then going on to the track you installed?

A. Yes, through a switch and a frog.

Q. You knew you were going to connect with that right of way further up the track, then, when you made the agreement?

A. At some future date.

Q. Yes, you were going to have three sidings?

A. Yes, sir.

Q. And you knew it would take a switch to get into it?

A. For two of them; for one of them, not.”

Also, his further cross-examination, page 63, line 20 to line 29, indicates that by his own admission, there was no action on the part of the defendants which prevented or debarred him from making a switching connection at the terminal point.

“Q. Have you made any switching connection with the track at this terminal point?

A. No, sir.

Q. Has Mr. Stevens kept you from making any?

A. Yes, sir.

Q. A switching connection.

A. Oh, not a switch.

Q. Has Mr. Stevens kept you from doing that?

A. No, sir.”

In other words, the privileges granted by the defendants to Neumann were not such as to interfere with the real legal rights of Blouch under his agreement. The learned trial Judge in dealing with the motion for a non-suit as to the first count said, page 112, line 32 to end of page:

“The Court: Well, let me say to counsel that it seems to me that the agreement is clear and speaks for itself, and that there is no ambiguity in it. I am not shutting off counsel from arguing by stating my views.”

Also, on page 113, line 5 to line 24:

“The Court: Just to get my thought on it. The parties themselves say that the buyer is granted the privilege of so extending the said siding from the said terminal point thereof or from any point in said siding. Now, the parties had in mind the granting by the buyer, or the

seller to the buyer or connecting on to that right of way, either at the end of it or at any point along it, and used the word 'extension' applying both to an addition on the end of the right of way or a connection by way of a switch or other contrivance. The testimony seems to be that the defendant has given the plaintiff everything he contracted to give him under this clause of the agreement. The testimony as it now stands is that the plaintiff could either connect his extension, using the word 'extension' as it is in the agreement, from the point 325 feet from Cove Road, or from any point along the right of way. Now, Judge, I would be glad to hear from you."

It is, therefore, respectfully submitted that the motion for non-suit as to the first count was properly granted.

AS TO THE SECOND COUNT.

The entire effort on the part of the plaintiff with respect to the second count of his complaint was to again read into the contract something that was not there. If, through that effort, he had been able to establish that the contract provided for the grading of the right of way to some purely theoretical height, then his computation of an additional 1950 cubic yards of dirt might have been proper. However, there was no definite or fixed height to which the right of way should have been graded. It was graded by the defendants and again it is repeated that in the appellant's brief in this proceeding, it is said:

“There was no complaint in regard to the right of way as the plaintiff suffered no damage by reason of the failure to grade it to its proper height.”

What the plaintiff in this suit attempted to do was to establish an ideal line between two distant points, pass a plane through that line and require the defendants to dump enough earth on the plaintiff's land to cause all parts of that land to reach said plane surface. The plaintiff has confused himself and has attempted to confuse the Court and jury in this case through a failure to read the contract in its plainest and unmistakable terms. The contract said:

“The sellers agree to grade all of the proposed right of way hereinbefore mentioned extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr. and the United New Jersey Railroad & Canal Company as shown on the plan herein mentioned and referred to and also to furnish on the herein described premises all necessary earth required to grade the parcels of land herein described so that they may conform to the grade of the said Cove Road and the proposed right of way.”

In this paragraph of the agreement, the words, “extending from Cove Road to the line between lands of the said Elmer E. Stevens, Jr. and the United New Jersey Railroad & Canal Company as shown on the plan herein mentioned and referred to,” refer to the right of way and establish its territorial extent or length by stating where said right of way was to begin and where it was to end. Those

words had absolutely nothing to do with the level or height to which the right of way should be built, unless, perhaps, where it was said, "as shown on the plan herein mentioned and referred to," it might have meant that said plan established some height for the right of way.

The trial Judge had the latter proposition in mind when he engaged in the following colloquy with counsel, page 101, line 1 to line 13:

"The Court: Cannot counsel agree as to whether or not the levels of the right of way are mentioned in the plan?"

Mr. Baldwin: No, there are no levels on the plan. It is a boundary survey.

Mr. Waddington: The plan as mentioned was a boundary survey, as mentioned in the contract.

The Court: Then, according to the agreement, all that Stevens had to do was to grade this right of way, no particular level."

After it was once established that the plan mentioned in the agreement had nothing to do with the height of the right of way, the Court found no difficulty in dealing with the second count of the complaint.

Perhaps, to show why the plaintiff adopted the mistaken notion that he was entitled to 1950 cubic yards more of dirt than were dumped on his premises, it is interesting to know how his engineer, Mr. E. Warren Bowden, proceeded in the making of that computation. See Mr. Bowden's direct examination by Judge Waddington, page 95, line 22 to page 96, line 20:

"Q. Mr. Bowden, at the request of Mr. Blouch, did you make a plan or map of the

amount required to bring up his ground to the level of the right of way and Cove Road?

A. I did.

Q. And is this the map or plan that you made?

A. It is.

Q. And did you, for Mr. Blouch, calculate the amount of dirt necessary and required to fill the piece of ground?

A. I did.

Q. And what was that amount?

A. 1950 cubic yards.

Q. And that is the number of cubic yards necessary to bring Mr. Blouch's land up to the grade of the Cove Road with the grade of the right of way?

A. With the grade of the ideal right of way.

Q. What do you mean by the ideal right of way?

A. These figures give the yardage required to fill with the plane surface determined by the center line of Cove Road to a point down the right of way.

Q. Why did you take a point down the right of way?

A. That was the point where the original track extension had ended.

Q. In other words, you took the point where the original track extension had ended and took a straight line from there to the Cove Road, is that right?

A. That is right, that is true.

Q. And your calculation here is based on the grading of that right of way on that straight line?

A. It is."

In his cross-examination, the said engineer amplified his explanation, page 98, line 15 to line 34, as follows:

“Q. You have testified to a computation made by you of the amount of cubic yards of earth required to fill up from where Mr. Stevens had left the grading to a line which you would call the ideal elevation, isn't that right?

A. That's true.

Q. Now, that line by which you fixed the ideal elevation was fastened on one end to the crown of Cove Road, wasn't it?

A. It was.

Q. And on the other end you went up the right of way considerably beyond Mr. Blouch's boundary line and established another stake up there, didn't you?

A. That's right.

Q. You then stretched a line, or theoretically you did stretch a line between that stake on the crown of Cove Road and the stake away up the right of way?

A. I did.”

In other words, the plaintiff, thinking that the two ends of the right of way were suitable points from which to determine the proper level of the right of way throughout its course, instructed his engineer to proceed with his computation on that basis, even though that end of the right of way which was in the line between lands of said Stevens and the United New Jersey Railroad & Canal Company was up the right of way considerably beyond Mr. Blouch's boundary line. That course of procedure would be just as ridiculous as it would to grade the land on both sides of the road from Trenton to Bordentown

by establishing one point in Trenton and another point in Bordentown and grading to a line between those points no matter whether the road itself was up hill or down dale. In such a case, it would certainly not mean that because the road runs from Trenton to Bordentown, the only two levels to be considered in the grading of the adjacent property are levels at the two ends of the road. The Court, by questioning the plaintiff's engineer Bowden, developed the fact that the right of way had no ups and downs in it, page 106, line 9 to line 13. In other words, the right of way was smoothly graded, although it certainly did not run in a perfect plane surface from its one end to the other. The plaintiff's engineer in his cross-examination was both fair and honest and seemed to have no undue interest in following the plaintiff, his employer, into the realms of folly. He was asked point-blank the proper method of doing what the defendants had agreed to do for the plaintiff. See page 107, line 22 to page 108, line 15:

“Q. Given the problem, Mr. Bowden, of grading a piece of land which is adjacent on one side to one thing that has physical existence such as a street or road or right of way or what not, and has another side of it adjacent to another street or road extending along one of those streets or roads for 360 feet and along the other one for 250 feet, and you are given the problem to grade that parcel of land so that it may conform to the grade of those two boundary elements, now what is the proper engineering method of determining how to grade that piece of land so as to conform to those two boundary levels?

A. I would try to pass a plane such as it would contain both the lines.

Q. Would you go any further down the one street than the 250 feet, or would you go down the other street any further than the 360 feet to get your starting point?

A. No.

Q. You would limit yourself to that part of the grade of those streets that was adjacent to the land which you were to grade, wouldn't you?

A. I would.

Q. Couldn't it happen that if you did go down the street four, five, six or seven hundred feet to get a point and pass your plane through that point, if you try to grade to that plane that you might grade your land itself so high that it wouldn't meet the street or road or avenue adjacent to it?

A. That is true."

Further cross-examination with Court rulings interspersed further developed the point. See page 109, line 13, all of page 110 and page 111, lines 1 and 2:

"Q. Now, again going back to our question, would it be proper engineering practice if you were going to grade a piece of land so as to make it conform to the two boundary levels to go down three or four or five or six hundred feet away from the piece of land itself to establish your plane?

Mr. Waddington: I object to that question. It should be the boundary level called for by the contract and not a boundary level as made at that time, which was incorrect.

Mr. Baldwin: Again I say there is no boundary level in the contract, there is nothing in the contract about what the grade of the right

of way should be. The right of way is finished; it was finished when Mr. Bowden made this. Taking the right of way as he found it, if Mr. Blouch is entitled to have that conform on one side with Cove Road and the other with the right of way, it must be the right of way as presently finished, because there has been no complaint that it was not properly finished.

The Court: According to the contract, there doesn't appear to be any grade fixed for the right of way. I will allow the question.

Mr. Baldwin: Will you repeat the question? (Exception noted for plaintiff.)

(Question repeated.)

A. It would not.

Q. Have you computed how much the yardage of 1950 cubic yards would shrink or increase if no point for the determination of your plane were taken beyond the 360 feet along the right of way or the 250 feet along the Cove Road?

A. I have never made any such computation.

Q. Would it shrink or increase?

Mr. Waddington: I object to the question.

Mr. Baldwin: Well, he hasn't made any computation, but he may have some general idea.

The Court: If he knows, he may say. (Exception noted for plaintiff.)

A. There would certainly be less yardage required to fill, considering the property lines only of the plot.

Mr. Baldwin: Will you repeat the answer?

The Witness: There would certainly be less yardage to fill, considering the property lines adjacent to the plot.

Q. Are you able to say how much less?

A. I don't think I could."

The Court then took a hand and asked Mr. Bowden as follows, page 111, line 15 to line 24:

“By the Court:

Q. Can you determine from your notes and maps the amount of fill necessary to make this property conform to the grade of the right of way and Cove Road?

A. As it now stands?

Q. Yes.

A. Yes.

Mr. Baldwin: I will ask that that be done overnight and the witness return in the morning with the information.”

And page 111, lines 31 and 32:

“The Court: Well, you make that computation overnight.”

Therefore, the following morning, the Court, when dealing with the defendants' motion for a non-suit as to the second count, gave the plaintiff an opportunity to have Mr. Bowden state what his computation would be should that computation be made according to proper engineering methods based upon a proper construction of the agreement. The plaintiff's attorney, however, objected to the testimony going in and the Court granted the motion. See page 116, line 11 to line 19:

“The Court: I understand that plaintiff does not desire to recall Mr. Bowden.

Mr. Waddington: That is right.

The Court: Then I will grant the motion as to the second count, and grant you an exception.”

It is, therefore, respectfully submitted that the Court's action in dealing with the motion for a

non-suit as to the second count was also judicially correct and proper.

Respectfully submitted,

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Appellees.*

