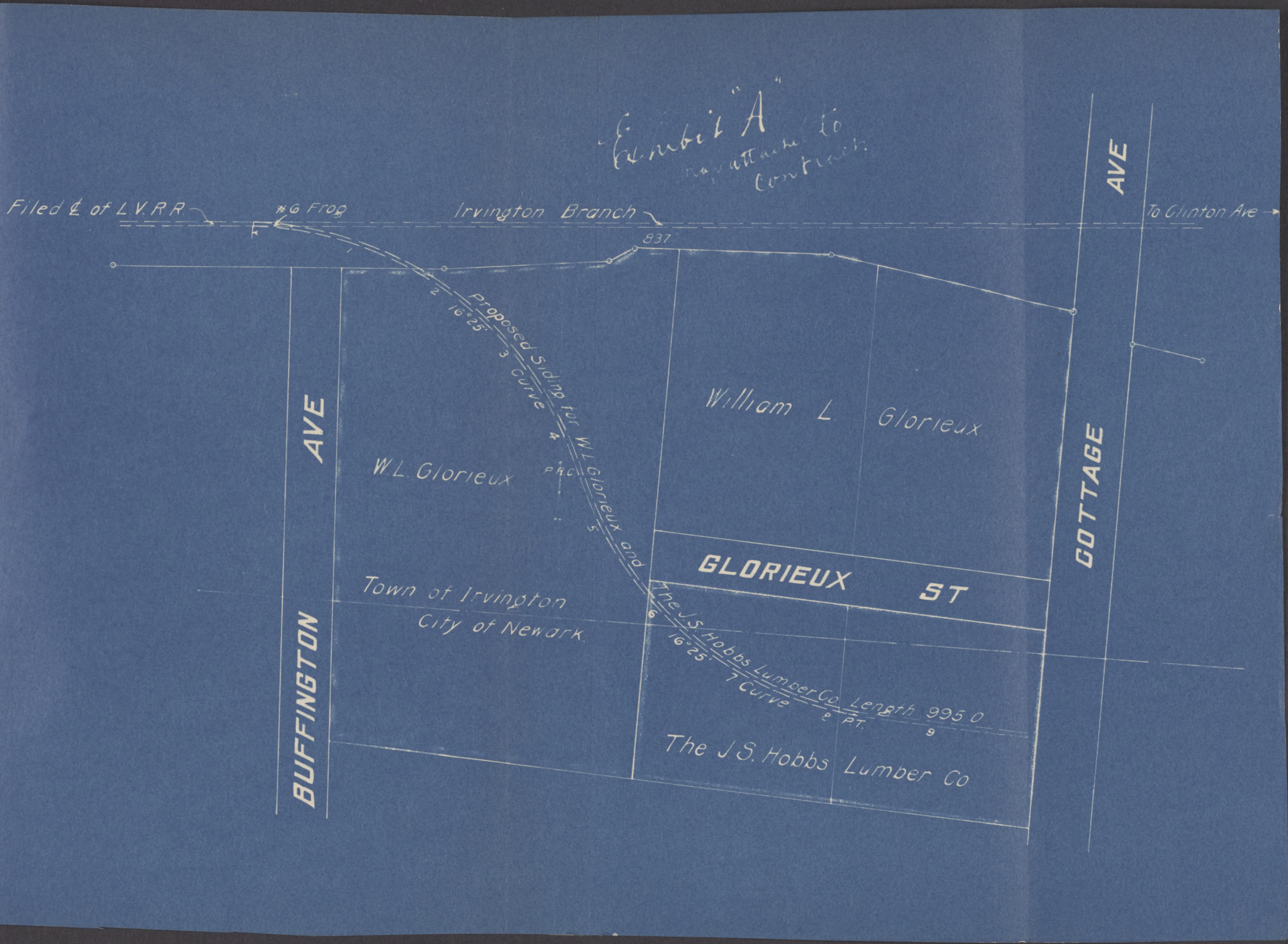
Exhibit "A"
Filed & of L.V.R.R.
#6 Frog
Irvington Branch
To Clinton Ave
837
Proposed Siding for W.L. Glorieux and
16°25'
3 Curve
4
P.R.C.
5
6
16°25'
7 Curve
2 P.T.
9
Length 995.0
BUFFINGTON AVE
W.L. Glorieux
Town of Irvington
City of Newark
William L. Glorieux
GLORIEUX ST
The J.S. Hobbs Lumber Co.
The J.S. Hobbs Lumber Co
COTTAGE AVE

INDEX.

Testimony.

Bill of Complaint.

Filed Dec. 26, 1917.

In Chancery of New Jersey

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

The complainants, Nellie F. Hedden, who resides in the City of Newark, County of Essex and State of New Jersey, and Franklin Lumber Co., a corporation, duly organized and existing under the laws of the State of New Jersey, having its principal office in the City of Newark, respectfully show:

1. That in the year 1908, one William L. Glorieux was the owner of a large tract of land situated partly in the City of Newark and partly in the Town of Irvington, the western course thereof abutting on the right of way of the Lehigh Valley Railroad, as shown more particularly on a map hereto attached and made a part of this bill of complaint, and marked "Exhibit A."

2. That on and prior to the third day of April, 1908, one John S. Hobbs desired to purchase a portion of said land owned by Glorieux as aforesaid and located east of the right of way of the said Lehigh Valley Railroad, to be used by him as a lumber yard on condition that a right of way for a railroad siding from the tracks of the Lehigh Valley Railroad would be established over the remaining lands of the said Glorieux.

3. The said Glorieux consented to sell the said Hobbs the aforesaid portion of land and as a part of the consideration therefor agreed to give to the said Hobbs the right of way for a railroad siding across his remaining lands to the Lehigh Valley Railroad tracks.

4. On April third, 1908, an agreement was made between the said William L. Glorieux as party of the first part, John S. Hobbs as party of the second part and the Lehigh Valley Railroad Co. of New Jersey as party of the third part, wherein it was agreed that the Lehigh Valley Railroad Co. of New Jersey would construct a railroad siding upon and across a portion of the lands of the said William L. Glorieux to serve the land about to be purchased by the said Hobbs; a true copy of which said agreement is hereto attached and made a part hereof marked, "Exhibit B."

5. That thereupon the said William L. Glorieux conveyed to the said John S. Hobbs that portion of his lands hereinabove referred to by deed bearing date April 3rd, 1908, and recorded in Book N. 43 of Deeds for Essex County, pages 365, etc., an abstract of which said

deed is hereto annexed and made a part of this bill of complaint and marked "Exhibit C."

6. That under and by virtue of said deed the said Glorieux for himself, his heirs and assigns, also granted and conveyed to the said Hobbs, his heirs and assigns, the right of use of said side track over the lands of the said Glorieux between the lands of the Lehigh Valley Railroad Co. and the lands conveyed to the said Hobbs, as will more fully and at large appear from the aforesaid deed from Glorieux to Hobbs.

7. That thereupon and pursuant to the aforementioned deed and agreement, the Lehigh Valley Railroad Co., said Glorieux and Hobbs constructed and caused to be constructed the said side track across the lands of the said Glorieux to and upon the lands so purchased by the said Hobbs, as will more fully appear from the map hereinabove referred to, and that said parties thereto have kept and fully performed all the covenants in said agreement provided.

8. Said Glorieux and Hobbs paid for the construction of said track, the expense thereof being about $2,000.00, and also erected upon the lands so purchased the necessary buildings, sheds, fences, gates and other structures requisite for the conduct of the lumber business.

9. That thereupon the said Hobbs established his business as a lumber merchant on the aforesaid lands, and he and his successors in title have continued the business to the present time.

10. That thereafter on or about June 29th, 1908, the said William L. Glorieux, conveyed to one Oscar Staeger the remaining portion of the lands of the said Glorieux over and through which said railroad siding was laid, which conveyance expressly recites that same is subject to the right of way of the said Hobbs, his heirs and assigns, for said side track, as by reference to said deed will more fully appear, an abstract of which is hereto annexed and made a part hereof, marked "Exhibit D."

11. That thereafter and on or about the twenty-fourth day of November, 1916, the said Oscar Staeger conveyed to one Jennie Canfield, and the Lehigh Valley Railroad Co. of New Jersey, a corporation, a portion of the aforesaid lands obtained by him from the said Glorieux upon and over which the said railroad siding was constructed, which conveyance expressly recites that the same is made subject to the rights of others in a railroad siding crossing said premises and in the use of the same pass and re-pass over said siding, an abstract of which deed is hereto annexed and made a part hereof, marked "Exhibit E."

12. That thereafter and on or about January 6th, 1915, the said Oscar Staeger conveyed to Bierman-Everett Foundry Co., a corporation, another portion of said lands obtained by him from the said Glorieux upon and over which the said railroad siding was constructed which conveyance expressly recites that it is subject to the

rights of the said Hobbs, his heirs and assigns in and to the said railroad siding as given to the said Hobbs by deed recorded in Book N. 43 for Essex County, pages 365, etc., an abstract of said deed from Staeger to the Bierman-Everett Foundry Co. being likewise hereto attached and made a part hereof marked "Exhibit F."

13. That subsequently and on or about the first day of April, 1916, the said Bierman-Everett Foundry Co. purchased three lots from one Theckla B. Haas over a portion of one of said lots ran the railroad siding in question. That this purchase from the said Theckla B. Haas was made by the said Bierman-Everett Foundry Co. with full knowledge of the rights of the said John S. Hobbs and his successors in title in and to the aforesaid railroad siding.

14. The complainant, Nellie F. Hedden, is the successor in title of the said lands and right of way conveyed by Glorieux to Hobbs as aforesaid; and the complainant, Franklin Lumber Co., is the lessee of the said Nellie F. Hedden and is in possession of said lands and is engaged in the business of a lumber merchant thereon.

15. The Bierman-Everett Foundry Co. being the successor in title to that portion of said lands of Glorieux upon and over which said side track was constructed (which lands are situated between the main line of the railroad and the lumber yard of the complainant) claims the right, under the contract entered into between William L. Glorieux, John S. Hobbs and the Lehigh Valley Railroad Co., under date of April 3rd, 1908, hereinabove referred to, to terminate the rights of the said complainants in and to the aforesaid railroad siding upon thirty days' notice, and has also notified complainants of its purpose and intention to take up and destroy said side track and to prevent the said complainants from any further use of the said railroad siding and to exercise their alleged rights under the aforesaid agreement terminating the use of said railroad siding by complainants.

16. Said Bierman-Everett Foundry Co. in order to further carry out their intentions of preventing the said complainants from a further use of said railroad siding purchased the three lots from the said Theckla B. Haas hereinabove referred to over a portion of which runs the railroad siding in question, and have threatened to tear up or remove the aforesaid siding and prevent the complainants from the use thereof by reason of the alleged fact that the said railroad siding is an encroachment upon a portion of one of the said lots, although the said Bierman-Everett Foundry Co. purchased the aforesaid lots with full knowledge of the rights of the complainants in and to the entire length of the said railroad siding, and complainants allege that the said Bierman-Everett Foundry Co. is now estopped from denying the right of the complainants to use the aforesaid siding as it is now constructed, throughout its entire length.

17. Complainants show that they are wholesale dealers in lumber and receive shipments of lumber in carload lots, that such cars are

switched from the main line of the Lehigh Valley Railroad Co. by means of said side track directly into and upon the premises of complainants. The complainants have no other side track facilities and the said side track is the only available means of receiving lumber in carload lots, and the deprivation of this side track in the manner aforesaid subjects the complainants to irreparable loss and injury and prevents the complainant, Franklin Lumber Co., from fulfilling its contract and renders useless its buildings, sheds and other structures erected and used by it upon the said lands for the conduct of its lumber business.

18. Complainants further say that ever since the said side track was constructed in the year 1908 it has been used for the delivery of lumber to the premises of the complainants, and that such use has been open and notorious and that in the several conveyances by which the title of said lands devolved from said Glorieux through the said Staeger to the said Bierman-Everett Foundry Co. the rights of the complainants in and to the use of said track or railroad siding were expressly recognized and reserved, as granted by Deed N. 43, page 365, hereinabove referred to.

Complainants are without adequate remedy in the courts of law and therefore pray:

(1) That Bierman-Everett Foundry Co., Oscar Staeger, Jennie Canfield, and the Lehigh Valley Railroad Co., of New Jersey, a corporation, who are the defendants in this suit, may answer this bill of complaint without oath and each statement therein contained:

(2) That Bierman-Everett Foundry Co., a corporation, its successors and assigns, agents and attorneys, may be enjoined and restrained from in any manner obstructing the free and uninterrupted use of the said railroad siding by complainants and from making or maintaining any gates or any other obstructions upon or across said side track and from doing any act whereby the complainants may be deprived or prevented from using said side track for the switching of cars to and from the Lehigh Valley Railroad and the lands of these complainants.

(3) That complainants, their heirs, successors and assigns, may be decreed by this Court to have, possess and enjoy full and unrestricted use of said railway siding, as the same is now laid out.

(4) That a construction of the said agreement bearing date April 3rd, 1908, together with the deed and other documents made with reference thereto, as hereinabove set out, may be had by this Court.

(5) That the rights of the parties complainant and defendant, their respective heirs, successors and assigns, under the said agreement and the deed made with reference thereto may be determined by the decree of this Honorable Court.

(6) That complainants may have such other and further relief as may be equitable and just.

(7) That writs of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

M. M. STALLMAN,
J. F. HOOVER,
Solicitors for and of Counsel with the Complainants.

EXHIBIT B.

THIS AGREEMENT, made this third day of April, A. D. Nineteen Hundred and Eight (1908), between WILLIAM L. GLORIEUX, of Irvington, Essex County, New Jersey, of the first part; JOHN S. HOBBS, of the City of Newark, Essex County, New Jersey, of the second part, and the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey (hereinafter called the Railroad Company), of the third part.

Whereas, The said parties of the first and second parts have requested the Railroad Company to lay down and maintain a railroad siding upon certain premises situate partly in the Town of Irvington and partly in the City of Newark, Essex County and State of New Jersey, as shown upon the plan hereto attached and made a part hereof.

NOW THIS AGREEMENT WITNESSETH:

That the said parties hereto, each in consideration of the covenants and agreements hereinafter contained to be kept and performed by the other, hereby covenant and agree each with the other as follows:

FIRST. The said Railroad Company hereby agrees to construct a railroad siding partly upon its land or right of way and partly upon lands of the said parties of the first and second parts, situate partly in the Town of Irvington and partly in the City of Newark, County of Essex and State of New Jersey, as shown upon the plan hereto attached and made a part hereof, said plan being entitled: "Plan showing proposed location of siding for William L. Glorieux and the J. S. Hobbs Lumber Co., Irvington, N. J. Office of Division Engineer, Phillipsburg. Scale 1″=100′. Nov. 19th, 1907."

SECOND. The said parties of the first and second parts hereby agree to pay to the Railroad Company, by certified check, before the work of constructing the said siding is begun, the sums of One Thousand One Hundred and Sixty Dollars ($1,160) and Seven Hundred and Sixty-five Dollars ($765), respectively; said amounts being the estimated cost of the said siding.

It is distinctly understood and agreed by and between the parties hereto that that part of the said siding located upon lands of the said

parties of the first and second parts shall be owned and maintained by the said parties of the first and second parts.

THIRD. The said parties of the first and second parts hereby covenant and agree, during the continuance of this agreement, to ship or cause to be shipped over the railroad of the Railroad Company and over connecting and forwarding transportation lines preferred by it to the exclusion of all other means of transportation whatsoever, and in such manner as to give the Railroad Company the long haul, all the freight, the shipment of which the said party of the first part or the said party of the second part can control or influence, shipped from the above described siding to its ultimate destination, or shipped from its point of departure to the said siding; PROVIDED ALWAYS, that the freight rates on such shipments be as low as the rates charged to other shippers by the Railroad Company for like contemporaneous service.

FOURTH. The said parties of the first and second parts shall each be liable for all loss or damage which may occur to any cars while on said siding for their respective accounts, unless the same be caused by the negligence of the Railroad Company, and for all loss or damage to the contents of cars consigned to or for their respective accounts on said siding, until the said party of the first part or the said party of the second part notifies the Railroad Company to remove the cars.

FIFTH. This agreement shall continue in force unless or until terminated by any of the parties hereto giving thirty days' written notice to the others of intention so to terminate, and upon the expiration of such period this agreement shall absolutely end; PROVIDED ALWAYS, that if the said party of the first part or the said party of the second part shall fail to keep and perform the covenants hereof on their part to be kept and performed this agreement shall forthwith cease and determine at the option of the Railroad Company without notice to the said party of the first part or the said party of the second part, or to any one.

SIXTH. Any waiver at any time of the rights of the Railroad Company as to anything herein contained shall not be deemed a waiver of any breach of covenant or other matter subsequently occurring.

This agreement shall be binding upon and enure to the benefit of the parties hereto, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the said parties hereto have duly executed these presents, the day and year first above written.

W. L. GLORIEUX (L. S.)
JOHN S. HOBBS, (L. S.)

Bill of Complaint—Exhibit C.

Sealed and delivered in the presence of:
(as to John S. Hobbs)

DANIEL L. CAMPBELL.

(as to William L. Glorieux)

FREDERIC L. JOHNSON.

LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.

By E. B. THOMAS,
President.

Attest:

(SEAL) D. G. BAIRD,
Secretary.

EXHIBIT C.

DEED.

William L. Glorieux and Jeannie, his wife,
—to—
John S. Hobbs.

Deed Bargain & Sale
Bk. N. 43-365.
Dated Apr. 3, 1908.
Ackd. Apr. 3, 1908.
Recd. Apr. 9, 1908.
Cons. $1 etc.
Grant & Habendum
in fee. Full covenants.

Conveys premises located in the City of Newark and Town of Irvington.

Recites: "Together with the right to use a certain proposed single track railroad siding as described in a certain triplicate agreement bearing even date with these presents entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey, and located and established on the map attached to said agreement, which siding is to run over other lands of said Glorieux from the easterly line of the property of the said Railroad Company to the lands hereby conveyed, it being expressly understood that said right to use the said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive.

Bill of Complaint—Exhibit D.

EXHIBIT D.

DEED.

William L. Glorieux and Jeannie Glorieux, his wife, —to— Oscar Staeger.	D. B. & S. Book 043-513. Dated June 29, 1908. Ackd. June 29, 1908. Recd. July 2, 1908. Cons. $1. G. & H. in fee, full covs.

Conveys premises situate in the Town of Irvington, and City of Newark, Essex County, New Jersey.

BEGINNING at the most southerly corner of lands lying partly in the Town of Irvington and partly in the City of Newark, recently conveyed by said Glorieux to John S. Hobbs, being at a point 400.10 feet southwesterly from Nye Ave. on a course running south 44 degrees 19′ west from said Ave., said course being the southwesterly boundary line of the tract so conveyed to said Hobbs, and striking said southerly line of Nye Ave. at a point therein distant 138.96 feet westerly from Fabyan place; thence running (1) north 49 degrees 40′ west 153.35 feet; thence (2) north 49 degrees 53′ west binding in part upon the rear line of a street called Glorieux, on a map of property belonging to the said Glorieux, made May 27, 1907, by Edmund R. Halsey, Surveyor, 380.04 feet; thence (3) south 37 degrees 49′ west 46.44 feet; thence (4) south 18 degrees 19′ west 26.40 feet; thence (5) south 36 degrees 49′ west 168.30 feet; thence (6) south 50 degrees 11′ east 198 feet; thence (7) south 55 degrees 41′ east 294.36 feet; thence (8) north 44 degrees 19′ east 206.10 feet to the place of BEGINNING.

Recites: "Together with all the right of said Glorieux in and to a railroad siding of Lehigh Valley Railroad Company as now laid over said premises and subject to the rights of said Hobbs, his heirs and assigns, in said siding, which rights were granted by deed N 43-365. It being expressly agreed by the parties hereto that the Warranty in this Indenture, hereinafter set forth, shall not extend to any lands lying south of the dotted line on said map, drawn between the beginning point of the sixth course, and the beginning point of the eighth course, hereinbefore mentioned."

Bill of Complaint—Exhibit E.

EXHIBIT E.

DEED.

Oscar Staeger and Anna Staeger, his wife,
—to—
Jennie Canfield.

Bk. C. 58-321.
Dated Nov. 24, 1916.
Ackd. Nov. 24, 1916.
Recd. Nov. 25, 1916.
Cons. $1 & other valuable consideration Wty. Deed
Hab. in fee.

Conveys premises in the Town of Irvington, County of Essex.

BEGINNING in the westerly line of Glorieux Street at a point therein distant 400 ft. southerly from the southerly line of Nye Ave. formerly Cottage street, which beginning point is also the southeasterly corner of land now or formerly of Adolph Samuels & Son; running thence (1) southerly along said line of Glorieux Street 100 feet to land now or formerly of Bierman-Everett Foundry Company; thence (2) along the same north 49 degrees 53 minutes west 256.39 feet to land of the Lehigh Valley Railroad; thence (3) along the same north 36 degrees 49 minutes east 30.95 feet; thence (4) still along the same north 8 degrees 19 minutes east 26.40 feet; thence (5) still along the same north 37 degrees 49 minutes east 46.44 feet to the southwesterly corner of said Samuels land; thence (6) along the same south 49 degrees 53 minutes east 281.26 feet to said line of Glorieux street and place of BEGINNING.

Being part of the premises conveyed to William L. Glorieux by Philip H. Jackson, Administrator, etc., of Nanny F. Nye, by deed recd. in Book C. 41 page 86, and also part of the premises conveyed by said Glorieux to said Oscar Staeger by deed recd. in Book 0.43 page 513.

This conveyance is subject to the right of others in a railroad siding crossing said premises and in the use of the same to pass and repass over said siding.

Bill of Complaint—Exhibit F.

EXHIBIT F.

DEED.

Oscar Staeger and Anna Staeger, his wife, —to— Bierman-Everett Foundry Co. (a corp.)	D. B. & S. Bk. I 55-229. Dated Jan. 1, 1915. Ackd. Jan. 8, 1915. Recd. Jan. 8, 1915. Cons. $1 etc. G. & H. in fee, full covs. except as shown below.

Conveys premises situated in the Town of Irvington, Essex County, New Jersey, described as follows:

BEGINNING in the westerly line of Glorieux Street as same is laid out upon a map of property belonging to William L. Glorieux, made by Edmund B. Halsey, Surveyor, and dated May 27th, 1907, at a point therein distant southerly 500 feet from the southwest corner of same and Cottage St.; thence north 49 degrees 53′ west and parallel with Cottage St. 256.39 feet to the line of land of the Lehigh Valley R. R. Co.; thence along lands of the Lehigh Valley R. R. south 36 degrees 49′ west 137.35 ft. to the extreme southwesterly corner of premises described in deed from William L. Glorieux to Oscar Staeger dated June 29th, 1908, and recorded in Book O 43 of Deeds at page 513; thence along said Staeger's line south 50 degrees 11′ east 198 ft.; thence still along his line south 55 degrees 41′ east 41 feet to the aforesaid westerly line of Glorieux Street; and thence along the said westerly line of Glorieux Street, north 44 degrees 19′ east 132.43 feet to the point or place of BEGINNING. The above description is drawn from a survey made by Borrie & Kreiner, Surveyors, and dated January, 1915, it being expressly agreed that the covenant of warranty herein contained shall not extend to any lands lying to the south of the dotted line shown on said map dated May 27th, 1907, and running between the beginning point of the sixty course and the beginning point of the eighth course in said deed from William L. Glorieux recorded in Book O 43 of Essex County deeds, at page 513.

"Together with all the rights of the party of the first part in the railroad siding of Lehigh Valley Railroad Company which is now laid upon the premises above described subject to the rights of one Hobbs, his heirs and assigns in said siding as given to said Hobbs, by deed recorded in book N 43 of Essex County deeds on pages 365 etc. but reserving to said Oscar Staeger, his heirs and assigns as owners of the lands adjoining the premises hereby conveyed being the remaining portion of the lands conveyed to said Staeger by said Glorieux by said deed recorded in Book O 43 of Essex County Deeds at page 513, to use that portion of said siding which runs through the lands hereby conveyed subject to all of the terms and provisions of the contract referred to in said deed recorded in Book N. 43 of Essex County deeds at page 365, it being further agreed that said Oscar Staeger,

Answer.

his heirs and assigns as such owners of said adjoining lands will and do hereby agree that at any time hereafter they will and do hereby consent to any change of location within the lines of the property hereby conveyed of said railroad siding which may be desired by said party of the second part, its successors and assigns, provided such change be made at the expense of said party of the second part, its successors and assigns and provided it does not prevent the use of said siding in substantially the same manner as that to which it is subject at the present time."

Answer.

Filed Januray 26, 1918.

THE ANSWER OF BIERMAN-EVERETT FOUNDRY CO., A CORPORATION.

This defendant answering the bill of complaint, says that:

1. Paragraph 1 is admitted.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 2; and this defendant objects to said statements upon the ground that the facts alleged are immaterial to the real issue between the parties to this suit.

3. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 3 and objects to the same for the same reason given in the answer to paragraph 2.

4. Paragraph 4 is admitted, and defendant admits that a true copy of the agreement referred to is annexed to the bill of complaint and marked Exhibit B, except the allegation that the agreement was made with reference to any previous agreement between Glorieux and Hobbs, which is denied and objections made as stated in answer to paragraph 2.

5. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 5, except that there is a deed of conveyance on record, as alleged in said paragraph, to which record this defendant begs leave to refer, if necessary.

6. Paragraph 6 is admitted, except this defendant contends that the right of use of said sidetrack over the lands of the said Glorieux, was given subject to the terms and conditions of the agreement referred to in paragraph 4.

7. Paragraph 7 is admitted, except that this defendant has no knowledge or information sufficient to form a belief as to the statement that the parties to the agreement aforesaid, fully kept and performed all the covenants prior to the time that this defendant acquired

an interest therein and except the reference to the aforementioned deed.

8. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 8, except it has been informed that the expense of the construction of said track was about $2,000.00 and was paid by the said Glorieux and Hobbs.

9. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 9, except that the Franklin Lumber Company now appears to be in possession of the said lumber business, and is conducting the same.

10. Paragraph 10 is admitted, with the contention by the defendant, that the conveyance was made subject to the terms and conditions of the agreement aforesaid referred to in paragraph 4.

11. Paragraph 11 is admitted with the same explanation and contentions as stated in the answer to paragraph 10.

12. Paragraph 12 is admitted with the same explanation and contention as stated in the answer to paragraph 10.

13. Paragraph 13 is admitted, except this defendant denies that in making the purchase from Theckla B. Haas, it had any knowledge or notice that John S. Hobbs and his successors in title had any rights whatever in and to the land that was being purchased by this defendant from the said Theckla B. Haas.

14. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 14, except that the complainant, Franklin Lumber Company, appears to be in possession of the lands, as alleged, and appears to be engaged in the business of a lumber merchant thereon.

15. Paragraph 15 is admitted with this exception, that the defendant has not notified the complainants of any purpose or intention to take up and destroy the sidetrack aforesaid. This defendant claims that it has the right to terminate the agreement upon 30 days' notice, as provided in the agreement.

16. Paragraph 16 is denied.

17. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 17, except that this defendant is informed that a track can be laid so as to provide means whereby the complainants may receive lumber in carload lots in a different location from that of the present track; and in this connection, the defendant says that it only desires to have the location of the track changed so as to accommodate its own business. The track across defendant's land in its present location, is detrimental to the defendant in the prosecution of its business.

18. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 18, except that this

Replication.

defendant denies that the complainants have any other rights in and to the use of said track or railroad siding than the rights given in the agreement referred to in paragraph 4, and that the complainants and the defendants are both bound by the terms and conditions in said agreement; and that the lands purchased by this defendant from Theckla B. Haas are not included in said agreement, and the complainants have no rights whatever in relation to said lands.

This defendant is advised that this honorable Court has jurisdiction under sections 7 of chapter 116 of Laws of 1915, to determine any question relating to the construction of the agreement referred to in paragraph 4 of the bill of complaint insofar as the same affects the rights of the parties to this suit and to declare the rights of the persons interested.

This defendant objects to so much of the bill of complaint as seeks to establish any pretended rights of the complainants in and to the lands purchased by this defendant from Theckla B. Haas as aforesaid, as said lands are not included in the agreement referred to in paragraph 4 of the bill of complaint.

ROSINGER, MAYER & ALBANO,
Solicitors of Defendant.

(Corp. Seal) BIERMAN-EVERETT FOUNDRY CO.,

By George Bierman,
President.

State of New Jersey, }
County of Essex. } *ss.*

The answer of the defendant, Bierman-Everett Foundry Company, a corporation, was taken this 24th day of January, in the year 1917, before me under the common seal of the said corporation as by its said seal thereto affixed appear.

HARRY CAMPTON,
Master in Chancery of New Jersey.

Replication.

Filed February 23, 1918.

Complainants join issue on the issue of the defendant, Bierman-Everett Foundry Company, a corporation.

In reply to the defense stated in paragraph 17 of the answer, and not anticipated in the bill of complaint, complainants, by leave of Court, say that they deny that the railroad track in question can be laid other than it is without great expense and hardship to the complainants, which hardship the defendants have no legal right to impose upon the complainants.

M. M. STALLMAN,
J. F. HOOVER,
Solicitors of Complainants.

Decree Pro Confesso.

Filed February 9, 1918.

This cause being opened to the Court by M. M. Stallman and J. F. Hoover, of counsel with the complainants, and it appearing that process of subpoena for the defendants to appear and answer the complainants' bill hath been duly issued and returned served upon the defendants, Oscar Staeger, Jennie Canfield, and Lehigh Valley Railroad Co. of New Jersey, a corporation; and that the defendants have not nor have any or either of them appeared and pleaded, answered or demurred to the said bill within the time limited by law or at any other time, but that they have wholly failed and neglected so to do,

It is thereupon on this 9th day of February, 1918, on motion of M. M. Stallman and J. F. Hoover, solicitors for the complainants,

ORDERED AND DECREED that the complainants' bill be, and the same is, hereby taken as confessed against the said defendants, Oscar Staeger, Jennie Canfield and Lehigh Valley Railroad Co. of New Jersey, a corporation, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

A true copy.

ROBERT H. MCADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between

NELLIE F. HEDDEN, *et als.*,
Complainants,

and

BIERMAN-EVERETT FOUNDRY CO., *et als.*,
Defendants.

Before His Honor, Vice-Chancellor Stevens.

Messrs. Congleton, Stallman & Hoover, for complainants.

Mr. Frank E. Bradner and Messrs. Mayer, Rosinger & Albano, for defendants.

Transcript of shorthand report of the evidence given upon the trial of the above stated cause, on Friday, May 3rd, 1918, at Chancery Chambers, Newark, New Jersey.

WILLIAM L. GLORIEUX, sworn.

Direct examination by Mr. Stallman.

Mr. Bradner. We will object to this. The bill alleges that Hobbs desired to purchase a portion of land to be used by him as a lumber yard, on condition that a right of way for a railroad siding could be established, and that Glorieux consented to sell the land, and as part of the consideration agreed to give to Hobbs the right of way; that we knowing nothing of; he did make a grant, that we cannot dispute, but what occurred before hand we are not bound by it at all.

The Court. No, you are not bound by anything that passed between the parties, but they can explain the situation.

Q Mr. Glorieux, you reside in Irvington? A No, sir, I am residing at Union, Union County, at the present, Union Township.

Q You have lived in Irvington? A Yes, to last June.

Q You developed considerable real estate out in that section? A Yes, sir.

Q As I understand it, you, some ten years or more ago, prior to 1908, were the owner of this tract of land roughly bounded by the Lehigh Valley, Irvington branch, and Cottage street and Buffington street on the south? A Yes.

Q And running somewhere east of Glorieux on the easterly side? A Yes, sir.

Q I understand at that time you did not own these three lots up at the corner of the railroad and Buffington street? A No, I did not.

Q Did you own the rest of it on Buffington street? A No, sir.

Q Your line was the first line north of Buffington? A Have you the original map?

Mr. Bradner. Here is the diagram that is annexed to the agreement.

A If I had the original map as I bought it from the Nye estate. I don't want to get this thing wrong. I will have to have the map. Suppose to be one hundred feet from Buffington street right across the Lehigh Valley.

Q That is what this shows? A Yes, sir.

Q That was the property you owned? A There is a question on that that these lots on Buffington street were encroaching on the property I bought from the Nye estate, so the surveyor told me at the time, and I even questioned whether that survey is right, whether it crosses that little lot.

Q In 1908 was there a lumber yard where Hobbs' lumber yard was afterwards established? A What was that question?

Q (Question read.) A No, Durands.

Q That is at the corner of Glorieux street and Nye place? A It is.

Q Is not Nye place the name of this street in Newark and Cottage street in Irvington? A It used to be Cottage, it is all Nye avenue now.

Q You afterwards sold a tract of land down at that corner of Mr. Hobbs'? A I did, yes.

Q Do you remember as in point of time whether that property was sold to Mr. Hobbs before or after the question of the side track, the putting in of a side track, came up? A The sale was conditional that we would get that siding in, I being part of it and they being part.

Mr. Bradner. I object to that on behalf of the defendants, Bierman-Everett Company.

The Court. I do not think that the grantees of the land are bound by anything that was said.

A That was a written agreement.

The Court. If it was a written agreement, then the agreement ought to be produced.

Q I have never been able to find any written agreement between Mr. Glorieux and Mr. Hobbs for the conveyance of that property, I didn't know there was an agreement in writing providing for the sale and the conveyance. You say there was such a paper in writing? A There was such agreement, yes.

Q Have you a copy of it in your possession? A I don't hardly think so, I only have my own entry in my sale book, that is all.

Q Mr. Hobbs is deceased, is he not? A Yes, sir, so I understand.

Q Can you tell us whether or not the matter of the side track preceded or was after the sale of the property? A It was before the sale of the property.

Q Did you know at that time the purposes for which the property was being sold to Hobbs?

Mr. Bradner. I object.

A For a lumber yard.

The Court. No, I do not think that is evidence.

Mr. Bradner. We are only bound by the grant, whatever grant was made.

The Court. Yes. You can explain the situation, but when it comes to oral evidence of what occurred before the deed was executed, why that is a different thing altogether.

Q Now there was a contract made with the Railroad Company for the building of this track? A Yes, sir.

Q That was dated April 3, 1908, was it not? A I can't tell you the date without looking in my book.

Q If that was the date, do you recall that your deed to Mr. Hobbs for the sale of the tract was executed and delivered the same day? A My recollection is that it was.

Q Now, I show you this agreement dated April 3, 1908, between William L. Glorieux of Irvington and John S. Hobbs of Newark, and the Lehigh Valley Railroad Company. A Do you want to know if that is my signature?

Q Yes. A Yes, that is my signature.

Mr. Bradner. Is that the original?

Q Yes, this is one of the originals. I ask you if you know who prepared that agreement? A The Lehigh Valley Railroad people.

Q And brought it out for you and Mr. Hobbs to sign? A Yes, Mr. Hobbs attended to the transaction and brought it over.

Q At the time this agreement was made for the laying of this siding, did Mr. Hobbs own any land there? A No, he didn't, he only had an option in case the railroad—

Q Well, he didn't own any land there at that time? A No, owned no land.

Q The track that is now on the ground, Mr. Glorieux, is that the track that was provided for in this contract? A Do you mean the lumber yard, where the lumber yard is?

Q The siding that runs from the Lehigh Valley Railroad Company down into the lumber yard? A That is the one, yes.

Q And that extended from the Lehigh Valley right of way across other lands of yours, and then into the Hobbs' lumber yard property which you sold to them? A Yes.

Q And that track is now on the ground? A The lumber yard you mean?

Q Yes. A Yes; the other has been subdivided since, you know.

Q How long after this contract was made was it before the track was built? A I think they went right on with it, very shortly, if I remember, a month or two, I couldn't say.

Q The contract is dated April 3, 1908; was it completed during the following summer? A My recollection is it was, yes.

Q I notice that the contract provides for the payment for the construction of said track by certified checks of the sums of $1,160 and also $765; do you know what those separate amounts were for? A Yes, for the part that crossed my property, and Mr. Hobbs paid for the extension into the lumber yard.

Q That is your part, the $1,160? A Yes, my recollection is it was the largest amount anyway.

Q And Mr. Hobbs' was the $765? A Yes.

Q And the cost was divided on the basis of the length of your respective property? A Yes, lineal feet.

Q Then you subsequently sold the remainder of your property up there to Mr. Staeger, is that right? A No, not all.

Q Well, let me put it this way: Did you sell the remainder of your property over which the side track was constructed? A To Mr. Staeger, yes, all to Mr. Staeger; the street was not through at that time.

Q (*By the Court.*) You mean Glorieux street? A Yes, sir.

Q (*By Mr. Bradner.*) Did that street come out of your land, may I ask? A Yes.

Q (*By Mr. Bradner.*) It was all out of your land? A Yes.

Q Just when was that Glorieux street laid out or worked as a street? A You mean the extension of it?

Q Glorieux street between Buffington street and Cottage street? A Well, I was going to say, Glorieux street, the butt end of it was the only entrance to Mr. Staeger's land, and then Mr. Staeger having difficulty to dispose of that large plot I advised him to put the street through to Buffington street and subdivide it.

Q Did it originally start from Nye place or Buffington street? A From Nye place, and the full length of the property as sold to Hobbs, so they had a front on that street.

Q (*By Mr. Bradner.*) That is the private street that was put through by Mr. Staeger? A No, later on it was done by the town.

Q Do you know whether there is any other railroad track running into or near the Hobbs lumber yard? A Any steam railroad you mean?

Q Yes. A No, there is no other, that is the only one.

Q Is the main line of the Lehigh Valley branch on the northwesterly side of the property which you own the nearest railroad to this property? A Yes, the main line runs to Clinton avenue, and this is taken off of the main line.

Cross examination by Mr. Bradner.

Q Do I understand you that there was a part of the land over which the siding was laid that did not belong to you? A Not that I know of; my consent to the Lehigh Valley was to lay a track over lands owned by me from their railroad into the Hobbs lumber yard.

Q I show you this diagram, which is one that we have received from the railroad company with a copy of the agreement. A Yes.

Q And it appears from that that the siding is entirely on your land, does it not? A Yes, oh, yes, this was the extension of the street. Is this Cottage street here?

Q Yes. A And Nye avenue. Yes, that was the understanding. Mr. Halsey made the map and submitted it to the railroad company, and that is all I had to do with that part of it; I simply gave them consent to cross my lands.

Q If it is on Mrs. Haas' land, that you don't know anything about? A I don't know anything about that; no, sir.

Mr. Stallman. I would like to offer in evidence the deed from Mr. Glorieux to Mr. Hobbs, which is Exhibit C annexed to the bill of complaint, and I will read the clause in that deed.

Mr. Bradner. Haven't you got the original deed?

Mr. Stallman. No, I haven't got the original deed, but I understood there would be no objection to the offer of these papers; if you wish I will furnish certified copies from the register's office.

Mr. Bradner. I haven't any objection to the copy; I think perhaps we better compare it.

Mr. Stallman. This is the original contract that we will offer. Marked Exhibit C. 1.

Mr. Stallman. Now this deed, after describing the land conveyed by Mr. Glorieux to Mr. Hobbs, provides as follows: Together with the right to use a certain proposed single track railroad siding, as described in a certain triplicate agreement bearing even date with these presents, entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey, and located and established on map attached to said agreement, which siding is to run over other lands of the said Glorieux from the easterly line of the property of the railroad company to the lands hereby conveyed, it being expressly understood that the right to use the said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive.

Now I would like to offer next the deed from Mr. Hobbs to the complainant, Mrs. Hedden. This deed, I have the original deed here, is dated the same day, April 3, 1908, and contains, after the description of the property, the identical clause which I have just read, that is, together with the right to use a certain proposed single track railroad siding, described in a certain triplicate agreement, bearing even date with these presents, entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey, and located and established on the map attached to said agreement, which siding is to run over other lands of the said Glorieux from the easterly line of the property of said railroad company to the lands hereby conveyed, it being expressly understood that the right to use the said siding over other lands of said Glorieux

hereby granted to said Hobbs, his heirs and assigns, is not exclusive.

Marked Exhibit C. 2.

Now just to keep that chain complete, I want to offer in evidence a deed made by Mrs. Hedden to the J. S. Hobbs Lumber Company, a corporation, and another deed by the J. S. Hobbs Lumber Company back into Mrs. Hedden.

Mr. Bradner. They are not in the defendants' bill.

Mr. Stallman. The deed from Mrs. Hedden to the J. S. Hobbs Lumber Company being dated February 10, 1909, and recorded in book R-44, page 328; and the deed from J. S. Hobbs Lumber Company to Nellie Frances Hedden being dated March 3, 1910, and recorded in book Q-46, page 263. Your Honor will see that Mrs. Hedden obtained title to this land on the day that the original deed and contract was entered into, she made a conveyance to the corporation, and when they got in financial difficulty she took the property back in her own name again and is still the owner.

Marked Exhibits C. 3 and C. 4.

Mr. Stallman. Now I would like to offer in evidence the deed marked Exhibit D, annexed to the bill of complaint, which is a deed from Mr. Glorieux to Oscar Staeger, dated June 29, 1908, recorded July 2nd, 1908, in book O-43, page 513. That deed, after describing this parcel sold to Mr. Staeger over which the remainder of the track runs, provides as follows: Together with all of the right of the said Glorieux in and to a railroad siding of Lehigh Valley Railroad Company as now laid over said premises, and subject to the rights of said Hobbs, his heirs and assigns, in said siding, which rights were granted by deed N-43, page 365; it being expressly agreed by the parties hereto that the warranty in this identure shall not extend to any lands lying south of the dotted line.

I would now like to offer in evidence Exhibit F attached to the bill, which is the deed from Oscar Staeger and wife to Bierman-Everett Foundry Company.

Mr. Bradner. We have the original deed if you want to put that in.

Mr. Stallman. Particularly the clause relating to this side track, after the description of the property. This deed is dated January 1, 1915, recorded January 8, 1915, in book I-55, 229, and provides as follows: Together with all the rights of the party of the first part in the railroad siding of Lehigh Valley Railroad Company which is now laid upon the premises above described, subject to the rights of one Hobbs, his heirs and assigns, in said siding, as given to said Hobbs by deed recorded in book N-43 of Essex County deeds on page 365, etc., but reserving to said Staeger, his heirs and assigns, as owners of the lands adjoining, the premises hereby conveyed, being the remaining portion of

the lands conveyed to said Staeger by said Glorieux, by said deed recorded in book O-43 of Essex County deeds, at page 513, to use that portion of said siding which runs through the lands hereby conveyed, subject to all the terms and provisions of the contract referred to in said deed, recorded in book N-43 of Essex County deeds, at page 365; it being further agreed that the said Oscar Staeger, his heirs and assigns, as such owners of the adjoining lands will and do hereby agree at any time thereafter that they will and do hereby consent to any change of location within the lines of the property hereby conveyed of said railroad siding which may be desired by the party of the second part, its successors and assigns, providing such change be made at the expense of said party of the second part, its successors and assigns, and provided it does not prevent the use of such siding in substantially the same manner as that to which it is subject at the present time.

Now there is one other deed that I would like to offer in evidence, it is marked Exhibit E attached to the bill of complaint, and is the deed from Oscar Staeger and wife to the defendant Jennie Canfield, of the premises adjoining that of the Bierman-Everett Foundry Company; that deed is dated November 24, 1916, and recorded November 25, 1916, in book C-58, 321, and after describing—

Mr. Bradner. I object to that deed, if your Honor please, upon the ground that it is a transaction between other parties and we are not bound by it.

The Court. Well, it can go in subject to your objection.

Mr. Stallman. This was a deed made by Staeger to Mrs. Canfield of the adjoining parcel, and after the description merely says: This conveyance is subject to the right of others in a railroad siding crossing said premises and the use of the same to pass and repass over said siding.

Mr. Bradner. That is made a year after the grant.

CLARENCE H. HEDDEN, sworn.

Direct examination by Mr. Stallman.

Q Mr. Hedden, where do you reside? A I reside in East Orange.

Q Do you know Nellie F. Hedden, one of the complainants in this suit? A Yes.

Q She is your mother? A She is my mother.

Q Do you know the location of the side track that runs from the Lehigh Valley Railroad, Irvington branch, over into the lumber yard at Nye avenue and Glorieux street in Irvington? A Yes.

Q How long have you known that property and that side track? A Ever since it was put in, about nine and a half or ten years ago.

Q Do you know what that track has been used for? A Yes.

Q What? A Been used to run cars in to the lumber yard.

Q Your mother's property you mean? A My mother's present property; yes, sir.

Q And this property at the corner of Nye place and Glorieux street, has that ever been used for any other business purpose than a lumber yard, to your knowledge, since this track was built I mean? A No, sir.

Q When did the Franklin Lumber Company go into possession of your mother's property as tenants? A I think it was May first of 1915.

Q May first, 1915? A I think that is the date.

Q They have been conducting a lumber business there since? A Yes, sir.

Q Who conducted the lumber business there before them? A A Mr. Grant, I forget his first name.

Q Was he a tenant of your mother's, do you know? A Yes.

Q Did anybody conduct a lumber business there before him? A Previous to that the Hobbs Lumber Company.

Q Oh, the Hobbs Lumber Company, and then Mr. Grant, and then the Franklin Lumber Company? A Yes.

Q In the year 1915 was that track being used for shipment of lumber? A Yes, sir; after the present tenants went in.

Q And so far as the premises, your mother's premises are concerned, has it been used for any other purpose, that is any other commodity shipped in there, or just lumber? A Just lumber.

Q And I assume that is in carload lots? A Yes, sir.

Q Are you familiar enough with the use of that track to tell us about how many cars per day or week?

The Court. Does that make any difference?

A I couldn't tell you that, sir.

Mr. Bradner. There is no limit in the agreement.

Cross examination by Mr. Bradner.

Q Mr. Hedden, was the lease made to the Franklin Lumber Company made to Frank A. Willett? A It was made to Mr. Willett.

Q Representing the Franklin Lumber Company? A I forget whether it was the Franklin Lumber Company then, or whether he before that brought in other parties and formed the company, I don't recall.

Q That was in the spring of 1915? A That was in 1915; I think they took possession the first of May, that is, the lease dated from the first of May, but they took possession in April I think.

Q Were the Bierman-Everett people there then? A I really do not recall.

Q When did the Hobbs Company give up business? A I think it was in 1910.

Q And the ground there was vacant for some years, was it not? A It was vacant for probably a year or a year and a half.

William L. Glorieux, re-direct.

Q Then you made the lease to Grant? A Then the lease to Grant.

Q How long was he there? A I think about eighteen months.

Q And then this lease to Willett? A Then the lease to Willett or the Franklin Lumber Company.

Q Was the Hobbs Company adjudged bankrupt? A No, sir.

Q Just went out of business? A Went out of business; Mr. Hobbs was sick and away from business and they disbanded.

Re-direct examination by Mr. Stallman.

Q Was your mother, Mrs. Hedden, connected with the Hobbs Lumber Company? A She was a stockholder.

Q Do you know when she became a stockholder? A At the organization.

Mr. Stallman. If the Court please, I think that is all the evidence we have to produce, with the exception of some oral testimony that I would like to put in on the part of Mr. Staeger, for the purpose of showing that the location of this side track across these premises was a very material factor and established the consideration for the price, that the burden of this easement across these premises was an important factor in fixing the consideration paid for the property. I have been unable to get Mr. Staeger here, but if there might be some objection to the introduction of it I want to state now, in case the Court wants to rule on it,, that I think it is material as showing the knowledge and the notice that these people had of the rights which the other parties had in the siding.

Mr. Bradner. I understand that was prior to the conveyance, and I object to any conversations that led up to that conveyance, whatever was said.

The Court. I suppose the rights of the parties were fixed by the deed.

Mr. Stallman. There is no consideration expressed in the deed excepting one dollar and other considerations, and I think I should show the true considerations for that conveyance.

The Court. But there is no doubt that the consideration was valuable, it was a valuable consideration.

Mr. Stallman. Yes, but I do not know whether I made myself clear. I want to show, and I think it would be competent and relevant to show that the consideration was reduced on account of the presence of this easement across the property.

The Court. But they knew of the easement, and they took the deed for valuable consideration subject to the easement. Conversations that occurred before the deed was given cannot enlarge the easement and cannot narrow it.

Mr. Stallman. No.

The Court. Then I do not see what difference it makes.

Mr. Stallman. Then that is our proof on the complainant's side of the case at this time.

Mr. Bradner. Now they state in the bill that they claim the right to go over that little strip of land which belongs to us, and I want to show that situation clearly.

Mr. Stallman. I explained to you that we do not insist on that; I have agreed with Mr. Mayer that if we have any rights across the other part of the land we will take the track off of that corner; I cannot state it any more fairly or clearly.

Mr. Bradner. Then can it go on the record that the complainant and the railroad company do not claim any rights over the land that was bought from Mrs. Haas?

Mr. Stallman. I will put it on the record this way; your Honor can see just the reason for this; if we have no rights across this lot to maintain a track across there, obviously that little corner is of no interest to us whatever; if we have any rights to cross the land of the Bierman-Everett Company for the maintenance of a track then, in order to avoid any unnecessary litigation, I will agree, if we have such rights, to move that track over so as to get off of that corner.

Mr. Bradner. That is satisfactory, that part. Now you claim in your bill that the Bierman-Everett Company have threatened to remove the track and obstruct you in the use of it, but there is no proof of that.

Mr. Mayer. In our answer we deny it, but we claim the right to terminate the entire situation by giving thirty days' notice if we wish to; we haven't done it yet, so there is no proof of that.

Mr. Bradner. They allege we claim the right to terminate on thirty days' notice, and we admit we claim that right, so it resolves itself into a question of the construction of the agreement.

GEORGE BIERMAN, sworn.

Direct examination by Mr. Stallman.

Q Mr. Bierman, you are one of the officers of the Bierman-Everett Foundry Company? A Yes.

Q That is a corporation? A Yes.

Q And they are the owners of the property across which a portion of the side track runs into the Franklin Lumber Company yard? A Yes, sir.

Q Is it not a fact, Mr. Bierman, that after you acquired title to this strip, your first strip that you purchased, bounded about one hundred feet from Buffington street, and on the other side by the Canfield property, that you erected a fence along the northerly line of your property and across the location of that side track, with a gate in it? A Yes, sir.

Q (*By Mr. Bradner.*) That is three years ago you erected the gate there? A About three years ago, yes.

Q Have you on any occasion whatever or at any time refused to permit cars to be switched through your property to the Franklin Lumber Company? A Yes, sir.

Q It is a fact, is it not Mr. Bierman, that you contemplated extending your foundry buildings beyond the location of this siding across your lot? A Yes, sir.

Q And you have been in negotiation with the owners of the Franklin Lumber Company for the purpose of having that track removed so that you could get your building through there? A Yes, sir.

Q It is a fact, is it not, that what you really want is to have the track removed to the northwesterly side of your premises rather than to still have it cross over the Canfield property and into Glorieux street? A I do not quite get your question. If it was moved over to the northwesterly side it would naturally go through the Canfield property just the same.

Q You would rather have the track all taken up and out of there, would you not? A Well, it is preferable, but we do not insist upon it.

Q And you claim the right to terminate—

The Court. Is not the track useful for your own purposes?

A It is absolutely essential.

Q (*By the Court.*) The siding? A Yes, sir; but it will not do away with our siding by having it removed.

Q (*By the Court.*) Well, you do not want the siding abolished; you want its location changed? A A portion of the siding can be abolished and we can still have the use of it.

Q (*By the Court.*) You want the use of the siding; you would not want to see that siding disappear. For instance, you would not like the Lehigh Valley Railroad Company, the owners, to disconnect from their track? A Not if we couldn't yet another siding.

Q But your interest in the siding is entirely with reference to so much of it as would serve your lot; you do not care anything about the people beyond you?

The Court. Well, that is natural, is it not?

Q That is true, is it not? A Certainly.

Q You have been shown, haven't you, by me this map, which I now show you, showing an alternative location of this track in yellow, and you have stated that that does not meet your requirements? A That is right.

The Court. You better have the map identified.

Q Witness refers to map C-5. And it is your position, is it not, Mr. Bierman, that if that track is not moved any further than that, that you will have to exercise the right of having it removed on thirty days' notice, as you are advised that you have the right? A That is right.

Exhibit C. 2.

Q And it is your intention to give that notice if the track cannot be moved far enough to accommodate your building? A That is right.

Cross examination by Mr. Bradner.

Q Mr. Bierman, where is the fence erected—on the piece you bought from Staeger or from Mrs. Haas? A Well, the portion with the track for the other side; that portion of the fence is on the Staeger piece, but the other portion of the fence is on the Haas piece.

Q When you refused to let any cars go through, over what land did you refuse to let the cars go? A Over the Haas property.

Q Only over that? A Only, positively.

The Court. Have you any evidence, Mr. Bradner?

Mr. Bradner. No, sir.

EXHIBIT C. 2.

This Indenture, made the third day of April in the year of Our Lord One Thousand Nine Hundred and eight

Between

JOHN S. HOBBS and EMMA F. HOBBS, his Wife,

of the City of Newark, in the County of Essex and State of New Jersey, of the First Part

And

NELLIE FRANCES HEDDEN,

of the City of Newark, in the County of Essex and State of New Jersey, of the Second Part,

Witnesseth, That the said party of the first part for and in consideration of ONE DOLLAR and Other Good and Valuable Considerations, lawful money of the United States of America to them in hand well and truly paid by the said party of the second part at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey, and confirm to the said party of the second part and to her heirs and assigns forever. All that certain tract or parcel of land hereinafter particularly described, situate, lying and being in the City of Newark and Town of Irvington, in the County of Essex and State of New Jersey,

BEGINNING at a point formed by the intersection of the Southeasterly line of Glorieux Street with the Southwesterly line of Cottage Street, or Nye Avenue; thence running (1) along the said Southeasterly line of Glorieux Street South forty-four degrees and nineteen minutes West four hundred feet; thence (2) South forty-nine degrees and forty minutes East two hundred feet; thence (3) North forty-four degrees and nineteen minutes East four hundred feet and

Exhibit C. 2.

ten one-hundredeths of a foot to the said Southwesterly line of Nye Avenue or Cottage Street; thence (4) along the same North forty-nine degrees and forty minutes West one hundred and seventy-four feet and eight one-hundredths of a foot; and thence (5) still along the same North forty-nine degrees and fifty-three minutes West twenty-five feet and ninety-two one-hundredths of a foot to the said line of Glorieux Street and the place of Beginning. According to Survey by Edmund R. Halsey, May 27th, 1907.

BEING the same premises conveyed to the said John S. Hobbs by William L. Glorieux and Wife by deed bearing even date herewith and not yet recorded.

TOGETHER with the right to use a certain proposed single track railroad siding as described in a certain triplicate agreement bearing even date with these presents entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey, and located and established on the map attached to said agreement, which siding is to run over other lands of said Glorieux from the easterly line of the property of the said Railroad Company to the lands hereby conveyed, it being expressly understood that said right to use said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining; ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same and of, in and to every part and parcel thereof; TO HAVE AND TO HOLD all and singular the above described land and premises with the appurtenances unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever:

AND the said JOHN S. HOBBS doth for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part, her heirs and assigns that he, the said JOHN S. HOBBS, is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging; and that the said land and premises or any part thereof at the time of the sealing and delivering of these presents are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever;

AND ALSO that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid; AND ALSO that he, the said JOHN S. HOBBS, will WARRANT, secure, and forever defend the said land and premises unto the said party of the second part, her

Exhibit C. 2.

heirs and assigns forever against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In Witness Whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

JOHN S. HOBBS, (Seal)
EMMA F. HOBBS. (Seal)

Signed, Sealed and Delivered
in the presence of

Daniel L. Campbell.

State of New Jersey, }
County of Essex. } *ss.*

Be it Remembered That on this ninth day of April in the year of Our Lord One Thousand Nine Hundred and eight before me the subscriber, a Master in Chancery of New Jersey personally appeared John S. Hobbs and Emma F. Hobbs, his Wife, who I am satisfied are the Grantors in the within Deed of Conveyance named, and I having first made known to them the contents thereof, they thereupon did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Emma F. Hobbs, being by me privately examined separately and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed FREELY and without any fear, threats or compulsion of her said husband.

DANIEL L. CAMPBELL,
M. C. C. of N. J.

ABS'T

Compared by Cook.

WARRANTY DEED.

John S. Hobbs and Emma F. Hobbs, His Wife,

to

Nellie Frances Hedden.

Dated April 3 1908

Received in the Register's Office of the County of Essex, N. J., on the 9th day of April A. D., 1908 at 1.48 o'clock, in the afternoon, and Recorded in Book N. 43 of DEEDS for said County, on pages 367-369.

EDMUND S. PERRY,
Register.

FIDELITY TRUST COMPANY,
Newark, N. J.
Received Register's Office Apr 9 1 48 P. M. 1908.
Essex County.

Conclusions.

Filed July 29, 1918.

Mr. M. M. Stallman, for complainant.
Mr. Frank E. Bradner, for defendant.

STEVENS, *V. C.*

The bill is filed for the purpose of obtaining a construction of a deed made by William L. Glorieux to John S. Hobbs. The deed conveys a part of certain land in Newark and Irvington owned by Glorieux, and then proceeds: "together with the right to use a certain proposed single track railroad siding as described in a certain triplicate agreement, *bearing even date with these presents* entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey and located and established on the map attached to said agreement, which siding is to run over other land of said Glorieux from the eastern line of the property of the said Railroad Company to the lands hereby conveyed."

The agreement referred to in this grant bears date the same day (April 3, 1908). It is made between Glorieux, as party of the first part, Hobbs as party of the second part, and the Railroad Company as party of the third part. It provides for the construction of a railroad siding partly upon land of the Railroad Company and partly upon lands of the parties of the first and second part, as shown upon the plan thereto attached and made a part thereof. After providing that the cost of the siding was to be borne by the parties of the first and second part, it says: "It is distinctly understood and agreed by and between the parties hereto that the part of the siding located upon land of the said parties of the first and second parts shall be owned and maintained by the said parties of the first and second parts. * * * This agreement shall continue in force unless or until terminated by any of the parties hereto giving thirty days' written notice to the others of intention so to terminate, and upon the expiration of such period this agreement shall absolutely end; provided always that if the said party of the first part or the said party of the second part shall fail to keep and perform the covenants hereof on their part to be kept and performed, this agreement shall forthwith cease and determine at the option of the Railroad Company without notice to the said party of the first part or the said party of the second part or to anyone. * * * This agreement shall be binding upon and enure to the benefit of the parties hereto, their respective heirs, executors, administrators, successors and assigns."

The complainant contends that while the agreement gives only a right or license terminable at the will of either of the parties, the deed gives a broader right, and that this right is nothing less than an easement of way over the lands retained by Glorieux, to be enjoyed by the grantee, his heirs and assigns, in perpetuity.

It is obvious that if this be so, the right given is a legal right, whose nature and extent can, at least in the first instance, be determined only in a court of law. But it seems to me quite clear that no such independent right is given. The right provided for, is that described in the contemporaneous agreement to which the grant, in express words, refers, not only for the purpose of locating the siding, but also for the purpose of defining the character of the right itself.

It will be observed that in neither paper is any mention made of an easement of passage. The agreement provides only for the construction of a *siding,* conceived of as distinct from the land itself, and the right to use it is made terminable at the will of either of the three parties, on thirty days' notice. The grant, as we find it in the deed, is of "*the* right to use a certain proposed single track railroad siding as described in a certain triplicate agreement," &c. Evidently the word "as" must be read as meaning "in the manner"; for the clause goes on to say that the siding thus described is "located and established on the map attached to the agreement."

Complainant's contention while giving effect to the agreement, as far as the railroad is concerned, would supersede it as between Glorieux and Hobbs the moment it was made; for it is evident that the right given by the agreement could not co-exist with the right contended for by complainant. It is impossible to believe that when the parties so carefully defined the right or license therein provided for, they had in mind, at the same time, a broader right whose nature and limits they did not think it worth while to define. One of the consequences of complainant's construction would be that the easement claimed to have been given by implication would, if the Railroad Company put an end to the agreement, continue to burden the defendant's land, although of no benefit to complainant. It is not at all likely that the parties intended to confer any greater right than they expressly provided for.

No notice terminating the agreement has been given by anybody, and the question as it is now presented is academic. Whether the Court should, because of the provisions of the Chancery Act, P. L. 1915, p. 184, sec. 7, decide a purely academic question is at least open to doubt, but as both parties have joined in asking it for its opinion I have thought it best to give my view of the matter.

The bill should be dismissed.

A true copy.

ROBERT H. MCADAMS,
Clerk.

Final Decree.

Filed September 26, 1918.

This cause coming on to be heard in the presence of M. M. Stallman and Jeremiah F. Hoover, of counsel with the complainants, and Frank E. Bradner and Rosinger, Mayer & Albano, of counsel with the defendant, Bierman-Everett Foundry Co., and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing to the Court that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint:

It Is, on this twenty-sixth day of September, 1918, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the complainants' bill be and the same is hereby dismissed, with costs. And it is further ordered and decreed that the complainants pay to the defendant, Bierman-Everett Co., the costs of this suit to be taxed, including an allowance of one hundred dollars, jointly, to Frank E. Bradner and Rosinger, Mayer & Albano, of counsel with defendant, Bierman-Everett Foundry Co., and that execution issue therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,

Frederic W. Stevens,
V. C.

Notice of Appeal.

Filed Sept. 29, 1918.

To Messrs Rosinger, Mayer & Albano, solicitors of defendants.

Take Notice that the complainant appeals to the New Jersey Court of Errors and Appeals from the decree entered in the above entitled cause in the Court of Chancery on the twenty-sixth day of September, 1918, and from each and every part thereof.

Yours, etc.,

CONGLETON, STALLMAN & HOOVER,
Solicitors of Complainant.

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

M. M. STALLMAN,
Of Counsel with Complainant.

Petition of Appeal.

Filed September 29, 1918.

New Jersey Court of Errors and Appeals

Between	*On Bill, etc.*
NELLIE F. HEDDEN, *et al.*, *Complainants,*	*Appeal from Court of Chancery.*
and	
BIERMAN-EVERETT FOUNDRY COMPANY, *et al.*, *Defendants.*	*Petition of Appeal.*

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

The petition of Nellie F. Hedden, complainant below in the above entitled cause and the appellant herein, respectfully shows:

That your petitioner finds herself aggrieved by a certain decree made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, on the twenty-sixth day of September, 1918, in a cause wherein the parties were as set forth in the foregoing title, wherein the bill of complaint of your petitioner was dismissed, and your petitioner is aggrieved in the following respects, to wit:

That the decree from said Court of Chancery erroneously adjudged and decreed that the bill of complaint of the said Nellie F. Hedden should be dismissed.

And your petitioner humbly appeals from said decree and from each and every part thereof upon the ground:

1. That the same is erroneous and that the Court should have adjudged and determined that Nellie F. Hedden has and holds the perpetual right in the nature of an easement to maintain and operate a railroad siding upon and across the lands of the Bierman-Everett Foundry Company by virtue of a deed from William L. Glorieux to John F. Hobbs, dated April, 1908, and the subsequent conveyances from said Hobbs to said Hedden.

2. That the Court should have adjudged and determined that the lands of the Bierman-Everett Foundry Company were subject to and encumbered with a right, in the nature of an easement in favor of John S. Hobbs and his successors and assigns, to maintain and operate a side track across the lands of the said Bierman-Everett Foundry Company by virtue of a deed from William L. Glorieux to Oscar

Staeger, dated April 3, 1909, and subsequent conveyances from said Staeger to said Bierman-Everett Foundry Company.

And your petitioner humbly appeals from said order or decree and from each and every part thereof upon the ground that the same is erroneous and that the Court on the hearing below erroneously and improperly admitted illegal and irrelevant evidence offered on behalf of the defendants and erroneously and improperly overruled legal and relevant evidence offered on behalf of your petition.

And your petitioner humbly appeals from said decree or order and from each and every part thereof and finds herself aggrieved thereby because said decree or order was for divers other reasons illegal, erroneous and unlawful.

And your petitioner humbly appeals from said decree on the ground that the same is erroneous in that the Court of Chancery should have made a decree in favor of your petitioner adjudging that Nellie F. Hedden has and holds the perpetual right in the nature of an easement to maintain and operate a railroad siding upon and across the lands of the Bierman-Everett Foundry Company as aforesaid, with costs and a reasonable counsel fee.

Your petitioner therefore prays that the said decree or order of the said Chancellor made in the premises aforesaid, be reversed, set aside and for nothing holden, and that the Court of Chancery may be directed to make a proper decree in accordance with the directions of this Honorable Court and that your petitioner may have such other and further relief in the premises as to your Honorable Court shall seem meet.

CONGLETON, STALLMAN & HOOVER,
Solicitors for Appellant.

M. M. STALLMAN,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

NELLIE F. HEDDEN, *et als.*,
Complainants-Appellants,

and

BIERMAN-EVERETT FOUNDRY COMPANY, *et als.*,
Defendants-Respondents.

On Appeal from Chancery.

Brief of Complainants-Appellants.

This is an appeal from a decree advised by Vice-Chancellor Stevens dismissing complainants' bill. The complainant Hedden is the owner, and Franklin Lumber Company is the tenant and operator, of a lumber yard. This yard is located some distance from the main track of the Irvington branch of the Lehigh Valley Railroad, but is connected with the railroad and served by a side track which extends partly across the lands of the defendant Bierman-Everett Foundry Company, which lands were formerly owned by W. L. Glorieux. The complainants also acquired their lands from Glorieux and claim an easement of a right of way for this side track across the defendant's lands by virtue of an express grant from Glorieux as an essential appurtenance of the land purchased from him. The defendant desires and purposes in order to extend its buildings to remove the track across its land, thereby shutting off the side track service between the railroad and complainant's lumber yard, and this suit is brought to have her rights determined and to enjoin defendant from interfering with the track on the ground that such removal would result in irreparable damage to her and her property.

The answer formally denies the complainants right to the continued use of the siding, but joins in the prayer for a construction of the deeds upon which the rights and obligations of the parties are based. At the hearing the defendant admitted its purpose to remove the siding or compel its discontinuance (p. 25, l. 51; p. 26, l. 1), and there is no dispute of fact in the case, the rights of the parties depending entirely upon the construction of their documents of title.

In 1908 all of the lands in question were owned by William L. Glorieux. One Hobbs decided to establish a lumber yard in that vicinity with a side track connection with the railroad, and under date of April 3rd, 1908, the railroad company entered into an agreement with Glorieux and Hobbs (Exhibit B, p. 5), which recited that the parties desired the construction of the side track and provided:

1st: That the railroad company should build the siding.

2nd: That Glorieux and Hobbs should pay its cost in certain proportions and should own and maintain the same.

3rd: That Glorieux and Hobbs should ship their freight via the Lehigh Valley Railroad.

4th: That Glorieux and Hobbs should be liable for all loss and damage to cars, etc.

5th: That the agreement should continue in force until terminated by either party on thirty days' notice.

Nothing was expressed in this contract with respect to Hobbs right in Glorieux's lands, or defining or regulating any use of the track.

By a deed dated the same day (Ex. C, p. 7) Glorieux conveyed the lumber yard site to Hobbs, and Hobbs, by deed of the same date (Ex. C 2, p. 26) conveyed the land to Mrs. Hedden, who was a partner or financier of Hobbs. Both of these deeds, after describing the land conveyed in fee, contains the following grant (p. 5; p. 27):

> "Together with the right to use a certain proposed single track railroad siding as described in a certain triplicate agreement bearing even date with these presents entered into by the said William L. Glorieux, the said John S. Hobbs and Lehigh Valley Railroad Company of New Jersey and located and established on the map attached to said agreement, which siding is to run over other lands of said Glorieux from the easterly line of the property of the said railroad company to the lands hereby conveyed, it being expressly understood that said right to use the said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive."

The track was built shortly after the contract was made and the deed delivered, and has been used ever since for the handling of carloads of lumber to and from the lumber yard of the complainants (p. 22).

A few years later Glorieux conveyed his remaining land to Oscar Staeger (Exhibit D, p. 8), by which deed Glorieux recognized and reserved complainants' right, as follows:

> "Together with all of the right of said Glorieux in and to a railroad siding of Lehigh Valley Railroad Company as now laid over said premises and *subject to the rights of said Hobbs, his heirs and assigns, in said siding, which rights were granted by deed N 43-365.*"

Staeger sold this land in two parcels. First, he conveyed the portion nearest the railroad main line to the defendant Bierman-Everett Company, reserving the right to use the siding (Exhibit F, p. 10). Secondly, he conveyed the remainder to Mrs. Canfield, subject to complainants' rights in the siding across these lands (Exhibit E, p. 9).

The defendant contended, and the learned Vice-Chancellor held, that the grant contained in the deed of April 3rd, 1908, did not create any right in the nature of an easement in favor of the lumber yard, because the reference in the deed to the agreement with the railroad company operated to limit its purpose and effect to that of a revocable license only. The Court also held that the complainants must first establish their rights at law before seeking equitable relief, but decided the case because both parties prayed for the construction of the deeds (p. 30).

I.

The Court erred in holding that the bill should be dismissed on the question of jurisdiction.

If the Court had not determined this case on its merits, it should not have dismissed the bill on the ground that complainants should first establish their rights at law. Under the old practice the Court should have retained the bill pending a decision at law (*Mason* v. *Ross,* 77 N. J. Eq. 527) and under the Transfer of Causes Act, it should have transferred the cause to the Supreme Court. We insist however, that it was proper for the Court below to hear and decide the case on its merits.

In *Hart* v. *Leonard,* 42 N. J. Eq. 416, Mr. Justice Dixon said:

> "No doubt many cases arise in which courts of equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can, I think, be classified under the following heads:
>
> 1. Cases where the legal right has been established in a suit at law, and the bill in equity is filed *to ascertain in the extent of the right and enforce or protect it in a manner not attainable by legal procedure.* * * *
>
> 3. Cases where the legal right, though formally disputed, *is yet clear on facts which are not denied* and legal rules which are well settled, and the object of the bill is as before stated. * * *
>
> 6. Cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable, *i. e.,* one for which the damages that may be recovered according to legal rules do not afford adequate compensation." * * *

This case seems to fall clearly within the third class mentioned by Justice Dixon. While the defendant formally disputes the complainant's legal right to the easement across its lands, her right is exclusively a question of law and does not involve any disputed question of fact, and there is nothing for a jury to determine; the rights of both parties depends entirely upon the meaning and effect of the deeds, a question which this Court alone must now or ultimately decide.

The jurisdiction of the Court of Chancery over this controversy is also clear under the sixth class mentioned by Justice Dixon. The contract with the railroad company recites (p. 5, l. 45) that the track was to be built for Glorieux and the "J. L. Hobbs Lumber Company" (a trade name), so that both parties clearly had in mind the fact that Hobbs was to engage in the lumber business and was purchasing Glorieux's land for that purpose. The bill alleges that to deprive the complainant of the use of this side track would work an irreparable injury and the prayer for the injunction is based on this ground. Manifestly, if a lumber company instead of having loaded cars switched directly to its premises was deprived of the use of its side track, it would have to abandon the premises or purchase or hire teams and trucks for the purpose of hauling lumber to and

from the freight yard, the expense of which would be continuous and the amount incapable of ascertainment in any single verdict, and this damage would be an addition to the diminution in the value of the land itself.

It was on these grounds that Vice-Chancellor Grey retained and decided the similar issue in *Shreve* v. *Mathias,* 63 N. J. Eq. 170. He said (p. 176):

> "In this case there is no dispute regarding the territorial location of the easement. Both sides agree upon the location and boundaries of the alley. * * * The point disputed is the character of the use which he is entitled to make of the way, a question—not of fact to be found by a jury, but of law, to be determined by a court upon inspection of the alleged grant."

In *Public Service Corp.* v. *Westfield,* 82 N. J. Eq. 43, 47, Vice-Chancellor Stevenson said:

> "The jurisdiction of the court of equity in cases of irreparable injury, to establish at final hearing the legal title where the right to its establishment at law is not asserted by the answer, is confirmed by the earlier decisions of the Court of Errors and Appeals—Holmes *v.* Jersey City (Court of Errors and Appeals, 1857), 12 N. J. Eq. (1 Beas.) 299; where the question of legal title, involving as it did a mere question of law (at p. 310), was finally decided upon the application for a preliminary injunction which was made permanent, and the decree of the Chancellor dissolving the injunction was reversed. In Morris Canal and Banking Co. *v.* Jersey City (Chancellor Williamson, 1859), 12 N. J. Eq. (1 Beas.) 253, irreparable damage was expressly relied on (at p. 263) as an exception to the general rule that the Court would not settle questions of legal title, and the failure of the defendant to assert in the answer an objection to the jurisdiction on this ground and coming to hearing on the merits was held to be a waiver of any objection to jurisdiction—following on this point Holmes *v.* Jersey City, *supra.* The Chancellor established complainant's legal title on final hearing, and on the appeal, the Court of Errors and Appeals—12 N. J. Eq. (1 Beas.) 547 (1859)—reversed the decree, and dismissed the bill, on the merits of the case, considering and settling the legal title. Chancellor Green, in Zinc Company *v.* Franklinite Company, 13 N. J. Eq. (2 Beas.) *supra,* after stating that the course most consistent with the practice and inclination of the Court, where an injunction (to protect against irreparable damage) was granted, was to have the right tried at law, held, that on account of the peculiar circumstances of the case, the question of legal title should be decided at final hearing, and the Chancellor and the Court of Errors and Appeals on appeal did settle the legal title, as well as the equitable title, which was also involved. These decisions of the Court of Errors and Appeals, earlier than Hart *v.* Leonard (a case not involving irreparable damage), seem to establish the rule that where the jurisdiction of the Court to protect complainant's legal title is based on the ground of irre-

parable damage, and the defendant, without proper objection by its answer or otherwise, goes to hearing on the merits, any right to a settlement of title at law may be considered as waived and the Court has, as a matter of jurisdiction, the right to settle the title at final hearing, and on the question of exercising this right, instead of holding the case for settlement at law, will consider all the circumstances of the case."

II.

The complainants have an easement by grant, under seal, of a right of way for a railroad track, across defendant's lands, which easement is appurtenant to their lumber yard.

The complainant bases her right to an uninterrupted use of the siding, upon the deed from William L. Glorieux to John L. Hobbs, her predecessor in title, dated April 3rd, 1908, which conveyed said lumber yard (p. 7):

> "Together with the right to use a certain proposed single track railroad siding as *described in a certain triplicate agreement* bearing even date with these presents entered into by the said William L. Glorieux, the said John L. Hobbs and Lehigh Valley Railroad Company of New Jersey and located and established on the map attached to said agreement, which siding is to run over other lands of said Glorieux from the easterly line of the property of the said railroad company to the lands hereby conveyed, it being expressly understood that said right to use the said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive."

That such a grant creates and conveys an easement appurtenant to the land previously described has been uniformly held by our courts. *Perry* v. *P. R. R. Co.*, 55 N. J. L. 178; *Mitchell* v. *D'Olier*, 68 N. J. L. 375.

Language very similar to this was held by the Supreme Court to create an easement appurtenant in *Richardson* v. *International Pottery Co.*, 63 N. J. L. 248, 250:

> "McCall, by deed dated June 30, 1851, conveyed to Harding and Bottom, in which, after the description of the land conveyed, are the following words: 'Together with the free and common use of said basin to load and unload at all times without let or hindrance from the said party of the first part, their heirs and assigns forever. * * *
>
> "It is insisted in the first place, on the part of the defendant, that the conveyance from McCall to Harding and Bottom did not convey an easement, but a mere personal privilege or license which was not appurtenant to the land. * * *
>
> "It is so clear that it needs no discussion to establish the proposition that the deed from McCall to Harding and Bottom

conveyed an easement of the right to use the basin, which was appurtenant to the premises, and that this easement was apparent and continuous and passed by the sheriff's deed to the bank, and by the subsequent conveyances to the plaintiff.

"The cases are numerous and uniform to that effect. Fetters *v.* Humphreys, 3 C. E. Gr. 260, *S. C.*, 4 *Id.* 471; Larsen *v.* Peterson, 8 Dick. Ch. Rep. 88; National Bank *v.* Segur, 10 Vroom 173; Coudert *v.* Sayre, 1 Dick. Ch. Rep. 386; Perry *v.* Pennsylvania Railroad Co., 26 Vroom 178; Skull *v.* Glenister, 111 Eng. Com. L. 81; Burr *v.* Mills, 21 Wend. 290; Smiles *v.* Hastings, 24 Barb. 244; Underwood *v.* Carney, 1 Cush. 285; Kent *v.* Waite, 10 Pick. 138; Am. & Eng. Encycl. L. (2d ed.) 405, 418.' "

In the Court below the learned Vice-Chancellor held that the easement apparently granted by the deed was not an easement but a revocable license, because the agreement referred to in the grant was subject to termination. The error of the Court below was first in construing the words *"as described in"* to mean *"subject to all of the provisions of,"* and secondly, by reading into the contract with the railroad company, thus referred to, a grant of a license or right of some sort by Glorieux to Hobbs, notwithstanding the contract is absolutely silent upon that subject and innocent of any such intention.

The contract is between the Lehigh Valley Railroad Company, and W. L. Glorieux and J. L. Hobbs. It was prepared by the railroad company and it is patent that it was intended to protect its rights and interests only. It shows that in November, 1907, the railroad company surveyed and made a map of the track to be built for Glorieux and the "J. L. Hobbs Lumber Co." Glorieux at that time had not conveyed the lumber yard site to Hobbs, although the map refers to the lands as the lands of Glorieux and Hobbs. It recites that they desired the construction of the side track, and provides (Exhibit B, p. 5):

1st. That the railroad company should build the siding.

2nd: That Glorieux and Hobbs should pay the cost thereof in certain proportions and should thereafter own and maintain the same.

3rd: That Glorieux and Hobbs should route their freight over the Lehigh Valley Railroad.

4th: That Glorieux and Hobbs should be liable for certain loss and damage, etc.

5th: That the agreement should continue in force until terminated by either party on thirty days' notice.

The first significant feature of this agreement is that it does not create, define or determine any use, right or obligation as to Glorieux and Hobbs *inter sese* with respect to the siding or the land upon which it was to be laid. There is no word or phrase from which can be spelled any agreement, express or implied, between Glorieux and Hobbs as to Hobbs' right in Glorieux' lands, the extent thereof or the consideration therefor.

The second peculiarity about the contract is that the "termination" clause has no rational application to any feature of the agreement pertinent to this case.

The first paragraph says that the railroad company will *build the track* in a specified location. Obviously, after it was constructed, there was nothing left to terminate.

The second paragraph provides that Glorieux and Hobbs should *pay the estimated cost* in advance, and, and the track shall then be owned by them. There is no right in either party which one of the others could terminate.

The third paragraph requires Glorieux and Hobbs to give the railroad company preference in their shipments and the fourth paragraph makes them liable for certain loss and damage. Neither of these clauses are pertinent to the case.

The fifth paragraph provides that the agreement may be terminated on thirty days' notice.

If the Court is of the opinion that any of the subjects of these four paragraphs (1) construction; (2) payment and ownership; (3) preference in shipments; (4) loss and damage; are subjects of termination by notice the contract is nevertheless silent on the question of Hobbs' rights over Glorieux's lands, and we submit that neither party can by a notice to *terminate this contract,* put an end to the rights which are not created by or even mentioned in the contract, but which are expressly *created by a deed under seal.*

We therefore contend that the easement created by the deed is not limited by the contract, because:

First: The agreement created no rights between Glorieux and Hobbs with respect to Glorieux' lands.

Second: The termination clause had no application to any right or obligations of Glorieux and Hobbs *inter sese.*

Third: That the words in the grant of the easement mentioning the proposed siding *"as described in"* the contract, refer only to the *description of the track* as set forth in the contract and nothing else.

The ordinary meaning of the words "proposed siding as described in" is too plain to admit of debate. The proposed track was described in the contract "as upon certain premises situate partly in the Town of Irvington and partly in the City of Newark, as shown upon the plan hereto attached and hereby made a part hereof."

This is definite and the deed properly referred to the contract with its map for a particular description of the track by simple and appropriate words.

It is impossible that the parties, in describing the easement, should use the words, "right *herein* granted," to *"Hobbs, his heirs and assigns"* if they did not intend Hobbs and his assigns should have, by virtue of this instrument, a perpetual right to use the track. *Standard Oil Co.* v. *Buchi,* 72 N. J. Eq. 492. Indeed if Glorieux intended to create only a revocable license, he would not have been so careful to provide that the right of that use of the track over his lands was not exclusive of himself. The rule is well

settled that where there is ambiguity, the language will be construed favorably to the grantee and against the grantor. *Dunn* v. *English,* 23 N. J. L. 126; *Crane* v. *McMurtrie,* 77 N. J. Eq. 545 (Err. & App.). Furthermore it will be assumed that if it was the intention of the parties to grant by this deed only a revocable license, they would have used appropriate words to express it. We urge therefore that there is no ambiguity in the deed, and that the reference to the contract for the description of the track cannot be enlarged beyond the ordinary meaning of the words employed and the obvious purpose of the reference.

In *Guerini Stone Company* v. *P. J. Carlin Construction Company,* 240 U. S. 264, Justice Pitney said:

> "Notwithstanding occasional expressions of a different view (see Shaw *v.* First Baptist Church, 44 Minn. 22, 24, 46 N. W. 146; Avery *v.* Ionia County, 71 Mich. 538, 546, 547, 39 N. W. 742; Stein *v.* McCarthy, 120 Wis. 288, 295, 97 N. W. 912), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. Woodruff *v.* Hough, 91 U. S. 596, 602, 23 L. Ed. 332, 335; Neuval *v.* Cowell, 36 Cal. 648, 650; Mannix *v.* Tryon, 152 Cal. 31, 39, 91 Pac. 983; Moreing *v.* Weber, 3 Cal. App. 14, 20, 84 Pac. 220; Short *v.* Van Dyke, 50 Mins. 286, 289, 52 N. W. 643; Noyen *v.* Butler Bros., 98 Minn. 448, 450, 108 N. W. 839; Modern Steel Structural Co. *v.* English Constr. Co. 129, Wis. 31, 40, 41, 108 N. W. 70."

We submit that the reference to the contract with the railroad company is limited to the *description* of the siding, but this reference does not justify a construction which would insert the whole agreement in the deed.

The *deed* expressly recites that the right to use the siding across Glorieux's remaining lands is "*herein granted.*" These words cannot be discarded or ignored. The deed further states that the right is to Hobbs *his heirs and assigns.* The deed altho of the same date is subsequent in time to the contract. Obviously Hobbs would not buy the lumber yard until he knew that he was assured of his side track, and when the railroad company sent the side track agreement to Glorieux and Hobbs, these gentlemen signed it and then proceeded to close the title to the property and settle the matter of the easement between themselves.

In view of the fact that the railroad agreement does not express any rights between Glorieux and Hobbs, and the fact that the deed expressly provides that the right is *herein* granted to Hobbs, *his heirs and assigns,* we submit that no reference to extraneous documents can be permitted to change the effect of this language employed by the parties themselves to express their meaning.

The learned Vice-Chancellor in his opinion says:

> "It will be observed that in neither paper is any mention made of an easement of passage. The agreement provides only

> for the construction of a siding conceived as of distinct from the land itself, and *the right to use it* is made terminable at the will of either of the three parties on thirty days' notice."

We think this extract from the opinion indicates the error of the Court below, because the words "the right to use said siding over other lands of said Glorieux" as contained in the deed, must be construed with reference to the ordinary meaning of the words "use of said siding." The only use for which a railroad siding is constructed is to switch cars over it and this necessarily involves "passage" over the land over which the siding is laid.

And so the Court's observation that the contract provides that the right to use the track is made terminable at the will of either of the three parties is erroneous, *because the contract makes no mention of the use of the siding.*

III.

The defendant is estopped from denying complainants' rights in the siding across its land.

First there is equitable estoppel. The views of the Court below when summarized are to the effect that as soon as Glorieux delivered his deed to Hobbs and received Hobbs' money, or as soon as Hobbs had paid his share of the construction of the siding, Glorieux could have said to Hobbs, "I give you thirty days' notice, you can't use that track across my land." It is too clear to require the citation of authority, that Glorieux could not lead Hobbs to buy his land and see him pay out money for a side track and then unconsciously deprive him of the use thereof.

The cases on this point were collected and analyzed by Vice-Chancellor Pitney in *Morton* v. *Morton,* 47 N. J. Eq. 158, where he quotes from *Raritan Water Power Company* v. *Veghte,* 21 N. J. Eq. 475, as follows:

> "Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law affecting the land of another, to which his consent is necessary, and where such consent is expressly proved or necessarily implied, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of consent although not according to the strict mode of the law or within the statute of frauds."

In the case at bar, Hobbs would not have paid for the portion of the railroad track on his own land if he could not have the use of that portion extending over Glorieux's land. Such a construction would be useless.

See also opinion of Chancellor McGill in *Van Horn* v. *Clark,* 56 N. J. Eq. 476.

Defendant is also estopped by the terms of its own title. The deed from Glorieux to Staeger expressly provides that the convey-

ance is made "subject to the rights of said Hobbs, his heirs and assigns in said siding, which rights were granted by deed N 43-365." This deed had been recorded July 2nd, 1908. The deed from Staeger to the defendant was dated January 1st, 1915, and that conveyance is *"subject to the rights of one Hobbs, his heirs and assigns in said siding as given to said Hobbs by deed recorded in Book N. 43 of Essex County Deeds on page 365, etc.,"* with certain reservations to said Staeger regarding the relocation of said siding *"provided it does not prevent the use of said siding in substantially the same manner to which it is subject at the present time."*

All of the deeds from Glorieux down to the defendant refer to Hobbs' rights *"as given by deed"* of the defendant's predecessor in title.

Presumably the defendant had its title searched before purchasing its land. It had notice that Glorieux granted the easement in favor of the lumber yard, and the track was on the ground and its use was apparent, as well as specifically mentioned in its own deed. We insist that the defendant cannot set up this claim against the use of the siding in contravention to its own title.

And in the third place, the defendant is estopped from denying complainant's right as an easement of necessity. As we have pointed out the agreement upon which the defendant relies shows that the complainant's predecessor, Hobbs, under the name of the J. L. Hobbs Lumber Company, and in conjunction with Glorieux, negotiated with the railroad company to build this track as a means of access to the lumber yard by railroad cars, and proceeded to buy the land and easement from Glorieux for that specific purpose. There is no other way to get freight cars into these premises, and a lumber yard without direct railroad or water connection is an impossibility. It is not enough to say that the place is accessible to pedestrians and teams.

The real test is whether the easement claimed is necessary to the enjoyment of the land in the manner and for the purpose for which he acquired it within the knowledge of the grantor. *Kelly* v. *Gunning,* 43 Eq. 62; *Camp* v. *Whitman,* 51 Eq. 467. In the case last cited Vice-Chancellor Pitney said:

> "The case shows quite clearly, and it was very properly admitted at the hearing, that the defendants knew of the purpose for which the lot was to be used by the complainant. In fact, it was of no value for any other purpose. The character of the improvements put upon it are such as seem to me to preclude the idea that either party could have contemplated that a footway was all that was required for the use of the house.
>
> Now, the law implies the grant, in order to carry out the intention of the parties, which, in a sense like the present, is that the grantee shall have the complete and beneficial use of the thing granted, in the manner contemplated by the parties at the time."

Sergeant Williams, in his note to *Pomfret* v. *Ricroft,* 1 Saud. Sec. 323 note 6, suggests that the name—way of necessity—is cor-

rect "in a partial sense because the way is a necessary incident to the grant." And again he says:

> "For there seems to be no difference where a thing is granted by *express words,* and where, by *operation of law,* it passes as incident to the grant. In the latter case, it would be a superfluous and inoperative clause in the deed to convey the incident by express words of the grant, being only *expressio eorum quae tacite insunt.* Therefore, in both cases the grant is the foundation of the title."

For the reasons stated we respectfully urge that the decree below should be reversed and an injunction allowed restraining the defendant from interfering with the siding on its lands.

CONGLETON, STALLMAN & HOOVER,
Solicitors of Complainant.

MAXIMILIAN M. STALLMAN,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

NELLIE F. HEDDEN, *et als.*,
Complainants-Appellants,

and

BIERMAN-EVERETT FOUNDRY COMPANY, *et als.*,
Defendants-Respondents.

On Appeal from Chancery.

Brief of Bierman-Everett Foundry Company.

The contest is chiefly between the complainant, Nellie F. Hedden, as owner of a tract of land in Irvington, and Bierman-Everett Foundry Company, owner of an adjoining tract of land. Complainant seeks an adjudication, that she has a right to the unrestricted use of a railway siding which extends across her land and the land of the defendant, and partly across land of Lehigh Valley Railroad Company, and connects with a branch line of that railroad.

Complainant also seeks an injunction to prevent an alleged threatened interference with her right of way; and she also prays that the rights of the parties may be determined and fixed by a decree of the Court.

Defendant joins in the prayer for a determination of the rights of the parties. This prayer is based upon the Chancery Act, P. L. 1915, p. 184, section 7, which reads as follows: "Subject to rules, any person claiming a right cognizable in a Court of Equity, under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, insofar as the same affects such right, and for a declaration of the rights of the persons interested." This section has been construed in two cases: *Re Ungaro Will,* 102 Atl. 244; *Snyder* v. *Taylor,* 103 Atl. 396.

The question is, whether the complainant claims a right cognizable in a Court of Equity. The complainant claims a right to equitable relief to restrain the defendant from obstructing the railway siding, and in that respect, the complainant is properly in this court if the legal right is clear. The defendant claims a right growing out of the terms of a contract, and perhaps, the complainant must also rely upon the contract, so that the Court can entertain jurisdiction by virtue of its power to compel specific performance. But the complainant seems to rely upon a legal right of way apart from the agreement. The question then arises, whether the complainant has such a clear legal right as is required to give the Court jurisdiction.

Hart v. *Leonard,* 42 Eq. 416.
Todd v. *Staats,* 60 Eq. 507.

Unless the complainant has such clear legal right, or the case may be disposed of under the Chancery Act of 1915, a decree of course,

would be without legal effect. It is proposed to test the legal right of the complainant in this manner. Has the complainant proved an easement of way which would sustain an action of law if the defendant should give thirty days' notice to terminate the agreement and should then obstruct the siding? The complainant could not stand on the agreement alone, for that at best gives a determinable easement. It is a three party contract. It purports to have been made at the request of Glorieux, as party of the first part, and Hobbs, as party of the second part, made to the railroad company, as party of the third part. The railroad company agrees to construct a siding partly upon its own land, and partly upon lands of the parties of the first and second parts, as shown upon a plan, which plan is entitled: "Plan showing proposed location of siding for William L. Glorieux and the J. S. Hobbs Lumber Company, Irvington, N. J., Office of Division Engineer, Phillipsburg, November 19, 1907."

This shows that the parties contemplated a use of the siding by Glorieux and by the J. S. Hobbs Lumber Company. After making provision for the payment of the construction work by the respective individual parties, it is agreed that the siding located upon the lands of the parties of the first and second parts, shall be owned and maintained by the parties of the first and second parts.

It is clear that the siding on Glorieux's land is owned by him and must be maintained by him. It is further agreed on behalf of the parties of the first and second parts—"during the continuance of this agreement, to ship over the railroad of the railroad company," the purpose of this part of the agreement being to give the railroad company a preference in shipping freight.

It is to be observed, that the obligation to make shipments is to be in force only during the continuance of the agreement. Shipments could not be made until the siding had been constructed, and therefore, the clause "during the continuance of this agreement" must refer to the continuance of the agreement after the siding had been constructed.

It is further agreed in item 5 of the writing, as follows: "This agreement shall continue in force unless or until terminated by any of the parties hereto, giving 30 days' written notice to the others of intention so to terminate, and upon the expiration of such period, this agreement shall absolutely end; provided always, that if the said party of the first part, or the said party of the second part, shall fail to keep and perform the covenants thereof on their part to be kept and performed, this agreement shall forthwith cease and determine at the option of the railroad company, without notice to the said party of the first part, or the said party of the second part, or to anyone."

This stipulation clearly gives the railroad company the right to terminate the agreement upon a breach by either Glorieux or Hobbs. If Glorieux violated the agreement, the railroad company could refuse to perform, and that would necessarily cut off Hobbs.

The parties agreed that the obligations shall be binding upon their respective heirs, executors, administrators, successors and assigns. As to the railroad, it is a limited easement from Glorieux and Hobbs.

As to Glorieux and Hobbs, it is a mere agreement upon the part of the railroad to carry freight.

The theory of the complainants seems to be, that while the railroad company could shut off both Glorieux and Hobbs by giving thirty days' notice, Glorieux and Hobbs would have to join in a notice to the railroad. Such construction is quite unreasonable. Hobbs might abandon his possession and make no use of the siding, and even tear up the tracks on his lands, and still Glorieux could not end the agreement, or change the location of the siding without Hobbs' consent.

The contract provides a means for its discharge; it is expressly agreed that the contract shall continue in force until terminated by a written notice given by any of the parties to the others. The words are clear, and there can be no doubt about the meaning of them. Ordinarily partnership agreements stipulating for termination upon notice, are illustrative. This notice may be given by the assigns. The covenants relate to the use of land, and run with the land, so that the respective grantees of Glorieux and Hobbs of the particular land included in the siding, sufficient for the purpose of a railroad, passes the legal right to the benefit of the covenant.

We contend, that if the complainant stood on the agreement alone, the complainant would have no legal right to sustain an action at law, or to be protected in equity. But the complainant proves a grant from Glorieux to Hobbs and mesne conveyances to complainant. In some of these, there is no reference to the siding, and complainant claims the way as appurtenant. The language of the deed, is as follows: "Together with the right to use a certain proposed single track railroad siding, as described in a certain triplicate agreement, bearing even date with these presents entered into by the said William L. Glorieux, the said J. S. Hobbs, and Lehigh Valley Railroad Company of New Jersey, and located and established on the map attached to said agreement, which siding is to run over other lands of said Glorieux from the easterly line of the property of the said railroad company to the lands hereby conveyed, it being expressly understood that said right to use said siding over other lands of said Glorieux herein granted to said Hobbs, his heirs and assigns, is not exclusive."

The complainant's argument is, that the determinable agreement merged in the grant to Hobbs, and that Hobbs acquired an easement of way "in perpetuity," which means that the siding must remain on the defendant's land forever. A single illustration will show the weakness of this argument. Suppose the railroad company should decide to tear up the track on its land, and should give notice of its intention; of what use would the siding on defendant's land be to it, or to complainant? Neither Glorieux or Hobbs could change the situation without the consent of the railroad. Therefore, Glorieux and Hobbs did not intend that the grant should be in violation or discharge of the agreement. The grant gives a right to use the proposed siding as described in the agreement, and as located on the map. "Described" is here used to mean all the particulars relating to the siding in the agreement. The subsequent reference to the loca-

tion, clearly indicates that the word "described" was not used for the purpose of merely pointing out the location of the siding. Hobbs is given the right to use a proposed siding, as described in the agreement. This gives him at most an easement to use the siding for a determinable period. He took an easement for years just the same as an estate for years.

Newhoff v. *Mayo,* 48 N. J. Eq. 618-623.
Goldman v. *Beach Front Realty Co.,* 83 N. J. L. 97, 99.

The grant was made subject to the proposed erection of the siding. It appears upon inspection of the agreement, that it was not acknowledged by the railroad company until April 24, 1908, and probably was not delivered to the individual parties until that date. The deed from Glorieux to Hobbs was recorded on April 9, 1908, and must have been delivered on or before that day. *It is therefore, clear that Hobbs took the deed subject to the contingency of the refusal of the railroad company to enter into the agreement, which indicates that it was not intended to give Hobbs an absolute right of way, but merely a right to use the proposed siding in accordance with the terms of the agreement that had been submitted to the railroad company,* and which was afterwards accepted and assented to by the railroad company. It is, therefore, contended that the complainant has at most only an easement, which may be terminated by giving thirty days' notice.

It was suggested at the hearing, that other grantees of Glorieux would have to join in any notice; but it does not appear that such grantees acquired any right in the siding, and took subject to Hobbs' rights, evidently a mere precaution to protect the grantor.

The defendant acquired all of Glorieux's rights in the siding, as shown by the deed to Staeger, and from Staeger to the defendant. The defendant finds that the siding, as now located, interferes with the development of its business, and finds that it is necessary to change the location of the siding. If the complainant is right, the defendant's business must stop. As between the defendant and the railroad company, there cannot possibly be any doubt about the defendant's right to terminate the use of the siding by the railroad company.

A somewhat similar case is *Rodefer* v. *Pittsburg O. V. & C. R. Co.,* 74 N. E. Rep. 183 Ohio. In that case, there was a written agreement, which was silent as to the length of time the siding was to remain, and it appeared that the siding was constructed at the expense of the owner of the land, and solely for its benefit to afford facilities for receiving and shipping freight. It was claimed in that case, that the license was executed and irrevocable. The owner of the land threatened to remove the siding, and the railroad company brought an action to prevent the removal. The Court says, at p. 186, that

> "A right such as is claimed by the railroad company to maintain and use in perpetuity a siding for its benefit on the land of the defendant, is an easement and not a license, we think, apparent from the study of the cases, and that a failure to discriminate between them has occasioned much of the con-

fusion that exists upon the question of the revocability of a license.

The right indefinitely to maintain and use its track upon the land of the defendant, would be in effect an appropriation of it to plaintiff's use. It would be permanent in its nature and an interest in the land."

At p. 187, the Court says:

"The agreement does not purport to grant any interest in the land. An interest in the land was not necessary to the accomplishment of the object of the agreement, and there is nothing in the agreement or in the circumstances surrounding the parties at the time they entered into it, from which may be inferred an intention to grant such an interest. The railway company did not pay for the privilege of putting in a siding for its benefit. The sole object of the agreement, so far as relates to the siding, was to secure an accommodation from the railway company for the owner of the land, not to grant to the railway company a privilege in the owner's land. The siding being on the land of the defendant, and solely for his benefit, he may terminate the right to maintain it, and may require its removal."

Hobbs and his grantees can have no greater right than the railroad company. The defendant, it is contended, may terminate the agreement at any time, by giving thirty days' notice to Hobbs' grantee, the complainant, and to the railroad company.

There is annexed hereto a list of cases which may aid the Court in disposing of the questions involved.

Respectfully submitted,

ROSINGER, MAYER & ALBANO,
FRANK E. BRADNER,
Of Counsel with Defendant.

Cases in New Jersey.

AS TO LICENSE.

Richman *v.* Baldwin, 21 N. J. L., 395 at p. 404, Sup. Ct. 1848.
Hetfield *v.* Central R. R. Co., 29 N. J. L., 571, Ct. of Er., 1862.
Johanson *v.* Atlantic City R. R. Co., 73 N. J. L., 767, Ct. of Er., 1906.
Shubert *v.* Nixon Co., 83 N. J. L., 101 Sup. Ct., 1912.
East Jersey Iron Co. *v.* Wright, 32 N. J. Eq., 248 (1880), V. C. Van Fleet.
Morton *v.* Morton, 47 N. J. Eq., 150 (1890), V. C. Pitney.
Van Horn *v.* Clark, 56 N. J. Eq., 476 (1898), Ct. of E.
Standard Oil Co. *v.* Buchi, 72 N. J. Eq., 492 (1907), Pitney, V. C.

AS TO EASEMENT.

Stuyvesant *v.* Woodruff, 1 Zab., 133.
Newhoff *v.* Mayo, 48 Eq., 619 (1891) Ct. of Er.
Lawrence *v.* Springer, 49 Eq., 289 (1892) Ct. of Er.
Goldman *v.* Beach Front Realty Co., 83 N. J. L., 97 (Sup. Ct., 1912).

OTHER AUTHORITIES.

Wood *v.* Leadbitter, 13 M. & W., 838 (1845), Eng. Rul. Cas., Vol. 16, page 49.
City of Berwind *v.* Bergland, 99 N. E. Rep., 705 (1912).
Rodefer *v.* Pittsburgh &c. R. Co., 74 N. E. Rep., 183 (1905).
Yeager *v.* Tannig, 86 N. E. Rep., 657 (1908).
Willoughby *v.* Lawrence, 4 N. E. Rep., 356.
Wolfe *v.* Frost, 4 Sand Chv., N. Y. 71 (1846).
Jones on Easements, p. 370, as to duration of right of way.

n Rond Southern