New Jersey Court of Errors and Appeal.

Between

JOHN H. CAPSTICK,
Complainant and Respondent,
and
GILBERT D. CRANE,
Defendant and Appellant.

On Appeal from Decree in the Court of Chancery.

Brief of Newton S. Kitchel, Solr. of and Counsel for Appellant.

The object of this Bill is for the specific performance of a contract or compensation and allowance for the defendants not being able to give a warranty deed for three special reasons :

First—A mortgage given by said defendants to one, Melvin S. Condit, dated July 1st, 1890, to secure $3,500. This is admitted.

Second—A right of way for a pipe line granted to Lewis VanDuyne, April 6th, 1893, for which it is agreed there shall be $25, if anything, an amount of itself not worth striving for.

Third—A right of way reserved in a deed from John J. Norris and wife to Henry W. Crane, for which an allowance was made in the Court below for $2,000, which we contend is excessive, so the grounds of our appeal are :

First—There should be no allowance or compensation whatever for the said pipe line.

Second—That $200, not $2,000, is all that should be allowed as compensation for the right of way. It was proven and admitted that Edward J. Cahill secured this contract for the benefit of the complainant, May 15th, 1902, and assigned the same to the complainant, John H. Capstick, May 22d, 1902. that said Capstick knew that the pipe line went through this property when it was put there, about 1893 ; that it was the main line (not a branch) for the public water supply for the Town of Boonton. (See evidence of Thomas J. Hillery, Page 17, lines 7 and 8.) That it ran along the centre line of a proposed Boulevard. (See evidence of said Hillery, Page 17, line 35, to page 18, line 5), which being an incumbrance to an ordinary observer, impracticable to be moved or changed and of which complainant had full knowledge. While I find no authority in the law in question in a Warranty of Title for Real Estate, I contend it is the same as a road or street and more of a benefit

than a damage to the property it passes through, so that the principle laid down by Blackstone, in case of Personal Property, viz: "A warranty against the plain object of one census is a nullity," should be of equal force and applicable to Real Estate in a Court of Equity, using the illustration of soundness of a horse with an ear or tail cut off.

Third—The real controversy is the compensation or allowance of $2,000 for the right of way reserved in the Norris Deed. We have in all 28 54-100 acres, extending from the East side to the West side, a distance of 8 chains 39 links or 553 feet of which this right of way cannot take over 30 feet, less than 1-18 in width off of the West side, which is 13 chains and 58 links, and the opposite side being over 17 chains long and this strip 30 feet wide off the West side containing about 3-5 of an acre, or a little more than 1-50 of the entire quantity of land and the Court below has allowed 1-5 of the entire contract price. While on the opposite side is where the buildings, water wheel, pen-stock and fixtures (see contract, Page 95, lines 29 and 30), also a mill (see evidence of Dr. Ryerson, Page 27, lines 6 and 7) including a house that cost $1,200 or $1,400; (see evidence of G. D. Crane, Page 41, line 8); besides this Right of Way was located where it would do the least injury to the property; (see evidence of Dr. Ryerson, Page 31, lines 20 to 27), the man who has owned the Norris lot, for which this Right of Way is reserved since 1870; (see Page 33, line 20. The reason for this large assessment

by the Court below we must judge of by the reason given in the Second Opinion, Page 111, lines 30 to 23, it appears this land was worth but $2,500 for farming purposes, when the house, water wheel, penstock and water-power must have cost at least $2,500, considering the house cost $1,200 or $1,400, without any land, and it must have been estimated at a higher valuation than $2,500 for farming purposes, for we find that M. S. Condit took a mortgage on it, July 1st, 1890, for $3,500.

It is apparent that the real cause of this large assessment is based on the evidence of complainant on Pages 51 and 52, where he laid his damage by his inability to carry out a certain contract with the Railroad Company by which it becomes necessary for the Railroad Company to change their track, elevate the same, so as to have coal pockets and other places to unload freight, etc., for in the evidence of E. J. Cahill, real estate agent, who was employed by the complainant to purchase this land, he estimates the damage to this property by this right of way to be $4000 (see Page 68, line 37), and the complainant estimates it (see Page 51, lines 13 and 14) at $2500, and Lewis Van-Duyne on Page 85, lines 11 and 12, estimates it at $3000 to $5000. But all these estimates are based on building a trestle on the railroad for coal pockets, freight, etc., and on the supposition that the plan of the Railroad Company be carried out and the line of the track changed and an elevation of the track made, which is a special purpose, and if damages are to be assessed it

must be for special damages for which it was intended to use said premises, and to hold the defendant to this rule of domages, it is necessary that such use should have been communicated by the complainant to the defendant at the time the contract was entered into (see Woolcott & Johnson vs. Mount, 9th Vr., Pages 496-501), which is not alleged, pretended or intimated in this case. The railroad was built about 1869 or 1870 (Page 36, line 31), and it is an exceptional, not an ordinary thing, for a Railroad Company to change the line of a railroad which has been operated for over 30 years, except for special purposes. The value of this land may with as much propriety be said to consist in its location of 500 feet from the corporation line of the Town of Boonton (see evidence of defendant, Page 43, lines 7 and 8). It has desirable building lots, water power, etc. (see Page 41, lines 1 to 5). Dr. Ryerson, who owns directly back of it, the land for which this right of way is reserved, says of his land: "It has very decided speculative value." His opinion could not have been based on elevating the railroad, because he says there was a cut across the railroad (see Page 26, lines 7 to 10), which necessarily implies that the railroad track is lower than the surface of the ground on at least one side. This must have been known to the complainant, who says "he has passed it probably a thousand times," Page 55, line 35. He thinks he could draw a map of it from recollection, Page 56, lines 4 to 6. He sent five different men to buy it—M. S. Condit, W. W. Riddle, E.

J. Cahill, Enoch Hammond and M. L. Brower—within three years, (see Page 58, line 35 to the bottom of 59th Page. The defendant Crane says that the complainant Capstick came to see him several times himself about it. It is evident that Crane was not anxious to sell, but that Capstick was anxious to buy, (see Pages 38 and 39). But Crane was willing to sell if he got his own price. What equity can there be or justice in punishing Crane by making him pay Capstick punitive damages or damages based on an exceptional rule owing to this oversight in not excepting this Right of Way, as it would have made no difference in making the contract. Cahill had received no special instructions and Hillery drew the contract. He says on Page 22, lines 28 and 29 : "Mr. Crane came in and said he wanted an option drawn on the Crane property and gave us a price and either he or Mr. Cahill, I am not sure which, brought in the description."

What reason can there be in taking off 1-5 valuation on one for 1-50 of the land taken ? Why multiply the rate by ten ? Why by Capstick owning the Kanause lot he could start back there to grade, etc. But I submit this is a special purpose which Capstick could not carry out without owning the Kanouse lot and before that can be taken in consideration it is necessary that Crane know it at the time of making the contract, which is not the fact, nor is there a particle of evidence of it.

NEWTON S. KITCHEL,
Of Counsel for Appellant.

NEW JERSEY COURT OE ERRORS AND APPEALS.

Between JOHN H. CAPSTICK, Complainant and Respondent. *and* GILBERT D. CRANE, Defendant and Appellant.	On Appeal.

To the Honorable, the Court of Errors and Appeals.

The petition of Gilbert D. Crane, the defendant and appellant above named respectfully shows:

That petitioner appealed from the decree of the Chancellor, made in the above stated cause, to the Court of Errors and Appeals, and that said appeal is number 66 on the list of causes to be argued at the present term of this Court.

That said cause was tried before Vice Chancellor, Henry C. Pitney on the first day of May 1903.

That on the trial of said cause the main and most important question to be determined was whether said complainant, at the time the agreement of sale mentioned in the Bill of Complaint was entered into, had notice of an easement or right of way owned by Dr. John G. Ryerson across said premises agreed to be conveyed.

Also whether said complainant had notice of the fact that the main pipe line of the Boonton water works also crossed said premises.

That as to said pipe line, it was agreed by the respective parties on the trial of said cause, that if the complainant "was entitled to anything" he is entitled to $25.

That upon the question, whether said complainant, at the time said agreement of sale was entered into, had notice or knowledge of said right or way of Dr. Ryerson, petitioner on the trial of said cause, on direct examination testified as follows: (pages 34 to line 5, page 36 of case).

Direct Examination by Mr. Werts.

Q. This land that you have agreed to convey to Mr. Capstick—you know all about that do you?

A. Yes, sir.

Q. And how long has Mr. Capstick been negotiating with you for the purchase of that land?

A. Oh, for six or seven years.

Q. Prior to the actual signing of the agreement eh?

A. About six years previous to that.

Q. Was Mr. Capstick ever on that land, to your knowledge?

A. I think he has been on it, to my certain knowledge. I have seen him up there on the Kanouse property and I think he came out through me.

Q. Did you ever describe to him the character of the land, what you used it for?

A. Only as farm land.

Q. Well, about this right of way of Dr. Ryerson's, did you and Mr. Capstick ever discuss that?

A. I told him there was a right of way there, at my house.

Q. At your house?

A. At my house.

Q. By that you mean Mr. Capstick was calling at your house?

A. He came to my place to see me.

Q. Is your house located on these premises?

A. No, sir.

Q. Well, now, when was it that Mr. Capstick called at your house?

A. It is perhaps five years ago, between four and five; I can't locate it.

Q. What did he call there for?

A. That was his only business that night that he made known.

Q. What was the object of his calling?

A. He came to talk to me about the purchase of that property.

Q. This land in question?

A. Yes, sir.

Q. Just what occurred between you and Mr. Capstick at that time?

A. He asked questions about the doctor, and I told him.

Q. About Dr. Ryerson you mean?

A. Yes, sir.

Q. (By the Court). What about Dr. Ryerson—what did he say about Dr. Ryerson?

A. He asked if the doctor had a right of way there, and I told him he had.

Q. What did he say to that?

A. I don't remember that he made any reply?

Q. Did he ask you where the right of way was located?

A. I don't know that he did; I think I told him though the line where we had established it twenty or thirty years ago.

Q. That was five years ago he came and he had this talk?

A. In that neighborhood; yes, sir.

Q. And in that talk you told him about this pipe line and this right of way?

A. Yes sir.

That on cross examination Petitioner testified as follows: (pages 36 line 22 to 39, line 33 of case)

Cross Examination by Mr. Lindabury:

Q. You know Mr. Capstick?

A. Perhaps twenty years.

Q. Has he been in the habit of calling at your house on other occasions than this one you mention?

A. Once or twice; that is about all.

Q. You mean to say he called only once or twice at your house in the last twenty years?

A. I think that is about all.

Q. And one of those occasions was the one you mention?

A. Yes, sir.

Q. Do you remember when the other was?

A. I think he came there—we had been buying saw dust from Blower's saw mill and they wrote up a pretty sharp note and I answered it.

Q. When was it?

A. I can't tell you, sir, not exactly, it was perhaps four or five years ago.

Q. It was after the other visit that you told us about?

A. Yes, sir.

Q. Now can you fix any nearer date of the visit you spoke about on the direct examination?

A. No, sir; I have no means of knowing; I didn't keep track of it.

Q. So it may have been more than five years ago?

A. Not more than five or six years ago; it might have been a year either way.

Q. Was it in the day time or the evening?

A. Evening.

Q. Anybody by?

A. Not that I remember.

Q. Now what took place from the time Mr. Capstick came in?

A. He made his business known.

Q. How did he make his business known?

A. Went to inquiring about the place.

Q. What did he say?

A. I don't know his exact words.

Q. Give the substance.

A. He wanted a description of the property and I gave it to him.

Q. And that is the property that you lately contracted to sell?

A. Yes, sir.

Q. (By the Court). What kind of description, what did you give him, write it out, or what?

A. Verbal description.

Q. What was it, do you remember?

A. Told him where it went; he asked who laid on the north of it; he knew all about it; but I told him.

Q. Only tell us what passed?

A. And he wanted to know if the pipe line was there and I told him that it was, and he wanted to know if the Dr. had a right of way there and I told him that he had.

Q. Anything else?

A. He inquired how many acres he had there.

Q. Anything else?

A. I told him. That is about all I remember now, sir.

Q. Did he offer to buy it?

A. No, sir; he wanted a price, never has offered to buy it; he has always been looking for a price.

Q. How do you know he was looking for a price?

A. Wanted to know what I wanted for it.

Q. Did you tell him?

A. Yes, sir.

Q. What did you tell him?

A. $10,000.

Q. $10,000?

A. Yes, sir.

Q. And you wanted to sell, did you?

A. Yes—no.

Q. You never wanted to sell?

A. Never wanted to sell, never offered to sell it.

Q. What did he say when you told him you would take $10,000.

A. It was too much.

Q. That is what he said, is it, something to that effect?

A. Yes, sir.

Q. And what did you say?

A. I don't know that I made any reply.

Q. And that ended the matter, did it?

A. I think at that time or later he made me an offer.

Q. Did he at that time make you an offer?

A. I couldn't say whether it was then or later.

Q. If it was later, have you any idea how much later it was?

A. Very soon—within a few days.

Q. What offer did he make you?

A. I think he offered me $7,000; tried six and then I think he came up to seven.

Q. And you declined both?

A. And I won't be positive whether it was just at that time or a little later that he came up to $7,000.

Q. Where did he make the offer—come to your house again?

A. I don't think that he was at my house on that business again; he was there in relation to another piece of property.

Q. (By the Court)—You don't live on this piece of property?

A. No, sir.

Q. You declined the offer of six thousand and offer of seven thousand, did you?

A. Yes, sir.

That on direct examination complainant testified as follows (pages 45 line, 21 to page 48, line 16 of case).

Q. When did you first know that Dr. Ryerson had a right of way across this Crane property by virtue of his ownership of the lands to the south?

A. When my lawyer or Mr. Beam searched the records of this tract.

Q. (By the Court.) After the contract was made?

A. After the contract was made.

Q. (By the Court.) Never knew it before?

A. Never knew it before.

Q. Mr. Crane says you came to his house five or

six years ago, and proposed to purchase the property, at least inquired the price and inquired whether Dr. Ryerson had a right of way, and about the pipe line, and he told you the location of the pipe line. Did you call upon Mr. Crane at his house some five or six years ago and have a conversation with him regarding this property in which you suggested a willingness to buy it?

A. I don't know just the date, but I called upon Mr. Crane once, and nothing was mentioned in any way in reference to this property.

Q. Do you mean you never called at his house but once?

A. But once.

Q. When was that?

A. I can't tell you when it was; from three to five years ago; I can't tell you just when.

Q. What was the occasion of the call?

A. It was the matter of saw dust.

Q. To which he referred?

A. Yes, sir. He owned a half interest in the mill at Montville.

Q. Dispute regarding some saw dust?

A. Yes, sir.

Q. Was anything said then about this land that Cahill contracted for?

A. Not a word.

Q. Do you think you could have forgotten it?

A. No, sir.

Q. Did you at any time entertain the idea of buying?

A. No, sir.

Q. (By the Court.) Hadn't thought of buying?

A. No, sir; not to my recollection.

Q. Now, he says, that you did call on him once and have a talk about some saw dust, but that you also called upon him a year or two before that?

THE COURT: Did you have any more than the call about the saw dust?

A. Never recollect calling at his house but once. I fully recollect calling at that time. I had trouble over that saw dust.

Q. I am referring to what he said so as to call your attention distinctly to the time and place. He says it was a year or two before, and that you called at his house and the conversation referred to regarding this property. Now, is that so?

A. Had no conversation about this property.

Q. (By the Court.) At any time—I mean before he sent Cahill?

A. I don't remember talking about it at any time; don't remember speaking of the property to Mr. Crane.

Q. Now, he says that you offered him six thousand and afterwards seven thousand dollars for it, and he declined—asking ten thousand. What do you say about that?

A. I don't remember that.

Q. (By the Court.) Did you ever ask him to fix a price on it?

A. I don't remember.

Q. (By the Court.) Did he ever fix a price of ten thousand on it for you?

A. To me?

Q. (By the Court.) Yes, to you personally.

A. No, sir; not to my knowledge.

Q. (By the Court.) Did you ever offer him six thousand dollars for it?

A. No, sir.

Q. (By the Court.) Did you ever offer him seven thousand dollars for it?

A. No, sir.

Q. (By the Court.) You have no recollection?

A. No, no recollection of offering him any price at all, it always had to be through somebody else; I couldn't talk with him at all.

Q. You did send some of these men to buy the property?

A. Yes, sir.

Q. But didn't get it until it was captured by Mr. Cahill?

A. That is right.

Q. Did he ever tell you at his house or any where else that Dr. Ryerson had a right of way over this property?

A. No, sir.

Q. You are positive about that?

A. I am positive about that.

Q. You think that he could have told you that without your remembering?

Objected to.

THE COURT: It amounts to this. There is a very serious question whether if ten years ago or any other years ago he did have notice in casual conversation of the existence of this right of way, and then when he come to buying it, to employ a man to get it, whether he recollected it, is a very serious question, whether he would be affected with notice. He might under certain circumstances.

MR. LINDABURY: I understand from the rule he would not unless he was negotiating for the property.

THE COURT: If it is a question of fact in each particular case.

That on cross examination said complainant testified as follows (page 60 line 11 to 18 same page of case):

Q. Do I understand, that you want to be understood as swearing that the interview Mr. Crane has detailed between you and him did not take place?

A. Yes, sir.

Q. You want to swear to that?

A. Yes, I made that statement there. I don't think it did take place. I am positive it did not take place.

That on the trial on said cause petitioner had entirely forgotten and did not recall the fact that he had received from said complainant the letter herein-

after referred to and fully set out in his (petitioner's) affidavit, hereunto annexed. Some time after said trial, in conversation with his wife, respecting the above detailed testimony of himself and complainant, she told petitioner that complainant had written petitioner a letter of the purport of the said letter set out in said affidavit.

That on the 17th or 18th day of September, 1902, petitioner's wife found the original of said letter set out in said affidavit and handed the same to petitioner.

That when said letter was handed to petitioner by his said wife, he then, for the first time, recalled it, and remembered receiving it, at or about the time it bears date (May 3, 1901).

That petitioner is well acquainted with the handwriting of complainant, and that said letter and the signature thereto "John H. Capstick," are in the complainant's handwriting.

That on the night of the day that petitioner's wife handed said letter to him, he handed it to his solicitor, who told petitioner that he thought it was too late to make use of it at that time. That he should have had it at the trial.

That petitioner is now advised that said letter is very important and should be introduced as testimony in said case, and that it is within the power of this Honorable Court to permit the same to be done.

Petitioner therefore prays that the said cause may be, by this Honorable Court remitted to the Court of Chancery, to the end that he may before said Court of Chancery make application to reopen said decree and the proofs for the purpose of putting in evidence the said letter, or that this Honorable Court will make such other proper order in the premises as will enable petitioner to introduce said letter in evidence.

And petitioner will ever pray, &c.

NEWTON S. KITCHEL,
Sol. of Appelant.

GEO. T. WERTS,
of Counsel.

JOHN H. CAPSTICK, Complainant and Respondent. *and* GILBERT D. CRANE, Defendant and Appellant,	On Appeal from a decree in the Court of Chancery of the State of New Jersey.

STATE OF NEW JERSEY, } s.s.
MORRIS COUNTY. }

GILBERT D. CRANE, of said County, of full age, being duly sworn on his oath saith that I am one of the defendants and Appellant in the above stated cause which was heard before Vice Chancellor Pitney at Morristown, on the first day of May last. That one of the questions in dispute was whether the Complainant, John H. Capstick had notice before entering into a certain contract about the sale of the premises whether he, Capstick, had notice that one Dr. Ryerson had right of way over said premises and also whether he had notice of a certain pipe-line about which I testified that I had told said Capstick about; said Dr's right of way when said Capstick was at my house talking about purchasing said land and I further testified that said Capstick offered me six thousand Dollars and afterwards Seven thousand dollars for said land, that said Capstick testified denying my ever telling him of said Dr's right of way or of said pipe line or of his offering me six thousand or seven Thousand Dollars for said premises and by further denying that he ever had any conversation with me at all about said premises and (in substance) saying that he could not talk with me and that he always had to send some one else, thereby directly contradicting my evidence That I had no recollection at that time of ever receiving any letter from said Capstick about purchas-

ing said premises, but afterwards in telling my wife what I had testified to and what Capstick had testified to about his denial of his ever offering seven thousand dollars for said property she told me Capstick had written me a letter offering me seven thousand dollars, which I had forgotten about; but some time about the 17th or 18th day of September last, she found a letter in the house written to me by John H. Capstick of which the following is a copy, viz:

Montville, N. J., May 3rd, 1901.

MR. GILBERT D. CRANE,

My dear Sir: I have had under consideration our talk over the Black Mill property and the price you named is entirely too high. Now I am willing to pay what I think is a good fair price for it and if you still stick to your *original* idea, that will prohibit us and we will have to give up the idea. We will make you a cash offer of ($7,000) seven thousand dollars and leave open to you until May 10th 1901 for your consideration or if you can let me know sooner so the matter can be settled one way or the other, I would be obliged to you.

Yours very respectfully,
JOHN H. CAPSTICK

That when I saw said letter after my wife found it last September, it was the first time I ever recollect of having said letter in my mind since the time I received it I did not consider it of any account, as I did not think the offer worth considering, that said letter refers to the property in question in this suit and was known as the Black Mill property. That I am acquainted with the handwriting of said Capstick, and know the body of said letter and the signature to said letter all to be in said Capstick's handwriting. That after my wife found said letter and showed it to me I handed it to my solicitor who told me he

thought it was too late to make use of it at that time, that he should have it at the time of the trial

Sworn and subscribed to before me this 20th day of November, 1903. } G. D. CRANE.

[L. S.] LILLIE E. VINCENT,
Notary Public.

NEW JERSEY COURT OF ERRORS & APPEALS.

JOHN H. CAPSTICK,
Complainant and Respondent.

and

GILBERT D. CRANE,
Defendant and Appellant.

On Appeal from a decree in the Court of Chancery of the State of New Jersey.

STATE OF NEW JERSEY, } S.S.
MORRIS COUNTY. }

GILBERT D. CRANE, of said County, of full age, being duly sworn on his oath, saith that I am one of the defendants and Appellant in the above stated cause which was heard before Vice-Chancellor Pitney, at Morristown, on the first day of May last. That in the month of May, 1901, I received a letter from said complainant, John H. Capstick, dated May 3rd, 1901, in which he offered me seven thousand dollars for property said suit is about. That the first recollection I have ever had since receiving the letter, or having received the same, was the 17th or 18th of last September, when my wife found it and showed it to me. For when I received it I did not think it of any account, as I did not think the offer worth considering. That said letter referred to the property in question

in this suit and known as the Black Hill property. I am acquainted with the handwriting of said Capstick, and know the body of said letter and signature all to be in his handwriting. That night after my wife found said letter and showed it to me, I handed it to my solicitor who told me he thought it was too late to make use of it at that time. That I should have had it at the trial.

Sworn and subscribed to before me this 20th day of November, 1903: } G. D. CRANE.

[L. S.] LILLIE E. VINCENT,
Notary Public.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN H. CAPSTICK,
Complainant & Respondent,
AND
GILBERT D. CRANE,
Defendant & Appellant.
} *On Appeal, &c.*

BRIEF OF RESPONDENT.

This action was brought by the respondent for the specfic performance of a contract for the sale of certain lands, entered into by Gilbert D. Crane and Magdalene P. Crane his wife with Edward J. Cahill on the fifteenth day of May, Nineteen hundred and two, and assigned by Cahill to the respondent on May 22, 1902. The contract is found on page 93 line 18, &c. and the assignment on page 97 line 15 &c. of the printed case.

By this contract the defendants agreed to convey two certain tracts of land in the Township of Boonton, in the County of Morris, free from all encumbrance to Edward J. Cahill, his heirs and as-

signs, on or before January 1, A. D. 1903. Five hundred dollars was paid upon the signing of the contract, and the balance of the consideration, viz.: Nine thousand five hundred dollars was to be paid upon the delivery of the deed. After the contract had been assigned to the respondent, he caused an examination of the title to the lands to be made, and discovered that a former owner had reserved a right of way for himself, his heirs and assigns across the property. The reservation is found on page 102, line 10 &c.

The land was also subject to a right of way for a pipe line, granted by Crane and wife to VanDuyne April 6, 1903, (page 14, line 8, &c.) and to the lien of a mortgage of Thirty-five hundred dollars made and executed by Gilbert D. Crane and wife to Melvin S. Condit dated July 1, 1900, recorded in Book I 4 of mortgages for Morris County on page 89 &c. (Page 14 line 5.) The defendants were notified by the respondent that he had an assignment of the contract, and would be ready to take title to the property and pay the balance of the consideration on December 18, 1902. On the day so named the defendants offered to execute a warranty deed for the property, which should be made expressly subject to the said right of way and the said right to lay a pipe line. Respondent tendered the defendant the $9,500 in money and demanded a warranty deed, according to the contract and refused to accept a deed made subject to the said easements. This demand defendant refused. Thereupon respondent filed his bill in the Court of Chancery praying for a decree of specific performance, or in case the land could not be conveyed free from the said liens and encumbrances then, that it might be directed to be conveyed subject to said encumbrances, and he might be allowed compensation for the same.

The defendant by his answer admits these facts but says that the right of way could have been plainly seen at the time the contract was made, that the respondent should have taken notice of the same, and that the respondent knew of the existence of the pipe line, and the defendants are not therefore obliged to make the conveyances called for in the contract.

The case was tried before his Honor Vice-Chancellor Pitney, who held in his opinion found on page 104, that the respondent was entitled to specific performance with compensation for existing liens, and a decree was made directing a specific performance of the contract on or before July 28, 1903, and if the defendants fail so to do that the defendants convey the property subject to said encumbrances and that the Court would determine the amount of compensation to be allowed for the same.

The defendants having failed to specifically perform said contract within the time aforesaid, the Court fixed the compensation to be allowed for the right of way at $2,000, that for the pipe line at $25 and that for the mortgage at $3,516.03 and a decree was signed directing a conveyance of the property by the defendants to the respondent upon the payment of the balance due on the contract less these amounts. The second opinion is found on page 111, and the decree on page 113.

The petition of appeal does not attack the whole of the decree, but only that part of it which adjudges compensation for the easement of the pipe line, and the part which fixes the *amount* of compensation for the right of way.

POINT I.

Should compensation be allowed for the pipe line?

It appears from the evidence of Thomas J. Hillery that the line of the Boonton Water Supply Company passes through the property in question (page 15 line 5, &c.) but it does not appear that Mr. Capstick knew it altnough he did know that it was somewhere in that locality (page 45 line 10).

In the case of VanBlarcum vs. Hopkins, 18 Dick, on page 466, an abatement of the contract price was allowed the vendee for a shortage in the front of the property contracted for although the deed under which the vendee obtained title to the property contained its proper dimensions.

The case of Peeler vs. Levy, 11 C. E. Green 330, and the Newark Savings Institution vs. Jones, 10 Stewart 449, on page 451, supports the rule that actual notice of a defect in a title is required before a purchaser who has contracted for a perfect title can be required to take an imperfect one without an abatement of price being made.

The existence of an easement upon the land in favor of a third person or of other similar rights which conflict with those of the owner and which would prevent a vendor from forcing an acceptance upon an unwilling vendee will entitle the purchaser at his election to insist upon a conveyance of the land subject to these rights with such compensation or abatement from the price as shall be proportionate to the diminution of the value of the subject matter.

Pomroy on Specific Performance, Section 440.
VanBlarcum vs. Hopkins, 18 Dick. 466.
Melick vs. Cross, 17 Dick. 545.

It was agreed between counsel that if the respondents were entitled to any compensation the amount of damages for the pipe line should be $25

(page 17, line 29), and the Chancellor fixed the damages at this sum in the decree.

POINT 2.

Was the compensation excessive for the right of way?

It appears by reference to the deed from Norris to Crane that the location of the right of way was not fixed or determined, and from the evidence of Dr. Ryerson, the present owner of the property to which the right of way is appurtenant it appears that the right of way for the past eight or ten years had been near the fence, forming the westerly boundary of the lot in question. It was agreed by counsel that in fixing the compensation for damages due for the reserved right of way in question it should be as if it were directly and irrevokably located along the westerly line of the lot in question to a width not exceeding thirty feet (page 34, line 4. &c).

If the land in question was only capable of being used for farm purposes it would have comparatively small value, but the property is susceptible of being used for mill sites and other industrial purposes, if not encumbered by this right of way. The complainant testified that the property would not be worth over $7,500 subject to this right of way, and that it would be worth $10,000 without it. (Page 51 line 13). *Edward J. Cahill* who is in the real estate business and acquainted with property of this character, and the lot in question, fixes the value of the property at $6,000 with this easement upon it, (page 68 line 22), and $10,000 if free from the same.

Andrew J. Nafie engineer for the Delaware, Lackawanna & Western Railroad Co., testified as to the improvements to be made by the Railroad

Company in this vicinity, and on page 78, that it would be impossible to build a trestle for coal pockets and have a right of way under the same. On page 80 he testifies that the cost of building a foundation for the railroad to cross over a right of way would be between $1,500 and $3,000.

Lewis VanDuyne a Civil Engineer acquainted with property and a dealer in real estate in that vicinity, says this right of way would depreciate the property from $3,000 to $4,000. Page 85 line 10.)

Albert J. Whitehead, a witness produced by the the defendant testified that the property would not be worth more than $100 an acre for farming purposes, (page 93, line 12)

It thus appears from the whole evidence that the property would not be worth more than $2,500 for farming purposes, but that it is worth the price the respondent agreed to pay for it for mill sites, coal yards and purposes of that character, provided the same was free from this right of way, but that the right of way depreciates its value from $2,500 to $4,000.

The court fixed the value at $2,000, which was a low estimate for the loss incurred by reason of the easement.

POINT 3.

WAS THE MORTGAGE AN ENCUMBRANCE?

The defendants by their answer admit the existence of the mortgage, and there is no claim that the same is not a lien upon the property or that the amount fixed was more than the amount due upon the same.

The decree made by the Chancellorwas warranted by the law and facts and should be sustained.

"Banner" Steam Print, Morristown, New Jersey.

New Jersey Court of Errors and Appeals.

JOHN H. CAPSTICK,
Complainant & Respondent,
AND
GILBERT D. CRANE,
Defendant & Appellant.

On Bill.

Brief of Respondent.

RICHARD V. LINDABURY,
WILLARD W. CUTLER,
Counsel.

NEW JERSEY COURT OE ERRORS AND APPEALS.

Between
JOHN H. CAPSTICK,
Complainant and Respondent.

and

GILBERT D. CRANE, et al.,
Defendants and Appellants.

On Appeal.

BRIEF FOR APPELLANTS.

The Bill sets out an agreement dated May 15th, 1902, between appellant and wife and one Edward J. Cahill, wherein and whereby, appellants, in consideration of $10,000 to be paid as specified, agreed to sell and convey to Cahill, on or before January first, 1903, certain premises, consisting of two tracts of land (describing them) by deed of warranty free of all incumbrances.

That on May 22, 1902, Cahill assigned to complainant.

That in October, 1902, complainant discovered that the premises were incumbered by a mortgage for $3,500 held by Melvin S. Condict; "also that the "said Crane granted a right to one Lewis Van Duyne "'to lay a certain pipe under portions of said premises "by deed, dated April 6th, 1893;' and that there was "also a right of way over a portion of said premises, "more particularly reserved in a deed from Phoebe "Kingsland and others to one Henry W. Crane, dated "December 19, 1857, recorded," &c.

That Cahill had no knowledge of said incumbrances when the agreement was made, nor complainant, at the time of the assignment thereof to him.

The Bill then recites alleged attempts of complainant to induce appellants to comply with the agreement, and their failure and refusal so to do, and that the complainant "relying on the contract and "agreement of said Crane and wife to convey the "property as aforsaid, your orator, prior to December "18, A. D. 1902, entered into negotiations to improve "the said property and to sell a portion of the same, "and that by reason of the failure and refusal of the "said Crane and wife to carry out the agreement, "complainant is greatly damaged and injured thereby, "and put to great loss, cost, and expense," &c.

The prayer of the Bill is, that appellants may "specifically perform the aforesaid contract," * * * * "or, that, if said Crane cannot convey the said "property free from said incumbrances, that he may "be decreed to convey the same to your orator, and "your orator allowed such deduction from the "purchase price as the Court shall consider equit-"able."

The answer admits the agreement with Cahill and the assignment thereof to complainant, but charges that Cahill was a mere agent of complainant, and that complainant furnished the $500 paid by Cahill on execution of the contract.

It admits also that the defendant owned the two tracts of land agreed to be conveyed, with two exceptions, viz.:

First, The right, in and by the deed from said John J. Norris, *et als*, to Henry W. Crane, reserved to said Norris his heirs and assigns of crossing the tract of land, secondly described in said agreement, to and from a tract of land lying north of said tract and owned by said Norris, "from which time said right of

"crossing has been plainly to be seen on said "premises, the location and extent thereof, of which "complainant had full notice a long time before the "execution of said agreement."

Second: "The right granted by the said defendant "Gilbert D. Crane to one Lewis Van Duyne to lay a "pipe line under a portion of said premises as set forth "in complainant's bill, of which said complainant had "full knowledge a long time before the execution of "said agreement, and which said right to lay a pipe "line * * * is in reality a benefit rather than any "damage to said premises."

The answer then says, "the said right to cross over "said premises is impracticable to get released or "said right to lay a pipe line changed."

The answer admits the mortgage for $3,500, held by U. S. Condict, but states that arrangements were made for its payment and cancellation, and then recites that defendant tendered complainant a warranty deed for the premises "except said right of crossing, and to "lay a pipe, excepted therein."

That complainant refused to accept said deed with said exception, but tendered defendant the $9,500 and "demanded such a deed that said agreement "calls for, which defendant could not give."

The defendant then offered to return to complainant the $500 paid on the execution of the agreement, "for a return of said agreement, which said complain-"ant refused to accept."

"That said agreement, not excepting said right to "cross and lay said pipe was a matter of accident or "oversight on the part of the defendant, and of no "material damage to complainant, of which complain-"ant had full knowledge a long time before the execu-"tion of said agreement."

That complainant demanded a deduction of $3,000 from the contract price, on account of said right of crossing and said pipe line, which defendant refused, "when "less than one half an acre out of twenty-eight acres "is taken for both said right of crossing and pipe line,

"located so as to do no damage to any other part of "said premises and for the least valuable part "thereof."

That defendants were and are ready and willing "to "execute and deliver such a deed as defendants and "complainant intended at the time of the execution of "said agreement, also such a deed as said agreement "calls for, except said right of crossing and right to "lay a pipe line."

The two tracts agreed to be conveyed adjoin each other, constituting in fact one tract and contain together about 28 acres. The entire tract is square shaped, and lies about due north and south. About midway between north and south, it is crossed from east to west by the D. L. & W. R. R. It is also crossed, at one point, by the pipe line above referred to.

The right of way referred to adjoins and extends along its entire westerly line, (not exceeding 30 feet in width,) from the public road on the south, to lands adjoining on the north, now owned by Dr. John G. Ryerson.

On the trial, it was proved and admitted, that Cahill, the vendee named in the agreement, and who subsequently assigned to complainant was employed by and was acting for and in behalf of complainant, in negotiating and executing the contract.

The case is, therefore, between the parties to the agreement vendee complainant, and vendor defendant.

Upon the trial, it was understood that the mortgage upon the premises would have been satisfied out of the $10,000, to be paid under the agreement. As to the pipe line, it was agreed that compensation therefor, to the complainant, should be $25, if anything.

The principal question upon the trial was, whether the complainant had notice of or was chargeable with notice of the right of way along the westerly line of the tract agreed to be conveyed.

The defendants insist that he had such notice or is chargeable therewith.

FIRST,

The agreement to sell, describes the second tract (over which the right of way is located) by metes and bounds, and ~~by~~ at the end of the description recites: "being the same land and premises conveyed to "Henry W. Crane by John J. Norris and wife, by deed "dated December 19th 1857, recorded in the Morris County clerk's office, in Book X5 of deeds on pages 479" etc.

The deed was actually recorded January 29th, 1861.

The original of the deed thus referred to, at the end of the description, contains the reservation of the right of way, which, the scrivener who drew the agreement, seemed to have inadvertently overlooked. The reservation is as follows:

"The said John J. Norris, reserves the right, for "himself, his heirs and assigns of crossing the above "described tract of land to and from a tract of land "lying north of said tract, now owned by him."

Defendant insists that his agreement was to convey such estate, and only such estate, as the grantee acquired in and by said deed. That the reference, "being the same land and premises conveyed" etc. was a plain declaration that the vendor did not undertake or agree to convey any greater estate than was conveyed in and by the deed referred to. That the complainant, by the reference to said deed, in the agreement of sale, was put upon inquiry and cannot complain, if by inquiry or otherwise, he failed to discover the reservation of the right of way.

"A purchaser of real estate, is bound to take notice "of all recitals in the chain of title through which his "own title is derived. Not only is he bound by every- "thing stated in the several conveyances constituting "that claim, but he is bound fully to investigate and "explore everything to which his attention is thereby "directed." This is constructive notice, and therefore

cannot be rebutted. *Ency. of Law, Title Notice, vol.* 16, *page* 799, *and cases cited.*

In Van Doren vs. Robinson et al., 1 *C. E. Green*, 261, it was held,

"Notice of a deed, is notice of its contents, and "where a purchaser cannot make out a title but by "a deed which leads him to another fact, he will be "deemed to have knowledge of that fact."

We will cite an extract from this case, substituting the names of complainant and defendant in the case under review for those in the reported case, viz.:

"There is no proof of actual notice to the alienee. "At the time of the conveyance from Crane, the coven- "antor, to Capstick, the deed from the complainant to "Crane, was not on record. There is no evidence that "Capstick had ever seen that deed before he received "the title. He denies that he ever saw it or that he "had any knowledge whatever of the existence of the "covenant at the time of the conveyance to him. He "is nevertheless chargeable with constructive notice, " * * notice of a deed is notice of its contents. "And where a purchaser cannot make out a title but "by a deed, which leads him to another fact, he will "be deemed to have knowledge of that fact."

See also Wuesthoff vs. Seymour, 7 C. E. Green, 68; Jennings vs. Dixey, 9 Stew., 490.

SECOND.

Complainant had notice of or is chargeable with notice of the right of way.

We submit that the evidence clearly establishes this second proposition.

The defendant testified that the railroad across this property and across this right of way was constructed in 1869 or 1870; (page 36) that when the railroad was constructed, this right of way was planked over, as is

customary in such cases, that a short distance north of the track, there was a little hill, and twenty-five years ago, the hill was taken out and the earth placed on the road south of the track, in a depression (pages 41-42).

The whole length of the right of way is straight and plain to be seen, throughout its entire length from the public road, (page 42). This testimony of the defendant was practically uncontradicted.

Thomas T. Hillery made a survey of these premises in the year 1889, and was asked, page 19:

"Q. Did you see any indication of a right of way "across there?

Mr. Linderbury. Oh, no; not right of way, a road.

"A. There is, on the west side.

"Q. At that time, 1889?

"A. There was at that time.

"Q. Was what?

"A. A roadway running from the (public) road in "—how far that went or how far it was defined—it "was pretty well defined there, (indicating)

"Q. It is or was?

"A. It was.

"Q. By the Court. Along the west line next the "Kanouse line, there was a wagon way?

"A. Yes, sir.

"Q. By the Court. Planks?

"A. My recollection is it was planked.

"Q. By the Court. How near to the west line "was it, following along the west line?

"A. I don't say that it run all the way out there "(indicating): between that road (the public road) and "the railroad it is pretty well defined.

"Q. By the Court. You don't recollect about "north of the railroad?

"A. No, I don't recollect that.

Page 22. "Q. Did you notice any indications of "travel outside of the beaten track of this road?

"A. No, I did not.

Dr. John G. Ryerson, present owner of the right of way since 1870, was sworn as a witness, and testified (page 24) that access to his land from the public road, was had by means of this way, on the extreme west of the premises in question.

"Q. By the Court. How near to the fence does "your road run?

"A. Right close to the fence: I go as close as I "can conveniently go.

"Q. By the Court. A single track?

"A. Well as you would go through with a wagon.

"Q. By the Court. Is it straight?

"A. Oh, yes.

"Q. By the Court. Follow a fence close?

"A. Yes sir, follows a fence.

"Q. And how long have you used that way?

"A. Well, I have went across there a good while, "the first part of the time I had it, I didn't go across "very much, maybe, wouldn't go once a year, but the "last eight or ten years, I have been going along that "road: I have been cleaning up and I sold some "off of it.

"Q. What use does (Mr. Crane) make of his "land there?

"A. Oh, that is good farming land; he cultivates it.

"The Court. Did he plough up close to "your road or plow your road up some- "times?

"A. No, he left a place for me to go by there; he "left room to ride along there.

"Q. Now between the public road and the railroad, "what is the character of this road of yours?

"A. Well, it is a good road; there has been ground "put into it; this part (indicating) is rather low.

"Q. By the Court. The south side is low?

"A. Yes sir; and there has been ground put on "along that side.

"Q. Has the railroad been planked?

"A. Yes, there is one there; they fixed a crossing.

Edward J. Cahill, complainant's representative, vendee in the agreement of sale, was sworn as a witness for complainant and testified (page 63), that he was a real estate agent in Boonton; that he was well acquainted with this property, and had known it well for at least 30 years, and had been on and over every foot of it many times. That, one occasion when he was on it, "was at a time (preceding the agreement) when I was "looking over the property for Mr. Capstick (complain-"ant) to purchase the (adjoining) Kanouse property" (page 65.)

"Q. By the Court. Page 65—Did you see any-"thing like a traveled way leading from the Montville "road, up along the west side of the tract, to the east "side of Kanouse, up to the woods, owned by Dr. "Ryerson?

"A. In driving past I did notice that traveled way "between the Montville road and rail road tracks on "the east side (i e on east side of Kanouse tract and "west side of the tract in question.)

"Q. By the Court. Of the Kanouse tract?

"A. Of the Kanouse tract, yes sir.

"Q. Did it appear to run any further than just "across the rail road?

"A. I didn't think it did. I saw that part and "supposed it was the way Mr. Crane had of getting "backward and forward on his farm.

This witness, Cahill, evidently had full knowledge of this right of way, as is apparent from his testimony on cross examination, page 70, he was asked:

"Q. You were familiar with this land since you "were a child?

"A. Yes, sir.

"Q. I suppose you have been over every foot of it?

"A. I think I have stolen apples off every tree, I "will withdraw that; every foot of it. I have been "over the land pretty well—thoroughly from all "parts.

"Q. And when was it you first observed that there "was a roadway, south of the railway?

"A. Why, I think that that—I haven't noticed "that since—it has been since I got the contract.

After the witness had testified on direct examination of "the traveled way," &c., this testimony, on cross examination given, as it appears to have been, is certainly very suggestive that the witness was not entirely truthful in his later testimony.

The complainant himself, had resided in the immediate vicinity of these lands for more than twenty years. His residence was about half a mile away, and his manufactory about the same distance. The proof is that he passed along the public road at its junction with this right of way daily, and sometimes two or three times a day. He also crossed and observed the right of way from the railroad cars (page 49).

He was asked, page 49:

"Q. Could you see this road leading up as far as "the railroad from the public road?

"A. No, sir."

Every other witness who testified about the road at all, testified that it was a well defined road up to or beyond the railroad tracks, and it seemed to be conceded that such was the fact.

The next question was:

"Q. The Doctor's Road?

"A. I have noticed there were ruts in there; I "have noticed wheel marks in there.

"Q. How far did you notice them?

"A. About 50 or 60 feet in, I should say.

"Q. (By the Court.) Up as far as the railroad?

"A. Possibly as far as the railroad, it is all grown "up with brush."

Complainant is the only witness who testified to

any brush on the right of way. The defendant had testified (page 34), that complainant had been on this land, and "I think he came out through me" and with the idea of contradicting the defendant. Complainant was asked, on direct examination, page 49:

"Q. Were you upon this property before this "contract was made?

"A. Not to my recollection.

"Q. You don't ever remember being on it.

"A. You can see first-rate from the road."

Which rather corroborates than contradicts the defendant.

On cross examination (page 55), complainant testified:

"Q. How long have you lived where you do, or in "that neighborhood?

"A. About 20 years.

"Q. And during all that time you have been "engaged in the same business.

"A. Yes, sir.

"And during all that time have used this road to "Boonton, I suppose?

"A. Yes; there is no other road, except going "around the back way.

"Q. And certainly have passed by here (junction "of public road and right of way) thousands of times?

"A. I should say yes.

"Q. I should think you were pretty familiar with "every foot of the road, are you not?

"A. Every bit of the road; yes, sir.

"Q. And both sides of it?

"A. Yes, sir.

"Q. And you could pretty near draw a map of it "from recollection, couldn't you?

"A. I think I could.

"Q. And during all these 20 years you have seen "more or less evidence of this right of way.

"A. I have seen an entrance of a road there.

"Q. Now, when did you buy the Kanouse land?

(The Kanouse land adjoined the premises in question to the west, the right of way is between these premises and the Kanouse land, in fact separating one from the other).

"A. I think about three years ago.

"Q. Now then, how far along this right of way "does the Kanouse land that you bought extend? "Does it extend south?

"The Court. It is the whole length.

"Q. The Kanouse land that you bought does not "extend south of the railroad, does it?

"A. I do not know just the exact distance.

"Q. Now then, as you have gone by on this road, "on the road to Boonton, you have seen that, the "evidence of this private road, I will call it, as you "went by?

"The Court. He has sworn to that. Across the "railroad he said.

"Q. And apparently extended beyond the railroad, "did it not?

"A. Apparently; yes, sir.

"Q. Did you observe the cut there through which "it passed?

"A. No, sir.

"Q. Never observed that?

"A. Never observed that.

"Q. In all these years?

"A. No, sir."

(Every other witness in the case who testified concerning the right of way testified of the existence of this cut and the way passing through it, and that the cut, and the way through it, were plainly visible from the public road).

"Q. You knew that Dr. Ryerson owned land in "there, didn't you?

"A. Yes, sir.

"Q. Immediately adjoining the Crane land, didn't "you.

"A. I don't know anything about it.

"Q. You didn't know anything about that?

"A. No, sir; I don't know where his right of way "was, where he came out where he went in—never "inquired.

"Q. You know he must have a right of way over "somebody to get out.

"A. I suppose he must have a right of way over "somebody."

(Necessarily such right of way must have been over the premises in question, or over the Kanouse lot adjoining, which was owned by complainant two or three years before the execution of the agreement between his representative Cahill and Defendant Crane.)

"Q. You know, had it extended over the rail road, "it would strike Norris's land didn't you?

(Norris's land being the land now owned by Dr. Ryerson.)

"Q. Didn't know it would strike Norris' land?

"A. No.

Manifestly it must strike Norris's land. It could go nowhere else, unless it stopped upon Defendant's land,

We submit that from the evidence thus detailed, the complainant was chargeable with notice of the existence of this right of way, before and at the time of the execution of the agreement to convey. He does not in fact deny that he knew of it, except inferentially. He was very skilfully examined to make it appear that he had no knowledge in any way of its existence; but his denial does not go to that extent. He was asked by his counsel (page 45):

"Q. When did you first know, that Dr. Ryerson "had a right of way across this Crane property *by virtue of his ownership* of the lands to the south? "North it should be.

"A. When my lawyer (the witness Hillery) or Mr. "Bearn (Hillery's clerk) searched the records on this "tract.

"Q. By the Court. After the contract was made?

"A. After contract was made.

"Q. By the Court. Never knew it before.

"A. Never knew it before.

That denial merely amounts to a declaration that he never knew of the character of Dr. Ryerson's paper title, until after the agreement was made.

It is incredible, that a man of the acute observation, intelligence and business acumen of the complainant, could, under the proven circumstances of this case, be ignorant of the existence of this right of way, its location, and to what property it attached, it was appurtenant. He was probably the largest land owner in that locality. He owned lands adjoining, and almost surrounding those of Defendant and Dr. Ryerson. He had been scheming for years to obtain possession of these lands of Defendant, and finally succeeded in obtaining through Cahill, the agreement to convey.

A man cannot close his eyes to all his surroundings and then plead ignorance of what those surroundings teach. The evidence of the existence of this right of way, that was daily, for over twenty years, presented to the complainant, was such that he must be held to have had notice of it and to be chargeable with such notice.

Furthermore, the defendant testified, that a few years ago, in an interview during the course of negotiations between himself and complainant, for the purchase by complainant of these same premises, he, (although complainant knew all about it) told him of the existence of this right of way, its location, to whom it belonged, &c.

Also of the location of the pipe line. That, in this same interview, he asked complainant $10,000 for the premises, which complainant declined to pay, but subsequently, in a few days, offered

$7,000, which defendant refused to accept (pages 34 to 40).

It is true, complainant in his testimony, (pages 45 to 48 and page 60) denies any recollection of the interview testified to by Mr. Crane.

But we submit that the probabilities are all with Mr. Crane. He is test fying affirmatively to a transaction that actually occurred.

He cannot be mistaken. His statement is truth or a wilful mistatement, of which it will not be pretended, that Mr. Crane could be guilty.

On the other hand, the complainant's statement that he does not recollect, may well be true, as his positive denial might amount to no more, than to prove that he had forgotten the interview.

Complainant also, in a fashion, attempted to deny that he had notice or knowledge of the location of the pipe line on these premises. (page 45). He was asked:

"Q. When did you first know of the existence of "the pipe line or the right to maintain a pipe line "across the southerly end of the property?

"A. I knew there was a pipe line went through "there, but I didn't know just where it was about the "time that the pipe line was built there." (i. e. six or eight years ago).

"Q. Did you know it was on Crane's land?

"A. I didn't know positively where it ran. I "knew it run through Dr. Ryerson, and heard it run "through part of Crane's place; I never was through "the right of way there.

"Q. By the Court: It went some where there?

"A. It went some where there; I didn't know just "where it went."

And yet, Mr. Hillery, complainants own counsel and attorney in the matter of the agreement transaction, testified (page 18) that at the time the agreement was made with Cahill, the pipe line passed from the

Crane (defendant's) land, *directly* to the land of complainant.

Complainant had for several years been anxious to secure this property, and besides attempts he may have made himself, employed at least four others to secure it for him, before he employed Cahill. Cahill as we have already shown, knew of the right of way, and he also, when the agreement was executed, knew of the pipe line upon defendant's land, as appears from his direct examination, page 64:

"Q. Do you know about the location of the pipe line?

"A. Yes; I have been over it and know it practi-"cally; yes, sir.

"Q. You know where the pipe line is?

"A. Yes, sir."

And on cross examination, page 73:

"Q. You knew of the pipe line being across there?

"A. I knew the pipe line touched the Crane's "property somewhere, but at the time I got the con-"tract, I must say, I had forgotten about the pipe line "at that time; I had forgotten about it; didn't know "the pipe line was there; I didn't remember the pipe "line when I took the contract, although I did know "the pipe line touched Mr. Crane."

This Mr. Cahill, was the person selected and employed by complainant to negotiate and contract with the defendant. It is plain from his cited testimony (and some not cited) that he knew as much about the land in question, the right of way and the pipe line, as did the defendant himself.

Cahill having been thus employed by the complainant, and having secured defendant's assent to a contract, employs as the attorney to draw the contract and transact the business, Mr. Hillery, who two or three years preceding had surveyed and made a map of the premises and knew of the existence of the pipe line and the right of way and their location

upon the premises. Mr. Capstick throughout his testimony, speaks of Mr. Hillery as his attorney. It would seem certain that Mr. Hillery in drawing the agreement must have had before him the original deed containing the reservation in question, and that the failure to insert it in the agreement is primarily his oversight and mistake.

The defendant admits that the failure to mention the right of way and the pipe line in the agreement, was an oversight or inadvertence on his part, and Cahill, knowing of the "travelled way between the Montville road and the railroad tracks" and of the pipe line, admits that he forgot the pipe line. He must have forgotten the right of way also. It is charitable to assume he forgot it; otherwise, he deliberately refrained from mentioning it, and thus laid a track for the defendant, which equity will not sanction. At all events, in the negotiations leading up to the execution of the contract, the parties (without reference to the reservation in the deed) stood upon an equal footing. Both were thoroughly acquainted with the premises to be conveyed. The vendor and vendee both knew of the alleged incumbrances and both forgot to make any reference thereto. The situation would not be altered had the complainant in fact signed the agreement himself instead of by his agent and representative, Cahill. The proof is, that he had the same (if not better) information, concerning the premises, as Cahill had. And even, had he not such information, he cannot use his agents omissions, whether unintentional or otherwise, to take an advantage of the defendant.

Complainant is legally chargeable with notice under the proven circumstances of this case.

Knapp vs. Bailey, 79 *Maine*, 195.

"Actual notice, as applicable to conveyances, does "not necessarily mean actual knowledge; the notice

"may be implied, and from indirect or circumstantial "evidence. The doctrine of actual notice implied "from circumstances, supports the rule that if one has "knowledge of such facts as would lead a fair and "prudent man, using ordinary caution, to make further "inquiries, and inquiry is avoided, the party is charge- "able with notice of the facts which by ordinary dili- "gence he would have ascertained.

"The doctrine of actual notice, implied by circum- "stances (actual notice in the second degree), necessar- "ily involves the rule, that a purchaser before buying, "should clear up the doubts which apparently hang "upon the title, by making due inquiry and investiga- "tion. If a party has knowledge of such facts as "would lead a fair and prudent man, using ordinary "caution, to make further inquiries, and he avoids the "inquiry, he is chargeable with notice of the facts "which by ordinary diligence he would have ascer- "tained. He has no right to shut his eyes against the "light before him. He does a wrong not to heed the "signs and signals seen by him. It may be well con- "cluded that he is avoiding notice of that which he in "reality believes or knows. Actual notice of facts "which to the mind of a prudent man indicate notice, "is proof of notice."

Ency. of Law, Vol. 16, page 795. First ed. Title notice, and cases cited.

"It becomes the duty of one who has received know- "ledge of such facts as should put him upon inquiry, to "make such inquiry, with all due diligence, and in good "faith, and any thing short of this, will impose upon "the negligent party the same liability as though he "had acted with full knowledge of all that the inquiry "would have disclosed."

Van Doren vs. Robinson, 1. C. E. Green, 261, Ency. of Law, Vol. 22, page 945, 1st ed., Title Specific performance.

"Where the defects in the title are known to all

"parties at the time the contract is made, and are con-
"templated in the making of it, the vendee can only
"compel the conveyance of such title as he agreed to
"accept, and will not be allowed to claim a perfect
"title."

We submit ~~or~~ we have established our second proposition–viz--that irrespective of the reservation in the deed, complainant had notice of and is chargeable with notice of the right of way.

The learned Vice Chancellor, found however, that complainant, on account of the right of way, was entitled to a reduction of $2000 from the contract price. The data upon which this conclusion is based, are not stated.

And we are at loss to know upon what particular fact or facts the estimate of $2,000 could be made, unless it be upon that stated by the learned Vice Chancellor, on page 50, line 23, of the case, that a "little nasty right of way across it, makes trouble."

The conclusion, that $2000 should be deducted from the contract price, seems, so far as we can reason it down, to be based upon the idea that at some future time the complainant might want to establish a coal yard or some other business on these premises that might necessitate the construction of a trestle over the "little nasty right of way."

A trestle is an open work construction, and could readily be so constructed as to permit Dr. Ryerson to pass under it, without damage, expense, or inconvenience to complainant. It would naturally be so constructed in any event. Moreover, to permit the construction of a trestle, ~~as~~ such as complainant testified he might want to construct, would involve the purchase by him of land he does not own, and the moving of the railroad tracks.

Some point was also made, that the easement might

in some way hereafter interfere with certain arrangements that complainant hoped to make with the railroad company. But everything of that kind, as the evidence will disclose, is altogether "in the air," and can afford no basis whatever for the compensation allowed complainant. The right of way is not used once in a year, and should the "boulevard," of which complainant speaks, ever be constructed, it would pass directly over Dr. Ryerson's land, and thus render his right of way useless.

We insist, that the complainant, if entitled to compensation at all, is so entitled only technically, and the compensation should be merely nominal.

And we further insist, that under the law to be applied in this case, the complainant is not entitled to compensation at all.

Knox vs. Spratt, 23 *Fla.*, 64.

"The rule that when a vendor cannot comply with "the contract, by reason of not having the legal title "to all the land, the vendee is entitled to specific per- "formance for such as he has title, with compensation "for the residue, does not apply when the vendee "knew at the time of purchase, that the vendor had "not full title."

We submit that the Bill should be dismissed.

NEWTON S. KITCHEL,
Solicitor of Appellants.

GEORGE T. WERTS,
Of Counsel.

New Jersey Court of Errors and Appeal.

Between

JOHN H. CAPSTICK,
Complainant and Respondent,

and

GILBERT D. CRANE,
Defendant and Appellant.

On Appeal from Decree in the Court of Chancery.

To William J. Magie, Chancellor of the State of New Jersey:

Humbly complaining shows unto your Honor your orator, John H. Capstick, of the Town of Boonton, in the County of Morris and State of New Jersey, that on or about the fifteenth day of May in the year of our Lord One Thousand Nine Hundred and Two, one Gilbert H. Crane was in possession and claimed to be the owner of two certain tracts of land situate, lying and being in the Township of Boonton in the County of Morris and State of New Jersey described as follows:

First Tract.—Butted and bounded as follows: Being that tract of land and premises which Jacob I. Peer bought of Abraham Kingsland and Mary, his wife, by deed dated the second day of April, A. D. One thousand eight hundred and thirty-two; Beginning at the northeast corner of the farm lot of Edmund Kingsland, deceased, and the northwest corner of Abraham Vreeland's farm; thence running (1) south forty-seven degrees west five chains

and forty links to a corner of William Kingsland's land; thence (2) along his line south twelve degrees and thirty minutes east, eleven chains and seventy-five links to his corner; thence (3) south forty six degrees and twenty minutes west, ten chains and thirty-eight links to a dogwood tree, his corner; thence (4) along his line south twenty-six degrees and twenty minutes east, sixteen chains and ten links to the north bank of the Morris Canal; thence (5) along the bank of the same eight chains and forty-five links to a line of Abraham Vreeland's land; thence (6) along his line north twelve degrees and thirty minutes west fourteen chains to his corner; thence (7) along his line north forty-seven degrees east two chains to his corner; thence (8) along his line north twelve degrees and thirty minutes west eighteen chains to the place of beginning. Containing twenty-four acres and ninety-one hundredths of an acre, after deducting therefrom sixteen acres and twenty-seven hundredths of an acre heretofore sold by Jacob I. Peer and Lidia, his wife, to Abraham Riker, off the northwest end thereof, reference to his deed had will fully appear, there will be and remain eight acres and sixty-four hundredths of an acre.

Being the same land and premises conveyed to Henry W. Crane by Richard Timbrook and wife by deed dated September 21, 1852, recorded in the Morris County Clerk's office in Book B-5 of deeds on pages 536, &c.

Second Tract. Beginning at a stake standing at the foot of burm bank of canal being the southeasterly corner of John L. Kanouse's land and from thence running along a line of his land (1) north nine degrees forty minutes, west thirteen chains and eighty-six links to a stake; thence (2) north forty-eight degrees east fifteen chains to a stake; thence (3) north fifty-eight degrees forty-five minutes east five chains fifty-two links to north end of stone wall and line of John Vreeland's land; thence (4) along said stone wall and Vreeland's line south nine degrees forty minutes, east five chains

fifteen links to a corner of said stone wall; thence (5) south along a stone wall again fifty degrees twenty minutes, west two chains ten links to end of stone wall; thence (6) along a stone wall again south nine degrees forty minutes east five chains forty-three links to a corner of said Crane's land; (7) along the lines of his land south seventy-four degrees west ten chains and fifty links; thence south twenty-three degrees forty-five minutes east ten chains twenty-five links, to the foot of said burm bank of canal; thence (9) along the same south seventy-one degrees forty minutes west eight chains thirty-eight links to the place of beginning. Containing nineteen acres and ninety-hundredths of an acre strict measure.

Being the same land and premises conveyed to Henry W. Crane by John J. Norris and wife by deed dated December 19th, 1857, recorded in the Morris County Clerk's office in Book X-5 of deeds on pages 479, &c.

Excepting, however, so much of the above described lands as is used as a right of way by the Delaware, Lackawanna and Western railroad.

And being so in the possession of the same he did on the day and year last aforsaid enter into an agreement in writing under seal with one Edward J. Cahill whereby the said Gilbert D. Crane and Magdalene P., his wife, for and in consideration of the sum of five hundred dollars to them in hand then and there paid, agreed to sell to the said Edward J. Cahill, his heirs and assigns, the aforesaid mentioned tracts of land and all the buildings including the water wheel, pin stock and fixtures thereunto appertaining, for the sum of ten thousand dollars, and which the said Edward J. Cahill agreed to pay to said party of the first part as follows:

Five hundred dollars on the delivery of this agreement, and the balance to be paid on or before the first day of January, Nineteen hundred and three, at the office of Hillery & Beam in the Town of Boonton, in the County of Morris and State of New Jersey, at which

place the said deed shall be delivered; and the said Crane and his wife did further agree that they would at their own proper costs and expenses execute, acknowledge and deliver to the said party of the second part a proper deed for the conveying to him or them the fee simple of the above described premises free from all incumbrances, which deed shall contain a general warranty and usual covenants, as will more fully appear by reference to the agreement, a copy of which is hereto annexed; which said agreement was duly acknowledged by the said Gilbert D. Crane and Magdalene his wife and recorded in the Clerk's office in the County of Morris on the thirtieth day of June in the year last aforesaid in Book Z16 of deeds on pages 165, &c., and to which contract now in possession of your orator your orator begs reference may be had.

And your orator further shows that afterwards on or about the twenty-second day of May in the year last aforesaid, the said Edward J. Cahill did by his certain deed of assignment bearing date the day and year last aforesaid, grant, bargain, sell, assign, transfer and set over the aforesaid contract of sale and all his right, title and interest therein unto your orator, empowering your orator upon his performance of the covenants and conditions of said contract to demand and receive of the said Gilbert D. Crane and his wife the deed covenanted to be given in the said contract in the same manner and to all intents and purposes as the said Edward J. Cahill might or could do if said assignment had not been executed, which said assignment was duly acknowledged according to law by the said Edward J. Cahill and recorded in the Clerk's office of the County of Morris on the thirtieth day of June in the year Nineteen hundred and two, in Book Z-16 of deeds for said county on pages 170, &c., and to the said deed your orator begs reference may be had if necessary so to do.

And your orator further shows that afterwards in

the month of October, Nineteen hundred and two, he caused an examination of the records to be made in reference to the title of said property and discovered that said property was encumbered by a mortgage made by the said Crane and wife to one Melvin S. Condict to secure the sum of three thousand five hundred dollars, which mortgage is recorded in the Clerk's office of Morris County in Book I-4 of mortgages on pages 89, &c., and also that the said Crane granted a right to one Lewis VanDuyne to lay certain pipe under portions of said premises, by deed dated April sixth, one thousand eight hundred and ninety-three, and which deed is recorded in the Clerk's office in Book A-14 of deeds on pages 394, &c., and that there was also a right of way over a portion of said premises more particularly reserved in a deed from Phebe Kingsland and others to one Henry W. Crane, dated December nineteenth, eighteen hundred and fifty-seven, recorded in Book X-5, 479, &c., as will more fully appear by reference to the said records.

And your orator further shows that the said Edward J. Cahill had no knowledge of the existence of the aforesaid right of way and the aforesaid right to lay pipes over said premises or that the same was encumbered by a mortgage at the time of the execution of the said contract, neither had your orator any knowledge of the same at the time that the said contract was assigned to him as before mentioned.

And your orator further shows that afterwards on the fifth day of December, he served a written notice on the said Gilbert D. Crane, that he had an assignment of the interest of Edward J. Cahill in the agreement before mentioned, and that he would be ready to take title to said land mentioned in said agreement on Thursday, the eighteenth day of December, nineteen hundred and two, at the office of Hillery & Beam, in the Town of Boonton, in the County of Morris and State of New Jersey, at two o'clock in the afternoon, and to pay the

balance of the consideration money mentioned in said agreement, viz., nine thousand five hundred dollars, and notifying the said Crane to deliver title to said land to your orator at that time free from all incumbrances, a copy of which notice is now in possession of your orator and to which he begs leave that reference may be had.

And your orator further shows that on the said eighteenth day of December he went to the office of Hillery & Beam, in the town of Boonton, at the hour of two o'clock in the afternoon and met the said Gilbert D. Crane, and then and there tendered the said Gilbert D. Crane the sum of nine thousand five hundred dollars, (said money being in gold coin of the United States and in legal tender notes of the United States) and demanded a deed for the said premises mentioned in said agreement, but that the said Crane absolutely refused to convey the said property to your orator free from encumbrances as he had covenanted and agreed to do in said contract, neither did he tender to your orator a deed of any character or description for the said premises, although your orator tendered him the money as aforesaid.

And your orator further shows that two or three days afterwards Newton S. Kitchel, an attorney at law of this state, claiming to represent the said Gilbert D. Crane and Magdalene P. Crane, showed to your orator a deed between the said Gilbert D. Crane and wife to your orator, for the property in question, but expressly subject to the right of the said VanDuyne to lay pipes, and also expressly subject to the right of way heretofore mentioned; which said deed had been signed by the said Magdalene P. Crane but had not been signed by the said Gilbert D. Crane; and that the said Kitchel stated that he would advise his client, Gilbert D. Crane, to execute that deed, but that he would not advise him to convey the property by deed of warranty as called for in the said contract,

and that his client absolutely refused to make any deduction for the encumbrance of the pipe line or the right of way across the same, neither would he make any effort whatever to obtain a release from such rights or convey the property in any other manner except by the deed then shown, but that the said Crane was not present at said conversation and that said deed had never been tendered your orator by the said Crane or by the said Kitchel or by any other person. That your orator then and there informed Kitchel that he was ready at any time to fulfill his part of said agreement and to pay the said money and unless the said Crane complied within a reasonable time he would be obliged to resort to the Courts for redress.

And your orator further shows that the said Crane has not at any time tendered to your orator a deed for the said property although your orator has always been ready to pay the said purchase money for the same and to accept a deed for the said property in accordance with the terms of said contract.

And your orator further shows that being desirous of obtaining title to the said land, on the second day of January, Nineteen hundred and three, your orator caused a warranty deed to be drawn, describing the property exactly as mentioned in said contract of sale, and took the said deed to the said Gilbert D. Crane, and requested the said Crane to execute the said deed and to receive the sum of Nine thousand five hundrd dollars, ($9,500) which your orator then and there legally tendered the said Crane, but the said Crane refused to accept the said money or to execute the said deed, or to convey the property to your orator in any manner whatever, but offered to return your orator the five hundred dollars which he had received on account of said sale.

And your orator further shows that relying on the contract and agreement of the said Crane and wife to convey the property as aforesaid, your orator prior to

Dec. 18, A.D. 1902, entered into negotiations to improve the said property and to sell a portion of the same, and that by reason of the failure and refusal of the said Crane and wife to carry out the agreement he is greatly damaged and injured thereby, and put to great loss, cost and expense by reason of the failure of the said Crane and wife to so convey the aforesaid property.

For as much as your orator is remediless in a Court of law and this Court has full and complete jurisdiction in the premises to the end that the said Gilbert D. Crane and Magdalene P. Crane his wife, may, without oath, answer under oath being hereby waived, full, true, direct and perfect answer make to all and singular the premises as fully as if the same were here again repeated and they thereunto particularly interrogated, and that a decree be made by this honorable Court directing the said Gilbert D. Crane and Magdalene P. Crane his wife to specifically perform the aforesaid contract so entered into by them as aforesaid and to carry out the terms of the same, and to make, execute and deliver to your orator a deed for the said property in accordance with the terms of said contract, upon being paid the aforesaid sum of nine thousand five hundred dollars, and which sum your orator is now ready and willing to pay to the said Crane or unto this Court if directed so to do, or that if said Crane cannot convey the said property free from said encumbrance, that he may be decreed to convey the same to your orator, and your orator allowed such deduction from the purchase price as the said Court shall consider equitable.

May it please your Honor to grant unto your orator the State's writ of subpoena to be directed to the said Gilbert D. Crane and Magdalene P. Crane his wife, comanding them and each of them at a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises

and to stand to, abide and perform such decree therein as to your Honor shall seem meet.

And your orator will ever pray

WILLARD W. CUTLER,
Solicitor and of Counsel for Complainant.

ANSWER.

In Chancery of New Jersey.

The joint and several answer of Gilbert D. Crane and Magdalene P. Crane, the defendants to the Bill of Complaint of John H. Capstick, Complainant.

These defendants saving and reserving to themselves all, and all manner of advantage of exception to the many errors, uncertainties and insufficiencies in the complainants' bill set forth for answer thereunto or unto so much and such parts thereof as these defendants are advised is material for them to make answer thereunto,—answer and say that they admit the execution of the agreement under seal, as set forth in said Complainant's Bill to said Edward J. Cahill a copy of which is hereto annexed, and also the assignment thereof as set forth by said Edward J. Cahill to said complainant, John H. Capstick.

And these defendants further answering say that in said agreement between these defendants and said Edward J. Cahill, that the said Edward J. Cahill was merely the agent of said complainant, John H. Capstick, that said complainant furnished the said five hundred dollars paid by the said Edward J. Cahill to said defendant, Gilbert D. Crane, at the time of the execution of said agreement. And these defendants admit that said defendant, Gilbert D. Crane, was in possession and claimed to own the said two tracts of land described in said agreement, with these two exceptions:

First, Said second tract described in said agreement refers therein to the same premises as described in

a certain deed from one John J. Norris et als to one Henry W. Crane dated the 19th day of December, 1857, in which he, the said John J. Norris, reserved the right for himself, his heirs and assigns of crossing the above described tract (said second tract) of land to and from a tract of land lying north of said tract and owned by him (Norris), from which time said right of crossing has been plainly to be seen on said premises, the location and extent thereof, of which complainant had full notice a long time before the execution of said agreement.

Besides the reservation in said deed from said John J. Norris et als to said Henry W. Crane the second the right granted by said defendant Gilbert D. Crane to one Lewis VanDuyne to lay a pipe under a portion of said premises as set forth in complainant's said bill, of which said complainant had full knowledge a long time before the execution of said agreement, and which said right to lay a pipe is the main line that supplies the Town of Boonton with a public water supply and is along the centre of a proposed street, and is in reality a benefit rather than any damages to said premises. The said right to cross over said premises is impracticable to get released, or said right to lay a pipe as aforesaid changed.

And these defendants further answering admit that said premises are encumbered by a mortgage given to one Melvin S. Condit, to secure the sum of thirty-five hundred dollars as set out in said complainant's bill, and also of the written notice served on said defendant Gilbert D. Crane, on the fifth day of December, as set forth in complainant's bill. That he, said complainant, had an assignment of the interest of said Edward J. Cahill in said agreement and would be ready to take title to said premises on the 18th day of December, 1902, at the office of Hillery & Beam, of the Town of Boonton, at two o'cclock in the afternoon of that day to pay the balance of said consideration money mentioned in

said agreement, viz., nine thousand five hundred dollars, as set forth in complainant's bill. But defendants further say that said defendant Gilbert D. Crane was at said office of Hillery & Beam at the time aforesaid, which offices are upstairs over the Boonton National Bank, of which said Melvin S. Condit was then cashier, with whom said Gilbert D. Crane had arranged to have said mortgage ready to be delivered up to be cancelled when said sale should take place, the principal and interest due on said mortgage to be paid from a part of said consideration money of such sale, and that said defendant, Gilbert D. Crane, was at said office of Hillery & Beam at the time aforesaid with his counsel, a Master in Chancery of this State and a regular warranty deed such as said agreement calls for, except said right of crossing and to lay a pipe, excepted therein, already executed by said defendant, Magdalene P. Crane, ready to be executed by said defendant, Gilbert D. Crane, if said complainant would accept the same, when said complainant refused to accept said deed with said exception, but tendering said defendant said nine thousand five hundred dollars demanded such a deed that said agreement calls for, which said defendant could not give. And said defendant, Gilbert D. Crane, then and there offered to return to said complainant said five hundred dollars for a return of said agreement which said complainant refused to accept. That said agreement, not excepting said right to cross and lay said pipe was a matter of accident or oversight on the part of said defendant and of no material damage to said complainant, of which complainant had full knowledge a long time before the execution of said agreement between said defendant and said Edward J. Cahill.

And these defendants further answering say that four days after the 18th day of December to wit: on the 22nd day of December, 1902, one Newton S. Kitchel, attorney, representing said defendants, showed said complainant a deed as set forth in said complain-

ant's bill and stated that he would advise his client not to execute such a deed as set forth in said bill, but did not positively refuse to make any deductions on account of said pipe line or right of crossing, but did absolutely refuse to entertain such deduction as one Willard W. Cutler, solicitor and counsel for complainant, suggested, to wit: the sum of three thousand dollars, when less than one half an acre out of twenty-eight acres is taken for both said right of crossing and pipe line, located so as to do no damage to any other part of said premises, and for the least valuable part thereof.

And these defendants further answering say that they were on the 18th of December, last, ready and willing, and ever since have been ready and willing to execute and deliver such deed as said defendants and said complainant intended at the time of the execution of such agreement, also such a deed as said agreement calls for, except said right of crossing and right to lay a pipe line and will continue to be ready, but only for a reasonable time.

And these defendants deny that there is any other matter, acts or thing in the complainant's bill of complaint contained material or necessary for these defendants to make further answer unto not herein and hereby well and sufficiently answered, avoided traversed or denied is true to the knowledge or belief of these defendants. All of which these matters and things these defendants are ready to maintain, aver, and prove as this honorable Court shall direct.

NEWTON S. KITCHEL,
Solicitor and of Counsel for Defendant.

Between

JOHN H. CAPSTICK,

Complainant,

and

GILBERT D. CRANE and
MAGDALENE P. CRANE, his wife,

Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause at Morristown, New Jersey, before Hon. Henry C. Pitney, Vice Chancellor, in the presence of R. V. Lindabury and W. W. Cutler, counsel and solicitor for complainant, and George T. Werts and Newton Kitchel, counsel and solicitor for defendants.

Mr. Cutler—I offer in evidence the agreement of sale made by Gilbert D. Crane and wife to Edward J. Cahill, dated the 15th day of May, 1902, and recorded in the Clerk's office of the County of Morris on the 13th day of June, 1902, in Z-16 of deeds, on pages 165 and so on.

Marked Exhibit C 1.

And complainant also offers an assignment of contract of sale made by Edward J. Cahill to John H. Capstick, dated 22nd day of May, 1902, and recorded in the Clerk's office of the County of Morris on June 30, 1902, in Book Z-16 of deeds, page 170 and so on.

Marked Exhibit C 2.

And complainant offers a certified copy of a deed from John J. Norris and wife to Henry W. Crane, dated the 19th day of December, 1857, recorded in the Clerk's office of the County of Morris in Book X-5 of deeds, pages 497 and so on. That is the deed which has the reservation.

Exhibit C 3.

The Court—That is the reservation of the right of way?

Mr. Cutler—Yes, sir; this is the reservation of the right of way.

Record of mortgage made by Gilbert D. Crane and wife to Nelden S. Condit, dated July 1st, 1890, recorded in I-4 of mortgages, page 89 and so on, to secure $3,500; then a grant of a right of way from Gilbert D. Crane and wife to Lucy VanDuyne, dated April 6, 1893, recorded in A-14 of deeds on pages 394, &c., offered in evidence and marked Exhibit C 4.

Thomas J. Hillery sworn for the defense.

Direct examination by Mr. Kitchel:

Thomas J. Hillery direct.

Q. Where do you live?

A. Boonton, New Jersey.

Q. What is your business?

A. Attorney-at-law.

Q. Did you have any connection in the drawing of this contract with Mr. Cahill and Mr. Crane?

A. The contract was drawn in my office, yes sir.

Q. Under your supervision?

A. Practically under my supervision; it was drawn principally by Mr. Beam who is employed in the office.

Q. He is not admitted yet, is he?

A. No.

Q. You are the one that is admitted—you have charge of the office?

A. Yes, sir.

Q. And practically drawn under your supervision? Is that the contract? (showing witness paper.)

A. Yes, sir; that is the contract.

Q. How long have you been a practicing attorney?

A. Since February, 1901.

Q. And what was your business before that?

A. I was employed by Mr. VanDuyne in civil engineering and surveying.

Q. Look at that map (handing witness map.) Who drew that map?

A. I drew that map.
Q. What is it?

The Court—It is substantially admitted to be correct, the map is,, isn't it?
Mr. Lindabury—Yes, sir.
Q. What is that mark across there "Pipe line?"
A. Well, that is a pencil line drawn across there to represent the practical location of the main line of the Boonton water supply.
Q. Do you know where the line is located?
A. Practically; yes, sir.
Q. Is that the location?
A. That is the practical location; there are no measurements given on that map to show the exact location, and that pencil line was drawn across there to show the practical location.
Q. (By the Court) Is that about right?
A. That is practically right.
Q. Who drew it?
A. Those are my letters. I don't know just when that pencil line was drawn there, but I evidently drew that line across; it is not in ink.
Q. You say you were acting for Mr. Cahill at the time of drawing up this agreement?
A. At the drawing of the agreement, yes sir.
Q. Then you certainly knew about the pipe line when you made the map, did you not—you knew about the pipe line when you drew the map?
A. If my attention had been called to it I certainly would remember it; yes, sir.
Q. Did you or not know at the time it was drawn up—
Mr. Lindabury—I object.

The Court—Very little consequence. I do not want to rule the evidence out, because my rule is to let evidence in, but I must let it in with the statement to you that it does not make a particle of difference. As at

present advised, my recollection of the rule of law and common sense and common jurisprudence is that the man who employed Mr. Hillery to draw this contract was not chargeable with notice of what Mr. Hillery knew from other sources before he employed him. You may answer the question if you wish, and let the evidence in. Mr. Hillery has already stated he knew about that pipe line; he has stated that already. You can ask him whether he told Cahill, perhaps, subject to what objection may be raised. That is another question.

Q. Did you tell Mr. Cahill this?

A. At that time?

Q. (By the Court)—At the time the contract was executed, did you tell him that you knew about this pipe line?

A. I did not.

Q. What else did you have to do with this pipe line? Did you help to survey the whole line?

A. Yes, sir.

Q. Do you know whether Mr. Capstick knew of it or not?

A. No; I don't know.

Q. Do you know whether Mr. Capstick knew where the pipe line went?

A. Well, with reference to his property?

Q. Yes.

A. Oh, no.

Objected to.

The Court—Mr. Capstick is a purchaser from Mr. Cahill, and I suppose it will be argued by the complainant that it matters not what he knew.

Mr. Lindabury—We admit Mr. Cahill acted for Mr. Capstick.

The Court—If you know anything about what Mr. Capstick knew you can state it.

A. I have no intimate knowledge that Mr. Capstick knew about the location of this pipe line, of course not.

I know Mr. Capstick lives in that community and knows there is a pipe line.

Q. How is this pipe line connected with any other line of street or proposed street——

The Court—Part of the Boonton water works?

A. Yes, sir.

Q. Main line or branch line?

A. Main line running through this property.

Q. What line does this pipe line take along any other line, along any street or proposed street?

The Court—It went down through there somewhere. You can assume Mr. Capstick, if he lived there when the pipe line was laid, knew that it ran down there somewhere.

Q. You say you helped make this pipe line?

A. Helped survey the pipe line; yes, sir.

The Court—It is admitted on both sides that the line touches this land, and I understand you gentlemen, looking at this (referring to map), the complainant does understand that it does run along close to the line——

Mr. Lindabury—We understand that that location is practically correct.

Q. Is this pipe line run along the line of the proposed street through Mr. Capstick's ground?

Objected to.

Q. (Byt the Court)—Has this property ever been laid out in building lots?

A. No, sir.

Mr. Werts—If they are entitled to anything, we agree they are entitled to $25.

Q. Does this pipe line run along the proposed street?

The Court—What do you know about any proposed street?

A. Well, no, I haven't any intimate knowledge; there was something said about a proposed boulevard running from Boonton down through that country, and that had been surveyed sometime previous to this sur-

vey, and this pipe line I understand at the time was following about along the center of that line.

Q. Mr. Capstick own on that line?

A. At this point (indicating).

Examined by Mr. Werts.

Q. Who owns this land along here (indicating)

A. At the presnt time? At that time it was owned by Kanouse, I think. On this side (indicating) that was owned by the Vreelands; on the east side of this tract was owned by the Vreelands, I believe. Mr. Capstick owns it at the present time, but he purchased it since.

Q. Since when?

A. Within the last year.

Q. Since this agreement was signed?

A. I can't tell you that.

Q. Didn't Mr. Capstick own this land all along here when that agreement was signed?

A. I can't say about that.

Q. Didn't he own this land marked "Kanouse"?

A. At the time the agreement was signed?

Q. Yes?

A. I think he did, but I can't state that positively.

Q. And the pipe I think is here (indicating)

A. Yes, sir.

Q. So then as a matter of fact the pipe line passed from the Crane line on to the Capstick land, didn't it?

A. At the time this agreement was made?

Q. Yes?

A. Well, I presume it did; I haven't any intimate knowledge of the ownership, but I have been told Capstick owned on both sides.

Q. You said you drew this map?

A. Yes, at Mr. Crane's direction.

Q. About the time this map was made did you go on the ground to make a practical survey?

A. Yes, sir.

Q. You did survey it all around?

A. Yes, sir; surveyed the line.

Q. Did you see any indication of a right of way across there?

Mr. Lindabury—Oh, no; not right of way; a road.

A. Did I see any indication?

Q. Yes?

A. There is, on the west side.

Q. (By the Court)—What did you see on the ground when you were surveying, indicating a roadway to the Kanouse land?

A. There is a line right along the edge of it—one side of the property.

Q. (By Mr. Lindabury) At that time, 1889?

A. There was at that time.

Q. (By Mr. Lindabury)—Was what?

A. A roadway running from this road (indicating) in—how far that went or how far it was defined—it was pretty well defined here (indicating.)

Q. (By Mr. Lindabury)—It is, or was?

A. It was.

Q. (By the court)—Along the west line next the Kanouse line there was a wagonway?

A. Yes, sir.

Q. (By the court)—Across the railroad?

A. Yes, sir.

Q. (By the court)—Planks?

A. My recollection is it was planked.

Q. (By Mr. Lindabury)—Are you pretty sure about that?

A. I am not positive.

Q. (By the court)—How near to the west line was it, following along the west line?

A. I don't say that it run all the way out there (indicating); between that road and the railroad it is pretty well defined.

Q. (By the court)—You don't recollect about north of the railroad?

A. No; I don't recollect that.

Q. What was the roadway composed of,—any stone there?

A. No; simply wagon track.

Mr. Werts—What I want to get at,—he says there was a well defined road.

The Court—He recollects distinctly near the line from the road, but as far as the railroad, and beyond that to the north, his recollection is very indistinct.

A. Very indistinct as to the marked lines.

Q. What is the character of the ground north of the railroad, ascend a hill?

A. Yes, sir; I think there are some hollows north of the railroad.

Q. I want to call your attention to this and ask you whether or not you recollect this embankment north of the railroad there was a cut for this road to pass through?

Mr. Lindabury—The railroad is in a depression.

Mr. Werts—After you get across the road there is a hill, and they have cut away this hill.

Q. (By the court)—Did you observe that?

A. I did not observe that.

Cross-examination by Mr. Lindabury.

Q. What was the property to the north of the railroad used for, the Crane property?

A. Farming purposes.

Q. And did Mr. Crane cross the railroad at that point to his lands?

A. I presume he did cross over.

Q. And between the railroad and the wagon road, the part which you observed, what was there that you saw there indicating that it was used for driving?

A. Well, now, my recollection is that there was a little stone row on the west side; of course, there is a stone row following the property line and fence, and on

the east side I think there was something of the same kind marking it, particularly east of the wagon track.

Q. Was the road grown up with grass?

A. Yes, sir.

Q. Was the track visible made by the wagon?

A. The depressions were there where the wheels had gone.

Q. (By the court)—Was that the only way that you know of that Mr. Crane had to get to the north side of the land lying north of the railroad—I am speaking of what you observed at that time?

A. I did not observe any other way by which you could cross the track at the north side of the railroad.

Q. There was no road coming in from the north?

A. No wagon road; no.

Q. (By the court)—Do you say this was all farming land?

A. It was all farming land, in grass.

Q. (By the court)—Actually used?

A. Yes, sir.

Q. Between Ryerson's and the railroad was all farming land?

A. Yes, sir.

Q. And there was no way to get to the land on the south side of the railroad?

A. As far as I observed, there was not, across the track.

Q. (By Mr. Werts)—In plowing, cultivating there, how far to the west did Mr. Crane plow his land?

The Court—Did you observe how close to the Kanouse line it had been plowed?

A. I couldn't say about that; I didn't notice particularly what part of the land had been plowed and what was still in grass. There are some depressions in there, some little bog holes north of the tracks on part of this land.

Q. They didn't plow that?

A. No.

Q. Did you notice any indications of travel outside of the beaten track of this road?

A. No; I did not.

Q. (By Mr. Lindabury)—But you noticed no beaten track except between the railroad and the public road, did you?

A. My recollection now is that I did notice that as well defined there, there was a track up as far as the railroad.

The Court—North of that his recollection is indistinct.

A. No; I don't remember.

Examined by Governor Werts :

Q. Where did John Capstick live with reference to this property?

A. John Capstick lives to the east, well, to the north, on the upper side of the track; I should judge half to three-quarters of a mile from this property.

Q. How near to this track are the Capstick works located?

A. The Capstick works are located about the same distance away, but are on the south side of the track.

Q. John lives above the works?

A. John lives above the works.

Q. When you drew this tract the fact of this road being there escaped your attention?

A. This was 1889 I drew this survey, and contract was within the last year. The facts with reference to that are these. Mr. Crane came in and said he wanted an option drawn on the Crane property, gave us price, and either he or Mr. Cahill, I am not sure which, brought in descrpition. Mr. Beam in the office took the description and made contract for them.

Q. Then you drew contract at the suggestion of Mr. Cahill?

A. Yes, sir.

Q. And you were employed by him?

A. Yes, sir; Mr. Cahill.
Q. Not by Mr. Crane?
A. Not by Mr. Crane; no, sir

Dr. John G. Ryerson, sworn.
Direct examination by Governor Werts:
Q. You live where?
A. Boonton.
Q. And have lived there how long?
A. Oh, thirty or forty years, I guess.
Q. Practicing physician there?
A. Yes; been practicing forty years.
Q. Now, I show you this map, exhibit 1, I suppose it is. Do you recognize the location there?
A. Yes.
Q. I call your attention to a tract of land marked "Dr. J. G. Ryerson." Do you own that tract of land there?
A. Yes, sir.
Q. How long have you owned it?
A. Since 1870.
Q. And who owned it before you?
A. Vreeland.
Q. And how long had he owned it, if you know?
A. Oh, I don't exactly now; I guess perhaps five or six years; I don't know exactly.
Q. You have owned it since 1870, you say?
A. That is what my deed says; yes.
Q. Well, now, any buildings on that?
A. No.
Q. What is the character of your land?
A. Well, it is woodland against the hill.
Q. (By the court)—Not much value. Is it cultivated at all?
A. No.
Q. (By the court)—How many acres are there?
A. 39 or 40.
Q. (By the court)—Is it capable of cultivation?

A. No, sir; well, oh, no.

Q. (By the court)—Rocky?

A. It is rocky; no, it isn't hardly capable; nice wood onto it. I might say that it has very decided speculative value.

Q. (By the court)—For building purposes some day?

A. Yes, I suppose so; yes, close to Boonton.

Q. How do you get off your land to the north?

A. Well, it is difficult way; I had no way to get off of it.

Q. Until when you said you had no way to get off?

A. Until, well, I don't know as I have yet. I have bought land on the upper side, but I ain't sure that I have a right of way; they do go through.

Q. Now, then how do you get to your land from the public road and from your land to the public road?

A. Through this tract here on that side (indicating).

Q. That is the west side?

A. Yes, sir.

Q. (By the Court)—How near to the fence does your road run?

A. Right close to the fence; I go as close as I can conveniently go.

Q. (By the Court)—It is not very smooth right close to the fence; they have stones there in the fence?

A. No; there is no stones; they have been taken off mostly on this; it is through here; there is brush along there (indicating).

Q. And about how wide is this road that you travel?

A. I haven't taken up any more room than I needed; I don't know as I have ever measured it

Q. (By the Court)—A single track?

A. Well, as you would go with a wagon through.

Q. (By the Court)—Is it straight?

A. Straight?

Q. (By the Court)—Yes?

A. Oh, Yes.

Q. (By the Court)—Follow a fence close?

A. Yes, sir; follows a fence.

Q. And how long have you used that way?

A. Well, I have went across there a good while; the first part of the time I had it I didn't go across very much, maybe wouldn't go once a year, but the last eight or ten years I have been going along that road; I have been cleaning up and I sold some wood off of it.

Q. When you had occasion to go to your land, is this the road you always used?

A. Yes, I went across here, across the railroad track here (indicating).

Q. (By the Court)—What width do you claim from the line? It may be an improper question, but I am going to put it—from the actual line about how many feet wide do you claim for your right?

A. I suppose I didn't have a right to a full road width but width enough to get back and forth in it and perhaps turn around on it.

Q. Now what use does Mr. Crane make of his land there?

A. Oh, that is good farming land; he cultivates it.

Q. Well in cultivating it how close to this road does he cultivate and plow?

The Court—Did he plow up close to your road or plow your road up sometimes?

A. No; he left a place for me to go by there; he left room to ride along here.

Q. Now, between the public road and the railroad what is the character of this road of yours?

A. Well, it is a good road; there has been ground put into it; this part (indicating) is rather low.

Q. (By the Court)—The south side is low?

A. Yes, sir; and there has been ground put on along that side.

Q. (By the Court)—Mr. Crane has improved that as a farm?

A. It has been improved.

Q. (By the Court)—You didn't spend much money on it yourself?

A. No.

Q. (By the Court)—And up above your line where Mr. Crane did not want to use it for his purposes the road has not been improved, I suppose?

A. No; I dug a little place in there; no, it hasn't been improved; there is a cut across the railroad; the ground is a little high there.

Q. It was cut through?

A. Yes, dirt has been taken out there, down south (indicating on map.)

Q. Has the railroad been planked?

A. Yes, there is one there; they fixed a crossing.

Q. You have never used any other road?

A. No.

Q. Don't claim any right to any other road?

A. No.

Cross-examination by Mr. Lindabury.

Q. Did you never go up to your lands by any other route across the Crane property than the one along the fence?

A. No.

Q. Didn't you ever used to travel out across the middle of the property?

Mr. Werts: That would be outside of the deed, outside of the deed reserving the right of way.

A. When I said no I supposed you meant from any other point except Crane's property.

Q. Didn't you cross Crane's property at some other place or places for a number of years in going to and from your property?

The Court—Did you cross other places besides this one?

A. Yes, sir; but I felt I was trespassing.

Q. I didn't ask you about your feelings. I asked you about what you did?

A. Yes, sir; I have been through other places.

Q. Where?

A. Oh, there is a good place right here (indicating) I went through, from here (indicating on map).

Q. That is through the east end?

The Court—By the mill, the little mill?

A. Yes, sir; west of the mill considerably.

Q. Did you go there regularly, or as it happened?

A. Happened, more particularly, yes, sir.

Q. For how many years did you go that way when it was convenient to you?

A. Well, I don't know; I have been across there; when I drive around the road and come from below right by the lot I would just ride in through there.

Q. Has that been the practice for all the years you have owned your property?

A. No, no.

Q. Well, for what part of that time?

A. Well, you mean other than this tract, point here you refer to (indicating map).

Q.(By the Court)—He wants to know how often and for what period of time you used the road at these other places?

A. I have often gone here (indicating) and not kept close to the line, turn off here and then get on again, and then perhaps gone up that way (indicating).

The Court—The witness says that he would cross at the southwest corner, and when he got up to the railroad instead of keeping the line along the Kanouse line to his land he would run diagonally across any way he chose?

A. Yes, sir.

Mr. Lindabury: That is not exactly what he said. He said he would go on here (indicating.)

The Court—He puts it about two inches east of the Kanouse line; the railroad is even with the ground and that was a convenient place to cross. Then he would cut across that place and then turn to the right and

more to the north and go straight to his land without following the Kanouse line at all?

A. Yes, sir; I have gone that way.

Q. Has that been your practice off and on ever since you have owned your property?

A. No.

Q. When was it that you were in the habit of doing that?

A. How late that I didn't do it?

Q. No. When did you cease doing it?

A. Probably about eight or ten years ago.

Q. Then the practice you refer to in going differently over the Crane land was before the period beginning eight years ago?

A. Eight or ten years ago.

Q. And since that time has your practice been different?

A. Yes, sir.

Q. How has it differed?

A. Because.

Q. (By the Court)—Have you confined yourself to the line?

A. Yes, sir; to the line.

Q. Have you ceased also going in on the east side under and near the barns?

A. Yes, sir; I may have rode with the buggy as I come up the road and wanted to go up to the lot, turned up there and rode up there perhaps, well now, I don't believe hardly three or four times in eight or ten years, without thinking, perhaps.

Q. You mean you haven't gone across the property, starting in at the barns?

The Court—More than three or four times in eight or ten years?

A. Yes, sir; perhaps not more than that I think I have done it in that time.

Q. Isn't there a plank crossing over the railroad about in the middle of the Crane property?

A. There is a plank crossing somewhere about here, not far from the middle (indicating.)

Q. Have you crossed over there?

A. Yes, I have crossed over there.

Q. There was something of a road, was there, each way from that?

The Court—Farm road each way leading to that plank crossing?

A. Sometimes I couldn't see the track at all when it was plowed on the other side.

Q. (By the Court)—When it was plowed up you couldn't see where it was drove there, and when it was not plowed up you could see it?

A. Hard matter to find a track north of the railroad.

Q. There never has been much of a sign of a track north of the railroad, has there?

A. I don't know as there has.

Q. And it has been your practice to pick the best way that you could see when you got over the railroad, hasn't it, to go wherever the passage seemed easiest?

A. Formerly, yes sir.

Q. But latterly you confined yourself pretty closely to the line?

A. Yes, sir; had wood taken out, and they always come out that way.

Q. Did you instruct them to do it?

A. Yes, sir.

Q. I suppose that change was induced by Crane's improving the lower end of the road?

A. That lower end of the road I guess has been that way for a long time.

Examined by Governor Werts:

Q. You say there was one railroad crossing down here along the west line planked by the railroad, and another one out in the center?

A. Yes, I think there is; I think there is plank out there, yes sir.

Q. (By Mr. Lindabury)—I meant to ask him when that plank was put there?

Q. When were the plank put there?

A. I don't know.

The Court—In the middle?

Mr. Lindabury—No, not in the middle; I meant back here, along the west line, where you cross now.

Q. (By Mr. Lindabury)—Those planks were not put there until six years ago, were they?

A. Oh, it was before that, I know directly that the pipe went through there then I fixed that up there, and I think that would be ten years—

Q. (By the Court)—About the time the pipe line went through?

A. It was directly afterwards; yes, sir.

Q. (By the Court)—Then the railroad was planked near the—

A. It was planked before.

Q. (By the Court)—You recollect it was planked near Kanouse's line, the west line, when the pipe line went through?

A. Yes, sir; I think it was before.

Mr. Lindabury—I am told they were first put there six years ago. Is that right?

A. I guess it is longer than that.

Q. (By Mr. Lindabury)—You are not sure about it, are you?

A. Yes; I think I fixed that up the winter as the pipe line went through there that summer, and I guess that is all of eight years ago.

Q. Well, now the reservation of your right of way is in the deed to this lot?

A. Yes, it is in there, I know it is in there—twenty years ago.

Q. On this map two lots are represented?

A. Yes, sir.

Q. Now, when you cross down by the barn, that

wasn't any part of the land which contained the reservation of your right of way, was it?

A. No, sir. I thought I was trespassing always.

Q. You say there is where you claim the right to go? (indicating).

A. There is where I have fixed it.

Q. Are you willing to accept a writing binding yourself to that strip of land?

A. Am I willing?

Q. Yes?

A. Oh, dear, I didn't expect to be asked that question. I suppose I can be made to, can't I? I have got to have a place somewhere.

The Court—I suppose you can be notified, if you want to know what your rights are, you can have a notice served on you to locate where your right of way is, if they are not wiling to consider you have not already located it practically. That you can do, and be compelled to answer in writing, I suppose—I don't know.

A. I was under the impression in going along there that it was my duty and privilege to select the most practical entry on to that land, and least injury to Mr. Crane, and I really thought I was doing that when I went along there. It certainly is the nearest.

Q. (By the Court)—You mean along that fence?

A. Yes, sir; and I thought it was doing Mr. Crane the least injury.

The Court—I think it is your duty.

Q. (By Mr. Lindabury)—Did you mean to select that at the time you say you began to travel along there, did you mean to select that as your right of way?

A. As I said, I don't want to prejudice my case without counsel, but I say I had a feleing that I was doing justice to Mr. Crane in selecting the way that would injure him the least.

The Court—That is the rule of law, but you have got to have one convenient to use, and it might be a very difficult thing for you to get up to your land on that

corner, it might be a place where you couldn't get on, such a thing might be that you couldn't get on—only way out here?

A. That is actually a fact, that it was a difficult place there to get on, but they made that pipe line there and they fixed it up some and I fixed the road on my own land so that it made it convenient; it was rather impracticable before.

Q. Did you when you made the road and when you began to travel exclusively along there intend in your own mind thereafter to exercise your right along there along that fence?

A. I would answer that if I could feel I would not be prejudicing my case in anyway.

The Court—You can answer that now without prejudicing?

A. I did have that idea in view.

Q. Didn't you have some dispute with Mr. Crane on the subject as to where you should go?

A. Mr. Crane never wanted me to go, he or his father never wanted me to go across at all.

Q. Didn't you begin to travel exclusively along that line after a dispute with Mr. Crane and in pursuance of some sort of an agreement or understanding with him that you should thereafter go along that line?

A. I don't think we had—there was talk—I had a talk with his father before he died, but I don't think there was any understanding—I don't think we had a talk with a view to—with that idea you speak of.

Q. For how many years have you been traveling exclusively along that line?

A. I think it is eight years.

Q. Exclusively.

A. With the slight exception I spoke of going with a buggy occasionally.

Q. Four or five times in that period?

A. Yes, it might have been.

Q. And you began to go and have gone exclusively

along that for eight years then, of your own choice?

A. Yes, sir; I think so.

The Court—In thinking over the whole subject, of which I was very familiar at one time, it was the doctor's duty, and his counsel should advise him to now state in writing what his claim is there.

Q. (By Mr. Lindabury)—Haven't you some other way of getting out? I thought I had heard you went some other way to the public road, from your land, that you went to the public road some other way?

A. Well, I bought a little piece not far—that land lays peculiar, it is right up hill and very difficult to get at; I did buy a little piece of land on this side, but I ain't sure that I have got a way from that out to the main road; there are other lands laying between me that other parties own, and besides I would have to travel two miles where here I go in five hundred feet.

Q. (By Governor Werts)—What do you know about this proposed road to be laid out here, this boulevard?

A. The fact of the business is I instigated the first survey.

Gilbert E. Crane, Sworn.

Mr. Lindabury—We have talked about this and we are willing for the complainant to have this case disposed of and the damages assessed upon the theory that that road is located along that line and is not over thirty feet in width. The statute provides a private road shall not be laid out over thirty feet, and I presume the old reserve would be held in the greater width.

The Court—You mean without any other evidence taken?

Governor Werts—That is all right as far as we are concerned.

The Court—After hearing the evidence of Dr. Ryerson and some discussion, and seeing the map put in evi-

dence, the parties announce that they have agreed on the compensatory damages for the laying of the pipe line and are willing to leave to the court the damages due to the reserved right of way now owned by Dr. Ryerson as if it was practically located and irrevocably located along the westerly line of the tract in question to a width not exceeding thirty feet. Is that understood now?

Governor Werts—Yes, sir.

Direct examination by Mr. Werts.

Q. This land that you have agreed to convey to Mr. Capstick—you know all about that, do you?

A. Yes, sir.

Q. And how long has Mr. Capstick been negotiating with you for the purchase of that land?

A. Oh, six or seven years.

Q. Prior to the actual signing of the agreement, eh?

A. About six years previous to that.

Q. Was Mr. Capstick ever on that land, to your knowledge?

A. I think he has been on it, to my certain knowledge; I have seen him up there on the Kanouse property, and I think he came out through me.

Q. Did you ever describe to him the character of the land, what you used it for?

A. Only as farm land.

Q. Well, about this right of way of Dr. Ryerson's, did you and Mr. Capstick ever discuss that?

A. I told him there was a right of way there, at my house.

Q. At your house?

A. At my house.

Q. By that you mean Mr. Capstick was calling at your house?

A. He came to my place to see me.

Q. Is your house located on these premises?

A. No, sir.

Q. Well, now, when was it that Mr. Capstick called at your house?

A. It is perhaps five years ago, between four and five; I can't locate it.

Q. What did he call there for?

A. That was his only business that night that he made known.

Q. What was the object of his calling?

A. He came to talk to me about the purchase of that property.

Q. This land in question?

A. Yes, sir.

Q. Just what occurred between you and Mr. Capstick at that time?

A. He asked questions about the doctor, and I told him.

Q. About Dr. Ryerson you mean?

A. Yes, sir.

Q. (By the Court)—What about Dr. Ryerson—what did he say about Dr. Ryerson?

A. He asked if the doctor had a right of way there, and I told him he had.

Q. What did he say to that?

A. I don't remember that he made any reply.

Q. Did he ask you where the right of way was located?

A. I don't know that he did; I think I told him though the line where we had established it twenty or thirty years ago.

Q. Was anything said about the pipe line at that time?

A. We talked about the pipe line being there; I think that he admitted then it was no damage to the property.

Mr. Lindabury—I don't think he can say that after the $25.

A. That I got for putting the—

Q. That was five years ago he came and he had this talk?

A. In that neighborhood; yes sir.

Q. And in that talk you told him about this pipe line and this right of way?

A. Yes, sir.

Q. Did he ever have any conversation with you afterwards about buying this property?

A. Not directly.

Q. What do you mean by "not directly?"

A. I don't know that he ever mentioned to me a purchase price himself.

Q. You actually signed an agreement with Cahill?

A. Yes, sir.

Q. Did you understand at the time that Cahill was acting for Capstick?

A. I accused him of it and he didn't deny it.

Q. How long had the railroad been planked there?

A. Right after the road was built it was planked.

Q. When was it built?

A. 1869 or 1870.

Cross examination by Mr. Lindabury:

Q. What inference do you draw from the fact that Cahill didn't deny it?

A. Well, I thought it satisfied my test—I thought I was right.

Q. You know Mr. Capstick and Cahill, have you?

A. Perhaps twenty years.

Q. Has he been in the habit of calling at your house on other occasions than this one you mention?

A. Once or twice; that is about all.

Q. You mean to say he has called only once or twice at your house in the last twenty years?

A. I think that is about all.

Q. And one of those occasions was the one you mention?

A. Yes, sir.

Q. Do you remember when the other was?

A. I think he came there—we had been buying saw dust from Blower's saw mill and they wrote us a pretty sharp note, and I answered it.

Q. When was it?

A. I can't tell you, sir, not exactly; it was perhaps four or five years ago.

Q. It was after the other visit that you told us about?

A. Yes, sir.

Q. Now, can you fix any nearer the date of the visit you spoke about on the direct examination?

A. No, sir; I have no means of knowing; I didn't keep track of it.

Q. So it may have been more than five years ago?

A. Not more than five or six years ago; it might have been a year either way.

Q. Was it in the day time or the evening?

A. Evening.

Q. Anybody by?

A. Not that I remember.

Q. Now, what took place from the time Mr. Capstick came in?

A. He made his business known.

Q. How did he make his business known?

A. Went to inquiring about the place.

Q. What did he say?

A. I don't know his exact words.

Q. Give the substance.

A. He wanted a description of the property and I gave it to him.

Q. And that is this property that you lately contracted to sell?

A. Yes, sir.

Q. (By the Court)—What kind of description, what did you give to him, write it out, or what?

A. Verbal description.

Q. What was it, do you remember?

A. Told him where it went; he asked who laid on the north of it; he knew all about it, but I told him.

Q. Only tell us what passed?

A. And he wanted to know if the pipe line was there and I told him that it was, and he wanted to know if the doctor had a right of way there and I told him that he had.

Q. Anvthing else?

A. He inquired how many acres he had there.

Q. Anything else?

A. I told him. That is about all that I remember now, sir.

Q. Did he offer to buy it?

A. No, sir; he wanted a price; never has offered to buy it; he has always been looking for a price.

Q. How do you know he was looking for a price?

A. Wanted to know what I wanted for it.

Q. Did you tell him?

A. Yes, sir.

Q. What did you tell him?

A. $10,000.

Q. $10,000?

A. Yes, sir.

Q. (By the Court)—19 acres?

A. Twenty odd acres, 27 or 28 acres.

Q. How many acres do you say?

The Court—Exclusive of the railroad how many acres are there, not including the railroad?

Q. About how many acres, do you understand?

The Court—Without the railroad?

A. 27 or 28 acres there I have always thought.

Q. Without the railroad?

A. Yes, sir.

Q. And you wanted to sell, did you?

A. Yes—no.

Q. You never wanted to sell?

A. Never wanted to sell; never offered to sell it.

Q. What did he say when you told him you would take $10,000?

A. It was too much.

Q. That is what he said, is it, something to that effect?

A. Yes, sir.

Q. And what did you say?

A. I don't know that I made him any reply.

Q. And that ended the matter, did it?

A. I think at that time or later he made me an offer.

Q. Did he at that time make you an offer?

A. I couldn't say whether it was then or later.

Q. If it was later, have you any idea how much later it was?

A. Very soon—within a few days.

Q. What offer did he make you?

A. I think he offered me $7,000; tried six, and then I think he come up to seven.

Q. And you declined both?

A. And I won't be positive whether it was just at that time or a little bit later that he came up to $7,000.

Q. Where did he make the offer later—come to your house again?

A. I don't think that he was at my house on that business again; he was there in relation to another piece of property.

Q. (By the Court)—You don't live on this piece of property?

A. No, sir.

Q. You declined the offer of six thousand and offer of seven thousand, did you?

A. Yes, sir.

Q. And then the matter dropped there, did it?

A. So far as he was concerned; that is, directly.

Q. What do you mean by "directly?"

A. Well, there have been four different people at me to buy the property.

Q. Exactly.

A. And I have accused them all of being in the interest of Mr. Capstick; some of them have denied, and some of them have not had the gall to.

Q. Some of them had the gall to what?

A. Have not had the gall to deny it.

Q. Did it require more gall to deny it than to be silent?

A. Well, I am not saying against the gentlemen; I will leave that to you sir.

Q. But Mr. Capstick has never spoken to you about the matter since?

A. Not that I remember, directly; Capstick came to me about another piece of property.

Q. Did you deal?

A. Sure; that was small though.

Q. He had the requisite gall, I take it?

A. Well, he has got a gall any time.

Q. Let us say a word about this saw dust. Did you have some dispute with him over the question of saw dust?

A. Price.

Q. Price of saw dust?

A. Yes, sir.

Q. And he visited your house about that?

A. I think he did.

Q. And you had a conversation about it?

A. Yes, sir; we had been getting saw dust for another party and he came into the property and we didn't know there had been any change in the price.

Q. I don't want the details about that. You said that was not the occasion you have spoken about that you talked about the property?

A. No sir; I think not.

Re-direct examination by Governor Werts:

Q. The price of this land, $10,000—what makes the value of this land?

A. It is desirable building land, it is desirable property laying along the track; there is good water power there, and with the contemplated improvements that they say are on paper it would come in very nice—good thing to have and keep.

Q. There is a house on it that is not worth much, is it?

A. House that cost about $1,200 or $1,400.

Q. This water power is derived where from?

A. Morris canal.

Q. (By the Court)—Old Henry Speer had a saw mill on it further down?

A. Yes, sir.

Q. (By the Court)—Do you know where Speer's saw mill was further down 25 years ago?

A. That is further down, yes, sir, near Montville.

Q. (By the Court)—This is on the same stream?

A. Yes, sir.

Q. This road that runs along the property, where does that road lead from and to? It is a road from Montville to Boonton, isn't it?

A. Yes, sir.

Q. In going from Capstick's place to Boonton what road does he take?

A. Right along that road.

Q. Right past this right of way, wouldn't he?

A. Yes, sir.

Q. Is it plain to be seen from the road?

A. Yes, sir.

Q. How often does John Capstick pass that road?

A. Two or three times a day when he is at home; I have known him to be in Boonton as much as three times a day.

Re-coss examination by Mr. Lindabury:

Q. How far can you see up that road. I mean this road to the doctor's place from the public road?

A. Can see the whole length of it, straight line;

when you get above the track there is a cut to make the road, there was a little hill, and 25 years ago we took that hill out, carried it across the track and put it below.

Q. I am not asking you for a whole story about that thing, but just a single question. Do you say that Mr. Capstick passes there regularly two or three times a day?

A. That is his habit; not two or three times a day; perhaps once a day.

Q. You said two or three awhile ago?

A. I have known him to do that two or three times; that is my qualification.

Q. Is it his habit to go along there every day—do you swear to that, of your own knowledge? I want you to be careful what you say. Just think a little, what you know and you have just sworn to?

A. It is his habit to go by there every day.

Q. You swear to that of your own knowledge, do you?

A. I won't say he is by there every day, but he is by there whenever he goes to Boonton, and he ordinarily catches train one way or other there; sometimes it is more convenient to take a local.

Q. What are the improvements you alluded to there that added to the value of this property; you spoke of the improvements there being made or contemplated there as affecting the value?

The Court—There is no objection, but I don't see what it has to do with this case.

Q. What are the improvements you spoke of as affecting the value?

A. There are properties being bought up and built upon there in that locality.

Q. Is there a railroad station located right near there?

The Court—How far is this from the Montivlle station?

A. About a quarter of a mile.

Q. (By the Court)—It is very near where old Henry Speer's saw mill was?

A. About an eighth of a mile above.

Q. (By. Governor Werts)—How near is it to Boonton?

A. It is within five hundred feet of the corporate line of Boonton.

Q. I show you the map. Now there is a station contemplated to be built—

The Court—Paper now shown is a plan produced by the agent of the railroad showing what they expect to do with their general and regular passenger station at Boonton.

Q. Now, you have heard of this, I suppose, this contemplated improvement there?

A. Yes, sir.

Q. And this was the improvement that you refer to as affecting the value of this tract?

A. Not particularly.

Q. What other improvement was there that you alluded to?

A. The road might go through.

Q. The proposed boulevard?

A. Yes, sir.

Q. To what use would this property that you contracted to sell be best adapted?

A. It would be desirable for mill property.

Q. And lumber yards and coal sheds and that sort of thing?

A. No.

Q. Is there any other in the vicinity of the property, any other land that would be adapted for the purpose?

A. There is coal yards up that way.

Q. You would think it would be desirable for milling, and such like?

A. Yes, sir; this is high ground here, north of that.

John H. Capstick, Sworn.

Direct examination by Mr. Lindabury:

The Court—As I understand the attitude of the parties, at and after the time fixed for the delivery of the deed and up to the time the bill was filed at least, the complainant says—if you agree to give me warranty deed I will take it. The defendant says—I won't give it unless I can reserve the right of the pipe line and the right of way of Dr. Ryerson. Then the complainant files his bill, and my recollection from reading the bill, the hasty glance I gave it, is that complainant is still of that mind; he is willing to take Mr. Crane's deed with a warranty without reservations, looking to Mr. Crane for damages for injury—and I will suggest such question at least for the complainant to consider, if it turns out Mr. Capstick knew of this, if he can get anything more than just that warranty deed. But the complainant does say, as I understand, he is willing to take a title with compensation; he demands that right, and of course no doubt he has looked at the authorities and knows, as I have recently, very recently and very carefully, in an opinion that is printed somewhere, I don't know where, decided that it is almost a matter of course to give a vendee specific performance with compensation; but it is not so a matter of course to give a vendor specific performance with compensation. I did it after a careful examination of the authorities in the Sussex case which is reported. I called Mr. Cutler's attention to it. Now, that is the situation as I understand it. I don't know whether the attitude which the complainant occupied up to the time of the filing of the bill was changed by the filing of the bill. I don't know whether he or not claims that he receded from the position of being willing to take Mr. Crane's warranty deed. I am now going on the theory that he does not, that he claims specific performance, with compensation. Is that right?

Mr. Lindabury—I haven't assumed that, and I have not noticed that the bill made any such offer.

Q. It has been stated here, I think, that Mr. Cahill in entering into this contract with Mr. Crane was acting for you?

A. Yes, sir.

Q. When did you first know of the existence of the pipe line or the right to maintain a pipe line across the southerly end of the property?

A. I knew there was a pipe went through there, but I didn't know just where; it was about the time that the pipe line was built there.

Q. Did you know it was on Crane's land?

A. I didn't know positively where it run; I knew it run through Dr. Ryerson and heard it run through part of Crane's place; I never was through the right of way there.

Q. (By the Court)—It went somewhere there?

A. It went somewhere there; I didn't know just where it went.

Q. When did you first know that Dr. Ryerson had a right of way across this Crane property by virtue of his ownership of the lands to the south?

A. When my lawyer or Mr. Beam searched the records on this tract.

Q. (By the Court)—After the contract was made?

A. After contract was made.

Q. (By the Court)—Never knew it before?

A. Never knew it before.

Q. Mr. Crane says you come to his house five or six years ago and proposed to purchase the property, at least inquired the price and inquired whether Dr. Ryerson had a right of way, and about the pipe line, and he told you the location of the pipe line. Did you call upon Mr. Crane at his house some five or six years ago and have a conversation with him regarding this property in which you suggested a willingness to buy it?

A. I don't know just the date, but I called upon Mr.

Crane once, and nothing was mentioned in any way in reference to this property.

Q. Do you mean you never called at his house but once?

A. But once.

Q. When was that?

A. I can't tell you when it was; from three to five years ago; I can't tell you just when.

Q. What was the occasion of the call?

A. It was the matter of saw dust.

Q. To which he referred?

A. Yes, sir. He owned a half interest in the mill at Montville.

Q. Dispute regarding some saw dust?

A. Yes, sir.

Q. Was anything said then about this land that Cahill contracted for?

A. Not a word.

Q. Do you think you could have forgotten it?

A. No, sir.

Q. Did you at that time entertain the idea of buying?

A. No, sir.

Q. (By the Court)—Hadn't thought of buying?

A. No, sir; not to my recollection.

Q. Now, he says that you did call on him once and have a talk about some saw dust, but that you also called upon him a year or two before that?

The Court—Did you have any more than the call about the sawdust?

A. Never recollect calling at his house but once. I fully recollect calling at that time; I had trouble over that saw dust.

Q. I am referring to what he said so as to call your attention distinctly to the time and place. He says it was a year or two before, and that you called at his house and the conversation referred to regarding this proprety. Now, is that so?

A. Had no conversation about this property.

Q. (By the Court)—At any time—I mean before he sent Cahill?

A. I don't remember talking about it at any time; don't remember speaking of the property to Mr. Crane.

Q. Now, he says that you offered him six thousand, and afterwards seven thousand dollars for it, and he declined asking ten thousand. What do you say about that?

A. I don't remember that.

Q. (By the Court)—Did you ever ask him to fix a price on it?

A. I don't remember.

Q. (By the Court)—Did he ever fix a price of ten thousand dollars on it to you?

A. To me?

Q. (By the Court)—Yes; to you personally?

A. No, sir; not to my knowledge.

Q. (By the Court)—Did you ever offer him six thousand dollars for it?

A. No, sir.

Q. (By the Court)—Did you ever offer him $7,000 for it?

A. No, sir.

Q. (By the Court)—You have no recollection?

A. No, no recollection of offering him any price at all; it always had to be through somebody else; I coudn't talk with him at all.

Q. You did send some of these men to buy the property?

A. Yes, sir.

Q. But didn't get it until it was captured by Mr. Cahill?

A. That is right.

Q. Did he ever tell you at his house or any where else that Dr. Ryerson had a right of way over this property?

A. No, sir.

Q. You are positive about that?

A. I am positive about that.

Q. You think that he could have told you that without your remembering?

Objected to.

The Court—It amounts to this. There is a very serious argument whether if ten years ago or any other years ago he did have notice in casual conversation of the existence of this right of way, and then when he come to buying it, to employ a man to get it, whether he recollected; it is a very serious question whether he would be affected with notice. He might under certain circumstances.

Mr. Lindabury—I understand from the rule he would not, unless he was negotiating for the property.

The Court—It is a question of fact in each particular case.

Q. Now, you have been accustomed to riding along that public road sometimes?

A. Yes, sir.

Q. I don't knew whether with the frequency Mr. Crane mentioned—

The Court—You live—

A. I live about a mile from there; I go backwards and forwards to the Boonton station.

Q. (By the Court)—You don't go that road back and forth to your business?

A. No.

Q. (By the Court)—You are president of the bank up there?

A. Yes, sir.

Q. (By the Court)—You used to go back and forth to your banking business?

A. Once a week.

Q. Could you see this road leading up as far as the railroad from the public road.

A. No, sir.

Q. The doctor's road?

A. I have noticed there were ruts in there; I have noticed wheel marks in there.

Q. How far did you notice them?

A. About fifty or sixty feet in, I should say.

Q. (By the Court)—Up as far as the railroad?

A. Possibly as far as the railroad, it is all grown up with brush.

Q. Did you ever observe them beyond the railroad?

A. No, sir.

Q. Were you upon this property before this contract was made?

A. Not to my recollection.

Q. You don't ever remember being on it?

A. You can see first rate from the road.

Q. Did you observe anything from the road looking like a travel or used road beyond the railroad toward the doctor's property?

A. No, sir.

Q. (By the Court)—North of the railroad?

A. It is the same on the railroad there; there is a crossing there, you can see it as you go through on the cars, but nothing out of the ordinary.

Q. (By the Court)—Did you see anything to induce you to think there was a road leading from there up to Dr. Ryerson's?

A. No, sir.

Q. Was there anything observable from any point you were at like a road beyond the railroad, above the railroad?

The Court—North of the railroad?

A. No, sir.

Q. Are you the owner of other real estate in Boonton?

A. Yes.

Q. Considerable quantities? Do you own a number of pieces?

A. I own next to the Mr. Kanouse property on the

upper side of the railroad, north side of the railroad, and below it.

Q. Anything else?

A. Nothing else.

Q. Have you ever owned, bought or sold other property there?

A. Nothing, only in that vicinity.

Q. I mean in that vicinity?

A. I have never sold any.

Q. Do you know the value of land about that?

Governor Werts—What has that got to do with it when you have entered into an agreement to pay $10,000 for it?

Mr. Lindabury—I want to show the difference in the value with that easement on it, and without it.

Governor Werts—I don't think that is competent.

The Court—I don't see how I can rule the evidence out. I don't want to say anything to indicate that I have any settled notion about it; but the fact that Mr. Capstick owns as he does own the Kanouse tract of course puts a different phase on the case—interferes, may interfere with any plans for improvements there—little nasty right of way across it makes trougble. The evidence is objected to, but it is my judgment competent if it comes to that question in the determination of the case, and it is the duty of this court to hear it. If they succeed in their defence and satisfy me Mr. Capstick ought not to have any, that is a different thing. Suppose the court is satisfied under all the equities of the case Mr. Capstick is entitled to compensation, then the evidence is competent.

Q. Now, what in your judgment would be the value of this tract you purchased if it were free from this easement in favor of Dr. Ryerson?

Governor Werts: I object to that question certainly.

Mr. Lindabury—Upon what ground?

Governor Werts—You fixed the value already by

agreeing to pay $10,000 for it. Now you are setting up that you were cheated.

Objection overruled.

Q. (Question read.)

The Court—What is it worth if it was free from encumbrance of Dr. Ryerson's right of way?

A. It is worth $10,000.

RECESS.

Q. I asked you before the noon recess for your opinion of the value of the property without the road, the right of way. I now ask your opinion of the value subject to that easement?

A. I made a calculation $7,500.

Q. Being a difference of $2,500?

A. Yes, sir.

Q. For what is the land adapted without the right of way which leads you to put a value of $10,000 on it?

A. Mill sites; industrial purposes.

Q. For what is it adapted subject to that easement?

A. Well, it is a poor quality of farm land.

Q. (By the Court)—You mean to say that the easement through there would prevent your developing it?

A. For investment, for certain purposes I have in mind, I have got to have a trestle there.

Q. You said it was adapted to mill sites?

A. Yes, sir.

Q. And why can't it be used for mill sites with that right of way there.

A. Well, you would have to throw your track down so far that you couldn't get in there; the slope of the ground goes down to the east, and you can't come up a slope, the side track, you have got to come above, you have got to get that.

Q. You mean it is necessary to have an elevated track across there?

A. Yes, sir.

Q. Why? Why do you find that is important?

A. Especially for coal dumps and unloading other material that has got to be loaded above.

Q. Had you entered into any negotiation for the construction of such a trestle before you discover this easement?

A. Yes, sir.

Governor Werts—We are objecting to all this.

The Court—If you want to show his plans you can show how proper plans would be interfered with.

Q. Now, what do you know about a proposed change in the station over there?

A. Well, I have been working on that.

Q. Who with?

A. With the D. L. & W. R. R. company.

Q. What property do you own west, that is, on the village side?

A. I own the Kanouse lot and I own opposite the depot; I own this property up this line right here (indicating).

Q. (By the Court)—That is the west line of the Kanouse lot?

A. Yes, sir.

Q. (By the Court)—The line of the Kanouse lot as shown there, the west line of the Kanuose lot as shown toward the east line, and the new railway station is to be placed on the west part of the Kanuose tract, as I understand it?

A. Yes, sir.

Q. There is before you a map entitled "Plot showing the proposed passenger station and shelter house at East Boonton, New Jersey, office of the Division Engineer, December 10, 1902, Hoboken, N. J., scale 1 inch to the 100 feet." Where did you get this?

A. It belongs to the railroad company.

Q. What does this show?

A. This shows the new improvements that are proposed to be made there.

Q. (By the Court)—And you have arranged with them to let them have so much of it as they need which comes off the Kanouse tract, have you?

A. Yes, sir; I have arranged to let them have all that is necessary to carry out their plans.

Q. How much does that mean? I don't mean in the gross, but what of the land that is shown here have you arranged to give them?

A. I think at the present time they want 100 feet wide by 600 feet long.

Q. (By the Court)—Myrtle avenue is used?

A. Yes, sir.

Q. (By the Court)—That is on the traveled path down from Boonton to Montville?

A. Yes, sir.

Q. (By the Court)—They plan a driveway into Myrtle avenue to the south side of their station?

A. Yes, sir.

Q. (By the Court)—That they call the shelter house?

A. Shelter house.

Q. (By the Court)—And on the north side is to be their main station?

A. Yes, sir.

Q. (By the Court)—From here they plan the proposed boulevard? (indicating).

A. Yes, sir.

Q. (By the Court)—Has Division street been opened at all out here? (indicating). Mr. Kitchel says Division street is opened out to the line near the Lumber Company's property, and from that there is a traveled way marked in dotted lines here into a house which is just west of the Kanouse west line?

Q. When did you make this arrangement with the railroad company?

Objected to.

Q. This matter came up a little over a year ago. Was it before or after you made the contract, the Cahill contract?

A. I didn't make any arrangements with these people until I had—

Q. Was it before or after you discovered this easement, the right of way, the Ryerson right of way?

A. After.

Q. When did you discover that?

A. When Mr. Beam searched the record.

Q. When was that?

A. I don't know as I can tell.

Q. Was it before or after October?

A. I couldn't tell just exactly.

Q. (By the Court)—You can tell when you heard from Mr. Beam—you can recollect when you heard from Mr. Beam?

Q. Did you enter into verbal contract with the railroad company before you heard of this right of way from Mr. Beam?

A. Yes, sir.

Q. What arrangement, if any, did you have with the railroad company for building a trestle across this land?

A. I had made plans with the engineer to give me plans for a trestle.

Q. What was your purpose to build a trestle? What do you know now as to the practice nowadays of taking coals into mills on an elevation?

A. Not desirable; want it overhead.

Q. That is what I mean by elevation.

A. Always overhead, on trestle, elevation.

Q. Have you made investigation as to the modern practice in building factories with respect to the manner of taking in coal?

A. Yes, sir.

Q. What do you find it to be?

A. Elevated always.

Q. (By the Court)—Carried in on trestle?

A. Yes, sir.

Q. (By the Court)—Not to shovel it?

A. Yes, sir; not to shovel.

Q. Drop it?

A. Right in the place they want it.

Q. Many places they have it so it goes in the furnace by chutes?

A. Yes, sir.

The Court—They do not shovel coal at all?

Q. Have you, without giving names or going into particulars, negotiated with people with a view to their locating here manfacturing plants?

A. Yes, sir.

Q. And involving the construction of such a trestle for coal?

Court—Not necessarily.

A. Not with them, but I have been requested to do so.

Q. I meant whether it was part of the plan of his negotiating with them that there should be a trestle of that kind put in?

Court—The question is whether you represented to them that you could have a trestle?

Q. Well, what, did you?

A. I did, sir.

Cross-examination by Gov. Werts.

Q. How long have you lived where you do, or in that neighborhood?

A. About twenty years.

Q. And during all that time have been engaged in the same business?

A. Yes, sir.

Q. And during all that time have used this road to Boonton, I suppose?

A. Yes; there is no other road, except going around the back way.

Q. And certainly have passed by here thousands of times?

A. I should say yes.

Q. I should think you were pretty familiar with every foot of the road, are you not?

A. Every bit of the road, yes, sir.

Q. And both sides of it?

A. Yes, sir.

Q. And you could pretty near draw a map of it from recollection, couldn't you?

A. I think I could.

Q. And during all these twenty years you have seen more or less evidence of this right of way?

A. I have seen an entrance of a road there.

Q. Now when did you buy the Kanouse land?

A. I think about three years ago.

Q. (By the Court)—Is old Mr. Kanouse alive?

A. Yes, sir.

Q. Now, then, how far along this right of way does the Kanouse land that you bought extend? Does it extend south?

The Court—It is the whole length.

Q. The Kanouse land that you bought does not extend south of the railroad, does it?

A. I do not know just the exact distance.

Q. (By the Court)—Does not extend south of the railroad?

A. No, sir.

Q. All north of the railroad?

A. North of the railroad.

Q. And you bought the Kanouse land, you say, three years ago?

A. Yes, sir.

Q. Did you go on the Kanouse land before you bought it?

A. No, sir; I did not.

Q. And you have owned the Kanouse land three years and yet don't know of this road along there?

A. I do not, no, sir; it has only been about a very short time ago that I went on the Kanouse land.

Q. And you don't own any land, that is, any of the Kanouse land, south of the railroad, do you?

A. No, sir.

Q. It stops north of the railroad?

A. Yes, sir; I own property both sides of the railroad, but not that tract.

Q. (By the Court)—You don't own land lying immediately across the railroad from the Kanouse tract?

A. No, sir.

Q. (By the Court)—Don't own what faces on the Montville road, between the railroad and Montville road, just east of where the new station is going to be?

A. (No answer.)

Q. (By the Court)—He owns so much of the Kanouse tract that lies north of the railroad and none of that that lies south?

A. None of the Kanouse property. I own this property in here (indicating).

Q. That is not part of the Kanouse tract?

A. No, sir; used to be original Kanouse tract.

Q. (By the Court)—You own part of the Kanouse tract, but not the whole of it?

A. No, sir.

Q. What part?

A. South of the railroad.

Q. (By the Court)—That part right opposite on this blue print map—opposite the proposed railway station?

A. Yes, sir.

Q. (By the Court)—About the width of what the driveway is?

A. At its widest point, about an inch and a half wide at its widest point.

Q. Now, then, as you have gone by on this road, on the road to Boonton, you have seen that, the evidence of this private road, I will call it, as you went by?

The Court—He has sworn to that. Across the railroad, he said.

Q. And apparently extended beyond the railroad, did you?

A. Apparently; yes, sir.

Q. Did you observe the cut there through which it passed?

A. No, sir.

Q. Never observed that?

A. Never observed that.

Q. In all these years?

A. No, sir.

Q. You knew that Dr. Ryerson owned land in there, didn't you?

A. Yes, sir.

Q. Immediately adjoining the Crane land?

A. Yes, sir.

Q. And you knew that Dr. Ryerson couldn't get out except over the Crane land, didn't you?

A. I don't know anything about it?

Q. You didn't know anything about that?

A. No, sir; I don't know where his right of way was, where he come out, where he come in—never inquired.

Q. You knew he must have a right of way over somebody to get out?

A. I supposed he must have a right of way over somebody.

Q. You know, had it extended over the railroad it would strike Norris's land, didn't you?

A. No, sir.

Q. Didn't know it would strike Norris's land, eh?

A. No.

Q. You say you have different times sent three or four persons to interview Mr. Crane about buying this land?

A. Yes, sir.

Q. When was it you sent the first man to see him?

A. I do not remember, sir.

Q. And who was the first man you sent?

A. I think the first man I talked to about it was Mr. M. S. Condit.

Q. That is you wanted him to see if he could buy it?

A. Yes, sir.

Q. Of Crane?
A. Yes, sir.
Q. Who was the next man?
A. I think I spoke to Mr. Riddle—W. W. Riddle. I think I spoke to him about it.
Q. Who was the next man?
A. Mr. Cahill.
Q. Well, you cannot give any idea when it was you sent the first man to see Crane?
A. I could not tell you, no.
Q. Six or seven years ago?
A. I could not tell you that?
Q. Couldn't you approximate it in any way?
A. No; I do not think it was so long ago as that.
Q. (By the Court)—Was it before or after you had the interview with him about the sawdust?
A. After.
Q. Well, you have been wanting to acquire this land for some time, haven't you?
A. No, sir.
Q. You wanted to acquire it as early as the time you sent the first man to see him?
A. Yes.
Q. You can't tell us how long ago that was?
A. I cannot tell you how long ago that was; I should think it would be before three years ago, when I got possession of the Kanouse tract; then I was interested.
Q. Did you ever send Enoch Hammond?
A. I think I did.
Q. Did you ever send Mr. Brower?
A. Yes, I think I did.
Q. That makes five, then?
A. Yes.
Q. And you think you sent those five men inside of three years?
A. I think so, yes, sir.
Q. Why did you not go yourself instead of sending other people?

A. Because I could not deal with Mr. Crane at all.

Q. How do you know you could not?

A. Because of what I heard outside. I simply took it for granted what people had told me.

Q. You had not tried yourself?

A. Had not tried, and never attempted to try.

Q. You assumed that you could not deal with him?

A. I assumed.

Q. So you sent other people?

A. Yes, sir.

Q. Do I understand you, then—do you want to be understood as swearing then that the interview Mr. Crane has detailed between you and him did not take place?

A. Yes, sir.

Q. You want to swear to that?

A. Yes, I made that statement there; I don't think it did take place; I am positive it did not take place.

Q. In his parlor?

A. In his parlor.

Q. Well, now, all these projected improvements that you are talking about, they are sort of in the air, aren't they?

A. No, sir; they are not in the air; they are practically in the air; but they have been worked upon.

Q. When are they going to be done?

A. We can find out that later; other witnesses will very likely tell us something about that.

Q. Well now these trestle works and so on that you are speaking of, are they to be erected north or south of this railroad?

A. South.

Q. Then how could your ownership or non-ownership of this strip of land south of the railroad interfere with these things?

The Court—In other words, to get coal to a building, his idea is that there will be a trestle which will not adjoin a building. This is his theory, if I can understand

it, that he might put a building, for instance, thirty feet east or fifty feet east of the line—the west line of the tract in question, and in order to get the coal there to suit him he might want to put a trestle right over the place where this right of way crosses. Now, whether or not that is probable is quite a different question.

Governor Werts: He don't own that land, to begin with.

Q. You don't own right there (indicating)?

A. Yes, sir.

Q. (By the Court)—Do you own immediately south of the railroad and immediately west of the tract here in question?

A. No, sir.

Q. (By the Court)—Now, the question he puts to you—what good the question of trestle south of the railroad will do you if you don't own the land immediately west of this?

A. I have got to come in here (indicating).

Q. He has got to come in east of the proposed right of way here, he says. Why, you can go over that right of way; you are not excluded from going over the right of way.

A. With a trestle?

Governor Werts: If there is a mere right of way there he can put a trestle over it if he don't interfere with the right of way.

The Court: It would only be the expense of making a sufficient passageway.

Q. That is my very next question. What harm would it do to have Dr. Ryerson passing once or twice a year under this trestle of yours to reach his land?

A. That would be a question as regards to the height of the trestle at that point—whether he would allow it —I suppose he would have a say in the matter.

Examined by Mr. Lindabury:

Q. Is this trestle you negotiated with the railroad to go over that land?

A. There is no special point mentioned; I didn't tell them where I wanted it put.

Examined by Governor Werts:

Q. This map that you have brought here from the railroad company also shows this proposed boulevard?

A. Yes, sir.

Q. Well, what do you know about that? Is one just as likely to be constructed as the other?

A. Yes, sir.

Q. Boulevard and railroad?

A. It is getting right up to the actual point where we are going to commence operations.

Q. In other words, you and the railroad company together have concocted a bright scheme?

A. We have not concocted any scheme; we are making practical use of the property there for public benefits as much as mutual.

Q. You think the fact that this right of way is located over this land detracts $2,500 from its value?

A. I think so.

Q. You say you have arrived at that estimate?

A. Yes, sir.

Q. Just sit down there and take your pen and pencil and something or other and make up that $2,500—just give us the items that make up the $2,500?

A. If you do away with that right of way there I will give you check for the balance of the money I owe you.

Q. That is $9,500?

A. Yes, sir; $9,500.

Q. Oh, if we will do away with the right of way?

A. Yes, sir.

Q. That is not the question. I want you to tell us just what it is.

A. (No answer.)

Edward J. Cahill sworn.

Direct examination by Mr. Lindabury:

Q. Where do you live?

A. Boonton.

Q. What is your age?

A. 40.

Q. Business?

A. Real estate.

Q. For how long a time?

A. Six years—seven years.

Q. Where?

A. Boonton.

Q. Have you carried on an extensive business during that time?

A. Yes, sir.

Q. Bought and sold property?

A. Yes, sir.

Q. At and about Boonton?

A. Yes, sir.

Q. To considerable extent?

A. Yes.

Q. I think you represented some of the water companies there, didn't you?

A. Yes, sir; I have; Jersey City Water Supply Company; bought the right of way for twelve miles, and still employed in purchasing the property needed for the dam site.

Q. Are you acquainted with the property in question?

A. Yes, sir.

Q. Crane property?

A. Yes.

Q. How long have you known that?

A. Thirty years at least.

Q. Been over it many times?

A. Yes, sir.

Q. Do you know about the location of the pipe line?

A. Yes; I have been over it and know it practically; yes, sir.

Q. You know where the pipe line is?

A. Yes, sir.

Q. Were you over it at the time that that was laid?

A. No, sir.

Q. Did you ever have an option on it before you made this contract?

A. Yes, sir; I think, as near as I can recollect, six years ago, about; I judge that by the time we started in the shoe business, and I remember that I said at the time that I would not—

Q. I don't want your reasons in detail. For whom did you take an option?

A. For Col. Meek and Abner McKinley.

Q. For Mr. Crane?

A. No, sir; I went to Mr. Crane.

Q. He gave it, did he?

A. Not to me direct; I had a dispute with Mr. Crane and I got Mr. M. S. Condit.

Q. Condit got it for you?

A. Yes, sir.

Q. He had the requisite gall?

A. I suppose so, yes, sir.

Q. Were you on the property then when you got that option?

A. I didn't consider it necessary.

Q. I didn't ask you whether you did. Were you on it?

A. No, I was not on the property that day.

Q. I don't mean that day, but about that time?

A. Yes, sir; I think so.

Q. Did you look it over in connection with the getting of that option?

A. I did; yes, sir.

Q. And for your clients?

A. Yes, sir; about going on the property, I don't say I went around and walked all around the fences, but I looked at the property; walked up and down the railroad.

Q. For them, did you?

A. Yes, sir.

Q. Have you been on it since?

A. Yes, sir.

Q. Often, or what?

A. Why, perhaps six times, five times, six times.

Q. And what was the occasion?

A. Why, one of the occasions was probably laying this proposed boulevard, and another occasion was at a time I was looking over the property for Mr. Capstick to purchase the Kanouse property, and I presume in connection with several other purchases in that locality.

Q. Did you ever observe this right of way?

A. No; I didn't know that the right of way was there; when I was a boy there was a bridge across, the only right of way I say I knew there was a bridge across the little brook that has been closed up. That I supposed was for the passage to the different parts of the farm, and then went out by his farm—the only right of way I ever saw or noticed there.

Q. (By the Court)—Did you see anything like traveled way leading from the Montville road up along the west side of the tract to the east side of Kanouse up to the woods owned by Dr. Ryerson?

A. In driving past I did notice that traveled way between the Montville road and railroad tracks on the east side.

Q. (By the Court)—Of the Kanouse tract?

A. Of the Kanouse tract; yes, sir.

Q. Did it appear to run any further than just across the railroad?

A. I didn't think it did. I saw that part and supposed

it was the way Mr. Crane had of getting backward and forward on his farm.

Q. (By the Court)—Across the railroad?

A. Yes, sir.

Q. Was there anything during this period that you have observed on the property between the railroad and Dr. Ryerson's property to indicate a regular passage-way there?

A. No; there was not. I was over it about the time I got that option, on the upper end of it.

Q. (By the Court)—You mean the upper end toward Kanouse?

A. No; between Ryerson and Crane; went over that, and I noticed it was wet there, and in going over it I noticed the grass was high enough there to cut and no indication whatever of a road.

Q. Growing grass in what is now claimed to be the road?

A. Yes, sir.

Q. That was six years ago?

A. That was one year ago.

Q. You said "option." You mean when you made the contract then?

A. They were both contracts.

Q. You mean when you made this presnt contract, then you were over it?

A. Yes, sir.

Q. And there was simply grass growing on there?

A. Yes, sir; I might say I didn't look for any road; I didn't suppose any road was there; I didn't have that in mind; I didn't see any road there; saw nothing that ever led me to suppose there was a road there.

Q. On any of these occasions?

A. No, sir.

Q. What is your opinion of the value of this property if it were free of the encumbrance of that right of way?

A. With that property there as it lays it is a desirable property for manufacturing purposes, or should a sta-

tion be there it is a good place to put coal yards; I think that is what they call them, or for any manufacturing purposes; the fact is I have heard it was surveyed with a view of locating a rolling mill there, or any other plant, it would be equally valuable for any other purpose; and with the right of way over it you would have to make provision for the right of way crossing it, so you would have to maintain a bridge coming up or going down across the track; it would be a great disadvantage; also it might be convenient if a man owned both land, what is known as Kanouse and Crane; it might be convenient to locate a building exactly where the road is, and having that road there, that right of way there, makes a great difference, in my estimation, in the value of that property to use it for a large plant; it wouldn't make a great deal of difference, perhaps, for a small one.

Q. (By the Court)—Who owns that part of the Kanouse tract, that land immediately south of the railroad?

A. Why, immediately south of the railroad, I think Kanouse owns it.

Q. (By the Court)—He hasn't sold it yet?

A. I can't say; I wouldn't want to answer that; I don't know.

Q. On which side of the railroad were you speaking of as convenient to locate this building?

A. I was speaking of the west—north or northwest.

Q. On the part of the Kanouse property Mr. Capstick owns?

A. Yes, sir.

Q. (By the Court)—That is higher ground than the railroad, isn't it?

A. The ground is low there. You can bring the switch in a little over there above the Kanouse property.

Q. (By the Court)—Near where the new station is?

A. Yes, sir. You could start a switch if you would

at the new station and about the time you got where this right of way is you could have your switch arranged, in my estimation, four or five feet, and by carrying on that level down to the end of what is known as Crane property—I don't know that I am perfectly right —I should judge you could get 12 or 13 or perhaps 14 feet raise on your track. Now, if you had to begin right where this right of way is—

The Court: You would have more difficulty in getting up?

Q. Now, give me your estimate of the value of the property freed from that right of way?

A. I went down and looked at it and I have tried to get an estimate as well as I could about it.

Q. By "get" do you mean form an estimate?

A. Yes, sir; form an opinion; and I see a good deal of property and have to judge a great deal by the values, and I have purchased and had options on all the property there, thirteen hundred acres adjoining, and to do my best I couldn't consider that property, as I now know it with the right of way over it, worth over $6,000, putting extreme value. I have heard Mr. Capstick's evidence, and all that, but my opinion is it is not worth over $6,000 as I now know it.

Q. You have had some talk with Mr. Capstick before today?

A. About the value? Yes, sir.

Q. (By the Court)—What do you consider it worth without the right of way?

A. Why, your honor, I have twice taken an option on it—

Q. (By the Court)—I am asking you a direct question?

A. I said before, and say now, for the purposes that I said, it is worth $10,000.

Q. (By the Court)—You think that right of way would injure it $4,000 then?

A. I don't like to say that; I say what I thought it

was worth and what I think it is worth now; I don't want to say—I don't like to say that, and yet there is how I think about it; it is my opinion.

Q. You have discussed this matter with Mr. Capstick?

A. Yes, sir.

Q. And you and he don't agree?

A. No; we don't agree; Mr. Capstick thinks the land is worth more with the right of way on than I do.

Cross-examination by Governor Werts.

Q. This right of way is thirty feet wide, as you understand it?

A. I heard what was said here this morning; yes, sir; I didn't consider it so before.

Q. Then if it was sixty it would detract $8,000 from it?

A. I don't reason that way; I consider if that right of way was 12 feet wide it would probably damage it very nearly as much.

Q. Well, this was six years ago you said you held an option?

A. I judge that by the time we opened our store.

Q. Six years ago you were dealing for this land, were you?

A. Yes, sir.

Q. And who was that for?

A. For Col. Meek and Abner McKinley.

Q. Abner McKinley?

A. Together, those two gentlemen.

Q. That didn't go through, eh?

A. It didn't go through beyond getting the options on the land.

Q. I thought you said it was a contract?

A. Well, I consider an option a contract; I paid the money down on a contract.

Q. (By the Court)—There was some kind of contract entered into on behalf of McKinley and Meek?

A. Yes, sir.

Q. Was that the first time you ever had anything to do with this land?

A. With a view of purchasing it?

Q. Yes.

A. Yes, sir.

Q. Did you go on the land at that time?

A. Yes, sir.

Q. Had you been on the land before that time?

A. Yes, sir; familiar with the land since I was a child.

Q. And how old are you?

A. I am forty years.

Q. You were familiar with this land since you were a child?

A. Yes, sir.

Q. Suppose you had been over every foot of it?

A. I think I have stolen apples off every tree. I will withdraw that; every foot of it. I have been over the land pretty well—thoroughly from all parts.

Q. And when was it you first observed that there was a roadway south of the railroad?

A. Why, I think that that—I haven't noticed that since—it has been since I got the contract.

Q. When was the railroad put through there?

A. I don't remember; I don't know.

Q. Well, it has been testified here, I think, that it was in 1869?

A. I am willing to accept that if that was the time.

Q. You saw the railroad being constructed across there, of course?

A. No; I haven't any recollection of it at that point; I just can remember when it was constructed.

Q. Did you see where the railroad had planked over this right of way?

A. Why, I did, yes.

Q. And you said in your testimony a little while ago that you went over the Norris land when there was talk of buying the Norris land?

A. The Norris land, I also had a contract on that, that is, what I supposed to be the Norris land.

Q. Then didn't you cross this identical road those times?

A. You can come on that land from various directions. I live probably about—

Q. I don't care anything about where you live. If you went on this land and traveled west you must have crossed this road?

A. Not necessarily; the point I went from I was going to tell you I come on the land from the north—northwest.

Q. Around there (indicating)?

A. Yes, sir.

Q. Well, now, when did you next have an arrangement or an option with Mr. Crane or anybody about buying land?

A. Probably I seen him at various times within the past two years, maybe longer; I am not sure; Mr. Crane and I had a little disagreement at the time and that was the reason we didn't speak for four or five years after the McKinley option.

Q. What were you doing on this land all these years then?

A. Why, when I passed through the land I frequently went to Montville over the railroad and found it convenient to walk over, and I found occasion to cross that land; it didn't prevent me from going over it; and I had another tract of land on either side of it at different times, and I went within a year all around it; before the Kanouse land was purchased I went all around it.

Q. All around it but never upon it across this road?

A. This road? I no doubt crossed where this road is; I didn't say that.

Q. (By the Court)—Where it is said to be?

A. Where it is said to be.

Mr. Lindabury: Where it was located this morning, or tried to be.

Q. How did you come to go and make this contract with Mr. Crane?

A. Why, I had been working out for the water company a pipe line across his land in several places and it became an absolute necessity for me to meet Mr. Crane and he said he didn't want to deal with me—

Q. No, no; I mean this company—we are now talking about this contract?

A. I misunderstood you. Perhaps you mean how did I come to go. Why, Mr. Capstick asked me to go.

Q. Did he pay you anything for going?

A. Yes, sir.

Q. How much?

A. Would I have to answer what I got in payment for doing work?

Q. Capstick came to you and wanted you to go and try and buy this land of Crane?

A. Yes, sir; I had frequently bought land from Mr. Capstick.

Q. Frequently of?

A. Yes, sir.

Q. Were you on bad terms at that time with Mr. Crane?

A. No; we were on pretty good terms then.

Q. You had become reconciled?

A. Yes, sir.

Q. Why didn't Capstick go himself? Did he tell you?

A. He didn't tell me, but I should judge the reasons were evident; I supposed I knew the reasons. If Mr. Capstick went to Mr. Crane Mr. Crane probably wouldn't want to sell, and if he did he would probably want more for his land than if some one else was buying it.

Q. Did you tell Crane you were working for Capstick?

A. No, sir; I did not.

Q. Then you got a contract made with Crane, did you?

A. Yes, sir; I did.

Q. And assigned it to Capstick?

A. Yes, sir.

Q. You knew of the pipe line being across there?

A. I knew the pipe line touched Mr. Crane's property somewhere, but at the time I got the contract I must say I had forgotten about the pipe line at that time; I had forgotten about it; didn't know the pipe line was there; I didn't remember the pipe line when I took the contract, although I did know that the pipe line touched Mr. Crane.

Q. Did you know of this proposed boulevard at that time?

A. Well, I had heard that talked about for a good many years, and I knew of it; yes, sir.

Q. And did you know of these projected improvements, new railroad station and new trestle, all that sort of thing?

A. No, sir.

Q. Didn't know anything about this?

A. I didn't know about railroad station; I knew the ground was valuable for manufacturing; I had known about several other things connected with it; I knew the value of it pretty well.

Q. Did Capstick tell you how much he was willing to pay for the land?

A. I don't think he did; I don't think he did tell me how much he was willing to pay for the land.

Q. (By the Court)—Did not tell you a decided figure?

A. No, sir; he did not; I don't think he told me how much he was willing to pay.

Q. (By the court)—Did you learn this right away before the contract was made?

A. No; I did not.

Q. Or before it was assigned to Capstick?

A. About the signing I am not sure.

Andrew J. Neafie sworn.

Direct examination by Mr. Cutler:

Q. Where do you reside?

A. Boonton, New Jersey.

Q. And hold any position in D., L. & W. Railroad Company?

A. Principal assistant engineer.

Q. Look at the blue print. Did you produce that here this morning?

A. I did, sir.

Q. And what is it? Just explain to the court?

The Court: It explains itself. It was made in the regular course of business of the company?

A. Yes, sir; it was made in our engineer's office at Hoboken.

Q. (By the Court)—Made after consideration of the circumstances?

A. Made after consideration of the circumstances.

Q. (By the Court)—The new management sent out their engineers to look over it and see what improvement could be made?

A. Yes, sir; we sent our engineers out and made this survey.

Q. (By the Court)—Took your levels and all that sort of thing?

A. Took our levels and that plan was made from the surveys.

Q. (By the Court)—How far has it been adopted by the railroad?

A. We have gone in as far as to make the necessary arrangements for material.

Q. (By the Court)—I mean how far is it a settled plan?

A. It is the only plan we have adopted at this present time. It is the only feasible piece of property in East Boonton for station location up to the present time. We have endeavored to get valuation of all properties

practically; from Main street down to this piece of property; we have got to select a piece of property—

Q. (By the Court)—I understand all that. Taking all into consideration, is it the present judgment of the engineer and board that that is the best place and the only place?

A. Yes, sir.

Q. (By the Court)—You know nothing now in sight to change it?

A. No, sir.

Q. (By the Court)—You don't know what the intention of the Board of Directors is, I suppose?

A. No, sir; that is a matter that is up to the chief engineer; the chief engineer has selected that piece of property; the general superintendent has adopted the piece of property.

Q. (By the Court)—But whether the Board of Directors have or have not you don't know?

A. No, sir; I don't think it is necessary to get the consent of the directors.

Q. (By the Court)—I want to know how far you are competent to say that the thing has gone. Of course if the Board of Directors have passed a resolution adopting it, or the committee have adopted it, they could change it the next day. Do you know whether the property has been bought for the new station?

A. Arrangement for the property has been made with Mr. Capstick.

Q. (By the Court)—The transaction has not gone through?

A. No, sir.

Q. (By the Court)—I will ask you whether you know anything in the way of its going through?

A. There is nothing in the way that I know of.

Q. (By the Court)—Except money and time?

A. Except money and time.

Q. Has this been approved so far as such projects are usually approved before they are entertained?

The Court: Does he know anything further necessary to be done by any officials or directors of the company in order to make it a settled thing?

A. No, sir; I do not; as I say, we have not made any other surveys; it is the only survey we have made; it is the only feasible location we can get a freight house and station. There isn't another feasible location for freight house and station.

Q. Can you tell us what the grade of the present road is there?

A. The present grade is 47 feet to the mile.

Q. (By the Court)—Going east?

A. Going west.

Q. (By the Court)—47 up and down east?

A. Yes, sir.

Q. If a trestle should start in the neighborhood where the new station, or the switch would start about where the new station is, could you tell us about the height of the trestle when it would reach the—

The Court: That all depends upon the grade.

Q. Ordinary grade?

The Court: What is the scale?

A. One hundred feet to the inch.

Q. (By the Court)—Trestle can be run 100 or 150 feet to the mile. You can ask him what is usual and what is called a practical limit for the grade of trestles for ordinary use to prevent accidents and hold cars without having to block them?

A. We have trestles at all grades from 1 per cent to 4 per cent.

Q. (By the Court)—4 per cent is 200 feet to the mile, isn't it, a little over?

A. Yes, sir.

Q. (By the Court)—Wouldn't you want to put in a trestle, a switch for a trestle, right at a station—isn't it desirable?

A. No, sir.

Q. (By the Court)—According to your present prac-

tice and best rules of engineering, how far east of that station would you want to start in with a trestle?

A. We wouldn't start a trestle—those are main tracks—we wouldn't start a trestle track out of this track, not out of the main track.

Q. (By the Court)—The old tracks united with the new track just at the station?

A. That is about right.

Q. You wouldn't want to switch out—

A. We would do away with the old track.

Q. (By the Court)—But you could save enough land there to make any sidings at the south?

A. Yes, sir; we have four tracks here and only two shown on here (indicating).

Q. (By Mr. Lindabury)—How close to the station would it be practicable to start the trestle?

A. We wouldn't care to start it less than 400 feet.

Q. (By the Court)—That would be 500 feet short of the west line of the property in question. That 500 feet is one-tenth of a mile; that would be 5 feet natural grade; then if you make a 4 per cent switch, by the time you got to the line there you would get pretty well up?

A. Yes, sir.

Q. (By the Court)—But there is a cut there?

A. Not on this side; the cut is on the west side, cut about 4 feet on the west side.

Q. About how high would the trestle be at that point?

A. I should judge about 12 feet.

The Court: They own the land now down to the dotted line?

Q. And you still own it?

A. Yes; this exchange property would give us that.

Q. If you put your track north you would have room there on the old line to run out the trestles, and if you start far enough to the west occupying that land there your trestle would get up above 12 or 14 feet?

A. Yes, sir.

Q. Would you get under the trestle?

A. No, sir; you couldn't under pocket trestle; if you were going to put a trestle there to pocket coal, you couldn't drive under a trestle if it was pocketed for coal.

Q. (By the Court)—It would break the coal pockets; it takes just so much out of the coal pockets?

A. Yes, sir.

The Court: It takes out just so much of the building room at that point. The question is, interference with trestle.

Q. Could a trestle be built so that a wagon could get through?

A. A trestle could be constructed to pass a wagon, but it is working to disadvantage. You would have to so place your cars on the top of the trestle to span that—

Q. (By the Court)—It cost something to make a passageway?

A. A trestle is usually constructed to place cars in one place and dump in each bin; you would have a separate opening there where it would necessitate making a drill and drill that one car in so that you could dump that.

Q. (By the Court)—You are talking about building a trestle or using it?

A. I am talking about using it.

Q. (By the Court)—You mean to say your trestle must be such as to bear the weight of the locomotive?

A. No.

Mr. Lindabury: What he means, they send a whole train load along here.

A. After you have dumped all the cars or one car or two cars over that space you have to make a drill.

Q. (By the Court)—It would make a break in the line of pockets?

A. Yes, sir.

Q. (By the Court)—You mean to say in dumping a train of coal cars they are dumped from the bottom?

A. Yes, sir.

Q. (By the Court)—And under each cars are all built of a length?

A. Yes, sir.

Q. (By the Court)—And then the pockets are made to correspond with the holes in the bottom of the cars?

A. Yes, sir.

Q. (By the Court)—And a break in theline of pockets would make a break in the line of your train of cars?

A. Yes, sir.

Q. (By the Court)—But if there was not a pocket just there that wouldn't be just so?

A. No; if there was not pockets there it wouldn't be so.

The Court: The question I put to the witness was what would be the effect, what would be the cost of building a passageway under an ordinary trestle?

A. It isn't a practical construction to construct an opening; but in a pocket trestle, I never saw a pocket trestle constructed with an opening or driveway.

Q. (By the Court)—Not pocket trestle, but trestle leading to a pocket trestle, leading to a factory or anything of that kind, not meant for using for dumping?

A. Such a trestle could be constructed.

Q. (By the Court)—They do construct them, plenty of them?

A. Yes, sir.

Q. (By the Court)—Quite independent of any coal dumps. Now, then, what would be the cost in an ordinary case? Suppose there was a factory placed just over on the east of this line between the Kanouse tract and the Crane tract, and you wanted to connect a trestle, wanted to connect it with a trestle to dump coal into a corner of the factory, engine room, how much would it increase the cost of building the trestle there,

to have it covered with a span, a wagon track 10 or 12 feet wide?

A. I couldn't say, your honor.

Q. (By the Court)—Nothing very extravagant?

A. No; according to the construction of the trestle; hundred thousand pound cars, heavier class of cars it would be a difficult thing to do; I have never seen trestle constructed with driveway under it for heavy class of work; such a trestle could be constructed—by driving piles it could be constructed.

Q. (By the Court)—It could be constructed by stone wall on each side?

A. Yes, sir; with abutments.

Q. (By Mr. Lindabury)—Do you know what the ordinary farm crossing costs?

A. Ordinary farm crossing?

Q. (By Mr. Lindabury)—Yes, with the abutment, ordinary way?

A. One farm crossing, overhead crossing, abutment, concrete work, we are putting up today is worth $5 a yard; they run from $1,500 to $3,000—$4,000.

Q. How old are you?

A. 38.

Q. And where do you live?

A. Boonton, New Jersey.

Q. Where are you employed?

A. My office is Hoboken; employed all over the Lackawanna system between Hoboken and Buffalo.

Q. And how long have you been so employed?

A. I have been employed by the Lackawanna company for 22 years.

Q. What was your first employment with them?

A. I started in in the construction work with a switch gang; I fired a locomotive, run a locomotive; conducted; if you want to know all.

Q. And station agent?

A. No, sir.

Q. Never was that, eh?

A. No, sir; from that into the engineering department.

Q. When did you go into the engineering department?

A. I have been principal assistant engineer since the first of the year; I have been general road master.

Q. Answer the question that I asked you?

A. I was general roadmaster for four years and division roadmaster for ten years, and in the engineering department.

Q. And your present title is what?

A. Principal assistant engineer.

Q. First principal?

A. Principal assistant engineer.

Q. (By the Court)—Who is the principal engineer?

A. Mr. L. Bush (?)

Q. (By the Court)—He is the man that succeeded Mr. McFarland?

A. Yes, sir.

Q. Principal assistant engineer. Well, now, McFarland was the chief engineer down to when?

A. Until the first of the year, about February.

Q. Of this year?

A. Yes, sir.

Q. And then he was succeeded by Mr. Bush?

A. The principal assistant engineer took the place of Mr. Bush.

Q. Mr. Bush was the principal assistant engineer?

A. Yes, sir.

Q. And then you stepped into Bush's shoes?

A. I did, sir.

Q. Who actually got up this map, this blue print?

A. That blue print was drawn up under the direction of the chief engineer, Mr. Bush.

Q. (By the Court)—By draughtsmen in the office?

A. Yes, sir.

Q. (By the Court)—Have a lot of that work all the time?

A. Yes, sir; we have about 125 draughtsmen at work at Hoboken.

Q. And who gave orders to have it prepared?

A. The chief engineer.

Q. Who made the surveys for it?

A. One of the resident engineers under the direction of the chief engineer.

Q. I want to know the names of the men who made the survey.

A. I can't tell you positively; I think Mr. Wheaton made it; I wouldn't say positively.

Q. (By Mr. Lindabury)—Who made the survey?

A. I think Mr. Wheaton made the survey, but I am not positive.

Q. Do you know how Mr. Bush gave the orders for it?

A. Mr. McFarland gave the orders for that.

Q. Who instructed McFarland to give the orders?

A. I don't know as any one instructed Mr. McFarland; the matter of station was taken up, I suppose, between the President and McFarland; McFarland selected the site for the stations.

Q. I suppose that it comes down to this, that it has been generally discussed that it would be a good thing to make certain improvements at Boonton?

A. Yes, sir.

Q. And the chief engineer, acting on the suggestions, or on orders, as you please, got up this scheme, didn't he?

A. He got up that plan.

Q. To be submitted to the powers that be?

A. That plan has been submitted to the president; the president has looked over the situation with the general superintendent and the traffic managers.

Q. Well, now, let us see. It has been submitted to whom, the president?

A. Yes, sir.

Q. That means Mr. Truesdale, I suppose?

A. Yes, sir.

Q. He is the general superintendent?

A. He is the president.

Q. Who is the general superintendent now?

A. C. H. Ketcham is division superintendent.

Q. Been submitted to him?

A. He has nothing to do with it.

Q. Well, who submitted them to Mr. Truesdale?

A. I suppose Mr. McFarland.

Q. How do you know they have been submitted to him?

A. Because I have talked with Mr. Truesdale on the matter.

Q. And when are you going to commence to carry out this scheme?

A. As soon as the necessary arrangements are made and we can get the necessary property and—

Q. And what?

A. And get the necessary materials on the ground to do the work; as soon as the entire plan is feasible; there are things there that are not feasible yet.

Q. Been adopted by your board of directors, do you know?

A. No.

Q. You don't meet with the board of directors, of course?

A. No.

Q. Or they don't ask your advice, I suppose, do they?

A. No, sir; they don't.

Q. When this map was gotten up—are there any trestles shown on this map?

A. I don't see any, no, sir.

Q. On this blue print?

A. No, sir; I don't know anything at all about trestles.

Q. Or coal chutes are not shown on here, are they?

A. No, sir.

Q. Well, how did this proposed boulevard come to be

put on here—why was that put on?

A. That was part of the arrangement I think; Mr. McFarland and Mr. Truesdale and Mr. Capstick and some of the property owners in this vicinity proposed this boulevard, and perhaps the railroad company agreed to place this approach and the townspeople pay for the proportion of the highway that connects with this boulevard, some of the property owners in this part of the township.

Q. It is all part of one scheme, then, isn't it, or, rather, it is all one scheme?

A. It is a betterment or improvement which we are making over the entire system.

Q. Suppose the town should not agree to this cross road, or suppose this boulevard should not be put there; what becomes of your railroad company?

A. I think the property owners there have agreed to that; I am not positive about that, but I think they have.

Lewis Van Duyne sworn.

Direct examination by Mr. Cutler:

Q. Where do you reside?

A. Boonton.

Q. What is your business?

A. Civil engineer and contractor.

Q. Do you know where this Crane property is?

A. I do.

Q. And how long have you been acquainted with it?

A. Since a child up.

Q. Are you acquainted with the values of lands in that vicinity?

A. Yes, sir.

Q. And dealt in lands in that neighborhood?

A. Yes, sir.

Q. And for how many years?

A. About fifteen.

Q. What do you consider the value of that Crane property if there were no right of way over it?

A. The value of the property I should consider that which they have agreed to pay for it, $10,000.

Q. You have heard the description where this right of way is claimed to be over the property?

A. Yes, sir.

Q. In your opinion what is that property worth with the right of way over it?

A. With that right of way as located there I should think it would depreciate the value from $3,000 to $5,000.

Q. Why?

A. For the reason that the land is adapted for only one purpose in that vicinity, that is factory sites. We are now constructing a factory right adjoining this; the land lays in a position that can be drained, but is at the present time wet on the south side of the railroad between the railroad and Boonton avenue; it lays in such a position that a trestle could be run in for coal pockets or for any purpose requiring freight to be sent into a factory easy of access; this right of way is exactly in the position where a trestle or railroad leading to any factory that could be built on this property at the grade that it would necessarily need for this roadway, you couldn't get it high enough to go under and still go over the present railroad at the grade that it now is or would be if changed in its location; neither could you go over it without making too long approaches and bridges, and then the grade on the roadway is such that it would be almost impracticable to drive over it.

Cross-examination by Governor Werts:

Q. You think that $5,000 would be a fair price for it?

The Court: $3,000 to $5,000.

Q. That is depreciation?

The Court: He said it would reduce its value from $3,000 to $5,000.

Q. Just this right of way?

A. Yes, sir.

G. E. Crane sworn.

Direct examination by Governor Werts:

Q. You see this blue print map here?

A. Yes, sir; it looks good on paper.

Q. Have you heard about this proposed new depot?

A. Yes, sir.

Q. Shown on that map?

A. Yes, sir.

Q. And how long have you heard about that?

A. Oh, a year and a half.

Q. And have you heard of any other proposed depot?

A. Yes, sir.

Q. And how long have you heard of the other proposed depot?

A. Well, about two years, and up to yesterday.

Q. What did you hear about it yesterday?

A. A party asked me for an option on my property corner of Main street and Myrtle avenue.

Q. Where is that shown on this map?

A. Why, up above here (indicating); showed me a map from the railroad company the same as that.

Q. Showed you what?

A. Showed me a map drawn by the railroad company the same as that.

Q. Now, you say that the man who came to you produced a map like this?

A. A map describing that property and between Park street and Main street.

Q. Further west?

A. Further west; yes, sir; there is the only feasible place for the railroad, that has been turned down by the company.

Q. What did they want this land of yours at Birch and Division streets for?

A. For freight and passenger station.

Q. You say this has been turned down. How do you know that?

A. I got it pretty good from the railroad people, who stand pretty well, too.

Q. Did any of them stand as high up as Mr. Neofie?

A. I wouldn't want to commit Mr. Neafie.

Q. Commit him?

A. I wouldn't want to locate him; no, sir.

Q. What do you think it takes from this land, this right of way across there?

A. Whatever a surveyor of highway would allow to put a road across there to give the doctor a driftway.

Q. Your idea it would take as much from the value of this land as a surveyor of highway would award?

A. I am giving warranty deed for everything I ever owned in that piece of property.

Q. What I want to know is how much it detracts from the value of the land, and you say, what the surveyor of the highways would award?

A. Yes, sir.

Q. What do you say that would be, or how much would it be?

A. Oh, I can't tell.

Cross-examination by Mr. Lindabury:

Q. Who was this man high up that you got your information of that it was abandoned?

A. I think Mr. Neafie told me he didn't think the thing would go up.

Q. You said it was some man higher up than Mr. Neafie?

A. He didn't tell me he didn't think it would go through; he didn't know it would go through.

Q. Is he the man you referred to awhile ago from whom you got your information?

A. Yes; one of them.

Q. What other one was there?

A. Well, I wouldn't care to say.

Q. (By the Court)—You must say, because if you want to have your evidence have any effect on me,

these gentlemen are entitled to trace it to see if there is any truth in it.

Governor Werts: Tell who it was.

A. I wouldn't tell who it was.

Q. Do you know?

A. Yes.

Q. Have you his name in mind?

A. I know who he is; he is a railroad man.

Q. Where did you see him?

A. In Hoboken.

Q. In the office of the company?

A. No, sir.

Q. On the street?

A. No; in the station.

Q. In the station—met him casually?

A. Yes.

Q. Had you known him before?

A. Well, yes.

Q. Where had you met him before?

A. Up on the survey line.

Q. Did you know his name?

A. No.

Q. Don't know who he is?

A. I know who he is.

Q. Well, who is he?

A. I wouldn't want to tell you; there is a good deal of funny business going on in that location of the Boonton station.

Q. You seem to have more or less funny business up there in connection with your property?

A. No; not at all; I was approached for an option.

Q. Do you refuse to tell the name of this gentleman?

The Court: He has refused.

Q. Look at this map which I now hand you dated March 5, 1903, and tell me whether or not that is the map which was shown you the other day when they wanted an option on your property?

A. I think that is the same map; yes, sir, or copy of it.

Q. It shows your property, don't it?

A. Yes, sir.

Q. Do you remember the name of the gentleman who applied to you for the option?

A. Yes, sir. Is it necessary for me to tell it?

Q. Yes. Who is it?

A. W. W. Riddel.

Q. (By the Court)—And he wanted to buy your lot on the corner?

A. Yes, sir.

Q. (By the Court)—Of Main street and Myrtle avenue?

A. Yes, sir.

Q. (By the Court)—That is right in the heart of Boonton?

A. Yes, sir.

Q. (By the Court)—You don't own this front here? (indicating).

A. No, sir; I own this.

Q. (By Governor Werts)—Who was Mr. Riddel dealing for, if you know?

A. I think for the railroad company.

Andrew J. Neafie sworn.

Direct examination by Governor Werts:

Q. Do you know about Mr. Riddel getting an option from Mr. Crane?

A. Yes, sir; I had Mr. Riddel get an option of all property east of Main street, that includes the property.

Q. Is that in aid of and in connection with this plan?

The Court: This plan that has just been shown Mr. Crane was brought here by you?

A. Yes, sir.

Q. (By the Court)—And it shows map of Boonton right out Main street crossing your road near the canal, right in the heart of the town?

A. Yes, sir.

Q. Is that a different plan from the plan you produced here a while ago?

A. Yes; that is a different plan.

Q. Then it indicates a different railroad development plan?

A. No; it indicates the same development.

Q. Part of the same scheme?

A. Yes, sir.

Q. (By the Court)—The question is whether if you succeeded in purchasing Mr. Crane's property here on the corner of Main street and Myrtle avenue it would displace or supersede the plan shown that you explained when you were on the stand a few minutes ago?

A. No, sir; we are not only getting a price on Mr. Crane's property, but we are getting a price on all the property from this point, from Mr. Crane's here down to B street; we own this property on this side—getting a price on all this property—we are getting a price on this property.

Q. (By the Court)—You mean to say you are trying to get a price on all the property on both sides of the railroad east of Main street as far as B street and still further on to where your new station is located?

A. Yes, sir.

Q. (By the Court)—Would the purchase of property belonging to Mr. Crane and in that neighborhood south of the railroad and just east of Main street, between that and B street, if you got that, would that displace the other plan?

A. I don't think it would. The purchase of Mr. Crane's property would not give us sufficient amount of ground for a station.

Q. Wouldn't you rather locate your depot there than here (indicating)?

A. I don't think we would; we have got to locate a freight station as well as depot.

Q. (By the Court)—There isn't room there for a freight station?

A. No; we have to put a yard there for forty cars; you couldn't get them all in there.

Q. (By the Court)—You want a yard where you can drive in along there and load directly from the cars?

A. Yes, sir.

Cross-examination by Mr. Lindabury:

Q. Did you ever tell Mr. Crane that his plan had been abandoned?

A. I did not; no, sir.

Governor Werts: He said he didn't know whether it would go through or not.

Q. Did you tell him you didn't know whether it would go through or not?

A. Not to my knowledge.

Q. When have you talked with him on the subject?

A. I don't recall talking to Mr. Crane on the subject.

Q. When have you seen him?

A. I haven't seen Mr. Crane to talk to for two months at any rate.

Q. I suppose there was a time when you didn't know it would go through as much as you do now?

A. Yes, sir.

Albert J. Whitehead sworn.

Direct examination by Mr. Kitchel:

Q. Where do you live?

A. Near Montville.

Q. Do you know where this property in question of Mr. Crane's is?

A. Yes, sir.

Q. How far do you live from it?

A. Eighth of a mile, I suppose.

Q. Do you know where this right of way is referred to on the west side of the line next to Kanouses?

A. I have seen it.

Q. How often?

A. Oh, quite often.

Q. Ever used it?

A. I never used it, no, sir.

Q. Ever seen it used?

A. I have seen the doctor go through there.

Q. Do you own much land around that neighborhood?

A. I own some.

Q. Sold much?

A. Sold quite some.

Q. Bought much?

A. Bought some.

Q. Have you ever been surveyor of the highway?

A. Yes, sir; I was.

Q. How many times?

A. One term.

Q. What in your opinion would be a fair valuation of the damage to this property by this right of way going over where it is mentioned?

A. I don't know what damage it would be; according to what it would be used for.

Q. As it is, and from your general observation, seeing the property, what would you place as a fair valuation of damages for the right of way?

A. As it is now, used for farm purposes, it isn't much damage.

Q. How much?

A. Very little.

Q. Fix an amount, please?

A. I don't see as it would hurt it any of any account for farm purposes.

Q. Fix the amount—fifty dollars, a hundred dollars, more or less?

A. It might be a hundred dollars damages for farm purposes.

Q. (By the Court)—What is the land worth for farm purposes—what is that land worth for farm purposes?

A. Probably a hundred dollars an acre for farming purposes.

Q. (By the Court)—Is it worth as much as that?

A. Yes; pretty good farm.

Q. (By the Court)—Land worth a hundred dollars an acre there?

A. I have seen some bought for a hundred dollars an acre for farming purposes.

Q. That includes buildings?

A. Yes, sir; buildings on this; house and barn on this.

Q. (By the Court)—There are 26 acres? Do you think it is worth $2,500 for farming purposes?

A. Yes, sir; I should say yes.

This Agreement made this fifteenth day of May in the year of our Lord One thousand nine hundred and two; between

Gilubert D. Crane and Magdalene P. his wife,

of the Town of Boonton, in the County of Morris and State of New Jersey, parties of the first part; and

Edward J. Cahill,

of the Town of Boonton, in the County of Morris and State of New Jersey, party of the second part;

Witnesseth, That the said parties of the first part for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, hereby agrees to sell to the party of the second part, his heirs and assigns, all those tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Boonton in the County of Morris and State of New Jersey:

First Tract: Butted and bounded as follows: Being

that tract of land and premises which Jacob I. Peer bought of Abraham Kingsland and Mary his wife by deed dated the second day of April, A. D. one thousand eight hundred and thirty-two; beginning at the northeast corner of the farm lot of Edmund Kingsland, deceased, and the northwest corner of Abraham Vereland's farm, thence running (1) south forty-seven degrees west five chains and forty links to a corner of William Kingsland's land; thence (2) along his line south twelve degrees and thirty minutes, east eleven chains and seventy-five links to his corner; thence (3) south forty-six degrees and twenty minutes west ten chains and thirty-eight links to a dog-wood tree, his corner; thence (4) along his line south twenty-six degrees and twenty minutes, east sixteen chains and ten links to the north bank of the Morris Canal; thence (5) along the bank of the same eight chains and forty-five links to a line of Abraham Vreeland's land; thence (6) along his line north twelve degrees and thirty minutes west fourteen chains to his corner; thence (7) along his line north forty-seven degrees east two chains to his corner; thence (8) along his line north twelve degrees and thirty minutes, west eighteen chains to the place of beginning. Containing twenty-four acres and ninety-one hundredths of an acre, but after deducting therefrom sixteen acres and twenty-seven hundredths of an acre heretofore sold by Jacob I. Peer and Lidia his wife to Abraham Riker, off the northwest end thereof, reference to his deed had will fully appear, there will be and remain eight acres and sixty-four hundedths of an acre.

Being the same land and premises conveyed to Henry W. Crane by Richard Timbrook and wife by deed dated September 21st, 1852, recorded in the Morris County Clerk's office in Book B-5 of deeds on pages 536, &c.

Second Tract: Beginning at a stake standing at the foot of burm bank of Canal being the southeasterly corner of John L. Kanouse's land, and from thence running

along a line of his land (1) north nine degrees forty minutes west thirteen chains, eighty-six links to a stake; thence (2) north forty-eight degrees, east fifteen chains to a stake; thence (3) north fifty-eight degrees forty-five minutes east five chains fifty-two links to north end of stone wall and line of John Vreeland's land; thence (4) along said stone wall and Vreeland's line south nine degrees forty minutes, east five chains fifteen links to a corner of said stone wall; thence (5) south along a stone wall again fifty degrees twenty minutes, west two chains, ten links to end of said wall; thence (6) along a stone wall again south nine degrees forty minutes, east five chains forty-three links to a corner of said Crane's land; (7) along the lines of his land south seventy-four degrees west ten chains and fifty links; thence south twenty-three degrees forty-five minutes, east ten chains twenty-five links to the foot of said burm bank of canal; thence (9) along the same south seventy-one degrees forty minutes, west eight chains thirty-eight links to the place of beginning. Containing nineteen acres and ninety-hundredths of an acre strict measure. Being the same land and premises conveyed to Henry W. Crane by John J. Norris and wife by deed dated December 19th, 1857, recorded in the Morris County Clerk's office in Book X-5 of deeds on pages 479, &c.

Excepting, however, so much of the above described land as is used as a right of way by the Delaware, Lackawanna and Western Railroad.

Also all the buildings, including water wheel, pen stock and fixtures thereunto appertaining, for the sum of ten thousand dollars ($10,000.00) which the said party of the second part hereby agrees to pay to the said party of the first part as follows: Five hundred dollars ($500.00) is paid on the delivery of this agreement as above stated, and the balance, nine thousand five hundred dollars ($9,500.00) is to be paid in lawful money before the first day of January A. D. nineteen hundred and three (1903) at the office of Hillery &

Beam in the Town of Boonton, County and State aforesaid, at which place the deed hereinafter mentioned shall be delivered. And the said party of the first part on receiving such payments, above mentioned, shall at his own proper cost and expense execute, acknowledge and deliver to the said party of the second part, or to his heirs or assigns, a proper deed for conveying to him or them, the fee simple of the above described premises, free from all encumberances, which deed shall contain a general warranty and the usual full covenants.

And it is further covenanted, promised and agreed by and between the parties hereto that the said party of the first part shall keep all the buildings on the premises fully insured, and should any loss occur before the delivery of the deed, the amount of insurance received by the said party of the first part shall be deducted from the purchase price at the time of the delivery of the deed; which premium or premiums of insurance shall be paid by the said party of the second part.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

G. D. CRANE, (L.S.)
MAGDALENE P. CRANE, (L.S.)
EDWARD J. CAHILL, (L.S.)

Signed, sealed and delivered
in the presence of

J. V. BEAM.

State of New Jersey, } SS.
County of Morris. }

Be it remembered that on this twenty-first day of May, in the year of our Lord one thousand nine hundred and two, before me, James V. Beam, a commissioner of deeds for New Jersey, personally appeared Magdalene P. Crane, wife of Gilbert D. Crane, who I am

satisfied is one of the persons named in and who executed the within instrument, and I having first made known to her the contents thereof she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed; and the said Magdalene P. Crane being by me privately examined, separate and apart from her said husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed freely without any fear, threats or compulsion of her said husband.

JAMES V. BEAM,
Commissioner, &c.

ARGUMENT OF CONTRACT.

Know all these men by these presents, that I, Edward J. Cahill, of the Town of Boonton in the County of Morris and State of New Jersey, in consideration of one dollar, lawful money of the United States of America, to me paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto John H. Capstick, of the Township of Montville, in the County of Morris and State of New Jersey, a contract for the sale of certain real estate, hereinafter particularly described, situate, lying and being in the Township of Boonton in the County of Morris and State of New Jersey:

First Tract: Butted and bounded as follows:—Being that tract of land and premises which Jacob I. Peer bought of Abraham Kingsland and Mary his wife, by deed dated the second day of April A. D. one thousand eight hundred and thirty-two; Beginning at the northeast corner of the farm lot of Edmund Kingsland, deceased, and the northwest corner of Abraham Vree-

land's farm; thence running (1) south forty-seven degrees west five chains and forty links to a corner of William Kingsland's land; thence (2) along his line south twelve degrees and thirty minutes east, eleven chains and seventy-five links to his corner; thence (3) south forty-six degrees and twenty minutes west, ten chains and thirty-eight links to a dog-wood tree, his corner; thence (4) along his line south twenty-six degrees and twenty minutes east, sixteen chains and ten links to the north bank of the Morris Canal; thence (5) along the bank of the same eight chains and forty-five links to a line of Abraham Vreeland's land; thence (6) along his line north twelve degrees and thirty minutes west, fourteen chains to his corner; thence (7) along his line north forty-seven degrees east two chains to his corner; thence (8) along his line north twelve degrees and thirty minutes west, eighteen chains to the place of beginning. Containing twenty-four acres and ninety-one-hundredths of an acre, but after deducting therefrom sixteen acres and twenty-seven-hundredths of an acre heretofore sold by Jacob I. Peer and Lidia his wife to Abraham Riker off the northwest end thereof, reference to his deed had will fully appear, and there will be and remain eight acres and sixty-four-hundredths of an acre.

Being the same land and premises conveyed to Henry W. Crane by Richard Timbrook and wife by deed dated September 21st, 1852, recorded in the Morris County Clerk's office in Book B-5 of deeds on pages 536, &c.

Second Tract: Beginning at a stake standing at the foot of burm bank of Canal being the southeasterly corner of John L. Kanouse's land and from thence running along a line of his land (1) north nine degrees, forty minutes west, thirteen chains eighty-six links to a stake; thence (2) north forty-eight degrees east, fifteen chains to a stake; thence (3) north fifty-eight degrees, forty-five minutes east, five chains fifty-two links to north end of stone wall and line of John Vreeland's

land; thence (4) along said stone wall and Vreeland's line south nine degrees, forty minutes east, five chains, fifteen links to a corner of said stone wall; thence (5) south along a stone wall again fifty degrees, twenty minutes west, two chains, ten links to end of said wall; thence (6) along a stone wall again south nine degrees, forty minutes east, five chains, forty-three links to a corner of said Crane's land; (7) along the lines of his land south seventy-four degrees west ten chains and fifty links; thence south twenty-three degrees, forty-five minutes east, ten chains, twenty-five links to the foot of said burm bank of Canal; thence (9) along the same south seventy-one degrees, forty minutes west eight chains thirty-eight links to the place of beginning. Containing nineteen acres and ninety-hundredths of an acre strict measure.

Being the same land and premises conveyed to Henry W. Crane by John J. Norris and wife by deed dated December 19th, 1857, recorded in the Morris County Clerk's office in Book X-5 of deeds on pages 479, &c.

Excepting however so much of the above described land as is used as a right of way by the Delaware, Lackawanna and Western Railroad.

Which contract was made and executed by Gilbert D. Crane and Magdalen P. Crane, his wife, to me, and bears date the fifteenth day of May, nineteen hundred and two, to have and to hold the same unto the said John H. Capstick, his heirs, executors, administrators and assigns for his and their use and benefit forever; subject, nevertheless, to the covenants and conditions therein mentioned.

And I hereby authorize and empower the said John H. Capstick, upon his performance of the covenants and conditions in said contract contained, to demand and receive of the said Gilbert D. Crane and wife the deed covenanted to be given in the said contract, in the same manner to all intents and purposes as I myself might, or could do, were these present not executed.

In witness whereof I have hereto set my hand and seal this twenty-second day of May in the year of our Lord one thousand nine hundred and two.

EDWARD J. CAHILL (L. S.)

Signed, sealed and delivered
in the presence of

J. V. BEAM.

State of New Jersey, } SS.
County of Morris. }

Be it remembered that on this twenty-second day of May in the year of our Lord one thousand nine hundred and two, before me, James V. Beam, a commissioner of deeds for New Jersey, personally appeared Edward J. Cahill who, I am satisfied is the assignor named in and who executed the within assignment, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

JAMES V. BEAM,
Commissioner, &c.

Indorsed.

Assignment of Contract.

Edward J. Cahill
to
John H. Capstick.

Dated May 22, 1902.

Received in the Clerk's Office of the County of Morris, New Jersey, on the thirtieth day of June, 1902, at 10.38 o'clock a. m. and recorded in Book Z-16 of deeds for said county on pages 170, &c.

DANIEL S. VOORHEES,
Clerk.

John I. Norris and wife
to
Henry W. Crane.

This indenture made the nineteenth day of December in the year one thousand eight hundred and fifty-

seven between Phebe Kingsland widow of William Kigsland deceased John I. Norris and Sarah A. his wife of the Township of Pequanac in the County of Morris and State of New Jersey of the first part and Henry W. Crane of the Township of Pequanac in the County of Morris and State of New Jersey of the second part.

Witnesseth that the said party of the first part for and in consideration of the sum of six hundred ninety-six dollars and fifty cents 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 and contented and paid hath given granted bargained sold aliend released enfeoffed conveyed and confirmed and by these presents doth give grant bargain sell alien release enfeoff convey and confirm to the said party of the second part and to his heirs and assigns forever, all that tract or parcel of land and premises hereinafter particularly described situate lying and being in the Township of Pequanac in the County of Morris and State of New Jersey near Boonton on the north side and adjoining the Morris Canal. Beginning at a stake standing at the foot of the burm bank of said canal being the southeasterly corner of John L. Kanouses land and from thence running along a line of his land (1st) north nine degrees and forty minutes west thirteen chains eighty-six links to a stake thence (2d) north forty-eight degrees east fifteen chains to a stake thence (3d) north fifty-eight degrees forty-five minutes east five chains fifty-two links to the north end of a stone wall and line of John Vreeland's land thence (4th) along said stone wall and Freeland's lines south nine degrees forty minutes east five chains fifteen links to a corner of said stone wall thence (5th) south (along a stone wall again) fifty degrees twenty minutes west two chains ten links to the end of said wall thence (6th) along a stone wall again south nine degrees forty

minutes east five chains forty-three links to a corner of said Crane's lands thence (7th) along the lines of his lands south seventy-four degrees west ten chains and fifty links thence (8th) south twenty-three degrees forty-five minutes east ten chains twenty-five links to the foot of said burm bank of canal thence (9th) along the same south seventy-one degrees forty minutes west eight chains and thirty-eight links to the place of beginning. Containing nineteen acres and ninety-hundredths of an acre strict measure. **The said John I. Norris reserves the right for himself his heirs and assigns of crossing the above described tract of land to and from a tract of land lying north of said tract now owned by him.**

Together with all and singular the houses buildings trees ways waters profits privileges and advantages with the appurtenances to the same belonging or in any wise 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 tract or parcel of land and premises with the appurtenances unto the said party of the second part his heirs and assigns to the only proper use benefit and behoof of the said party of the second part his heirs and assigns forever. And the said parties of the first part doth for themselves their heirs executors and administrators convenant and grant to and with the said party of the second part his heirs and assigns that they the said parties of the first part are the true lawful and right owners 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 delivery 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 or altered or defeated in any way whatsoever. And also that the party of the first part now hath good right full power and lawful authority to grant bargain sell and convey the said land and premises in manner aforesaid. And also that the said parties of the first part will warrant secure and forever defend the said land and premises unto the said Henry W. Crane his heirs and assigns forever against the lawful claims and demands of all and every person and persons freely and clearly freed and discharged of and from and all manner of incumbrances whatsoever.

In witness whereof the said Phebe Kingsland John I. Norris and Sarah A. his wife have hereunto set their hands and seals in the day and year first above written.

JOHN I. NORRIS, (L. S.)
SARAH A. NORRIS, (L. S.)

Signed, sealed and delivered
in the presence of

WM. McCARTY,

State of New Jersey, } SS.
Morris County }

Be it remembered that on this nineteenth day of December in the year one thousand eight hundred and fifty-eight before me William McCarty a Commissioner for taking acknowledgement and proof of deeds to the county aforesaid personally appeared John I. Norris and Sarah A. 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 did 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 Sarah A. his wife being by me privately examined separate and apart from her said husband she 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 or from her said husband.

WM. McCARTY,
Commissioner of Deeds.

Received and recorded January 29, 1861.

SWAYZE, Clk.

State of New Jersey, } SS.
County of Morris. }

I, Daniel S. Voorhees, Clerk of the County of Morris, do hereby certify that the foregoing is a true copy of the record of a deed given by John I. Norris and wife to Henry W. Crane as fully and entirely as the same remains in my office in Book X-5 of Deeds for said county on pages 479, etc.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county, at Morristown, this twenty-eighth day of April A. D. nineteen hundred and three.

[seal] DANIEL S. VOORHEES,
Clerk.

OPINION.

Pitney, V. C.

This bill is filed by John H. Capstick against Gilbert D. Crane and his wife to enforce the specific performance of a contract to convey land.

The contract is in writing dated May 15, 1902, between the defendants herein as vendors and one, Edward J. Cahill, as vendee, and was duly executed by the said defendants and the said Cahill and acknowledged by the said defendants before a Commissioner of Deeds, May 21, 1902, in such manner as to make it binding on the defendant's wife.

The contract was shortly afterwards duly assigned to

the complainant and the suit is therefore by vendee against vendor.

Five hundred dollars in cash was paid on the delivery of the contract and the balance of the purchase money, $9,500, was to be paid on the delivery of the deed of conveyance on January first, then next.

The premises consisted of two tracts lying in one body, one containing eight acres and the other nineteen acres.

The bill alleges and the proofs show that the complainant after taking the assignment of the contract from Cahill caused an examination to be made of the title and found that the nineteen acres tract, which may be denominated the "Norris Tract," was subject to a right of way reserved to the grantor in a deed from John J. Norris to Henry W. Crane, the father of the defendant, dated December 19,1857, in these words: "The said John J. Norris reserves the right for himself, his heirs and assigns of crossing the above described tract of land to and from a tract of land lying north of said tract now owned by him."

He also found upon inquiry that the municipality of the town of Boonton had obtained from the defendant and had a right to place and had placed a line of water mains along the northerly edge of the same tract.

Shortly afterwards he gave notice to the defendants that he was ready to complete the transaction prior to January first and fixed the day of December for the purpose at the office of Hillery and Beam in Boonton, which was the place fixed by the contract, for the delivery of the deed and the payment of the purchase monev.

On that day he met the defendant Crane at the place named and tendered him the amount and demanded a conveyance but received none.

A few days later the defendants by their counsel exhibited to the complainant an unexecuted deed of conveyance for the premises in question which they proposed to execute and which by its terms conveyed the

premises expressly subject to the pipe line right and to the right of way above mentioned, but without any covenants to approve the deed and demanded the performance of the contract.

Complainant shortly afterwards, on his own account, prepared an ordinary deed of warranty and against incumbrances and requested the defendants to execute the same but they refused.

The bill herein was filled a short time afterwards. It prays specific performance of the contract by conveyance of the property free of incumbrances, or, in the alternative, for a conveyance with an allowance or compensation for the incumbrances.

The answer admits the material allegations of the bill but charges that the complainant is not entitled to specific performance with compensation because he had notice of the incumbrances.

With regard to the pipe line it was agreed at the hearing that the allowance of compensation for that should be $25, if a decree should be made.

The contest was over the alleged notice to complainant of the existence of the right of way.

This charge of notice was based on two grounds; first by the reference in the description of the premises found in the contract to the deed from Norris to Crane which contained the reservation as above set forth. That description copies the description of the Norris Tract by metes and bounds and then is added these words: "Being the same land and premises conveyed to Henry W. Crane by John J. Norris and wife by deed dated December 19th, 1857, recorded in the Morris County Clerk's Office in Book X-5 of deeds on page 479, &c."

The argument of counsel for defendant is that such reference put the complainant on inquiry, and, in effect, limited the agreement to convey to the estate conveyed by Norris to Crane.

In support of this he relies upon the case of Wuesthoff v. Seymour, 7 C. E. Green, page 68, decided by

Chancellor Zabriskie in 1871. In that case the Chancellor was dealing with the difference in the calls of two deeds. The older deed by its calls included the one half of a lane, the later deed by its calls excluded that one half of the lane but contained a declaration "being the same premises conveyed" by the older deed. He declares that the result was two descriptions given in the same deed of the same premises and says: "The two descriptions of the property thus given in this deed do not agree. And the question is, which of the two must be taken. Each description is certain, definite, and complete, if it stood alone. There is a latent ambiguity, which does not appear on the face of the deed, but by extrinsic facts which show that these two descriptions differ. This ambiguity, like other latent ambiguities, can be solved by ascertaining the intention of the parties from the situation of the property."

This exposition of the case relied upon shows that it has no application here where there is no such discrepancy to be dealt with or ambiguity to be resolved.

The effect of this reference to the former conveyance must therefore depend upon the question whether a vendee is bound to examine his vendor's title before entering into a contract of purchase and is therefore chargeable with knowledge of all defects and incumbrances which such record discloses, and therefore not entitled to a remedy for specific performance with compensation for such defects and incumbrances.

I think that there can be but one answer to that question. No such duty is cast upon the purchaser. He is not supposed to know anything about his vendor's title although it may be spread upon the records. To cast such a burden upon him is to compel him to incur the labor and expense of a complete examination of his proposed vendor's title before he has any assurance that he will conclude a contract for his purchase.

On the other hand the vendor is supposed to know his own title and to know whether or not he has the

ability to make the conveyance which he agrees to make and which in this case was to "acknowledge and deliver to the said party of the second part, or to his heirs or assigns, a proper deed for the conveying to him or them, the fee simple of the above described premises, free from all incumbrances, which deed shall contain a general warranty and the usual full covenants."

But supposing that the complainant had examined the title and found the reservation of the right of way, I am by no means sure the result would have been different. It was at most a mere incumbrance which might be removed by a release, or otherwise disposed of, or for the removal of which the defendant may have had a reliable contract with the holder so as to enable him to perform his contract to convey at the time and place mentioned.

I can find no case in which the vendee has ever been held chargeable with notice of an incumbrance of this kind.

Vice Chancellor Emery dealt with a somewhat similar case in Melick v. Cross, 17 Dick., page 545. There was a bill and cross-bill by vendor and vendee, and it was held that the parties were each entitled, as against the other, to specific performance with compensation for an incumbrance of a water right reserved in a previous conveyance of the premises.

It does not appear affirmatively in that case that the conveyance containing the reservation was referred to in the contract, but the reservation was in fact contained in a comparatively recent conveyance of the premises.

The other ground of notice relied on by the defendants was that a travelled wagon-way was plainly visible on the ground on the west side of the land in question. It will be observed that no particular location of the right of way is mentioned in the reservation, but it is alleged by the defendants that it was practically located by Norris or his grantee along the west side of the

tract, and so used as to leave visible marks of a travelled way on the ground, and that this travelled way was so distinctly marked on the ground as to have the effect of notice to the purchaser of its existence. Evidence was gone into on that subject with the result that the effect on my mind was that the defendants' assertion was not maintained.

The two lots contracted to be conveyed lie together and form what for present purposes may be called a square; bounded on the south by the Morris Canal and on the north by the tract of land reserved by Norris, to which it attached the right of way, and which is now owned by Dr. J. G. Ryerson.

The only public highway touching the land passes along close to the bank of the Morris Canal and is laid on a course of nearly east and west. Almost parallel to that and nearly bi-secting the whole tract into two equal parts is the line of the Delaware, Lackawanna and Western Railroad Company. The land north of the railroad is thereby cut off from the highway, and access to that land has been had by a driveway from the highway along the west line of the premises to and across the railroad which at that place is in a "cut"; an excavation was made to enable a wagon to cross the railroad at that place. More or less of the land north of the railroad has been to some extent cultivated and its use for that purpose has resulted in a pretty well defined roadway leading to the highway at the place mentioned. But such defined roadway does not extend so as to be plainly visible to the Ryerson line on the north. On the contrary all that any casual observer would infer from its appearance would be that it was a farm road used exclusively for the use of that part of the premises which were situated north of the railroad.

The Ryerson tract is a wood-lot, the wood on which, as I recollect the evidence, was many years ago entirely cut off and carted away along the road mentioned, but since that time little or no use has been made

of the way by Dr. Ryerson and the marks of the previous use at or near the Ryerson line have become practically obliterated.

My conclusion is that the complainant had no notice of the existence of the incumbrance here in question.

Further, I think it is a plain case for specific performance with compensation. It is not necessary for me to go beyond the case of Melick v. Cross, supra, but the authorities are abundant.

I dealt with a case of vendor against vendee in Van Blarcom v. Hopkins, 18 Dick., page 466, and there referred to the general rule as well settled and to what is said by Professor Pomeroy in his treatise on Specific Performance at Section 434 et seq. At section 438 he lays down the general rule and at section 440 he deals with the case here in question, namely, the existence of easements, and uses the following language: "The existence of easements upon the land in favor of third persons, or of other similar rights which conflict with those of the owner, and which would prevent a vendor from forcing an acceptance upon an unwilling vendee, will entitle the purchaser at his election to insist upon a conveyance of the land subject to these rights, with such compensation or abatement from the price as shall be proportionate to the diminution in the value of the subject matter. As for example, when the land is found to be subject to a right in third person to dig for minerals or ores, the purchaser can demand a specific performance with compensation."

Lord Justice Fry in his treatise, 3rd, American Edition, section 1222 et seq., announces the same doctrine.

The contract in this case was a perfectly fair one, it was entered into intelligently by the defendant, an intelligent business man, who was himself, as he admits by his answer, well aware of those incumbrances, but excused himself by saying that he forgot about them at the moment of entering into the contract.

The land lies near the town of Boonton and a pro-

posed railroad station. The complainant has purchased it for the purpose of carrying out certain real estate projects in connection with other lands owned by him; the price fixed is three or four times what the property is worth for farming purposes and I think under the circumstances it is quite equitable and just upon the principles suggested by me in Van Blarcom v. Hopkins, supra, that he should have specific performance with compensation.

Evidence was gone into upon the amount of compensation. The problem of measuring that compensation is not an easy one to solve. It was stated at the hearing that a new highway was in contemplation leading from the town of Boonton along the northerly side of the tract in question which would render the right of way of little or no value to Dr. Ryerson. Under these circumstance I will defer announcing my opinion as to the amount of compensation until the defendant shall have a reasonable opportunity, say thirty days, from the announcement of this opinion, to come to an agreement with Dr. Ryerson and procure a release.

SECOND OPINION.

Pitney, V. C.

The defendant having failed to make a conveyance of the premises in question in accordance with the terms of the decree heretofore made, it becomes my duty to determine the amount of compensation which the complainant shall have by reason of the existence of the right of way across the premises held by Dr. Ryerson.

It appears that the premises are worth for farming purposes not over two thousand five hundred dollars, which is one-fourth of the contract price. If the use to be made of them was simply that for farming purposes the right of way would be manifestly of very little

injury, but such is not the intention of the parties. The price agreed to be paid shows clearly, independent of the testimony on the subject, that they have been purchased for some other purpose.

They are bisected by the D., L. & W. Railway a distance of nearly twelve hundred feet, with space on each side for the location of factories and coal and lumber yards and the like. A boulevard has been laid out nearly coincident with the north line of the premises leading into the town of Boonton, which gives a prospect of building sites along that line.

The testimony of the complainant and others is that the railway proposes to take a portion of the land for the purpose of straightening its line at this point by shoving its line further to the north over the westerly portion of the premises.

The complainant is the owner of the Kanouse lot which lies immediately to the west of these premises and to the north of the railway. That enables him to unite the two tracts to the north of the railway for the purpose of laying out coal yards and erecting factories, and he can make the same use of the land lying south of the railway without owning or using the land lying to the west of the tract here in question and south of the railway.

It appears satisfactorily to the Court that in order to make use of the land in the way proposed it is necessary to have trestles and the like erected, and it might be very desirable that those trestles should not be confined to the tract here in question. The placing of trestles to the south of the present railway track may be accomplished by the pushing of the railway further to the north, which will make room for trestles on the railway right of way west of the tract here in question, so that the continuous ownership of land south of the railway and west of the tract here in question is not necessary in order to give approach by trestles to any erections on it for the purpose of business south of the railroad.

It appears that the use of trestles for running an elevated railway up to any buildings or coal yards and the like is a great convenience and something approaching a necessity. If the railway is pushed further to the north it will be placed in a deeper cut than it now occupies at the west side of the tract.

These considerations show that the actual existence of this right of way will seriously interfere with the development for the practical purposes mentioned of the tract in question. It is difficult to estimate just what that injury will be, and I had hoped that the defendants would agree with Dr. Ryerson for a release of the right of way, whose existence will in my judgment do much more injury to the owner of the property than it is worth to Dr. Ryerson. In fact, it will probably be of nominal value to him after the new boulevard is opened. But as it is expressly reserved to his predecessor in title, he cannot be deprived of it, and is entitled to hold it and sell it for what he can get.

Various estimates have been put upon the injury resulting from its existence, varying from $2,500 to $5,000, and I cannot say that any of them are on a manifestly unreasonable basis. The complainant's estimate is $2,500. The best consideration I can give to the subject is that $2,000 will be a moderate allowance, and I therefore fix that sum and will advise a decree accordingly.

DECREE.

This cause coming on to be heard in the presence of Willard W. Cutler of counsel with the complainant and Newton S. Kitchel of counsel with the defendants, and it appearing to the Court that the said defendants have not specifically performed the contract mentioned in the complainant's bill, and have not conveyed the premises

mentioned in the said contract and described in this suit to the said complainant by deed of warranty, free from all encumbrances on or before the twenty-eighth day of July last past as directed by a decree of this Court made in this cause and bearing date the sixth day of July in the year of our Lord One thousand nine hundred and three.

And it further appearing that due and legal notice has been given to the said defendants, that application would be made at this time to this Court to fix a fair, equitable and just compensation to be allowed the said complainant for the encumbrances upon the said premises particularly mentioned and described in the said decree.

And the said Court having heard the argument of Counsel, and considered the evidence heretofore offered in relation to the said encumbrances and the damages resulting therefrom, and of the amount of compensation to be allowed the said complainant if the premises were conveyed to him subject to the said encumbrances, instead of free from all encumbrances as specified in the said contract.

And the Court having found and determined the amount of compensation to be allowed the complainant for the existence of the right of way mentioned in the pleadings and the preceding decree herein, at the sum of two thousand dollars, and the parties at the hearing of said cause agreeing that the compensation for the pipe line therein mentioned should be twenty-five dollars, if anything. And the amount due on the mortgage so held by Melvin S. Condit having been ascertained to be the sum of three thousand five hundred and sixteen dollars and three cents, making the total compensation to be allowed the complainant five thousand and forty-one dollars and three cents, as per statement hereunto annexed.

It is therefore on this fifth as of the third day of August in the year of our Lord one thousand nine hun-

dred and three, by his Honor William J. Magie, Esq., Chancellor of the State of New Jersey, and the said Chancellor does by virtue of the power and authority of this Court, and to carry into effect the aforesaid mentioned former decree of this Court made in this cause, order, adjudge and decree, that the sum of five thousand five hundred and forty-one dollars and three cents be and the same is hereby allowed the said complainant as a fair, equitable and just compensation for the aforesaid encumbrances upon the said premises, including the mortgage, and more particularly mentioned in the bill of complaint in this cause, and in the aforesaid former decree.

And it is further ordered that the said defendant, Gilbert D. Crane and Magdalene P. Crane convey the lands and premises situate in the Township of Boonton in the County of Morris and State of New Jersey, and more particularly described in the said bill and also in the contract of sale made by the said defendants with one Edward J. Cahill and dated the fifteenth day of May in the year of our Lord one thousand nine hundred and two, and recorded in the Clerk's Office of the County of Morris in Book Z-16 of deeds on pages 165, &c., and referred to in the said former decree to the said complainant, John H. Capstick, by deed of warranty with the usual covenants, but subject to the encumbrances mentioned in the former decree, on or before the fourteenth day of August A. D. 1903, and that the said complainant pay to the said defendants upon the delivery of such deed the sum of three thousand nine hundred and fifty-eight dollars and ninety-seven cents, less the counsel fee allowed by said former decree and the taxed costs of the complainant in this suit, and that the complainant also pay and extinguish the aforesaid mortgrage, and if any further interest shall accrue on said mortgage, such interest shall be deducted from the amount so to be paid the defendants as aforesaid.

And it is further ordered that if either party shall so

desire this decree shall be executed in the presence of Charlton A. Reed, Esq., one of the special masters of this court, upon five days notice of the time and place fixed for such execution, to be given by one party to the other.

And it is further ordered that the former decree made in this cause stand as the decree of this Court except as modified by this decree.

And it is further ordered that a certified copy of this decree may be recorded in the Clerk's office of the County of Morris.

Respectfully advised,

W. C. PITNEY, V. C.

STATEMENT ANNEXED.

Amount to be paid for land			$10,000.00
Paid on signing contract			500.00
Bal. to be paid on delivery of deed			9,500.00
Amount Compensation Allowed for Encumbrances.			
Condit mortgage	$3,500.00		
Interest on same	16.03		
		$3,516.03	
For pipe line		25.00	
For right of way		2,000.00	
			5,541.03
Bal. to be paid			$3,058.97

APPEAL.

The defendant hereby appeals from so much of the final decree in this Court in the above stated cause as declares the compensation to be allowed to the complainant for the existence of the right of way mentioned in the pleadings or herein, at the sum of two thousand dollars, and that declares the total compensation to be allowed to said complainant at the sum of

five thousand five hundred and forty-one dollars and three cents; and also from that part of said decree that orders said defendants Gilbert D. Crane and Magdalene P. Crane to convey said lands and premises to said complainant John H. Capstick by deed of warranty subject to the encumbrances mentioned in the pleadings in said cause, on or before the fourteenth day of August, nineteen hundred and three, and that the complainant pay to said defendant on delivery of such deed the sum of three thousand nine hundred and fifty-eight dollars and ninety-seven cents, less the counsel fee allowed by a former decree, and also the taxed costs of complainant in this suit, to the next Court of Appeals in the last resort in all causes of law.

NEWTON S. KITCHEL,
Solr. and of Counsel with Defendants.

Dated August 8th, 1903.

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

NEWTON S. KITCHEL,
Of Counsel with Defendants.

PETITION OF APPEAL.

To the Honorable the Court of Appeals in the last resort in causes of law:

The humble petition of Gilbert D. Crane, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, made on the fifth, as of the third, day of August, nineteen hundred and three, wherein the said John H. Capstick was complainant and the said Gilbert D. Crane and Magdalene P. Crane his wife were defendants, in this respect, to wit: that the said decree adjudges that the amount of compensation to be allowed to the complainant for the existence of the right of way mentioned in the pleadings and pre-

ceding decree herein, at the sum of two thousand dollars, and for the pipe line therein mentioned at the sum of twenty-five dollars. And your petitioner humbly appeals from these parts of the said decree, upon the grounds that the same are erroneous, for that said compensation for said right of way is excessive, and for said pipe line should not be anything, your petitioner therefore prays that the said decree of the Chancellor be reversed, and that the compensation for said right of way be reduced to the sum of two hundred dollars, and for the pipe line be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

NEWTON S. KITCHEL,
Solr. and of Counsel with Deft. as Appellant.

Dated Aug. 27, 1903.

The Answer of John H. Capstick to the Petition of Appeal of Gilbert D. Crane, Appellant.

The respondent not acknowledging all or any of the matters in the petition of appeal contained to be true for answer thereto, nevertheless says and admits that a decree was on the fifth as of the third day of August in the year of our Lord one thousand nine hundred and three made and entered in the Court of Chancery of the State of New Jersey in the cause for the purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof, this respondent prays to refer to said decree when the same shall be produced.

And this respondent is advised and believes that the said decree made in this cause is in all things agreeable to equity and prays that the same be affirmed in all things with costs to be adjudged to this respondent.

W. W. CUTLER,
Solr. and of Counsel with J. H. Capstick.

INDEX OF CONTENTS.